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The Federalist Society Majority

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JURISPRUDENCE

The Federalist Society Majority

The organization will soon have a 5–4 stranglehold on the Supreme Court.

By LAWRENCE BAUM and NEAL DEVINS
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Federalist Society–approved picks Justice Neil Gorsuch and Chief Justice John Roberts walk down the steps of the U.S. Supreme Court on June 15, 2017, in Washington.

Ricky Carioti/The Washington Post via Getty Images

On Monday, Donald Trump is set to nominate a Supreme Court justice who is tied to the Federalist Society and who has been vetted by leaders of that group. This is precisely what Trump did when he chose Neil Gorsuch in 2017. And in doing so, he will be continuing a pattern that dates back to the George W. Bush nominations of John Roberts and Samuel Alito:

Republican presidents not only emphasize ideology in judicial appointments but also look to the Federalist Society as the principal vehicle to identify qualified members of the conservative legal movement.

But there is a difference this time around, one that underlines how the Supreme Court has changed. Until now, the Republican appointees on the Supreme Court have included at least one justice who did not have substantial ties to the Federalist Society. During the first years of the Roberts court, Anthony Kennedy was not tied to the group nor were David Souter or John Paul Stevens. Once Kennedy's successor is confirmed, all five Republican appointees will have those ties.

In appointing a Federalist justice, President Trump will be sealing a deal between Republican presidents and the conservative legal movement. In effect, that deal began in 1985. Under the leadership of Attorney General Edwin Meese, the Department of Justice in Ronald Reagan's second term sought aggressively to advance conservative goals in the judiciary. By hiring staffers on the basis of ideological commitment, Meese sought to groom young conservative lawyers who would later become federal court judges. The Federalist Society—established as a law student group in 1982—was an important component of this strategy; it enabled Meese and others in the administration to identify promising candidates for significant government posts. Meese hired the society's founders as special assistants and tapped Stephen Markman, who headed the Washington chapter of the Federalist Society, to become the assistant attorney general in charge of judicial selection.

When nominating Anthony Kennedy, however, Reagan downplayed ideology. That nomination came after the Senate defeat of Robert Bork (who, like Antonin Scalia, was faculty adviser to one of the first Federalist Society chapters) and the withdrawal of Douglas Ginsburg, another strong conservative. Having been earlier passed over by the administration because he did not seem to be a sufficiently committed conservative, the more moderate Kennedy was nominated largely to avoid a potentially bruising confirmation battle.

By the time George W. Bush became president in 2001, the conservative legal movement was entrenched and truly dominated judicial appointments. Brett Kavanaugh—now one of Trump’s Supreme Court short-listers—was in charge of judicial selection. By 2005, the “farm team” of credentialed conservatives included John Roberts and Samuel Alito. Indeed, George W. Bush—particularly after the failed nomination of Harriet Miers—almost certainly would have turned to this deep Federalist Society bench if one of his nominees had been rejected; he would not have opted for someone—like Anthony Kennedy—who was not tied to the conservative legal movement. Indeed, the Miers nomination failed largely because the conservative legal movement saw her as an outsider and turned against her. Neil Gorsuch’s star was also on the rise at that time. After serving in the Bush Justice Department, he was appointed to a federal court of appeals in 2006.

Over his three decades on the Supreme Court, Kennedy, as Dahlia Lithwick has observed, typically took conservative positions on most issues. At the same time, unlike Trump’s finalists, Kennedy was not associated with the Federalist Society or the conservative legal movement. His voting record bears this out. Kennedy took moderate to liberal positions on some highly visible issues. He voted to reaffirm *Roe v. Wade* in 1992 and ruled against Texas’ stringent abortion regulations in 2016. He wrote a series of majority opinions favorable to gay rights, culminating in the court’s 2015 overturning of state prohibitions of same-sex marriage. In 2016, he backed affirmative action in higher education. Like Harry Blackmun and David Souter, Kennedy served as an object lesson to conservatives that Republican presidents could squander opportunities to reshape the Supreme Court.

The Federalist Society has served a critical function in making conservatives confident that they are taking *fullest* advantage of those opportunities. Ties to the society constitute a marker of a commitment to the textualist and originalist approaches to legal interpretation that it favors as well as conservative views on legal issues. And the society’s close scrutiny of prospective nominees helps to ensure that Republican presidents will not make “mistakes” like Kennedy in their choices of nominees.

With the 2017 nomination of Neil Gorsuch, the conservative legal movement largely controlled the vetting of Supreme Court nominees. Donald Trump largely outsourced the identification of prospective nominees to the Federalist Society, and society vice president Leonard Leo worked closely with the Trump White House on the Gorsuch nomination and confirmation. Those roles are being repeated in the selection of a successor to Justice Kennedy.

Gorsuch’s first full term on the Court was emblematic of what the conservative legal movement wants from a Supreme Court nominee. On the bench, he embraced originalism and textualism. He was on the conservative side of all but one 5–4 ruling. His agreement rate with other Republican appointees ranged from 81 to 86 percent as compared with 55 to 64 percent with Democratic appointees. Off the bench, he was the keynote speaker at the Federalist Society’s annual meeting. In September, he spoke to another conservative group at the Trump International Hotel.

He also accompanied Senate Majority Leader Mitch McConnell to Kentucky, where the pair made stops at the universities of Kentucky and Louisville.

Trump has called Gorsuch a “home run,” and his next nominee will certainly be cut from the same cloth. The ascendancy of the Federalist Society helps explain why. There is another factor as well: Political polarization among elite Republicans and Democrats has produced a partisan divide where highly credentialed Republicans are committed conservatives—and their Democratic counterparts liberal. With the appointment of a new justice, the Republican majority on the court will be composed of justices who have risen through the ranks of the conservative legal movement and who are committed to the ideals of that movement. It will truly be the Federalist Society’s court.