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Ideological Imbalance: Why Democrats Usually Pick Moderate-Liberal Justices and Republicans Usually Pick Conservative Ones

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Ideological Imbalance

Why Democrats usually pick moderate-liberal justices and Republicans usually pick conservative ones.

By *Lawrence Baum and Neal Devins*



Justice Elena Kagan on March 6 at the Pentagon in Arlington, Virginia.

Alex Wong/Getty Images

President Obama's nomination of Merrick Garland to the Supreme Court may have come as a surprise to the political world. But it shouldn't have. Garland is the kind of nominee whom we would have expected from Obama under ordinary circumstances. Indeed, in important respects he is similar to Sonia Sotomayor and Elena Kagan, the nominees whom Obama chose early in his presidency. More importantly, his nomination reflects the practice of recent Democratic presidents to balance ideology with other goals by appointing moderate liberals. In sharp contrast, **our research** shows that Republican presidents over the past 25 years have put ideology first by appointing strong conservatives to the court.

† Prior to the current political era, presidents chose Supreme Court nominees on the

basis of several criteria. The nominee's perceived ideological position was one of those factors. But presidents gave attention to other considerations, such as rewarding political allies, appealing to voters, and avoiding confirmation battles in the Senate. Indeed, presidents who cared about ideology were not necessarily meticulous in probing the views of the people they considered as nominees. Largely as a result, it was common for liberal Republicans and conservative Democrats to sit on the court.

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Among Democratic presidents, for instance, Harry Truman chose four justices who established conservative records on the court. John Kennedy chose one strong liberal, Arthur Goldberg, and the moderate conservative Byron White.

On the Republican side, Dwight Eisenhower's five appointees included two justices who played a key role in establishing the court's liberal legal doctrines of the 1960s, Earl Warren and William Brennan. And during the long period from 1969 to 1991, when every appointment to the court was made by a Republican president, the appointees included several justices whose records of votes and opinions were more liberal than conservative, including John Paul Stevens, David Souter, and (in the latter part of his career) Harry Blackmun.

All that has changed. From Elena Kagan's 2010 appointment to Antonin Scalia's death, the court's liberals were all Democrats and its conservatives were all Republicans. This was the first time in the court's history in which there were two ideological blocs that fell perfectly along party lines.

This development was not accidental. Rather, it reflected significant changes in the party system. For one thing, the parties have become more homogeneous ideologically, with conservative Democrats and liberal Republicans increasingly rare. And that is especially true among political and legal elites, from whom presidents, senators, and prospective Supreme Court nominees are drawn. Another source of change is an increased concern with Supreme Court policy among political elites, including party leaders and activists.

Recent Democratic and Republican presidents have nonetheless diverged on whether ideology should be the defining concern in Supreme Court nominations. Democrats

Bill Clinton and Barack Obama were careful to choose nominees who stood on the liberal side of the ideological spectrum. But at the same time, they veered away from candidates whose strong liberalism would prompt confirmation battles and toward nominees who embraced the rhetoric of judicial restraint, had rich personal histories, and were perceived as less ideological. Reflecting the tendency of Democrats to place interest group politics ahead of ideology, Clinton and Obama also put substantial emphasis on racial and gender diversity in judicial nominations, including Supreme Court appointments. On the court, the four justices they selected have adhered to moderate rather than strong liberalism, based on their proportions of liberal and conservative votes and the **analyses of justices' ideological positions** by Georgetown political scientist Michael Bailey.

Merrick Garland fits comfortably in this mold. He has a reputation as a relative moderate rather than a strong liberal. Garland's age, 63, and personal history as the prosecutor in the Oklahoma City bombing case also set him apart in ways that cut against ideology and in favor of confirmability.

In contrast, and as we detail in our **study on the relationship between the court and political ideology**, Republican presidents in the current era have generally not chosen to compromise by appointing moderates to the court. One reason is that members of conservative legal groups such as the Federalist Society play a key role in shaping legal policy in Republican administrations. Another is the disappointment of conservatives that 10 consecutive Republican Supreme Court appointments from 1969–1991 did not move the court more sharply to the right.

The 2005 withdrawal of George W. Bush Supreme Court nominee Harriet Miers vividly illustrates the power of the conservative legal movement. With four Federalist Society members sitting on the Supreme Court from 2006 to 2016, there is little question that Federalist Society membership is important to the credentialing of conservative lawyers. Indeed, Bush had put Federalist Society members Brett Kavanaugh and Viet Dinh in charge of judicial selection, and around half of the Bush appointees to the federal courts of appeals were Federalist Society members. When nominating Miers, Bush received the backing of Federalist Society head Leonard Leo. Nonetheless, the conservative legal establishment sharply attacked Miers both for her lack of Federalist Society “credentials” and for her ties to the American Bar Association. Twenty-four

days after her nomination, with conservative criticism unabated, Miers withdrew. Her replacement was Samuel Alito—a Federalist Society member and the favorite of the very conservatives who attacked Miers.

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Thus it is not surprising that—before the death of Scalia—the four strongly conservative justices on the court were Republican appointees. More to the point, there is little prospect that a modern-day Republican president would appoint Anthony Kennedy—a moderate conservative—to the court in order to secure confirmation.

None of this is to deny that the special conditions under which the Garland nomination occurred—a promise by Senate Republicans not even to take up hearings on the nomination—played into Obama’s choice of a moderate liberal to fill the Scalia seat. Choosing a moderate liberal as experienced and well-regarded as Garland was undoubtedly an effort to put pressure on Republicans to back down from their stated commitment to derail any Obama nominee. But that choice departs from the pattern of nominations in the current era less than might appear at first glance. More to the point, history tells that even if there were a Democratic majority in the Senate, Obama likely would have chosen a nominee who was roughly similar to Garland in ideological terms.

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