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The Supreme Politics: A Study of Partisan Influences on the U.S. Judiciary

by Dana Morrey

In 1981, first-year President Ronald Reagan nominated Sandra Day O'Connor to replace retiring Justice Potter Stewart to assume the role of Associate Justice of the United States Supreme Court. The Republican-controlled Senate easily confirmed Justice O'Connor in a convincing 99-0 vote. Five years later Reagan nominated Justice William Rehnquist to succeed Warren Burger as Chief Justice, and Antonin Scalia to assume Rehnquist's position. Again both nominations were given to a Republican Senate, and again both nominees were confirmed. Scalia gained a 98-0 Senate vote, and even the proven strict conservative Justice Rehnquist weathered a filibuster intended to block his promotion, and was confirmed by a 65-33 margin. In 1987, Reagan again had the chance to name a justice to the Supreme Court, and he offered another known conservative, convinced the confirmation would be as easy as the last three. Robert Bork, however, was rejected by a 58-42 vote on October 23, 1987. On October 29, 1987, Reagan tried again, nominating Douglas Ginsburg, only to see this nomination withdrawn after heated Senate debates. It was only with third-choice Anthony Kennedy that Reagan found success, as Kennedy was confirmed by a 99-0 vote on February 3, 1988 (Massaro 1990, 157-58).

What was the difference between Reagan's failed nominations and the successful ones? What had changed that turned a president with an excellent nomination track-record into a two-time nomination loser? Could the Reagan Administration have avoided these failed attempts to confirm a conservative justice to the Supreme Court bench?

Former Reagan staff members must still muse about these questions. One explanation that is obvious, perhaps even too obvious, and therefore is easily overlooked. The successful Reagan nominations were handed to a Senate controlled by the Republican Party, and the failed attempts were handled by a Democratically-controlled Senate. Did the divided party control of the presidency and the Senate cause the downfall of Bork and Ginsburg? If so, to what extent can party politics be blamed for failed nominations?

Have other nominees been victims of the same fate? What role does party politics play in the Supreme Court? What role does it play in the judicial branch as a whole?

It is clear that "political party considerations are hardly absent from the judiciary (Beck and Sorauf 1992, 419)." While not as visible as in other branches of government, partisanship plays a role in shaping the nature of the judicial branch, including the Supreme Court. Party politics and partisanship can impact the members of the Court and judiciary in four ways: First, partisan influences on the selection process itself; second, in the confirmation arena; third, in judging cases while on the bench; and fourth, party considerations on the subject of retirement. Each of these areas of party influence will be examined in detail.

To Nominate the "Party Man"

There is no question that party considerations play a role in determining who a President will choose to nominate. Theodore Roosevelt, in considering a Supreme Court nomination, once wrote:

[But] in the higher sense, in the proper sense, [a Supreme Court Justice] is not in my judgment fitted for the position unless he is a party man, [and a] constructive statesman (Beck and Sorauf 1992, 421).

Clearly, Theodore Roosevelt is not alone among presidents who nominate "party men" (or today including "party women") to fill the Supreme Court. Since the Eisenhower Administration, only two nominations have been put forth involving a nominee that was not from the president's own party: William Brennan by Eisenhower, and Lewis Powell by Nixon (Ducat and Chase 1992, A17-A19). This pattern of partisan selection is also seen in Table 1, which lists the percentage of lower federal judicial appointments that belong to the same party as each president, beginning with Grover Cleveland:
Table 1. Percent of Judicial Appointments to Federal District and Appeals Courts From the Party of the President

<table>
<thead>
<tr>
<th>President</th>
<th>Selection Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cleveland</td>
<td>97.3</td>
</tr>
<tr>
<td>Harrison</td>
<td>87.9</td>
</tr>
<tr>
<td>McKinley</td>
<td>95.7</td>
</tr>
<tr>
<td>T. Roosevelt</td>
<td>95.8</td>
</tr>
<tr>
<td>Taft</td>
<td>82.2</td>
</tr>
<tr>
<td>Wilson</td>
<td>98.6</td>
</tr>
<tr>
<td>Harding</td>
<td>97.7</td>
</tr>
<tr>
<td>Coolidge</td>
<td>94.1</td>
</tr>
<tr>
<td>Hoover</td>
<td>85.7</td>
</tr>
<tr>
<td>F. Roosevelt</td>
<td>96.4</td>
</tr>
<tr>
<td>Truman</td>
<td>90.1</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>94.1</td>
</tr>
<tr>
<td>Kennedy</td>
<td>90.1</td>
</tr>
<tr>
<td>Johnson</td>
<td>94.4</td>
</tr>
<tr>
<td>Nixon</td>
<td>92.9</td>
</tr>
<tr>
<td>Ford</td>
<td>81.2</td>
</tr>
<tr>
<td>Carter</td>
<td>90.3</td>
</tr>
<tr>
<td>Reagan</td>
<td>93.1</td>
</tr>
<tr>
<td>Bush</td>
<td>89.0</td>
</tr>
<tr>
<td>Clinton (to June 1994)</td>
<td>88.0</td>
</tr>
</tbody>
</table>


From this table it is clear that presidents seem to have no difficulty making a strong majority of their selection and appointment decisions along party lines. The notable exception to this general rule was former President Jimmy Carter, who attempted to establish a "merit-based" system of selecting federal judges (Ball 1980, 172). This innovation never got by the Senate, and ironically, Carter maintained a 90.3% party selection rating.

Therefore, partisanship can be a critical factor in the selection process, and in some cases perhaps a more significant effect may be felt. In the 1980 Republican Party platform, for example, was the promise to appoint more judges who upheld the "sanctity of life." This interesting political plank roughly translates to a call for judges who would be pro-life on the abortion issue. This shows that the treatment of an issue by the judiciary can become important to political parties. The parties, in turn, try to "regain control" of the issue by demanding the selection of judges whose opinions are in line with the parties' opinions. What better place to find such judges than within the respective party itself? Obviously, abortion played such a role in the Republican's view of judicial selection in the 1980s.

Candidates for nomination also contribute to this "indirect" party influence by activating party connections to "make their name known" for possible nomination. Federal district court judge Joseph Perry, referring to his federal appointment, once stated, "If I wanted that appointment, I had better get back into politics--which I did" (Ball 1980, 186). Ball continues this reasoning by stating the following:

...[potential nominees] have prepared for this moment by joining the appropriate party organization, by working tirelessly for the party, by supporting the party organization candidates, by contributing time and money to the party, and by befriending men who ultimately become senators, congressmen, governors, etc. (1980, 186).

Thus, even the potential nominees themselves have accepted the reality that ascending to the Supreme Court bench generally requires prior experience at a lower federal bench. Often, nomination to a federal bench is possible only by establishing contacts among government officials. This is most easily accomplished by ascending in the party ranks.

Confirmation Partisan Conflict

After the selection has been made, the confirmation process begins. Perhaps in this area especially the influence of party and partisan behavior is most strongly visible.

Clearly, partisan differences will be most evident in the cases of failed nominations. According to John Massaro, there are three leading factors which could move the Senate to oppose a confirmation: 1) the nominee's ideology, 2) the nominee's party affiliation, and 3) non-ideological considerations (1990, 1). Massaro further suggests that ideological opposition alone would likely not bring about a Senate's disapproval, and either would strict partisan concerns, as the Scalia and O'Connor votes show. There are two conditions, however, that when present can bring ideological concerns or partisan concerns to the surface which will more likely block a nomination. These two conditions are: 1) the majority of the Senate does not share the same party affiliation as the president, and 2) the nomination is forwarded to the Senate in the last full year of a president's term. Table 2 shows the Senate's refusal rates when one or both of these conditions is present.
Table 2. Senate Rates of Refusal to Confirm, 1789-1988

<table>
<thead>
<tr>
<th>Presence of Unfavorable Conditions of Senate or Timing</th>
<th>Nominations Made</th>
<th>Nominations Refused</th>
<th>Rate of Refusal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neither condition present</td>
<td>142</td>
<td>26</td>
<td>18%</td>
</tr>
<tr>
<td>One condition present</td>
<td>9</td>
<td>10</td>
<td>71%</td>
</tr>
<tr>
<td>Both conditions present</td>
<td>36</td>
<td>7</td>
<td>19%</td>
</tr>
</tbody>
</table>


Notice how refusal rate increased by 9% when one of the negative conditions is present, but jumps to an astounding 71% when both conditions are present (1990, 135-7). These data can be cause for concern for a last-year Senate-opposed president.

The data from Table 2 suggest that partisan or ideological motivations for rejecting a nominee may lie dormant until one or both of these conditions come into play. This may explain the failures of the Fortas, Haynsworth, Carswell, Bork, and Ginsburg nominations as one or both of these conditions were present in each. Both of these considerations can be called "party-based" as the first obviously taps the natural opposition the Senate controlled by the opposing party will feel toward the president, and the second as it taps into the "lame-duck" situation a serious non-ideological, non-partisan grounds for opposing confirmation can be critical in activating this opposition (1990, 147).

Such non-partisan concerns can serve as a rallying point for those who truly oppose the nomination on ideological or partisan grounds. This particular phenomena was most recently evident in the Ginsburg nomination where his past experience with marijuana became the focal point of the confirmation debates, and ultimately forced Ginsburg's withdrawal.

Not to overstate the role of the party in the nomination process, Massaro makes it clear the ideology plays the "dominant role" when looking at reasons for opposition. This was seen in the Fortas, Haynsworth, and Carswell nominations as the following table, which focuses on the "deviant votes" of the Senate, illustrates:

Table 3. Deviant Votes Generated by Party And Ideology: the Fortas, Haynsworth, Carswell, and Bork Nominations

<table>
<thead>
<tr>
<th>Nominee</th>
<th>Deviating from Party</th>
<th>Votes Deviating from Ideology</th>
<th>Change in Deviant Votes with Ideology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fortas</td>
<td>29</td>
<td>9</td>
<td>-20</td>
</tr>
<tr>
<td>Haynsworth</td>
<td>36</td>
<td>17</td>
<td>-19</td>
</tr>
<tr>
<td>Carswell</td>
<td>30</td>
<td>7</td>
<td>-23</td>
</tr>
<tr>
<td>Bork</td>
<td>8</td>
<td>16</td>
<td>+8</td>
</tr>
</tbody>
</table>


A president may be in during that final year. There is also the prospect of the opposition winning the presidency and thus filling the seat themselves. Election considerations may also activate the partisan opposition around certain ideological issues of the moment.

Other non-ideological or non-partisan issues might also surface that will activate dormant ideological or partisan opposition. As Massaro states:

"...a president must always be concerned about nominating an individual to the Court who is vulnerable on non-ideological, non-partisan grounds. Given the latent ideological opposition confronting all Supreme Court nominations, the presence of this data clearly shows that ideology was a key reason for senators to deviate from their party and oppose the nomination. The Bork data seems to suggest that partisanship was actually a stronger factor than, ideology but this data may simply be the result of stronger ideological parties at the time of Bork's confirmations, or the partisan and political need to support a popular President Reagan. Whatever the reason for ultimate partisan voting regarding Bork, it was clear in the debates that the opposing Senators' primary concerns centered on his 'extreme' ideology. A more recent example that shows the superior position of ideology is the withdrawn nomi-
nation of Lani Guinier during Clinton's administration. The Senate was held by the Democrats at that time, and it was Clinton's first year as president, so the Guinier nomination should have been easy by the original "conditions" model. Guinier's ideology was so at odds with even the most liberal Democrats, however, that Ted Kennedy, probably the most liberal of them all, stated that Guinier's views were "a threat to the Constitution." With such obvious ideological opposition, Clinton was forced to withdraw the nomination (Carter 1994, 35-53).

Thus, while party and partisanship play a secondary role to ideology, there is no question that it plays some role, if not a significant one. It is as John Frank stated about the Fortas failure: "the entire process, from one end to the other, was hardball politics (Frank 1991, 133)."

**Judicial Partisan Activism?**

The third area of party influence on the Supreme Court revolves around the actual adjudicating once a nominee successfully attains office. It is, however, more difficult to show partisan influences when the Court has a strong tradition of relying on legal precedent and established legal test. Still, as Professor Jack Peltason once noted, "the decision as to who will make the decisions affects what decisions will be made (Peltason 1955, 29)."

Along these same lines Ball noted the following:

Who hears the case often determines the outcome of the case; the turn of mind of the judge is often the decisive factor in the outcome of the litigation. This fact has not escaped the notice of the president (1980, 160).

Indeed, history provides ample examples of presidents who hoped to "stack the Court" with strong partisans that would be more likely to agree with the president's own policies. Franklin Roosevelt tried to increase the number of justices allowed to sit on the Supreme Court bench in order to pack the Court with supporters of his New Deal social reforms. Reagan and the Republicans also hoped to pack the Court in order to overrule Roe v. Wade and abortion rights. As Stephen Carter stated:

This is certainly true on abortion, where pro-life and pro-choice forces alike have insisted on the privilege of packing the Court. Naturally, they have done so not in the name of partisanship but that of the American people, who evidently are on their side (1994, 81).

So while few judges would admit their reasoning on a decision is based on partisan holdings, and few presidents would care to admit they want to pack the Court, it is clear there is at least some connection between the decision-making process of a justice and the party affiliation of that justice, and this connection cannot be totally eliminated.

John Gates outlines three major theories important to understanding the dynamic of partisan behavior in Supreme Court adjudication. These are: 1) the Legitimation Thesis, 2) the Delegitimizing Role, and 3) the Agenda-Setting Role.

One of the more pervasive roles given to the Supreme Court is that it serves to legitimize the policies of the other branches of government, especially the executive, who has the power to change the Court make-up. This position was first advanced by Robert Dahl in 1957 and has gained some support over the years from Charles Black and others. The most important conclusion to draw from this theory, states Dahl, is that

...policy views dominant on the Court are never for long out of line with the policy views dominant among the law making majorities of the U.S. Instead of serving as a protector of minority interests, the Court serves to enhance majoritarian democracy by conferring the approval of the much-revered Constitution on the policies of the other branches (1957, 285).

Thus, according to this view, the Court has an inherent nature to eventually support the policies of the majority, and often these policies align along partisan lines.

The second theory sees the role of the Court in an opposite light. The supporters of this theory assert the Court:

...will find itself in conflict with Congress following a critical election. The role of the Court may be to impede the policymaking of new majorities ushered into power in one or more critical elections. ...The Supreme Court remains as custodian of the old regime's ideology ....Richard Posner has termed this period [between the critical election and replacement of "old regime" justices] as the "lag" period, when the Court is ideologically behind majoritarian forces (1992, 15).

Thus, the Court's partisan make-up may be in conflict with a newly elected government, and these forces may sway the decisions of the justices who are now "the last defense of the upset party." This theory has some historical support most notably when John Adams attempted to
"stack" the judiciary with loyal Federalists after the party's crushing defeat by the Jeffersonian-Democrats in the election of 1800. Led by John Marshall, these Federalists did at times effectively block the implementation of new policy by the new government.

The final theory applied to partisan Court behavior also centers on critical elections. The Agenda-Setting Role Theory asserts that before a critical election, the Court can play a significant role in "setting the agenda" or positions of the majority party. Gates states:

"...during times of instability in the parties, the Court has an unusual opportunity to shape the majority party's position on the realigning issues. This is consistent with Dahl's (1957, 294) observation over twenty-five years ago: 'There are times when the coalition is unstable with respect to certain key policies; at very great risk to it legitimacy powers, the Court can intervene in such cases and may succeed in establishing policy' (Gates 1992, 20)."

This theory also has some historical evidence to support its claims. David Adamany's analysis of the historical record of two critical presidential election periods, 1896 and 1960-1964, finds that "the Court played a significant role in setting the majority party's position, which was later vindicated at the ballot box (Gates 1992, 20)." Whichever theory is most accurate does not change their common assertion that party politics and partisanship play some role in the judgments of the Court.

It should be noted, however, that these theories describe the relationship of the Court to the large political environment. The actual internal working of the Court are largely void of party influences. The justices do not organize in partisan blocs, they shift voting coalitions often, they are not effected by their own reelection concerns, and they do not interact with party leadership in general. Still, as was already mentioned, it is often difficult to draw a distinction between ideology and party bias when deciding issues. Years of partisan involvement may be difficult to set aside with true objectivity. Ultimately, the Court remains a "political" body.

Supreme Court justices may not be the only ones effected by the partisan forces involved in the selection and adjudicating of the Court. Christopher Smith argues that the controversial nomination and strictly conservative judgments of Justice Clarence Thomas, and the effects of the Anita Hill testimony during his confirmation trial, served to mobilize women, and feminists in particular, against President Bush and the Republican Party (Smith 1993, 126-30). This may partially explain the party's loss of the female vote in the 1992 elections. This analysis suggests that regardless of supposed unbiased judgments, the effects of Supreme Court decisions can effect the partisanship of the electorate.

The Party's Last Call

The final area in which Supreme Court justices reveal some partisan motivations is in the selection for a time of retirement. Justice Thurgood Marshall was reluctant to retire while a Republican was president. Justice Marshall was a devout liberal who did not like the idea of being replaced by another of Reagan's "ultra-conservatives." Clearly, Justice Marshall hoped to hold on to his position until he could be replaced by a Democratic president's nominee. Unfortunately for Marshall, his health could not withstand eight years of Reagan and four more years of Bush, and he was forced to retire during the term of the Bush presidency (Smith 1993, 45). Ironically, Marshall was replaced by what must have been his worst nightmare, Clarence Thomas, who immediately joined the extremely right-wing faction of Scalia and Rehnquist once in the Court. Clearly, this was the very thing Marshall had hoped to avoid.

The experience of Marshall is not unique. Most justices make it no secret they hope to retire during the administration of a president whose party affiliation agrees with their own. Professor Rainey, in studying the retirement patterns of federal-level judges, found the following:

"Of those who reached eligibility for retirement prior to 1975 and who had a known party identification, 35% of Supreme Court justices, 45% of Court of Appeals judges, and 51% of District Court judges took retirement while their party was in office. Among the Appeals and District judges there is substantial contingent who bring to the bench political loyalties that encourage them, more often than not, to maneuver their departure in such a way that will maximize the chance for the appointment of a replacement by a president of their party (1976, 1)."

Thus, while Supreme Court justices do not seem to follow this trend of partisan-influenced retirement as strongly as lower-level judges, it is clear that some do, and party considerations are never completely absent in the decision to retire. Certainly, Marshall's experience can attest to that.
Supreme Politics

In conclusion, it is clear that party and partisanship definitely play a role in the judicial branch and in the selection, nomination, adjudication, and retirement plans of Supreme Court justices. Gates summarizes this fact in the following:

The traditional idea of the judicial function is that it is essentially nonpolitical. ... This portrayal of the judicial function, however, is rejected by social scientists. ... The realists observed that when precedents are available as a guide to resolving a legal dispute, judges can often distinguish or overrule precedents. Implicit in this view is the assumption that the attitudes and values of individual judges affect their perception of valid claims....

In the modern view of the judicial process there is also a recognition that courts make policy simply as a matter of function. Judicial decisions will aid certain values and societal interests over others. ... Discretion is often available to judges, and at the level of Supreme Court adjudication, few cases are unimportant (1992, 10-12).

So what are the implications of partisan influence for a president who seeks the confirmation of his nomination? Clearly, the president must look at the relevant factors in each case. Is the current Senate majority from the opposing party? How far into the presidential term is this nomination taking place? Does the candidate have non-ideological characteristics that might adversely polarize the Senate vote? What implications will the candidate’s likely ideology and judgment behavior have on the issues that are partisan “flashpoints?” All of these questions should be looked at carefully in each nomination a president considers.

In this way, the president can better organize his resources for “battle” if necessary, or quietly pull out a nominee before a drawn-out and potential damaging debate series. Perhaps if Reagan had better considered these factors in 1987, he could have mobilized enough support to confirm Bork, and he certainly would have avoided offering Ginsburg as his “sacrificial lamb.” President Clinton may well have avoided the embarrassment of the Lani Guinier withdrawal. Clearly, these partisan factors should always have a strong impact on the president’s choices.

Finally, the president must set aside any lingering strong beliefs in the “neutral integrity” of the Supreme Court, for in the end as Massaro states, "the Senate’s action in refusing to confirm some future Supreme Court nominee will be, as it always has been, supremely political" (1990, 197). Thus, to work in a political system, the judiciary too must remain political.

WORKS CITED


