

## *Selection of Law Clerks and Polarization in the U.S. Supreme Court*

Corey Ditslear and Lawrence Baum  
Ohio State University

Scholars have pointed to signs of growing polarization in American politics along partisan and ideological lines. This article probes for polarization in the Supreme Court by examining the role of ideological considerations in the selection of law clerks. For the 1975–1998 terms of the Court, we analyzed the relationship between the justices' ideological positions and the positions of the lower court judges from whom the justices drew their clerks. We found that this relationship became stronger over the course of that period, with a sharp increase in strength during the 1990s. This finding provides one significant piece of evidence that the Court has been changing as an institution.

**S**cholars have pointed to signs of growing polarization in American politics along partisan and ideological lines (McCarty, Poole, and Rosenthal 1997). This polarization is especially evident in government, both in Congress and in relations between the president and Congress, since the mid-1980s (Bond and Fleisher 2000; Fleisher and Bond 1996; Rohde 1991).

Polarization in the executive and legislative branches raises the issue of polarization in the judicial branch. One form of polarization in the Supreme Court is regular disagreement over case outcomes and legal doctrine along ideological lines in the Court's decisions, disagreement that has long existed to varying degrees. Some commentators contend that in recent years there has been a second form of polarization, a hardening of ideological lines in the Court's operation as a collective group (Lazarus 1998). However, there has been little evidence about this possible development. It is an important issue because this second form of polarization might reduce flexibility in the justices' positions. Polarization could make the Court's decisions even more the sum of individual positions and less the product of collective consideration than they were in the past.

We appreciate the advice and assistance of Jon Bond, James Brudney, Gregory Caldeira, Sanford Gordon, Lori Hausegger, Scott Meinke, Deborah Merritt, Todd Peppers, Kevin Scott, Richard Timpone, and the reviewers for this journal. We also thank the staff of the *Almanac of the Federal Judiciary* for providing background information useful for interpreting that material.

This article explores this second form of polarization by analyzing the selection of law clerks. Clerks are an integral part of decision making on the Court. The justices seek clerks who are hard-working, highly competent, and trustworthy. If the justices perceive themselves as part of an ideological struggle on the Court, that perception will affect their criteria for clerk selection: they will give a high priority to ensuring that their clerks are willing to follow their lead. In turn, that concern is likely to affect their choices of lower court judges from whom to draw their clerks. As one means to assess polarization on the Court, we seek to determine whether the justices increasingly draw their clerks from ideological allies in the lower courts.

### Justices and Law Clerk Selection

Each Supreme Court justice today is entitled to hire four law clerks, and each employs at least three. Law clerks typically serve a justice for a single term. Clerks spend most of their time analyzing petitions for certiorari, researching cases accepted for decisions on the merits, and helping to write opinions (Domnarski 1996, Ch. 2). There is considerable disagreement about the extent to which the clerks exercise independent power over the Court's outputs (*The Long Term View* 1995; Glendon 1994, 146–147; Oakley and Thompson 1980; Peppers 2000; Posner 1996, 139–159). However, there is no doubt that the justices delegate considerable responsibility to their clerks. Thus, what the law clerks do in their jobs is important to the justices.

The relationship between justices and clerks can be thought of as one between principals and agents (Lazear 1998; Ross 1973). Because they work so closely with their clerks, the justices as principals are in a relatively good position to monitor law clerks as their agents. But their monitoring is necessarily imperfect. In any event, justices are better off with clerks who are motivated to behave as desired than with clerks whose actions need to be controlled or corrected. As in other organizations, then, the selection of law clerks is an important mechanism with which to obtain the desired behavior from subordinates (Carpenter 1997; Kaufman 1960, 161–70). (On law clerk selection, see Donahue 1995, 77–78; Mauro 1998; and Newland 1961, 305–309.)<sup>1</sup>

The predominant practice is to choose law clerks who were high-ranking graduates of the most prestigious law schools. That level of achievement, combined with recommendations from well-reputed legal academics, conveys a strong signal that a prospective clerk is highly skilled in the law and willing to work

<sup>1</sup>Because Supreme Court clerkships bring their holders enormous benefits, they are widely sought after. For the same reason, aspirants typically apply to all or nearly all of the justices and accept the first offer they receive (see, e.g., Greenya 1992, 40, 45). Some lower court clerks with strong ideological preferences do seem to avoid justices who stand at the other end of the spectrum, but the justices retain a great deal of choice in their selection of clerks—including the judges from whom they draw clerks. Of course, the large number of applicants renders more difficult the task of choosing clerks.

very hard.<sup>2</sup> The risks of insufficient competence and shirking in a literal sense are thereby reduced considerably.

Since the mid-1970s, nearly all law clerks have had prior service in lower courts, the great majority of them in the federal courts of appeals. This service too indicates a high level of competence. For one thing, it strengthens relevant skills. Further, the selection of a clerk by a federal appellate judge and the judge's recommendation of that clerk provide a signal to the hiring justice about a clerk's competence.

The identity of the specific judge for whom a clerk has worked can serve as another signal to a justice. Justices might look to judges with high prestige in the legal community because prestigious judges are likely to have clerks with exceptional competence. In addition, justices might look to judges with whom they are familiar, such as former colleagues on a court of appeals.

In choosing judges from whom to draw clerks, justices might also be inclined to seek out judges whose ideological positions are similar to their own. In part, that inclination could result from a tendency to accord prestige and develop personal ties on the basis of ideological affinity. However, every justice knows and respects judges with a wide range of ideological views, so we would not expect a strong inclination to draw clerks from like-minded judges on the basis of prestige and personal ties alone.

More critically, a judge's ideological position could serve as an important signal about the judge's clerks. Its potential importance lies in the possibility that clerks will engage in ideological "sabotage" (Brehm and Gates 1997) in the form of efforts to shift policy away from the justice's preferences and toward those of the clerk. For instance, conservative commentators have argued that liberal clerks influence the ideological content of their justices' policy outputs (Eastland 1993; *Legal Times* 1992; Rehnquist 1957).

Perhaps the best safeguard against such sabotage is to draw law clerks from like-minded judges in the lower courts. Some judges take the ideological views of prospective clerks into account when hiring them (see Kozinski and Bernstein 1998, 58; Walsh 1998, 1389). For those judges, selection of a clerk indicates that the clerk has ideological views similar to those of the judge. For any judge, the hiring of a clerk by a judge with a particular ideological bent indicates a degree of confidence that the clerk will follow the judge's ideological lead and thus the justice's lead as well. If the clerk has already served at least part of a term with the judge, as often is the case by the time a justice chooses clerks, the judge's satisfaction with the clerk's work conveys even more information.

The actual importance of this signal to the justices depends on how much they worry about ideological sabotage. In turn, the extent of such worries is a sign of polarization on the Court. The stronger the justices' perception that the

<sup>2</sup>We draw on the concept of signaling in the hiring process (Spence 1973), though with some adaptations.

Court is divided into ideological camps, camps that include law clerks as well as justices, the more they will seek assurances that their clerks are reliable allies. Thus, any tendency to draw clerks from like-minded colleagues on the lower courts should be stronger when the Court is more polarized. Specifically, if the Court has undergone a polarization similar to that found elsewhere in American politics, this tendency should have become more pronounced in recent years. This study examines the strength of this tendency over the past quarter century and, more important, probes for changes in its strength over time.

## Methods

The study encompasses the 24 Supreme Court terms from 1975 through 1998. The 1975 term was approximately the point at which the justices began to select clerks almost solely from among those who had served in lower courts. Clerks are included in the study if they served active justices and if they had formerly served lower court judges other than the employing justice. Altogether, 742 clerks met those criteria.

On theoretical grounds, we expected a linear relationship between the ideological positions of justices and those of the judges from whom they draw clerks, in that ideological considerations should have a similar impact on all justices. In the first stage of analysis, we undertook regression analyses of the relationship between the ideological positions of the justices as the independent variable and the ideological positions of the judges from whom they draw clerks as the dependent variable. We controlled for the ideological composition of the courts of appeals as a whole, which serves as a baseline from which to gauge ideological linkages between judges and justices. In supplementary analyses, we also controlled for other variables that have no theoretical importance for our inquiry but that might distort the ideological relationship between justices and judges: the gender of clerks, geographical linkages between justices and judges, and law-school linkages between justices and judges and between justices and clerks. Because these variables had virtually no impact on the ideological relationship between justices and judges in any analysis, we will not show the results that include them.

We began with analysis of the 1975–1998 terms as a whole. Because our primary interest is in polarization of the Court over time, we gave more attention to analyses of four subperiods: 1975–1980, 1981–1985, 1986–1992, and 1993–1998. The subperiods are not quite equal in length in order to keep natural courts (periods in which the composition of the Court was unchanged) or related sets of natural courts within single subperiods.

In the second stage, we focused on the behavior of individual justices across the subperiods. In regression analyses, our independent variables were a set of dummy variables for each of the justices. We also analyzed the behavior of individual justices in tabular form. These analyses provide more nuanced infor-

mation about the ideological linkages between judges and justices in the selection of law clerks.

Measuring the ideological positions of Supreme Court justices and lower court judges is difficult and a matter of disagreement among scholars (see Giles, Hettinger, and Peppers 1998). Our strategy was to use multiple measures of ideology for both justices and judges.<sup>3</sup>

For the dependent variable, the ideological position of the lower court judge, we used two measures.<sup>4</sup> The first was the party of the appointing president. Of course, this measure has weaknesses: presidents of the same party differ in their ideological criteria for selecting judges, and there is considerable variation in the views of the judges appointed by a particular president. But the party of the appointing president does correlate strongly with the decisional behavior of lower federal court judges (e.g., Rowland and Carp 1996, 38–51). For that reason, it provides a good indicator of the general ideological directions that judges take. Moreover, in an era when ideology plays a large role in appointments to the courts of appeals, justices may perceive a judge's ideological position largely in terms of the appointing president's party. For our purposes in this article, party has the additional advantage that results for this measure are susceptible to quite straightforward interpretation. Because this measure is dichotomous, regression analyses in which it was used were conducted with logit.

Our second measure of lower court ideology, *Almanac* scores, was drawn from commentaries on judges in the *Almanac of the Federal Judiciary* (Housen 1991–1998). This annual publication compiles and summarizes information provided by attorneys about several characteristics of each federal judge, including ideological leanings. The comments about ideology have the advantage of measuring directly the judge's reputation on the bench as perceived by the attorneys who practice before that judge, the same reputation that a Supreme Court justice would perceive. Following Klein's (1998) example, we analyzed the *Almanac*'s summary comments and the quoted statements from individual attorneys to place each judge on a five-point ideological scale. The *Almanac* provided little information on ideological positions prior to 1991, so some judges

<sup>3</sup> An Appendix with details on measurement of variables and data sources is available from the authors; write to baum.4@osu.edu.

<sup>4</sup> We also considered two other measures. The first was based on the proportions of liberal and conservative votes by court of appeals judges in the U.S. Court of Appeals Database compiled by Professor Donald Songer. The lack of comparability among the cases decided by different judges, especially across circuits, ultimately led us not to present this measure. The second measure was limited to the federal court of appeals for the D.C. Circuit, from which the justices drew about one-third of their clerks in our study period. Using commentaries on the D.C. Circuit (e.g., Goldman 1965; Loeb 1965), we characterized its judges as liberals or conservatives. As might be expected, this measure of ideology correlated very highly with the party of the appointing president so it did not provide sufficient new information to merit presentation. Analyses with both these measures produced the same general patterns of results that we obtained with the other two measures.

could not be coded; because there were too many missing cases early in the study period, analyses with this measure cover only the 1981–1998 terms. The *Almanac* scores were treated as interval-level so analyses involving them were conducted with OLS regression.<sup>5</sup>

The correlation between these two indicators of lower court ideology is .701, suggesting that they measure the same underlying attribute but in somewhat different ways. Thus we present some results from each measure. We give primary emphasis to party, for ease of interpretation and because the *Almanac* scores exclude some judges.

We also used two measures for the independent variable, the ideological position of Supreme Court justices. The first was ideological voting scores. Using data from the Supreme Court Judicial Database (Spaeth 1999), we calculated proportions of liberal votes for each justice for each of our four subperiods. The resulting voting scores were then applied to all clerk selections in the relevant subperiod. The second measure was the Segal-Cover scores (Segal, Epstein, Cameron, and Spaeth 1995), which are based on assessments of ideology in newspaper editorials at the time of a justice's appointment. Each of these measures has limitations that are well known, but their strengths tend to complement each other.

We operationalized our control variable, appellate composition, as the proportion of sitting court of appeals judges appointed by Democratic presidents. Our measure was based on the courts of appeals alone because the overwhelming majority of clerks (about 90% in the study period) come from those courts and because their partisan composition varies in step with that of the district courts (from which nearly all other clerks come).

## Findings

Table 1 shows the results of the regression equations for the whole study period, with each of the four combinations of measures of ideology for the Supreme Court and the courts of appeals. (In these and other analyses, we employed robust standard errors clustered by justice to take into account the lack of independence among the various choices of clerks by the same justice.) Not surprisingly, appellate composition served as an important baseline: as the proportion of Democratic appointees increased, so did the proportion of clerks drawn from Democratic appointees and judges with liberal *Almanac* scores. More important, the consistent result is that more liberal justices tend to draw clerks from more liberal lower court judges.<sup>6</sup>

<sup>5</sup>Arguably, this variable is better interpreted as ordinal. Analyses with ordered probit produced the same pattern of results as those with OLS.

<sup>6</sup>In an effort to assess whether there was a nonlinear relationship between Supreme Court and court of appeals ideology, loess smoothing techniques were employed on analyses with party as the dependent variable and voting scores as the independent variable for the whole study period and for each subperiod. The resulting functions revealed no evidence of a nonlinear relationship.

TABLE 1  
Regression Equations, Full Study Period

	B	rse	z	p
Dependent Variable: Party				
Supreme Court voting scores	5.097	1.262	4.037	<.001
Composition of courts of appeals	0.003	0.001	2.202	.014
Constant	1.447	0.726	1.991	.046
n = 742, pseudo-R <sup>2</sup> = .100				
Segal-Cover scores	0.682	0.247	2.760	.003
Composition of courts of appeals	0.002	0.001	1.691	.046
Constant	-0.798	0.759	-1.051	.293
n = 742, pseudo-R <sup>2</sup> = .050				
Dependent Variable: Almanac Scores				
Supreme Court voting scores	4.703	1.011	4.650	<.001
Composition of courts of appeals	0.003	0.001	3.441	.002
Constant	-0.968	0.628	-1.541	.146
n = 483, R <sup>2</sup> = .283				
Segal-Cover scores	0.549	0.241	2.275	.020
Composition of courts of appeals	0.003	0.001	2.942	.006
Constant	-3.206	0.591	-5.429	<.001
n = 483, R <sup>2</sup> = .127				

*Notes:* Analyses with party as dependent variable are logistic regressions for 1975–1998 terms; analyses with Almanac scores are OLS regressions for 1981–1998 terms. Independent and control variables are signed so that expected relationships are positive. One-tailed tests are used for relationships in the expected direction (all relationships for independent and control variables in these equations), two-tailed tests for constant term. “Rse” is robust standard error, with clustering by justice.

Estimated probabilities for the equations with party as the measure of lower court ideology provide a clearer sense of the strength of the ideological connection. Holding appellate composition at its mean value, the justice with the most liberal voting score during any subperiod had an 81.6% probability of choosing a clerk who had worked for a Democratically appointed judge. The most conservative justice by this measure had a 26.0% probability of choosing such a clerk. Similar estimates with the Segal-Cover scores produce a substantial but more limited impact for Supreme Court ideology, with the probability of choosing a Democratically employed clerk ranging from 71.8% to 40.2%.

To track change in the strength of this relationship over time, we replicated these analyses for each of the four subperiods in the study period. What we found was a striking pattern: with every combination of measures, the strength of the relationship between the ideological positions of justices and of the judges

from whom they drew clerks was substantially stronger in the 1993–1998 terms than in any of the prior subperiods. (The impact of appellate composition was depressed by the limited variation in that composition within each subperiod.)

The pattern of change did differ according to the measure of Supreme Court ideology. When justices' voting scores were used as that measure, with both party and *Almanac* scores as the measure of court of appeals ideology, the strength of the relationship increased in each successive subperiod and then jumped in the last subperiod. When the Segal-Cover scores were used as that measure, with both measures of court of appeals ideology, the relationship remained fairly uniform in strength and then became much stronger in the last subperiod. The uniqueness of the 1993–1998 subperiod was a constant across analyses.

Table 2 shows the equations with party as the measure of court of appeals ideology and voting scores as the measure of Supreme Court ideology. Table 3 shows estimated probabilities of selecting a clerk employed by a Democratic appointee for different values of the Supreme Court ideology variable, using both measures of Supreme Court ideology, across the four subperiods. The picture that emerges from the tables is clear: what began as a meaningful relationship between Supreme Court and lower court ideology, but one only moderate in strength, became a very strong relationship by the 1993–1998 subperiod. Depending on the measure of Supreme Court ideology, the difference between the most liberal and most conservative justice in the estimated probability of drawing a clerk from a Democratically appointed judge tripled or quadrupled between the first and last subperiods. This increase is especially striking because the variation in justices' ideological positions according to our measures was about one-third smaller in the 1993–1998 terms than in any other subperiod. The scale of this change is underlined by Figure 1, which depicts the fundamental difference in the estimated impact of the justices' ideological positions between the first and last subperiods.

For another perspective, we examined the behavior of individual justices. Table 4 shows the proportions of each justice's clerks, and of all clerks for active justices, who had served with a Democratically appointed judge for each of the four subperiods. Also shown, and used as a baseline, is the mean proportion of all court of appeals judges who were Democratic appointees. On the second line for each justice is the difference between that justice's proportion of clerks from Democratically appointed judges and the baseline. The same difference is shown for the Court as a whole.

As the table shows, the Court as a whole has had a moderate tendency to choose clerks from Democratically appointed judges throughout the study period. The reasons for this tendency are uncertain. Of course, the deviations from the baseline by individual justices are more substantial. The justices are listed in order of their overall proportions of liberal votes, so the role of ideology in their selection of clerks can be discerned. In this respect, the table reinforces the findings of the regression analyses. In the 1975–1980 period, the

TABLE 2

Logistic Regression Equations with Party of Appointing President as Dependent Variable and Voting Scores as Independent Variable, Subperiods of Study Period

	B	rse	z	p
1975–1980 Terms				
Supreme Court voting scores	1.873	0.588	3.186	<.001
Composition of courts of appeals	-0.001	0.004	-0.270	.787
Constant	1.838	1.826	1.007	.314
n = 178, pseudo-R <sup>2</sup> = .015				
1981–1985 Terms				
Supreme Court voting scores	3.071	0.708	4.335	<.001
Composition of courts of appeals	0.001	0.004	0.263	.397
Constant	1.390	2.408	0.577	.564
n = 154, pseudo-R <sup>2</sup> = .034				
1986–1992 Terms				
Supreme Court voting scores	5.290	1.523	3.474	<.001
Composition of courts of appeals	0.003	0.002	1.736	.042
Constant	1.512	0.930	1.626	.104
n = 214, pseudo-R <sup>2</sup> = .121				
1993–1998 Terms				
Supreme Court voting scores	14.308	3.195	4.479	<.001
Composition of courts of appeals	-0.002	0.006	-0.272	.785
Constant	7.609	1.997	3.811	<.001
n = 196, pseudo-R <sup>2</sup> = .311				

Notes: See Table 1. Two-tailed tests are used for composition of the courts of appeals when the relationship is in the direction contrary to expectations (negative).

relationship between the justices' ideological positions and those of the judges from whom they drew clerks was relatively weak. The most positive (i.e., liberal) deviation from the baseline was by the moderate Potter Stewart. Conservative Warren Burger had a small positive deviation, and moderate liberal John Paul Stevens was one of only two justices with a negative deviation.

In the 1993–1998 period, the picture was fundamentally different. To begin with, the average absolute size of the positive and negative deviations from the baseline was far greater. And, with the exception of moderate conservative Sandra Day O'Connor, all the justices deviated in the expected direction. The most striking behavior was the absence of any Democratically appointed judges among the sources of Clarence Thomas's clerks. The positive deviations from the baseline by Stevens, Ruth Bader Ginsburg, and David Souter were even greater,

TABLE 3

Probability of Choosing a Clerk from a Democratically Appointed Judge, According to Voting and Segal-Cover Scores of Justices, by Subperiod

Subperiod & Score	Voting Scores		Segal-Cover Scores	
	Mean	95% Conf. Interval	Mean	95% Conf. Interval
1975–1980 (n = 178)				
Most lib.	.699	.570–.807	.718	.597–.819
Mean	.602	.528–.673	.604	.530–.675
Most cons.	.490	.353–.630	.505	.396–.615
Range	.209		.213	
1981–1985 (n = 154)				
Most lib.	.753	.620–.857	.718	.574–.835
Mean	.609	.528–.684	.606	.526–.682
Most cons.	.466	.340–.596	.526	.411–.635
Range	.287		.192	
1986–1992 (n = 214)				
Most lib.	.807	.698–.889	.668	.526–.789
Mean	.523	.450–.595	.516	.447–.584
Most cons.	.278	.193–.379	.418	.319–.522
Range	.529		.250	
1993–1998 (n = 196)				
Most lib.	.868	.777–.932	.785	.647–.886
Mean	.354	.273–.442	.382	.311–.456
Most cons.	.066	.031–.121	.140	.075–.230
Range	.802		.645	

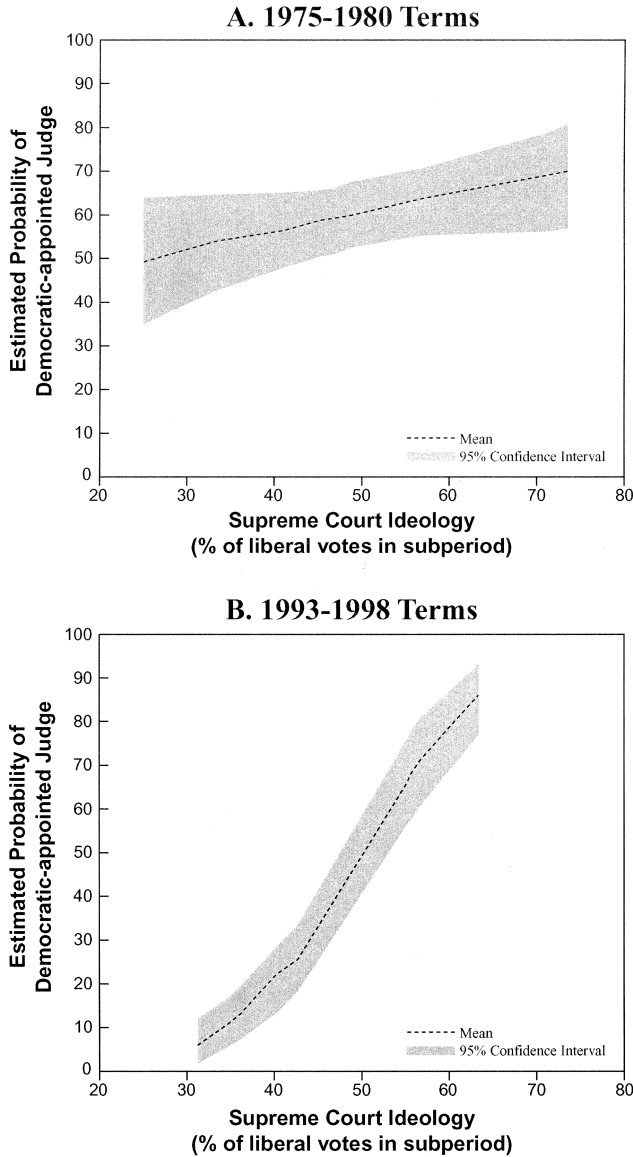
*Notes:* Variables other than Supreme Court ideology were set at their median values. “Most lib.” and “most cons.” are the most ideologically extreme justices of those who were in active service for the majority of the subperiod. Voting scores are for the subperiod. Probabilities were estimated with the CLARIFY program (see King, Tomz, and Wittenberg 2000).

though this reflected the greater room for deviation on the positive side caused by a shift to more Republican courts of appeals. In terms of clerk selection, this was a far more polarized Court than that of the other three subperiods.

Another way to gauge the change in the justices’ practices is through logit regression equations in which dummy variables for the individual justices were substituted as independent variables for measures of their ideological positions. The results for the 1975–1980 and 1993–1998 subperiods are shown in Table 5. Here the justices are ordered by their proportions of liberal votes in each subperiod. The constant was suppressed so all justices could be included in the analyses, though Justice Thomas was excluded from the 1993–1998 analysis because there was no variation in the dependent variable for him.

FIGURE 1

Probability of Drawing a Clerk from a Democratically Appointed Judge by Supreme Court Ideology



Notes: Dotted line is mean estimated probability; shaded area is 95% confidence interval. Estimated probabilities were plotted for the justices who served during all or most of the subperiod and are based on the simulation procedure described in King, Tomz, and Wittenberg (2000).

TABLE 4  
 Proportions of Supreme Court Clerks Who Previously Served  
 with Democratically Appointed Judges, by Justice

Justice	Terms			
	1975–80	1981–85	1986–92	1993–98
Marshall	68.2 <b>+20.1</b>	70.0 <b>+12.3</b>	66.7 <b>+27.7</b>	
Brennan	69.6 <b>+21.5</b>	73.7 <b>+16.0</b>	81.3 <b>+42.3</b>	
Stevens	46.2 <b>-1.9</b>	60.0 <b>+2.3</b>	77.8 <b>+38.8</b>	77.8 <b>+45.5</b>
Ginsburg				68.4 <b>+36.1</b>
Blackmun	61.9 <b>+13.8</b>	75.0 <b>+17.3</b>	82.1 <b>+43.1</b>	
Breyer				52.9 <b>+20.6</b>
Souter				83.3 <b>+51.0</b>
White	66.7 <b>+18.6</b>	66.7 <b>+9.0</b>	45.0 <b>+6.0</b>	
Stewart	75.0 <b>+26.9</b>			
Kennedy			10.5 <b>-28.5</b>	12.5 <b>-19.8</b>
O'Connor		55.6 <b>-2.1</b>	50.0 <b>+11.0</b>	54.2 <b>+21.9</b>
Powell	50.0 <b>+1.9</b>	60.0 <b>+2.3</b>		
Scalia			16.7 <b>-22.3</b>	4.2 <b>-28.1</b>
Burger	57.1 <b>+9.0</b>	40.0 <b>-17.7</b>		
Thomas				0.0 <b>-32.3</b>
Rehnquist	37.5 <b>-10.6</b>	40.0 <b>-17.7</b>	38.1 <b>-0.9</b>	5.6 <b>-26.7</b>
Court Total	60.1 <b>+12.0</b>	60.4 <b>+2.7</b>	51.4 <b>+12.4</b>	39.8 <b>+7.5</b>
Baseline: Cts. App.	48.1	57.7	39.0	32.3

Notes: Proportions listed in the first line for each justice are based only on clerks who served with a lower court judge before Supreme Court service. Figures listed in the second line, in **bold**, are proportions in the first line minus the baseline proportion. For each subperiod, only justices who were in active service for the majority of the subperiod are listed in the table, but "Court total" includes all justices who were in active service during any part of the subperiod (but only for the time that a justice was in active service). "Cts. App." is the mean proportion of judges in the courts of appeals who were appointed by a Democratic president in the period in question, with a one-year lag.

TABLE 5

Logistic Regression Equations with Party of Appointing President as Dependent Variable and Individual Justices as Independent Variables, Selected Subperiods of Study Period

	B	rse	z	p
1975–1980 Terms				
Brennan	1.308	1.431	0.914	.361
Marshall	1.243	1.433	0.868	.385
Stevens	0.321	1.447	0.221	.825
White	1.174	1.444	0.813	.416
Stewart	1.576	1.442	1.093	.274
Blackmun	0.969	1.434	0.676	.499
Powell	0.481	1.414	0.340	.734
Burger	0.771	1.431	0.539	.590
Rehnquist	-0.027	1.456	-0.018	.985
Composition of courts of appeals n = 178	-0.001	0.003	-0.355	.722
1993–1998 Terms				
Stevens	3.083	0.783	3.939	<.001
Souter	3.442	0.770	4.473	<.001
Ginsburg	2.651	0.740	3.582	<.001
Breyer	2.036	0.742	2.743	.006
Kennedy	-0.145	0.808	-0.180	.858
O'Connor	1.987	0.672	2.955	.003
Rehnquist	-1.036	1.153	-0.898	.369
Scalia	-1.339	1.146	-1.168	.243
Thomas (excluded)				
Composition of courts of appeals n = 196	-0.006	0.002	-3.429	.001

*Notes:* Two-tailed tests are used for all variables. Because the constant is absent, no pseudo-R<sup>2</sup> is calculated. In each subperiod justices are listed in order of their total proportion of liberal votes during that subperiod. Thomas is excluded from the 1993–1998 equation because his presence as selector of clerks correlated perfectly with the dependent variable.

The results provide the same impression as the proportions in Table 4. In the first subperiod, the justices' z-scores were clustered together fairly closely, and none of the dummy variables for the justices were significantly different from zero. In the last subperiod, the z-scores diverged more widely, and most were statistically significant. (Because deletion of the constant has a biasing effect, the identities of the specific justices who had significant scores are not meaningful.) As in Table 4, it is clear that the justices' tendencies largely followed

ideological lines, especially in the 1993–1998 terms. When the justices' voting scores are regressed on their z-scores, the adjusted  $R^2$  for 1975–1980 is .223 ( $p = .056$ ). For 1993–1998, the adjusted  $R^2$  is .684 ( $p = .004$ ).

Residuals from those regressions identify justices who departed from the general pattern. In the 1975–1980 terms the moderate Stewart was more inclined to choose clerks from Democratically appointed judges than would be expected, while the moderate liberal Stevens deviated in a conservative direction. (Rehnquist's residual indicated that he was even more inclined to choose clerks from Republican judges than his conservative voting would suggest.) In the 1993–1998 terms, as noted earlier, O'Connor stood out for her relative willingness to draw clerks from Democratically appointed judges. The other large residuals highlight Kennedy's strong inclination to draw clerks from Republican judges and Souter's inclination in a Democratic direction. In this last sub-period, however, the deviations are from a clear pattern of drawing clerks from ideologically similar judges.

To gain a more precise sense of how the change came about, we carried out logit analyses for each term with party as the measure of judges' positions and each of our measures of justices' positions. Of course, there is considerable instability in the results from term to term because of the small numbers of clerks hired each term. But each set of analyses indicated that there was a fairly sharp break: beginning with the 1992 term, the relationship between judges' and justices' ideological positions was consistently at a level of strength that was matched by few prior terms. This finding underlines the change that has occurred in the justices' recruitment strategies.

## Discussion

Supreme Court law clerks are important agents of the justices as principals, so justices need to select clerks carefully. During the last quarter century, the justices have drawn nearly all their law clerks from those who have served in lower courts, overwhelmingly in the federal courts of appeals. In choosing clerks, the justices make use of a variety of signals about the qualifications of candidates. One of those signals is the ideological position of the judge for whom a clerk has worked.

The importance of this signal has increased over time. In particular, the 1992–1998 terms stand out as a time in which the justices were very strongly inclined to draw clerks from like-minded judges in the courts of appeals. In our 1993–1998 period, when about one-third of the judges on the courts of appeals had been appointed by Democratic presidents, Souter, Stevens, and Ginsburg all drew more than two-thirds of their clerks from Democratic appointees. Scalia and Rehnquist drew about 95% of their clerks from Republican appointees, and Thomas never went to a Democratically appointed judge for a clerk.

This pattern of change could be interpreted in multiple ways, but it is surely a sign of polarization. In choosing clerks, the justices now give much more

weight to an ideological signal than they did in the 1970s and the 1980s. Not long ago, a substantial minority of clerks came to the justices from judges who had rather different ideological orientations. That is no longer the case. If choosing clerks is like “selecting mates in a foxhole,” as Justice Thomas has said,<sup>7</sup> today’s justices feel more comfortable with mates who have been certified as faithful agents by ideological comrades in the courts of appeals.

In Congress, increased polarization has been linked to a decline in comity (see Uslaner 1993). This is not necessarily the case in the Supreme Court. By historical standards (Cooper 1995), the current Court does not seem to have an unusually high level of personal conflict. Nor is the current Court unusual in the degree of ideological division in votes and opinions. What may have changed is the extent to which the justices act on the basis of a perceived ideological struggle on the Court. Perceptions of such a struggle would make the justices more concerned with ensuring that their clerks are acting as faithful ideological agents. This growth in polarization might not affect the appearance of voting blocs on the Court, but it may lead the justices to take firmer positions and reduce their willingness to modify those positions in the decision-making process.

Of course, patterns in selection of law clerks represent only one indicator of polarization. But it is a meaningful indicator, and our finding of substantial growth in ideology as a criterion for selection of clerks is striking. Thus, we have one significant piece of evidence that the Supreme Court has been changing as an institution.

*Manuscript submitted 15 January 2000*

*Final manuscript received 12 November 2000*

## References

- Bond, Jon R., and Richard Fleisher, eds. 2000. *Polarized Politics: Congress and the President in a Partisan Era*. Washington, DC: CQ Press.
- Brehm, John, and Scott Gates. 1997. *Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public*. Ann Arbor: University of Michigan Press.
- Carpenter, Daniel P. 1997. “Institutional Selection and Corporate Attachment at the U.S. Department of Agriculture, 1880–1920.” Princeton University. Typescript.
- Cooper, Phillip J. 1995. *Battles on the Bench: Conflict Inside the Supreme Court*. Lawrence: University Press of Kansas.
- Domnarski, William. 1996. *In the Opinion of the Court*. Urbana: University of Illinois Press.
- Donahue, Sean. 1995. “Behind the Pillars of Justice: Remarks on Law Clerks.” *The Long Term View* 3(1): 77–84.
- Eastland, Terry. 1993. “The Tempting of Justice Kennedy.” *American Spectator* 26(2): 32–37.
- Fleisher, Richard, and Jon R. Bond. 1996. “The President in a More Partisan Legislative Arena.” *Political Research Quarterly* 49(4): 729–48.
- Giles, Micheal W., Virginia A. Hettinger, and Todd C. Peppers. 1998. “Alternative Measures of Preferences for Judges of the Courts of Appeals.” Presented at the annual meeting of the Midwest Political Science Association, Chicago.

<sup>7</sup>Remarks at Texas A & M University, October 22, 1999.

- Glendon, Mary Ann. 1994. *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society*. New York: Farrar, Straus and Giroux.
- Goldman, Sheldon. 1965. "Politics, Judges, and the Administration of Justice: The Backgrounds, Recruitment, and Decisional Tendencies of the Judges on the United States Courts of Appeals, 1961–1964." Ph.D. diss., Harvard University.
- Greenya, John. 1992. "Super Clerks." *Washington Lawyer* 6(5): 36–46.
- Housen, Christine, ed. 1991–1998. *Almanac of the Federal Judiciary*. New York: Aspen Law & Business.
- Kaufman, Herbert. 1960. *The Forest Ranger: A Study in Administrative Behavior*. Baltimore: Johns Hopkins Press.
- King, Gary, Michael Tomz, and Jason Wittenberg. 2000. "Making the Most of Statistical Analyses: Improving Interpretation and Presentation." *American Journal of Political Science* 44(2): 347–61.
- Klein, David E. 1998. "Anticipatory Decision Making in the U.S. Courts of Appeals." Presented at the annual meeting of the Midwest Political Science Association, Chicago.
- Kozinski, Alex, and Fred Bernstein. 1998. "Clerkship Politics." *Green Bag* 2(1): 57–64.
- Lazarus, Edward. 1998. *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*. New York: Times Books.
- Lazear, Edward P. 1998. *Personnel Economics for Managers*. New York: John Wiley & Sons.
- Legal Times*. 1992. "Attacking Activism, Judge Names Names." June 22.
- Loeb, Louis S. 1965. "Judicial Blocs and Judicial Values in Civil Liberties Cases Decided by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit." *American University Law Review* 14(2): 146–77.
- Mauro, Tony. 1998. "Corps of Clerks Lacking in Diversity." *USA Today*, March 13.
- McCarty, Nolan M., Keith T. Poole, and Howard Rosenthal. 1997. *Income Redistribution and the Realignment of American Politics*. Washington, DC: AEI Press.
- Newland, Chester A. 1961. "Personal Assistants to Supreme Court Justices: The Law Clerks." *Oregon Law Review* 40(4): 299–317.
- Oakley, John Bilyeu, and Robert S. Thompson. 1980. *Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts*. Berkeley: University of California Press.
- Peppers, Todd C. 2000. "Courtiers of the Marble Palace: The Secret Life and Influence of United States Supreme Court Law Clerks." Presented at the Annual Conference on the Scientific Study of Judicial Politics, Columbus.
- Posner, Richard A. 1996. *The Federal Courts: Challenge and Reform*. Cambridge, MA: Harvard University Press.
- Rehnquist, William H. 1957. "Who Writes Decisions of the Supreme Court?" *U.S. News and World Report*, December 13.
- Rohde, David W. 1991. *Parties and Leaders in the Postreform House*. Chicago: University of Chicago Press.
- Ross, Stephen A. 1973. "The Economic Theory of Agency: The Principal's Problem." *American Economic Review* (Papers and Proceedings) 63(2): 134–39.
- Rowland, C.K., and Robert A. Carp. 1996. *Politics and Judgment in Federal District Courts*. Lawrence: University Press of Kansas.
- Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57(3): 812–23.
- Spaeth, Harold J. 1999. "United States Supreme Court Judicial Database, 1953–1998 Terms." East Lansing: Michigan State University.
- Spence, Michael. 1973. "Job Market Signaling." *Quarterly Journal of Economics* 87(3): 355–74.
- The Long Term View*. 1995. "Law Clerks: The Transformation of the Judiciary." 3(1): 1–109.
- Uslaner, Eric M. 1993. *The Decline of Comity in Congress*. Ann Arbor: University of Michigan Press.

Walsh, Lawrence E. 1998. "The Future of the Independent Counsel Law." *Wisconsin Law Review* 1998(6): 1379-94.

Corey Ditslear is a Ph.D. candidate in political science, Ohio State University, Columbus, OH 43210.

Lawrence Baum is professor of political science, Ohio State University, Columbus, OH 43210.