

The Effects of Divided Government and Polarization on the Behavior of Federal Circuit Court Judges

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Abstract:

Many people act strategically to be promoted. Is it possible that circuit court judges make decisions in an ideological direction with the goal of being nominated to the Supreme Court? I examine the behavior of federal circuit court judges by using a dichotomous variable where a ruling is made in either a liberal or conservative direction. I observe the effects of unified and divided government, as well as Senate polarization. Although I hypothesize that short list judges under unified government will behave more ideologically than non-short list judges under unified government, I find reverse results. Short list judges are more likely to vote moderately than their non-short list counterparts when government is unified. Perhaps this is the result of wanting to demonstrate their behavior is not bound to one ideology. Under divided government, there is no significant difference in behavior between short list judges and non-short list judges. I also find null results when I examine the effect of polarization on judge voting. Overall, the results offer some evidence that short list judges are, in certain instances, strategically altering their behavior, however they are moderating rather than acting in a polarizing manner. Implications for such behavior are vast – judges are not always deciding on cases based on “good law,” but are sometimes prioritizing personal gain. Continuation of such behavior could ultimately undermine public trust in the judiciary. My findings are not as robust as other studies on judge behavior, demonstrating that the Senate may have less influence than the president on the behavior of judges.

Keywords:

Supreme Court, polarization, divided government, behavior, circuit court, unified government, Senate, judicial appointments

The past several decades have demonstrated an enormous increase in political polarization that has impacted senators, presidents, judges, Supreme Court Justices and everyday individuals. Republicans and Democrats are incredibly divided and there is strong animosity between them. Since the 1980's, as polarization has increased, the effects of divided government have been intensified. This has left the two parties within Congress, and to a lesser extent, the public, with little to agree upon. Parties are becoming more homogeneous while also expelling moderate lawmakers and promoting extreme lawmakers. The Senate is more polarized than it has been in over a century, therefore, the "advice and consent" process has been negatively affected. The confirmation process of judges and Justices has been unusually contentious, with more judges at all federal levels being rejected, or at the very least, having long, combative confirmation periods filled with partisan battles among Senators. Judges, therefore, must act strategically if they aspire to be promoted to a higher court in the federal system.

Alex Kozinski, a Ninth Circuit Court of Appeals judge, stated, "Every magistrate judge is a district judge in waiting; every district judge in waiting is a circuit court judge in waiting; every circuit judge is an associate justice in waiting; and every associate justice is a chief justice in waiting... How does a judge reconcile his personal ambitions with the requirements of principled application of the law and sensitivity to individual justice?" (Kozinski, 2004, 1104). The idea that judges may suppress their intentions of creating "good policy" for personal gain is an odd one. We tend to believe, and hope, that judges are interpreting laws and making policy that benefits the country as a whole. However, like people of many professions, judges often seek personal gain in the form of career advancement.

This begs the question, does increasing polarization and its effects on divided versus unified government influence the behavior of circuit court judges who may be nominated to the Supreme Court?

I hypothesize that federal circuit court judges, desiring to be nominated to the Supreme Court, behave strategically to better align with the president and the Senate. For the purposes of this paper, I presume that all judges wish to be nominated to a higher court, especially judges in the U.S. Circuit Court of Appeals who aspire to advance to the U.S. Supreme Court. In order to accomplish this promotion, these judges consistently behave in certain ways to be recognized by presidents and, more importantly, to gain the approval of the Senate.

I have defined judge behavior as the direction – conservative or liberal – of judges' votes on the outcome of cases they decide. Many scholars conclude that judges, and especially Supreme Court Justices, behave ideologically and often make decisions in parallel with their political ideology (Segal & Spaeth, 2002). I am interested in explaining the conservative or liberal votes of federal circuit court judges and how such behavior can be strategically altered for promotion.

I further hypothesize that increasing polarization causes judges seeking career advancement to adopt more polarizing stances when government is unified, but to act more moderately when government is divided. During unified government, the Senate and the president will typically share similar ideology, especially in times of polarization when party unity is high. This forces judges to validate that they, too, fit the mold of being ideologically liberal or ideologically conservative and that they demonstrate the ideals and values of the current president and his party within the Senate. During divided government, however, judges will actively behave in ways to illustrate that they are moderate and make decisions independent

of personal political ideology. They will, perhaps, sometimes adopt liberal stances and sometimes take conservative stances in order to bridge the divide between the president and the majority party in the Senate.

There are several important reasons for studying for the behavior of judges. At a very basic level, judges are generally viewed as enigmatic; not much is known about their decision-making process. Studying this behavior may simply demonstrate how judges will act when and if they are seated on a higher court, such as the Supreme Court, especially when cases are similar. On a broader and more concerning level, the idea that judges are influenced by personal reasons, such as career advancement, also undermines the idea that judges seek to determine the “true” law. Additionally, it undermines the belief among scholars that judges act purely on ideology and partisanship. This strategic decision-making could have severe implications for the authority of the court system. Because the Supreme Court relies on its legitimacy from public trust, realizing that judges sometimes vote because of personal agenda could be detrimental to the basic institution. If the public were to realize that decisions on important and contentious issues were being made for personal gain, the court’s authority would be negatively impacted.

LITERATURE REVIEW

Article 2, Section 2 of the United States Constitution states that “[The President] shall have Power... by and with the Advice and Consent of the Senate, shall appoint... Judges of the Supreme Court.” Although the president nominates judges to the Supreme Court, the judge must then be confirmed by the Senate. The president clearly has the power to manipulate the political composition of the Supreme Court, however the advice and consent clause gives the Senate considerable influence over the confirmation process as well. The president is constrained in

two ways when nominating a judge. He is constrained by the ideological composition of the current court and he is constrained by the Senate (Moraski & Shipan, 1999; Nemacheck, 2007). With regard to the former, it would be difficult for a president to fill a vacancy with an extreme liberal when the departing justice was extremely conservative. When selecting a nominee, presidents must consider the current composition and how best to alter it to support his own agenda without ignoring the ideology of the departing judge. With regard to the latter, if the president and the Senate majority are of opposing parties, the president must act strategically to appease an opposing Senate. These constraints on the president force him to act deliberately in order to nominate a candidate, who, although pursuing the president's ideology, will not drastically alter the composition of the bench and who is likely to be confirmed by the Senate (Moraski & Shipan, 1999).

There is extensive debate regarding which attributes of a judge matter most. Many scholars believe ideology is the strongest consideration (Segal & Spaeth, 2002), however others continue to highlight the importance of merit and capability. Since Reagan's 1987 nomination of Robert Bork, Senate voting has emphasized politics, philosophy, and ideology and deemphasized ethics, competency, and integrity (Epstein, Lindstädt, Segal, & Westerland, 2006). There are, as the authors acknowledge, two significant limitations on this argument. First, ideology has always been a consideration of the Senate. Second, merit is still highly regarded and strongly considered by the Senate. The importance of merit is illustrated in the confirmation battle of Ruth Bader Ginsburg, who, despite being a staunch liberal, was confirmed on a 97-3 vote. Even those Senators who disagreed with her political positions acknowledged her outstanding abilities.

There are institutional factors that affect both the length of time taken to confirm or reject a nominee as well as the probability of confirmation or rejection. These factors are best

illustrated through the confirmation process of lower court judges because they are more frequent and less publicized than Supreme Court nominees. There is extensive data illustrating the substantial increase in the time the Senate takes to confirm lower court judges (Binder & Maltzman, 2002; Shipan & Shannon, 2003; Binder & Maltzman, 2009; Howard, 2015). Some nominations last months or even years before the judge is confirmed or denied (Binder & Maltzman, 2009). The further the ideological distance between the Senate and the judge, the longer the confirmation process takes (Binder & Maltzman, 2002). Senators employ both new and inherited rules in order to block, or at least delay, the confirmation process of a judge with an opposing party affiliation or opposing political ideology (Binder & Maltzman, 2009). Similarly, there has been a substantial decrease in the number of these nominees who are actually confirmed (Devins & Baum, 2016). According to Epstein & Segal, “from the start of Jimmy Carter’s presidency in 1977 through the end of George W. Bush’s first term in 2004, senators have not approved of 20% (69) of the 350 nominees to the U.S. Court of Appeals and over 10% (131) of the 1,248 nominees to the U.S. District Courts (Epstein & Segal, 2005, 21).

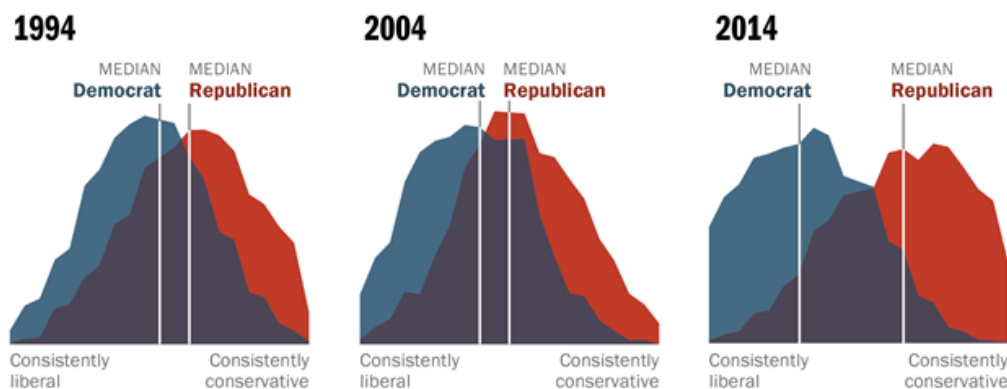
When voting to confirm a Supreme Court nominee, the Senate uses a single up-or-down vote to confirm or reject. This process, according to Binder, limits the amount of negotiating or bargaining used by Senators, as compared to the amount of such opportunities when discussing legislation (Binder, 2008). The confirmation process can also be filibustered, which then requires a cloture vote of 60% to end the filibuster. Unlike the process for other presidential nominees and lower court judges, the nuclear option, which reduces cloture requirements on nominations to a simple voting majority, has not been extended to Supreme Court nominees.

Polarization

Polarization of Congress, the Supreme Court, and the public has been the subject of much discussion over the past two decades (Poole & Rosenthal, 1984; Binder, 2008; Clark, 2009; Hasen, 2012; Barber & McCarty, 2015; Howard, 2015; Devins & Baum, 2016). Polarization involves both partisan sorting and an increased ideological consciousness among elites, also known as affective polarization (Devins & Baum, 2016). During the 1970's, partisan sorting occurred when most conservatives moved into the Republican party and most liberals moved into the Democratic party. This led to each party growing more ideologically homogeneous within itself. It also reduced the number of moderates, especially lawmakers. The graph below, collected from a Pew Research Center study in 2014, illustrates this idea of ideological sorting. Affective polarization, on the other hand, is a growing awareness of being affiliated with one party and a growing hostility towards members of the other party. For example, in recent decades the best determinant of an individuals' vote choice has changed from income to party affiliation.

Democrats and Republicans More Ideologically Divided than in the Past

Distribution of Democrats and Republicans on a 10-item scale of political values



Source: 2014 Political Polarization in the American Public

Notes: Ideological consistency based on a scale of 10 political values questions (see Appendix A). The blue area in this chart represents the ideological distribution of Democrats; the red area of Republicans. The overlap of these two distributions is shaded purple. Republicans include Republican-leaning independents; Democrats include Democratic-leaning independents (see Appendix B).

PEW RESEARCH CENTER

Barber and McCarty determine that there are both external and internal causes for rising polarization in Congress. They offer plausible causes and explain whether or not each cause is likely to have created the current era of polarization. The potential external factors are a polarized electorate, the realignment of the south, gerrymandering, primary elections, economic inequality, money in politics and the media environment. The most likely causes to have attributed to increasing polarization, according to Barber and McCarty, are the realignment of the south, income inequality, and partisan media. The potential internal factors are rule changes, majority-party agenda control, party pressures, teamsmanship, and the breakdown of bipartisan norms. For Barber and McCarty, the internal factor that has the most influence on polarization is teamsmanship, which is the norm that “members’ individual interests [have become] increasingly linked to the fate of their parties” (Barber & McCarty, 2015, 35). Teamsmanship not only exacerbates ideological differences, but frames non-ideological issues as ideological issues (Lee, 2009; Barber & McCarty, 2015).

Beginning in the 1970’s, Poole and Rosenthal developed a multi-dimensional scaling method – called DW NOMINATE scores – that uses roll-call votes to place members of Congress onto an ideological spectrum. Although at first the authors only used one dimension (Poole & Rosenthal, 1984), they later added a second, more nuanced dimension. The first, and vastly more important dimension is the scope of the government on economic issues, which is on a scale from liberal-moderate-conservative. The second observes regional differences, which are especially important in regards to the issues of slavery, bimetallism and the civil rights movement. Since the passage of the civil rights legislation in the 1960’s, these regional differences have become less significant. Now, race related issues that were once explained in regional terms can be explained by the first dimension. The dominant dimension explained 93%

of roll-call votes in the 113th Congress (Poole, 2015). The authors conclude that, over time, Congress has become more polarized and has witnessed a decline in moderate lawmakers. Using DW NOMINATE scores, Congress is the most polarized it has been in the post-Reconstruction era in both the House and the Senate (Poole, 2015).

As Congress, and specifically the Senate, has become more polarized, the Supreme Court has followed suit. The Supreme Court is affected, both directly and indirectly, by partisan sorting and affective polarization (Devins & Baum, 2016). The Court has divided into two distinct camps since 2010, with all of the liberal Justices being appointed by a Democratic president and all of the conservative Justices being appointed by a conservative president (Hasen 2012; Devins & Baum, 2016). This partisan split is unprecedented. Similarly, the Court often decides cases on 5-to-4 votes and many of these splits follow partisan lines.

Many scholars have examined the nomination process of the Justices (Moraski & Shipan, 1999; Nemacheck, 2007; Devins & Baum 2016). In the current polarized era, presidents are much more likely to choose candidates based on their ideology. Many scholars argue that ideology has become an increasingly important factor during the selection of justices since the Reagan presidency (Epstein, Lindstädt, Segal, & Westerland, 2006; Devins & Baum, 2016). Throughout history, presidents have differed in the amount of focus paid toward ideology as opposed to other considerations such as politics, diversity, personal relationships, judicial competence and experience.

Democratic presidents have, since Franklin D. Roosevelt, considered ideology more and more, but still consider other factors more often than do Republican presidents (Devins & Baum, 2016). For example, Franklin Roosevelt carefully selected several nominees based on their policy considerations as he hoped to elevate his New Deal plans and strong federal government.

Truman, Kennedy, and Johnson focused less on ideology and more on political and personal relationships. Both Clinton and Obama paid more attention to ideology, but still chose more moderate candidates who would face limited opposition within the Senate. Clinton and Obama also tended to focus on diversity, especially gender and race (Devins & Baum, 2016).

Differences in the nomination process of Republicans over time have been much more dramatic. Neither Eisenhower nor Ford gave extensive consideration to policy. Nixon's nominees reflect his campaign promises on criminal justice. His six choices were based heavily on politics rather than ideology of the judge. Reagan focused almost exclusively on ideology, illustrated in his nomination of so-called "conservative stalwarts" Antonin Scalia, Robert Bork, Douglas Ginsburg, and William Rehnquist as Chief Justice (Devins & Baum, 2016, 41). Neither Bork nor Douglas Ginsburg were confirmed. Bork was rejected by the Senate and Reagan withdrew the Ginsburg nomination when it was reported that he had smoked marijuana with his law students while at Harvard. Both George H. W. Bush and George W. Bush relied almost exclusively on ideology when nominating Supreme Court Justices. The decisive switch in the nomination process of Republican presidents "was largely a product of priorities of presidents and members of their administration. But those priorities were reinforced by the development of a new conservative legal movement" (Devins & Baum, 2016, 42). This is demonstrated by the ability of the Republican Party and its conservative legal movement to force George W. Bush to withdraw his nomination of Harriet Miers who, although deemed conservative enough to Bush, did not satisfy the more extremes in his party (Devins & Baum, 2016).

Presidents are much more likely, during times of high polarization, to nominate immoderate judges, especially because the confirmation vote is of a dichotomous nature (Binder, 2008). This dichotomous vote "encourages moderates... to support off-center nominees... [so]

the ideological makeup of confirmation coalitions in periods of polarized parties should look quite different than that of coalitions formed during periods of low polarization” (Binder, 2008, 112). I argue that the nomination of more extreme judges is dependent on whether government is unified or divided. When government is divided, I hypothesize, candidates will be more moderate than when government is unified.

An increase in polarization has not only affected the nomination process undertaken by the president and his administration, but has also distorted the confirmation process in the Senate. Ideology is of “paramount concern to Senators” (Epstein, Lindstädt, Segal, & Westerland, 2006, 296). This concern is illustrated in the recent contentious partisan battles within the Senate (Hasen, 2012; Barber & McCarty, 2015; Devins & Baum, 2016). The amount of time it takes to confirm judges has increased tremendously (Binder & Maltzman, 2002; Shipan & Shannon, 2003). The Senate is determined, now more than ever, to play a substantial role in the composition of the Supreme Court as well as in lower federal courts.

Until recently, and excluding the confirmations of Robert Bork in 1987 and Clarence Thomas in 1991, nominees received bipartisan support in their confirmation votes. Scalia and Ginsburg, who would have difficulty being confirmed in the modern era due to their extreme ideology, are prime examples of such bipartisan support. Conservative Scalia was confirmed unanimously in 1986 and liberal Ginsburg received only three votes against her in 1993. More recently, however, nominees have been the subject of dramatic and controversial arguments within the Senate and confirmations have typically been decided on party lines. Chief Justice John Roberts had 22 votes cast against him in 2005 and all were by Democrats. Sonia Sotomayor received 31 votes against her and was only supported by 9 Republicans in 2009; Elena Kagan had 37 votes against her and was only supported by 5 Republicans in 2010. Often,

the Senators who voted across party lines were considered moderates and many have since left the Senate (Hasen, 2012, 144).

Time taken to confirm, or reject, a nominee has also dramatically increased along with polarization and strong party unity. Some scholars have focused on why certain justices are confirmed in short periods of time and others take much longer (Shipan & Shannon, 2003). For example, Sandra Day O'Connor was confirmed in 30 days. Clarence Thomas, on the other hand, was confirmed in 125 days. The longer the confirmation process is delayed, the higher the probability that the nominee will be rejected (Shipan & Shannon, 2003). Other scholars have acknowledged the causes of delay for lower federal court nominees (Binder & Maltzman, 2002).

Although Senators have the ability to filibuster Supreme Court nominees, no nominee for Associate Justice has ever been filibustered and Abe Fortas is the sole nominee for Chief Justice who was filibustered. His nomination to Chief Justice was not confirmed. Some scholars believe that polarization and "the recent partisan realignment of the Supreme Court makes it more likely that a Supreme Court judicial nominee will be filibustered" (Hasen, 2012, 105), however the filibuster is clearly a rare occurrence for Supreme Court nominees. To date, Senators have opted against filibustering a Supreme Court nominee even when they have the majority to do so, as in the case of Samuel Alito (Hasen, 2012). During the Obama administration, parties on both sides, depending on whether they had control of the Senate, have attempted to enact the "nuclear option" for judicial nominees. The nuclear option would require only a simple majority to overcome a filibuster. In 2013, the nuclear option was enacted for presidential nominees to the bureaucracy and lower court judges, but so far, neither party has been successful in empowering the nuclear option for the Supreme Court.

Divided government

Divided government, at its most basic, is defined as different branches of government controlled by different parties. When studying the Supreme Court, it is most important to define divided government as that period in which the president is of a different party than the majority in the Senate. The effects of divided government have vast implications on the confirmation process of Supreme Court nominees, as well as lower federal court nominees. Divided government increases the delay in the confirmation process because the majority party in the Senate has incentives to block, or at least hinder, the nominee's process (Shipan & Shannon, 2003). These incentives include the fact that the Supreme Court continues to hear cases and make decisions even when there is a confirmation in process. The Senate can, by slowing the confirmation process, prevent an opposing stance on a specific case. A longer delay in the confirmation process also reduces the probability that the nominee will be confirmed. A statistic offered by Epstein & Segal states that, "through the history of the Republic, the Senate has confirmed just 59% of Supreme Court nominees under divided government (23 of 39), compared with 90% when the president's party controlled the Senate (97 of 108)" (Epstein & Segal, 2005).

It is important to acknowledge the relationship between polarization and divided government. Prior to World War II, "there was no positive association between divided government and polarization, but the two phenomena have occurred together frequently since then" (Barber & McCarty, 2015, 36). The effects of divided government have only been amplified by the rise of polarization. In times of high polarization, a divided government struggles to compromise, bargain, or negotiate (Barber & McCarty, 2015). During times of polarized, homogeneous parties, "the degree and kind of competition between the legislative and executive branches will vary significantly and may all but disappear, depending on whether party

control of the House, Senate and presidency is divided or unified” (Levinson & Pildes, 2006, 4). Polarization, during divided government, creates competition that is sometimes disadvantageous; polarization, during unified government, can cause too much power in the hands of one “faction,” as James Madison would call a political party.

Confirmations take longer during times of polarization and divided government (McCarty & Razaghian, 1999; Shipan & Shannon, 2003). Although McCarty and Razaghian focus on nominations to the executive branch, they find that “political conflict induced by divided government and polarization clearly leads to a more drawn out confirmation process” (McCarty & Razaghian, 1999, 1141). They blame such results partially on the procedures the Senate can initiate, such as the filibuster, to purposefully slow the process.

Similarly, during times when there is a combination of polarization and divided government there is “more aggressive gatekeeping by the opposition party [if] the ideological stakes of confirming presidential appointees are greater” (Binder, 2008, 115). For example, when current swing justice Anthony Kennedy retires, the opportunity to fill his vacancy could alter the Court considerably in a specific direction and therefore, there will be “more aggressive gatekeeping,” or a larger incentive for the Senate to block an ideological candidate if he is not of their party. Ultimately, “we should see nominees broadly reflective of the median voter in less polarized Congresses and nominees more reflective of the right or left in periods of high polarization – subject to the caveat that we may be less likely to observe confirmation votes on extreme nominees during periods of divided government” (Binder, 2008, 114). The caveat of divided government mentioned by Binder is extremely important. During polarization and divided government, I suggest that presidents will nominate candidates who indicate moderation in their recent behavior to appease the Senate. I will next explore the literature that discusses

how the rise of polarization affects the behavior of the judges who are subject to the more politicized confirmation processes of the modern Senate.

Behavior

There are many goals which influence judge behavior: creating “good” policy, ideology, approbation, legal accuracy, and collegiality, to name a few (Black & Owens, 2016). Most significant in my discussion, however, is the career goal of promotion and, possibly, elevation to the Supreme Court. Few scholars have discussed the behavior of lower court judges in terms of career advancement, however there are some important insights (Cohen, 1991; Baum, 2006; Black & Owens, 2016). In their desire to be nominated by the president, judges who perceive the possibility of advancement to a higher court behave differently. Baum, who focused on the ability of judges’ audiences to influence their decision-making, states judges will “be willing to sacrifice some of their preferred policies, which provide no tangible benefits, for even a small improvement in the odds of elevation to a higher court” (Baum, 2006, 82). Similarly, Cohen, who studied district court judges’ rulings on the constitutionality of the U.S. Sentencing Commission, provided evidence that judges who have a higher potential of being promoted tended to rule in favor of the administration (Cohen, 1991). By supporting the administration, these district judges hoped to be noticed by the President and potentially elevated to a higher court. It is evident, then, that certain judges will sometimes go against their ideological or policy goals. The potential of being nominated “may lead them to exaggerate their policy beliefs, to vote for some parties rather than others, or even to strike out against their colleagues” (Black & Owens, 2016, 30).

Black and Owens argue that circuit court judges behave in specific ways to demonstrate their abilities and ideology to the president in hopes of being promoted. In studying four

variables – whether the judge voted with the presidents’ ideological preferences, whether the judge voted in favor of the United States as a party, whether the judge wrote a dissent, and whether the judge wrote a concurring opinion – they found that, when there was a vacancy on the court, “contending” judges, or judges eligible for promotion based on Christine Nemacheck’s shortlists, altered their behavior compared to when there was no vacancy and compared to non-contenders (Black and Owens, 2016). Black and Owens were also able to employ a matching technique, which I unfortunately did not have the resources to conduct. The authors matched different variables, such as judge’s JCS scores, in order to “neutralize any remaining imbalance in the data and omitted variable bias” (Black and Owens, 2016, 38). An important difference between my research and that of Black and Owens is that they opted to focus on the influence of the president on circuit court judge behavior rather than the influence of the Senate. I am further contending that party control of the Senate impacts the strategic voting of federal circuit court judges who seek to impress both the president and Senate.

THEORY AND HYPOTHESES

Federal circuit court judges, who may be nominated to the Supreme Court, vote strategically during Supreme Court vacancies to appease both the President and the Senate with the goal of being promoted. The strategic behavior of judges is dependent on whether government is unified or divided, and the strength of such effects are amplified when government is polarized.

Hypothesis One: I hypothesize that when government is united under Republican control, a conservative judge on a presidential shortlist during a Supreme Court vacancy will vote more

conservatively than either 1. a shortlist judge when there is no Supreme Court vacancy and 2. a non-shortlist judge during a vacancy. The same would be true, I hypothesize, for a liberal judge when the government is united under Democratic control.

Hypothesis Two: If government is divided, these same judges would vote more moderately than their counterparts.

Hypothesis Three: This change in voting behavior, I hypothesize, will be heightened when polarization, which is measured by a greater than average difference in party means in the Senate, is high.

RESEARCH DESIGN

I intend to test whether increasing polarization in the Senate and its effects on unified and divided government has led to behavioral changes among federal circuit court judges seeking promotion to the Supreme Court. As illustrated by Black and Owens (2016), these judges know they must first gain the attention of presidents, then they must also win the support of a simple majority vote of Congress.

I use cross-tabs to analyze my data. Cross tabs compare the results of one variable with the results of another to offer information about subsets within the data. By using cross tabs, I can compare judges on short lists versus judges not on short lists, as well as votes during vacancy periods versus votes outside of vacancy periods. By examining these subsets, I can determine whether judges change their behavior based on presence on a presidential short list or presence of a Supreme Court vacancy. Cross-tabs also offer chi-squared values. The chi-square statistic offers a measure of “goodness of fit,” which means it compares observed values with expected values. Chi-squared values are only offered with categorical data, which works well with my

data because all the variables I use are dichotomous or have been converted to be dichotomous (JCS scores and difference in party means).

I use an individual vote level of analysis for two reasons. First, JCS scores are assigned upon confirmation and do not change. Second, my research design tests whether the relationship between ideology and voting strengthens or weakens during the brief period between when a judge is nominated by the president and when the Senate votes whether to confirm or reject. To witness this relationship, I must use a vote-level unit of analysis rather than an annual score.

I have three hypotheses about the data. First, I hypothesize that when government is united under Republican control, a conservative judge on a presidential shortlist when a Supreme Court vacancy exists will vote more conservatively than either 1. a shortlist judge when there is no Supreme Court vacancy and 2. a non-shortlist judge during a vacancy. I similarly hypothesize that when government is united under Democratic control, a liberal judge on a presidential shortlist when a Supreme Court vacancy exists will vote more liberally than 1. a shortlist judge when there is no Supreme Court vacancy and 2. a non-shortlist judge during a vacancy. Second, if government is divided, these same judges would vote more moderately than their counterparts. Lastly, this change in behavior, I hypothesize, will be heightened when polarization, which is measured by a greater than average difference in party means in the Senate, is high.

DATA

My unit of analysis is individual judges' votes and my dependent variable is a dichotomous indicator of whether the vote was conservative or liberal. I use two datasets, which I have merged together, describing circuit court judges by Donald R. Songer and Cass R.

Sunstein. Songer's data ranges from 1922-2002 and is a random sampling of appellate court cases. Sunstein's data ranges from 1995-2008 and is more comprehensive. Unfortunately, there is no data since 2008. This presents some minor issues, as I was hoping for more recent information in order to explore the skyrocketing levels of polarization that have been present within the United States for the past decade. Unfortunately, I will be unable to examine the Obama presidency which includes the nominations of Sonia Sotomayor and Elena Kagan (Kagan was the Solicitor General of the United States so she would not have been included in the data, regardless).

My dependent variable, the behavior of judges, is determined by the direction of the vote in each case. This is a dichotomous variable where a 1 implies the vote was conservative and a 0 implies the vote was liberal. Songer and Sunstein use a similar method for determining the direction of the vote, however, Songer uses a categorical variable with 4 responses: conservative, liberal, a mixture of the two, or non-ideological. For the purpose of my argument, I will only be using those cases that were determined by Songer to be either conservative or liberal. A possible caveat to my dependent variable is that not all cases are inherently ideological and therefore not all decisions are clearly made in a liberal or conservative direction. Despite such a caveat, examining votes is the best way to identify behavioral changes. The Songer datasets offer the direction of the vote for the two most important issues involved in the case, however the Sunstein dataset only focuses on the main issue at hand. I have chosen, as is common among scholars, to examine only the primary issue. Many cases do not have a second issue; therefore, this decision should not alter my findings in any significant manner.

Another important caveat of using the direction of the case as a measurement of judge behavior is that many cases, especially criminal cases, are inherently "conservative" in their

origin. For example, a case in which someone is accused of murder is inherently conservative. Although this is simply an example of the judge upholding the law, the case is considered “conservative” in nature. Most of the cases, therefore, despite being ruled on by equal numbers of liberal and conservative judges, are defined as conservative.

Of the cases in my dataset, 59% of the cases are coded as a “conservative” decision. Conservative judges voted conservatively 63% of the time and liberal judges voted conservatively 55% of the time. This reality skews the data in a conservative matter, which affects the outcome of my results. More recently, this data is even more slanted in a conservative direction. In all cases after 1985, 60% are conservative decisions. Liberal judges voted in a conservative direction 54% of the time and conservative judges voted in a conservative direction 65% of the time.

Independent Variables

1. JCS scores

JCS (Judicial Common-Space) scores, created by Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland, place judges on an ideological spectrum. Per Black and Owens, the “Judicial Common Space estimates circuit court judge’s preferences by looking to the pivotal actor(s) who nominated them” (Black and Owens, 2016, 36). This is a notable caveat because it assumes that judges have similar ideological preferences with the people who nominated them, which may not always be the case. It has, however, been shown to be quite accurate in predicting judges’ and justices’ ideological preferences. JCS scores are bounded by 1 and -1. JCS scores for federal circuit court judges range from -0.689 to 0.628 with the more negative numbers correlating to a more liberal ideology and the more positive numbers correlating to a more conservative ideology. The higher the number, the more conservative the judge. To

facilitate analysis with cross-tabs, I have changed JCS scores into dichotomous variable. A positive JCS score correlates to a “conservative” judge and a negative JCS score correlates to a “liberal” judge.

2. Presidential Short Lists

Presidential short-lists are lists of candidates who were seriously considered by the president for a nomination to the Supreme Court. Christine Nemacheck, acknowledging the inaccuracy of such lists created by the press, used primary sources, especially written correspondence between the president and his top advisors, to compile presidential short lists. She also considered diary entries, oral history accounts, and records of telephone conversations. Although Nemacheck’s data may ignore some potential nominees or some hopeful judges who changed their behavior despite not being considered by the president, Nemacheck’s use of primary sources is the most accurate method of determining which judges, or other individuals, were seriously considered by the president and his advisors. The short lists are offered in the appendix of “Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover through George W. Bush” (Nemacheck, 2007).

Nemacheck’s short lists have several potential limitations. First, some candidates were not federal circuit court judges. Some were state supreme court judges and others, such as George W. Bush’s failed nominee Harriet Miers, had never served as a federal circuit court judge. Therefore, some of the names offered by Nemacheck as potential nominees are not found in the Songer or Sunstein dataset and I am unable to use these individuals in my analysis. Second, short lists comprise a miniscule percentage of the thousands of judges who served in the federal circuit system.

I must also establish a difference between judges who have the possibility of being nominated to the Supreme Court and judges who lack such an opportunity. Again, despite Nemacheck's comprehensive short lists, there may be some judges who consider themselves to be potential nominees but are not included in the short lists or there may be judges who are on the short lists but were not actually considered by the president. I must set aside these factors as a simple caveat for readers to consider. It is necessary to have a control group of circuit court judges who are not being considered for nomination to the Supreme Court and whose behavior, I hypothesize, will not change. This group will illustrate that changes in behavior are due to promotional goals and not to other external factors that would confound my data. Therefore, my control group is defined as judges excluded from short lists.

3. Vacancy Period

I define a year as a vacancy period if any Supreme Court vacancy occurred during that year. Unfortunately, the Songer and Sunstein data do not include dates of decisions by month or day which would have allowed for a more precise definition of a vacancy period. A slight problem with using the year as the unit of measurement is that two nominees' vacancy periods extended past the new year. Anthony Kennedy was nominated on November 30, 1987 and confirmed on February 3, 1988 and Samuel Alito was nominated on November 10, 2005 and confirmed on January 30, 2006. In these two examples, I have only coded the first year as a vacancy period.

4. Divided Government

I have determined which years were categorized under divided government and those categorized under unified government. I use a dichotomous variable, in which a 1 signifies divided government and a 0 signifies unified government. In creating this variable, I only

compare the political affiliation of the president and the majority in the Senate, as the House of Representatives plays little role in the confirmation or nomination process of judges, other than simply occasionally voicing their opinion to presidents if asked (Nemacheck, 2007).

5. Partisanship

I will also consider a measure of partisanship; simply, is the Senate controlled by Republicans or Democrats and is the president a Republican or Democrat? This information will allow me to determine whether behavior changes based on party affiliation. Perhaps when the president is a Republican, circuit judges are more likely to make decisions with an extreme ideological conservatism but when the president is a Democrat, circuit court judges are likely to make decisions with a moderate perspective, or vice versa. I can determine such measures of partisanship by simply noting which party is in control of which branches each year. A small, unimportant caveat appears in the 107th Congress (2001-2002). The Senate was evenly split 50-50 with Democratic Vice President Al Gore as the tie-breaker for the first 17 days, until Republican Vice President Dick Cheney was sworn in on January 20. Less than six months later, on June 6, 2001, however, Senator Jim Jeffords, who was previously a Republican, declared himself an independent and asserted he would caucus with the Democrats, which again gave the Democrats a slight majority. I have, as generally done, coded the 107th Congress as Democratic. I have coded a Republican-controlled Senate and a Republican president with a 1 and a Democrat-controlled Senate and a Democratic president with a 0.

6. Polarization

I assume that, based on the information discussed in my literature review, polarization emphasizes and accentuates the effects of divided government. As the two parties become more homogeneous and polarized, the less compromise occurs between them and, therefore, periods of

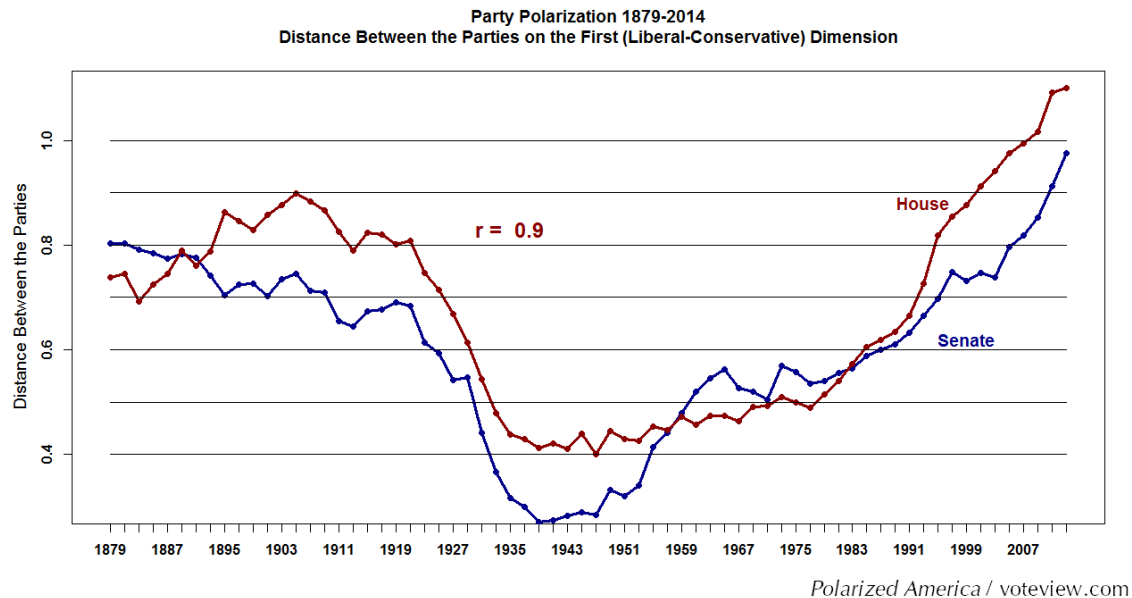
divided government in times of heightened polarization cause conflict and disagreement.

Polarization, which was high at the start of the 20th century and dwindled to a low from about the 1920's to the 1970's, has been steadily increasing ever since for a multitude of reasons which are also listed in my literature review (Barber & McCarty, 2015).

Using Poole and Rosenthal's DW NOMINATE scores, I can determine the level of polarization within Congress during any given year. The DW NOMINATE scores order roll-call votes on a two-dimensional scale. The first dimension – scope of government issues related to the economy – is vastly more important. The second dimension discerns regional differences and has not been nearly as important since the passage of civil rights legislation in the 1960's (Poole, 2015). These scores, depicted in the chart below, demonstrate the distance between the two parties on a liberal-moderate-conservative dimension. The scores also demonstrate that, in recent years, moderate lawmakers have all but disappeared, and more ideologically extreme candidates have taken their place. Based on the work of Poole and Rosenthal, I infer that the current era is the most polarized the United States Congress has been since the post-Reconstruction Era (Poole & Rosenthal, 2015). I will use the DW NOMINATE scores to determine whether heightened polarization in Congress has an impact on circuit court judge behavior, especially under divided government. As Congress becomes more polarized, judges may behave strategically to impress the more ideological senators who wield the power of confirmation.

I examined the mean difference between the two parties as my measure of polarization. I also changed the difference in party means within the Senate to a dichotomous variable called polarization. In this variable, values above the mean, which is 0.57, are years when the Senate was polarized and values below the mean are years when the Senate was not polarized. I

acknowledge that this oversimplifies the influence of polarization and negates its tendency to ebb and flow, however using a dichotomous variable was necessary for the tables of proportions that I created. The years that are coded as being “polarized” are 1925 and 1926 and 1985-2008.



DATA ANALYSIS

Hypothesis One: I hypothesize that when government is united under Republican control, a conservative judge on a presidential shortlist when a Supreme Court vacancy exists will vote more conservatively than either 1. a shortlist judge when there is no Supreme Court vacancy and 2. a non-shortlist judge during a vacancy. The same would be true, I hypothesize, for a liberal judge when the government is united under Democratic control.

Table 1: Conservative Judge under Unified Republican Government when a Vacancy Exists

| | Judge Not on Short List | Judge on Short List |
|-------------------|-------------------------|---------------------|
| Liberal Vote | 329 (35%) | 74 (42%) |
| Conservative Vote | 622 (65%) | 103 (58%) |

The p-value is 0.06 and the chi-squared is 3.381.

Table 2: Liberal Judge under Unified Democratic Government when a Vacancy Exists

| | Judge Not on Short List | Judge on Short List |
|-------------------|-------------------------|---------------------|
| Liberal Vote | 771 (42%) | 92 (40%) |
| Conservative Vote | 1066 (58%) | 140 (60%) |

The p-value is 0.5 and the chi-squared is 0.45.

Table 3: Conservative Short List Judge under Unified Republican Government

| | Not a Vacancy Period | Vacancy Period |
|-------------------|----------------------|----------------|
| Liberal Vote | 176 (44%) | 74 (42%) |
| Conservative Vote | 227 (56%) | 103 (58%) |

The p-value is 0.68 and the chi-squared is 0.17.

Table 4: Liberal Short List Judge under Unified Democratic Government

| | Not a Vacancy Period | Vacancy Period |
|-------------------|----------------------|----------------|
| Liberal Vote | 148 (48%) | 92 (40%) |
| Conservative Vote | 160 (52%) | 140 (60%) |

The p-value is 0.05 and the chi-squared is 3.78.

Pictured above, I used cross tabs and tables of proportion to create models and examine relationships between judge behavior and my independent variables. I hypothesized that liberal short list judges would vote more liberally than their non-short list counterparts and that conservative short list judges would vote more conservatively than their non-short list counterparts. I also hypothesized that short list judges would vote more ideologically during a vacancy than when there was no vacancy. Tables 1 and 2 demonstrate the differences in behavior between short list judges and non-short list judges during unified government. Table 1 examines conservative judges during united Republican government and table 2 examines liberal judges during united Democratic government. Tables 3 and 4 illustrate differences in behavior

between short list judges when there is a vacancy versus when there is not a vacancy. Table 3 observes conservative judges during united Republican government and table 4 observes liberal judges during united Democratic government.

I find that I can only reject the null hypothesis in one specific scenario – liberal judges under unified democratic government behave differently when a vacancy exists versus when the Court has a full bench (table 4). Although I hypothesized that judges in such a scenario would vote more ideologically, I find that these judges are actually voting more moderately. As transcribed above, these judges are 8% less likely to vote liberally when a vacancy exists than when one does not. The null hypothesis can be rejected with 95% confidence as the p-value is 0.05. Although this change in behavior is in the opposite direction than I hypothesized, these judges still behaved strategically.

This data demonstrates that judges behave more moderately when there is a vacancy on the Supreme Court. This could be the result for several reasons. First, perhaps they are hoping to appear unbiased to the American public in a time when Supreme Court nominations are highly publicized and politicized. It is possible that these judges are desiring to appear more loyal to precedent or the creation of “good law” than to ideology. Despite the majority of the Senate being controlled by their own party, these judges realize that they could be asked some difficult questions by opposition-party Senators in their Senate confirmation hearings. The ability to point back to a recent “conservative” or “liberal” decisions is a benefit in such a scenario.

The data for conservative judges in the same comparison is not statistically significant (table 3). When comparing short list judges to non-short list judges, there is evidence suggesting that conservative (table 1) – but not liberal (table 2) – short list judges behave differently than non-short list judges. Although I am unable to reject the null hypothesis with 95% confidence

because the p-value is 0.06, it is clear that, at least for conservative judges, presence on a short list can cause judges to behave strategically. Once again, this data is in the opposite direction than I had initially hypothesized; conservative short list judges are 7% less likely to vote conservatively than non-short list judges.

Hypothesis Two: If government is divided, these same judges would vote more moderately than their counterparts.

Table 5: Conservative Judge under Divided Government with Republican President when a Vacancy Exists

| | Judge Not on Short List | Judge on Short List |
|-------------------|-------------------------|---------------------|
| Liberal Vote | 832 (38%) | 167 (36%) |
| Conservative Vote | 1361 (62%) | 297 (64%) |

The p-value is 0.43 and the chi-squared is 0.62.

Table 6: Conservative Short List Judge under Divided Government with a Republican President

| | No Vacancy | Vacancy |
|-------------------|------------|-----------|
| Liberal Vote | 320 (37%) | 167 (36%) |
| Conservative Vote | 544 (63%) | 296 (64%) |

The p-value is 0.71 and the chi-squared is 0.14.

Table 7: Liberal Short List Judges under Divided Government with a Democratic President

| | No Vacancy | Vacancy |
|-------------------|------------|---------|
| Liberal Vote | 176 (41%) | n/a |
| Conservative Vote | 249 (59%) | n/a |

In regards to hypothesis two, I hypothesized that both liberal and conservative short list judges would vote more moderately than their non-short list counterparts and that short list judges would vote more moderately when there was a vacancy than when there was not. I

examined the same comparisons – judge behavior and presence on a short list and judge behavior and presence of a Supreme Court vacancy – but considered years under divided government, rather than unified government. In table 5, I examined the changes in behavior between short list judges and non-short list judges during divided government. In tables 6 and 7, I examined the changed in behavior between short list judges under divided government when there was a vacancy versus when there was not.

First, the null hypothesis cannot be rejected when a conservative judge on the short list during a vacancy behaves under divided government where the president is a Republican and the Senate is controlled by Democrats. A conservative short list judge under divided government when the president is a Republican and the Senate is controlled by Democrats is 2% more likely to vote conservatively than his non-short list counterparts (Table 5, above). I examined the same relationships with liberal judges and a Democratic president. As it turns out, there has not been a Supreme Court vacancy when government was divided under a Democratic president since at least prior to 1925. Unfortunately, I am therefore unable to compare examine the behavior of liberal short list judges when a vacancy exists under divided government.

Next, I looked at the relationship between judge behavior and presence of a vacancy on the Supreme Court. Conservative short list when government is divided with a Republican president and when there is a vacancy on the Supreme Court vote 1% more conservatively than short list judges when there is not a vacancy, but this change is not statistically significant (table 6). Again, there has not been a vacancy during any year when government is divided under a Democratic government so I cannot examine liberal short list judges' behavior when there is a vacancy versus when there is not.

Hypothesis Three: This change in behavior, I hypothesize, will be heightened when polarization, which is measured by a greater than average difference in party means in the Senate, is high.

Table 8: Conservative Judges under Unified Republican Government when a Vacancy Exists and Polarization is High

| | Not on Short List | Short List |
|-------------------|-------------------|------------|
| Liberal Vote | 258 (33%) | 53 (41%) |
| Conservative Vote | 514 (67%) | 76 (59%) |

The p-value is 0.09 and the chi-squared is 2.87.

Table 9: Liberal Judges under Unified Democratic Government when a Vacancy Exists and Polarization is High

| | Not on Short List | Short List |
|-------------------|-------------------|------------|
| Liberal Vote | 133 (37%) | 11 (26%) |
| Conservative Vote | 229 (63%) | 31 (74%) |

The p-value is 0.18 and the chi-squared is 1.83.

Table 10: Conservative Judges under Divided Government with a Republican President when a Vacancy Exists and Polarization is High

| | Not on Short List | Short List |
|-------------------|-------------------|------------|
| Liberal Vote | 344 (35%) | 71 (35%) |
| Conservative Vote | 643 (65%) | 134 (65%) |

The p-value is 0.95 and the chi-squared is 0.003.

Last, in regards to hypothesis three, I hypothesized that polarization would emphasize the changes in behavior witnessed above. I looked at the relationships between judge behavior and presence on the short list when polarization levels were high and judge behavior and presence of a vacancy when polarization levels were high. I again first examined the relationship between direction of vote and presence on a short list and then examined the relationship between direction of vote and presence of a Supreme Court vacancy. Table 8 and table 9 highlight the

differences in the behavior of short list judges when government is unified. Table 8 observes conservative judges under unified Republican government and table 9 observes liberal judges under unified Democratic government. Table 10 explores short list judge behavior versus non-short list judge behavior when government is divided. As stated previously, the years that are coded as being “polarized” are 1925 and 1926 and 1985-2008, based on the difference in the party medians within the Senate.

I first looked at the relationship between behavior and presence on a short list under unified government. When government is unified under Republican leadership, conservative short list judges are 8% less likely to vote conservatively when there is a vacancy on the Supreme Court than conservative judges not on a short list (Table 8, above). Although I cannot reject the null hypothesis with 95% confidence, the p-value is 0.09 which suggests that there may be an element of strategic decision-making. Once again, this change in behavior is in the opposite direction than I had hypothesized, however, it is possible to argue that polarization does influence conservative short list judge behavior under unified Republican government. These judges are acting moderately, reiterating my prior argument that judges want to demonstrate that they are nonpartisan.

Liberal short list judges under unified Democratic government were 11% less likely to vote liberally than judges not on the short lists. This behavioral change is not statistically significant as the p-value is 0.18 (table 9, above).

Next, I considered judge behavior and being on a short list under divided government. Conservative judges under divided government with a Republican president are just as likely to vote conservatively if they are on a short list versus if they are not (table 10). I cannot examine the behavior of liberal judges under divided government because there has not been a Supreme

Court vacancy under divided government with a Democratic president since at least prior to 1925.

Table 11: Conservative Short List Judges under Unified Republican Government when Polarization is High

| | No Vacancy | Vacancy |
|-------------------|------------|----------|
| Liberal Vote | 118 (45%) | 53 (41%) |
| Conservative Vote | 146 (55%) | 76 (59%) |

The p-value is 0.50 and the chi-squared is 0.46.

Table 12: Liberal Short List Judges Under Unified Democratic Government when a Vacancy Exists and Polarization is High

| | No Vacancy | Vacancy |
|-------------------|------------|----------|
| Liberal Vote | n/a | 11 (26%) |
| Conservative Vote | n/a | 31 (74%) |

Table 13: Conservative Short List Judges under Divided Government with a Republican President when Polarization is High

| | No Vacancy | Vacancy |
|-------------------|------------|-----------|
| Liberal Vote | 202 (37%) | 71 (35%) |
| Conservative Vote | 341 (63%) | 134 (65%) |

The p-value is 0.52 and the chi-squared is 0.42.

Table 14: Liberal Short List Judges under Divided Government with a Democratic President when Polarization is High

| | No Vacancy | Vacancy |
|-------------------|------------|---------|
| Liberal Vote | 157 (40%) | n/a |
| Conservative Vote | 237 (60%) | n/a |

I then examined the relationship between judge behavior and the existence of a vacancy under unified government. Tables 11 and 12 depict the changes in the behavior of short list judges when there is a vacancy versus when there is not and when government is unified. Table

11 offers observations for conservative judges and table 12 offers observations for liberal judges. Tables 13 and 14 demonstrate the changes in short list judge behavior when there is a vacancy versus when there is not and when government is divided. Table 13 observes conservative judges and table 14 observes liberal judges.

Conservative short list judges under unified government are 4% more likely to vote conservatively when there is a vacancy than when there is no vacancy, however this relationship is not statistically significant as the p-value is 0.5 (table 11). I, unfortunately cannot analyze this relationship with liberal judges because government was only under unified Democratic control for two of the “polarized” years (1993 and 1994) and both years had vacancies on the Supreme Court (table 12). I, therefore, am unable to make a comparison between liberal short list judge behavior when there is or is not a vacancy.

I also could not reject the null hypothesis when observing the behavior of Republican judges during a vacancy period and under divided government. Conservative short list judges were 2% more likely to vote conservatively when there was a vacancy than when there was not, however this is not statistically significant (table 13). There was never a vacancy under a Democratic president during the “polarized” years when government was divided, so I cannot examine the behavior of liberal judges under these circumstances (table 14).

As demonstrated above, it appears that polarization has little effect on the relationship between vacancy and judge behavior under either unified or divided government. I cannot reject the null hypothesis in any situation.

CONCLUSION

My results suggest that judges behave strategically in certain instances in order to be more seriously considered for promotion. With regard to hypothesis one, there are some results that demonstrate that, in certain cases, some judges do act strategically under unified government, depending on their status on a short list or the presence of a vacancy. These results, however, are in the opposite direction than I had hypothesized, yet it is still evident that occasionally judges do participate in specific strategies in order to pursue promotional goals. A liberal short list judge under united Democratic government is 8% less likely to vote liberally when there is a vacancy on the Supreme Court than when there is no such vacancy. A conservative short list judge under unified Republican government is 7% less likely to vote conservatively than a non-short list judge.

This tendency to act more moderately is most likely the result of the politicization of Supreme Court nominations. The nomination process has become increasingly publicized and a matter of increasing importance to the public. As the nomination process has become subject to partisan battles and the influence of interest groups and public opinion, different judges have opted for different strategies. It appears that some judges will act in a more moderate way to demonstrate their ability to separate themselves from their preferred ideology and distinguish themselves as nonpartisan. By acting more moderately, judges can validate that they are not simply voting on an ideological basis, but on the pursuit of “good law” or based on legal precedent.

In conclusion, my first hypothesis was somewhat correct in claiming that sometimes certain judges do strategically alter their behavior under unified government in pursuit of occupational goals. I was incorrect in the direction that they move, however, which is key to

understanding judicial behavior and motives behind the decision-making process. Judges under unified government are more likely to vote moderately than to vote ideologically.

There are many important implications resulting from this analysis. First and foremost, judges are paying close attention their audiences. If judges believe they will be participating in Senate hearings, they will cater to those in the Senate who may generally disagree with their ideological beliefs. Simply understanding that judges acknowledge their audiences and alter their behavior strategically for their audiences is important. As asked by Black and Owens, “[does the Supreme Court] modify their behavior or their opinion language when they rule on cases the public will read? Might doing so allow them to shape public perception of the courts and judicial legitimacy?” (Black and Owens, 2016, 40). To understand judge behavior must political scientists consider the judges’ audiences?

Another important implication is that there are some judges who, under some circumstances, are willing to change their behavior for occupational gain. This finding could result in a severe undermining of the authority and the legitimacy of the federal court system and its nomination and confirmation process. In the eyes of the public, judges are supposed to uphold the “law,” not cater their decisions to garner the support of the president and senators of both parties to be promoted. It is evident, however, that judges under unified government are not completely excluding their emotions and their own self-interests when they are making decisions. It is vital to acknowledge that judges do occasionally make judicial decisions based on reasons other than law.

The effects witnessed above, however, only occur under unified government. I conclude that hypothesis two is incorrect and, given the data above, there is no evidence that federal circuit court judges alter their behavior under divided government. Although I hypothesized that judges

would change their behavior to be more moderate under divided government in hopes of pleasing a Senate controlled by the opposition party, this is not the case. Under divided government, short list judges behave the same as non-short list judges and short list judges behave the same when there is a vacancy versus when there is not a vacancy. Perhaps the existence of different parties in control of different branches of government allows the judge to vote in line with his ideology as he no longer needs to demonstrate that he is bipartisan and unbiased.

This finding also produces some implications. Most importantly, judges acting under divided government are unwilling to drastically change their behavior for occupational goals. Despite the implications listed above, it is clear from the data that judges are not solely acting to enhance their careers. Generally, judges under divided government do not appear to be voting strategically to be nominated and confirmed to the Supreme Court. This conclusion demonstrates that other mechanisms – whether they be good law, ideology, or others – are the framework for judicial decision-making when different branches of government are controlled by different parties.

It is important to note that there is an important distinction between unified and divided government when studying judge behavior. Judges do not alter their behavior under divided government. They are, however, much more likely to behave strategically under unified government. Further research may question why this is the case. What underlying judicial philosophy leads short list judges to behave strategically when government is unified but not when government is divided? Does the prospect of promotion appear more attainable when government is unified? How will behavior change under unified versus divided government in the post-Gorsuch era (or, post-nuclear option) of Supreme Court nominations?

Hypothesis three – that polarization causes strategic behavior to be more drastic – is mostly null, however, polarization does appear to have a small influence under certain circumstances. Table 8 rejects the null hypothesis with 91% confidence, which although not extremely significant, still demonstrates a slight change in behavior amongst conservative judges during united Republican government that is polarized. This strategic behavior in times of high polarization does not appear in all circumstances and, overall, polarization appears to have little effect on the behavior of federal circuit court judges desiring to be nominated to the Supreme Court. Although polarization may have widespread implications on other aspects of politics, such as legislative output and relationship between branches of government, it only slightly indicates changes in the behavior of judges aspiring for nomination to the Supreme Court.

In conclusion, it is important to distinguish similarities and differences between my results and those of Black and Owens. Black and Owens argue that during Supreme Court vacancies, short list judges behave differently than non-short list judges. They also conclude that short lists judges behave differently when there is a vacancy than short list judges when there is no vacancy. Short list judges are more likely than non-short lists to vote in favor of the president, vote in favor of the United States, and write a dissent. Short list judges are also more likely to vote in favor of the president, vote in favor of the United States, and write a dissent when there is a vacancy than when there is not. Black and Owens also argue that short list judge behavior does not change depending on whether government is unified or divided – judges will behave differently regardless –which leads to different conclusions than I have made.

A key difference between my research and that of Black and Owens is the dependent variable and this disparity may explain why we have received different results. I used a dichotomous variable for the direction of the vote – either conservative or liberal. Black and

Owens examined whether the judges voted in favor of the president's party, whether they voted in favor of the United states, and whether they wrote dissents. This distinction in the dependent variable is important for understanding the differences in our results. The authors tended to concentrate on the influence of the president, rather than the influence of the Senate. Another key difference is that Black and Owens matched many variables, such as judge JCS scores, in order to "neutralize any remaining imbalance in the data and omitted variable bias" (Black and Owens, 2016, 38). I, unfortunately, did not have the resources available to conduct such extensive research and therefore did not employ such a matching technique. This difference may also have influenced our results and may explain why they are different.

According to Black and Owens, judges do have occupational motives than dictate behavior; I have similar conclusions, although mine are slightly less significant. Perhaps judges are acting more strategically than my results would suggest, but are demonstrating this behavior by showing support for the president, his party, and the United States rather than by attempting to please members of both parties within the Senate. It is possible that party control of the Senate is relatively unimportant to short list judges, who are focusing their efforts almost exclusively on the president.

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