

Of Potted Plants and Political Images: The Supreme Court and the State of the Union Address

Todd C. Peppers and Micheal W. Giles¹

Introduction

In the weeks leading up to President Barack Obama's January 25, 2011 State of the Union Address, journalists played a new political guessing game, namely, which Supreme Court justices would attend the President's speech. Historically, news stories about attendance at the State of the Union Address have focused on which members of a president's cabinet were watching the annual address from an undisclosed and secure location (thus preserving the line of presidential succession in case of an attack on the Capitol). This new fascination with attendance by the justices was fueled by a memorable moment from the 2010 State of the Union Address, when cameras caught Associate Justice Samuel Alito visibly grimacing - and seemingly mouthing the phrase "not true" - after President Obama chided the Supreme Court for reversing "a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections" in the case of *Citizens United v. Federal Elections Commission* (588 U.S. ____ (2010)). Given the justices' tradition of neither applauding nor physically reacting to the President's speech, Justice Alito's reaction was considered by some to be a startling breach of political etiquette and, in the days after the 2010 State of the Union Address, slow-motion images of his reaction were played repeatedly by the cable news stations.

After Justice Alito's perceived lapse of decorum, Chief Justice John Roberts rallied to his defense and expressed his own concerns about whether the justices should attend what he characterized as a "political pep rally." During a meeting with law students at the University of Alabama in March of 2010,

¹Todd C. Peppers is the Henry H. and Trudye H. Fowler Associate Professor of Public Affairs at Roanoke College and a visiting professor of law at the Washington and Lee University School of Law; Micheal W. Giles is the Fuller E. Callaway Professor of Political Science at Emory University. We would like to thank the research staffs at the Wilson, Roosevelt, Truman and Eisenhower Presidential Libraries for their assistance in locating photographs of State of the Union Addresses.

Chief Justice Roberts observed that “[t]he image of having the members of one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the court - according to the requirements of protocol - has to sit there expressionless, I think is very troubling.”² Later in the year, Chief Justice Roberts fielded additional questions on judicial attendance at the State of the Union Address during a visit to Canisius College in Buffalo, New York. "Some of my colleagues made the decision that they don't want to go, period," Roberts said, "and I think that's something that's up to each individual member of the court."³

Chief Justice Roberts was not the only justice to weigh in on the 2010 State of the Union controversy. Shortly after the annual address, Justice Clarence Thomas told a group of Stetson University College of Law Students that he no longer attends the State of the Union Address “because it has become so partisan and it’s very uncomfortable for a judge to sit there...there’s a lot that you don’t hear on TV - the catcalls, the whooping and hollering and under-the-breath comments.”⁴ Another consequence of the partisanship, according to Justice Thomas, was that the Supreme Court “becomes part of the conversation, if you want to call it that, in the speeches. It’s just an example of why I don’t go.” Justice Thomas’ comments about the partisan nature of the State of the Union Address were echoed by Justice Antonin Scalia when he appeared at a Federalist Society meeting in November of 2010. During a question and answer session, Justice Scalia succinctly described the annual speech - which he no longer attended - as "cheerleading sessions." "I don't know at what point that happened, but it did happen, and now you go and sit there like bumps on a log while applause lines cause one half the Congress to leap up while [another] causes the other half to leap up. ... It is a juvenile spectacle. And I resent being called upon to

² Adam Liptak, “One for the Justices: To Go to the State of the Union, or Not?”, *New York Times*, January 25, 2011. The White House was quick to respond, with White House Press Secretary Robert Gibbs telling reporters that “[w]hat is troubling is that this decision opened the floodgates for corporations and special interests to pour money into elections – drowning out the voices of average Americans. The president has long been committed to reducing the undue influence of special interests and their lobbyists over government. That is why he spoke out to condemn the decision and is working with Congress on a legislative response to close this loophole.” Helene Cooper, “White House Spars with Chief Justice,” *New York Times*, March 10, 2010.

³ Debra Cassens Weiss, “Chief Justice Roberts Admits He Doesn’t Read the Computer Fine Print,” *ABA Journal*, October 20, 2010.

⁴ Adam Liptak, “Justice Defends Ruling on Finance,” *New York Times*, February 4, 2010.

the indignity.”⁵ Scalia did not, however, call upon his fellow justices to boycott the annual address and conceded that it was easier for the justices to stay at home “when the president giving the State of the Union is not the man who appointed you.”

The criticism of the State of the Union Addresses by the more conservative members of the Supreme was echoed by retired Justice Sandra Day O’Connor. Justice O’Connor remarked that judicial attendance might continue to shrink after President Obama’s attack on the Court. “You might see a diminution in numbers...It’s always been uncomfortable. There were always people who thought: ‘God, do we have to go? Let’s don’t.’ So it’s been kind of a struggle to get them there anyway.”⁶

Even legal scholars got into the game of criticizing President Obama’s conduct. Law professor (and former Supreme Court law clerk) Lucas A. Powe, Jr. stated that the justices did not attend the annual address “in order to be insulted,” and confidently announced that he was “willing to bet a lot of money there will be no Supreme Court justice at the next State of the Union speech” (a bet that Professor Powe would have lost).⁷ Supreme Court commentator Tony Mauro was also sympathetic to the justices’ cries of protest, calling the attack on the Court “unprecedented,”⁸ but he argued against a judicial boycott. “The justices do have a point. It was an awkward moment to see them sit stoically, as they must, while Obama partisans cheered his attack on the court. Then again, life-tenured Supreme Court justices ought to be made of sterner stuff. Criticism goes with the territory of public service.”⁹

Perhaps emboldened by the defense of his more-senior brethren, Justice Alito finally broke his self-imposed silence about the State of the Union Address. In October of 2010, Justice Alito briefly addressed the State of the Union controversy while fielding questions after a speech at the Manhattan

⁵ Amanda Terkel, “Justice Scalia: The State of the Union Address is a ‘Juvenile Spectacle,’” *Huffington Post*, January 19, 2010.

⁶ “The Courts: More State of the Union No-Shows Predicted,” *New York Times*, April 7, 2010.

⁷ Julia Percha, “Supreme Court Historian: After President’s ‘Insult,’ Won’t be Surprised If Supreme Court Doesn’t Attend Next Year’s State of the Union Address,” ABC News.
<http://abcnews.go.com/blogs/politics/2010/01/supreme-court-historian-after-presidents-insult-wont-be-surprised-if-supreme-court-doesnt-attend-next-year/>

⁸ Tony Mauro, “High Court is Rare Topic for State of the Union Speeches,” *Legal Times Blog*, January 27, 2010.
<http://legaltimes.typepad.com/blt/2010/01/high-court-is-rare-topic-for-state-of-the-union-speeches.html?cid=6a00d83451d94869e20120a81c773b970b>

⁹ Tony Mauro, “Justices Should Attend State of the Union,” *USA Today*, January 19, 2011.

Institute in New York City. In response to a question posed by an audience member as to whether the Justice would attend the upcoming address in January of 2011, Alito – smiling – gave the following response:

I said in my talk that judges learn primarily from experience and from the example of those with greater experience. For many years the more senior members of the Supreme Court – Justice Stevens before he retired, Justice Scalia – stopped the practice of attending the State of the Union Addresses because they had become very political events and it's very awkward for the justices. We have to sit there like the proverbial potted plant most of the time. And we are not allowed to applaud...those who are more disciplined refrain from manifesting any emotion or opinion what so ever. And that's sometimes very hard because presidents...will fake you out. There are certain things a president will say that everybody has to applaud. So the President will say "isn't this the greatest country in the world'...and if you sit there like the proverbial potted plant, you look like you are very unpatriotic. So you get up and you start to clap and the President will say "because we are conducting a surge in Iraq" or "because we are going to enact health care reform" and then you have to immediately stop [clapping]...it's very awkward. So I doubt that I will be there in January.¹⁰

Justice Alito subsequently skipped the 2011 State of the Union Address, accepting instead an invitation to be a jurist-in-residence at the University of Hawaii School of Law. While in Hawaii, the Justice gave a talk to the legal community entitled "The Top Things You May Not Know about the U.S. Supreme Court." His lecture did not discuss the traditional practice of the Supreme Court attending the State of the Union Address.¹¹

Despite his criticism of the annual address, Chief Justice Roberts did subsequently attend the 2011 State of the Union Address. The Chief Justice was joined by Associate Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Although the Chief Justice did not publicly discuss his decision to attend, *New York Times* reporter Adam Liptak writes that institutional concerns likely motivated the Chief Justice. "He may have concluded that the court's

¹⁰ <http://www.manhattan-institute.org/video/events/index.htm?c=101310MI>

¹¹ Rebecca Copeland, "Recap of Justice Alito's Presentation," *Record on Appeal*, January 27, 2011 (www.recordonappeal.com).

reputation as an avowedly apolitical institution would be harmed should only the court's more liberal justices attend."¹²

The controversy surrounding Justice Alito's apparent reaction during the 2010 State of the Union Address and speculations about the attendance of the Supreme Court justices at the 2011 State of the Union Address occurred in a relatively impoverished factual environment. While the attendance of the justices at the State of the Union Address was treated as 'traditional,' little evidence was presented as to the historical practice and pattern of attendance by the justices. The present study addresses this empirical deficit. First, we provide a brief sketch of the history of the State of the Union Address. Second, against that historical backdrop, and based on original data collected from a variety of sources, we review the historical pattern of Supreme Court attendance at the address. To preview a principal finding of this historical record, we find that attendance by Supreme Court Justices at the State of the Union addresses declined across the past several decades, most dramatically so in the first five years of the George W. Bush presidency. Next, we explore factors that influence the decisions of individual justices to attend the address and examine possible explanations of the decline in attendance at the State of the Union Address across time. Finally, we examine the significance of Supreme Court attendance at the State of the Union Address. Is it simply 'fodder' for the news cycle and court watchers or are their ramifications for how the Court is viewed by the American public.

*A Brief History of the State of the Union Address*¹³

The tradition of the annual State of the Union Address springs from the United States Constitution, which states that the president "shall from time to time give to the Congress Information on

¹² Adam Liptak, "Six Justices to Attend State of the Union," *New York Times*, January 25, 2011.

¹³ This summary draws upon information from the following sources: "State of the Union Address," Office of the Clerk, U.S. House of Representatives (http://artandhistory.house.gov/house_history/stateunion.aspx); Gerhard Peters, "State of the Union Addresses and Messages: Research Notes by Gerhard Peters," American Presidency Project (<http://www.presidency.ucsb.edu/sou.php#axzz1bEtXXuG9>); Michael Kolakowski and Thomas H. Neal, "The President's State of the Union Message: Frequently Asked Questions," Congressional Research Service, March 7, 2006; Ryan L. Teten, "Evolution of the Modern Rhetorical Presidency: Presidential Presentation and Development of the State of the Union Address," *Presidential Studies Quarterly* vol. 33, no. 2 (June 2003): 333-346.

the State of the Union and recommend to their Consideration such measures as he shall judge necessary and expedient.”¹⁴ While the Constitution is silent as to the method of delivery, President George Washington instituted the practice of giving a formal speech before Congress. While President John Adams continued the tradition of appearing before Congress to give the “Annual Message,”¹⁵ Thomas Jefferson discontinued the practice - claiming that his decision was motivated by a “principal regard to the convenience of the Legislature, to the economy of their time, to their relief from the embarrassment of immediate answers on subjects not yet fully before them, and to the benefits thence resulting to the public affairs.”¹⁶ Political scientist Jeffrey K. Tulis suggests a more pragmatic reason why Jefferson ended the tradition instituted by Washington and followed by Adams. “[As] Henry Adams shrewdly observes: ‘The habit of writing to Congress was convenient especially to presidents who disliked public speaking.’”¹⁷

The State of the Union Address was delivered in written form by every subsequent president, from James Madison to William Howard Taft. It would not be until the administration of Woodrow Wilson that an American president would again appear before a joint session of Congress. On April 8, 1913, President Wilson spoke before both Houses of Congress on the issue of tariff reform. While the joint session is not technically consider a State of the Union Address by presidential scholars, it foreshadowed President Wilson’s decision to resurrect President Washington and Adams’ practice of delivering a formal speech before Congress. It was the first speech that a president had given before a joint session of Congress in over one hundred years.¹⁸ The nine minute talk was given in the House chamber, and representatives from all three branches of government were present - including the Supreme Court.¹⁹

In explaining why he chose to appear before Congress in April of 1913, President Wilson stated:

¹⁴ U.S. Constitution, Section 3, Clause 1.

¹⁵ It would not be until Franklin Delano Roosevelt that the phrase “State of the Union Address” was coined, but for sake of clarity we will use the phrase “State of the Union” throughout this paper.

¹⁶ “Again a President Addresses Congress,” *New York Times*, January 6, 1935.

¹⁷ Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987): 56 (quoting Henry Adams, *History of the United States During the Administration of Thomas Jefferson* (New York: Scribner’s, 1889)).

¹⁸ “Congress Cheers Greet Wilson,” *New York Times*, April 9, 1913.

¹⁹ The speech as given on a Saturday and the Supreme Court was not in session, which will be an important institutional factor in explaining patterns of judicial attendance.

I think that [a personal appearance] is the only dignified way for the President to address Congress at the opening of the session, instead of sending the address to be read perfunctorily in the clerk's familiar tone of voice. It is a precedent which, it is true, has been discontinued a long time, but which is a very respectable precedent.²⁰

On December 2, 1913 President Wilson went before Congress to give his first official State of the Union Address. President Warren Harding adopted President Wilson's practice of orally delivering the state of the union address, although his untimely death meant that President Harding only gave two annual addresses before Congress. His successor, Calvin Coolidge, personally appeared before Congress to give his first State of the Union Address on December 7, 1923, an address that was transmitted by radio for the first time. Befitting his nickname as "silent Cal" President Coolidge subsequently discontinued the practice and thereafter submitted written reports to Congress. President Herbert Hoover did the same.

Given Franklin Delano Roosevelt's legendary communication skills, it is perhaps not surprising that he reinstated the practice of orally delivering the State of the Union Address. During his twelve years in office, President Roosevelt gave ten State of the Union Addresses before joint sessions of Congress. As his health waned, he submitted written reports in 1944 and 1945. Every succeeding American president adopted Roosevelt's practice of orally delivering their State of the Union Addresses although there have been a few instances in the modern presidency when written messages have been delivered.²¹ The State of the Union Address has become an important event in the annual political calendar - a rare public gathering of the political leadership of the federal government and the military.

Since Woodrow Wilson resurrected the practice of the State of the Union Address, two changes have occurred in the timing of the speech. The first is relatively minor for our purposes. Article I, Section 4, Clause 2 of the United States Constitution stated that Congress "shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December." Accordingly, from 1913 to 1933 presidents delivered their state of the union addresses in December to correspond with this meeting date. When the Twentieth Amendment was ratified in January of 1933, however, the terms of office of

²⁰ Id.

²¹ President Harry S. Truman delivered written messages in 1946 and 1953, while Presidents Dwight Eisenhower (1961), Jimmy Carter (1981), and Richard Nixon (1973) each delivered a single written message.

members of Congress began on January 3, and presidents began appearing before Congress in January and occasionally February.

The second institutional change has to do with the time of day in which the speech is delivered. With the exception of one evening radio address by President Roosevelt on January 3, 1936, the State of the Union Addresses delivered by Presidents Wilson through Kennedy were given in the early afternoon. In 1965 President Lyndon Johnson switched the annual address to the evening which permitted it to be televised to a larger audience, and the State of the Union Address has thereafter remained an evening address. This change in the timing is particularly relevant to our study of attendance patterns by the Supreme Court justices because prior to the change to the evening time slot, the Supreme Court was often in session during the time that the address occurred. As we shall see, while the Court could (and on at least one or two occasions did) recess to attend an afternoon State of the Union Address, this appears to have been an institutional cost that the justices were typically unwilling to pay.

Supreme Court Attendance at the State of the Union

Many Court watchers assume that the Supreme Court has attended the State of the Union address since time immemorial, an assumption that has not been subject to rigorous empirical scrutiny. Neither Congress nor the Supreme Court maintains official records of judicial attendance at the State of the Union Address. To create an original data base, we employed two primary sources. First, we viewed all available videos of past State of the Union Addresses. These were found at three sites: the John F. Kennedy Presidential Library, the Miller Center (a presidential center associated with the University of Virginia), and C-SPAN.org. Complete videos of the addresses were available from 1961 to the present.²² Second, since we were unable to find complete videos of the addresses prior to 1961, we turned to photographs of State of the Union Addresses. The photographs were obtained through the Library of Congress and from the Woodrow Wilson, Franklin D. Roosevelt, Harry S. Truman, Dwight Eisenhower and John F. Kennedy

²² Because of poor video camera angles in the Kennedy and Johnson eras we supplemented the analysis of videos with photographs.

Presidential Libraries. Each of the videos and photographs was examined to determine if members of the Court were present.²³ If the individual justices attend the annual address, they sit attired in judicial robes in a row of seats immediately in front of the President. Hence, they are easily recognizable assuming an appropriate camera angle is available.²⁴ As a primary source when a visual record was not available, and as a supplement even when it was available, we also reviewed newspaper articles about annual State of the Union Addresses found in the *New York Times*, the *Washington Herald*, the *Washington Post*, and the *Washington Times*. Usually (but not always) these articles would note the presence or absence of the justices. As a final check, we reviewed the *Supreme Court Journal* for the days of the annual addresses to determine if the Court was in session at the time of the address.²⁵

Relying on these resources and coding rules, we can definitively conclude that members of the Supreme Court attended seven of the 35 State of the Union Addresses given orally between 1913 and 1964. Two of these seven addresses were given by Woodrow Wilson (1917 and 1918), and the remaining five occurred in the time period from 1957 through 1964 (the administrations of Presidents Eisenhower, Kennedy and Johnson). Of the five State of the Union Addresses attended by the justices in the latter period, the Supreme Court was not in session for three of the addresses²⁶ and oral argument was rescheduled earlier in the day to accommodate the justices' attendance at the remaining two.²⁷ Attendance

²³ Of course, one must be familiar with the individual faces of the Supreme Court justices in order to correctly code them. In an October 6, 2011 letter to these authors, retired Associate Justice David Souter had this warning. "One year, a decade or so ago, Justice Breyer was the only one to attend [the State of the Union], as I recall. As he entered the House chamber and came within focus of the TV camera, one of the networks announced that 'apparently only Justice Souter is attending from the Court this year,' or something very much like that. So use your sources cautiously." We have.

²⁴ Their placement to the left, center or right of the dais has changed across time. Presently, the Supreme Court justices sit in the front row and to President's immediate right.

²⁵ The *Supreme Court Journal* can be accessed at the Law Library Microfilm Consortium (<http://www.llmc.com/>).

²⁶ January 10, 1957, January 9, 1959, and January 7, 1960. Justice Black's attire at the 1957 State of the Union Address caught the attention of one newspaper reporter. In a humorous article, *Washington Post* columnist George Dixon applauded Justice Black's decision to wear "bobby socks" to the annual address. Referring to Justice Black's "undraped ankles," Dixon announced his own fondness for "bare fetlocks" but conceded that "[b]are shanks peeping from beneath the cassock of the trade may look [sic] fetching, but not judicial." Nevertheless, Dixon urged "all short-sock votaries" to "rally around Justice Black. Maybe he can declare long-leg cerements unconstitutional!" George Dixon, "Washington Scene...Justice Laid Bare," *Washington Post*, January 15, 1957.

²⁷ January 14, 1963 and January 8, 1964. This unusual practice caught the attention of at least one newspaper reporter. "The justices have not been in the habit of adjourning Court to hear the State of the Union if it came during

by the justices at these five addresses was perfect, save for the absence of Justice Felix Frankfurter in 1959.²⁸ For the two addresses in the 1957 through 1964 period that were not attended by justices (1958 and 1962), the oral argument schedule reported in the *Supreme Court Journal* indicates a conflict with the timing of the President's Address.

In collecting our data, we were initially surprised to find little evidence that the justices attended President Franklin Roosevelt's annual State of the Union Addresses. While some historians allege that the Supreme Court boycott of the 1937 State of the Union Address (a boycott sparked by Roosevelt's public criticism of the Court) was a dramatic "break from precedent,"²⁹ the precedent simply doesn't exist. Based on our research, we have tentatively concluded from a review of photographs provided by the Roosevelt presidential library that the justices did not attend the annual address in 1936, 1937, and 1939 - 1943. There is some limited evidence to suggest that the justices might have attended the January 4, 1935 address (the Court was not in session that day), but no evidence exists regarding the presence or absence of the justices at the 1934 and 1938 speeches.³⁰ The explanation for the absence of the justices does not lie in the Supreme Court's rocky relationship with FDR, but rather in the same institutional rules noted earlier: from 1937 to 1943, the Supreme Court was in session during President Roosevelt's annual addresses.³¹

a time they would normally be hearing cases." Robert E. Thompson, President to Detail U.S. Stance," *Washington Post*, January 14, 1963.

²⁸ We do not know if Justice Frankfurter's heart attack in November of 1958 was responsible for his absence.

²⁹ See, for example, Jeff Shesol, "Justice Will Prevail," *New York Times*, March 13, 2010. Shesol makes a similar claim in his recent book *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (N.W. Norton & Co., 2010): 269.

³⁰ There are two additional addresses that we do not believe members of the Court attended but for which there is insufficient evidence to make a definitive decision: President Harry Truman's 1949 and 1951 State of the Union Addresses. For example, while the Court was in session on the afternoon of January 5, 1949 (the day and time of the address), the *New York Times* reported that seats at the annual address had been reserved for the justices – but didn't say if the justices appeared. C.P. Trussell, "Truman to Chart Congress' Course in Message Today," *New York Times*, January 5, 1949. Given this ambiguity, we have decided to err on the side of caution and not make a definitive determination about judicial attendance.

³¹ President Roosevelt's January 3, 1936 State of the Union Address was given at night. Despite the fact that the Court was not in session, there is no evidence that any of the justices attended. The one existing photograph of the 1936 address clearly shows that the justices were not in their traditional seats in the front row. The event was filmed for posterity, but the Roosevelt Library cannot locate an existing copies of said film.

Starting in 1965, every American president has delivered his State of the Union address in the evening - thus eliminating the possible conflict with the Court's schedule. For the period from 1965 forward, the percentage of the Justices in active service attending the State of the Union Address in a given year is arrayed in Figure 1.³² For several of the years, it appears from Figure 1 that no justice attended the State of the Union. For most of these years this simply reflects that no address occurred³³ or that it was delivered in written form.³⁴ In 1986 the speech was held, but at the last minute it was re-scheduled from January 28, 1986 to February 4, 1986 due to the explosion of the space shuttle Challenger - which may have resulted in the lack of attendance by members of the Court.³⁵

None of the Supreme Court justices attended either the 1975 or 2000 State of the Union Addresses, absences which are not amenable to easy explanation. The press did not comment on the absence of the Court from President Gerald Ford's first State of the Union Address in 1975.

While six months prior to the address the Court had issued its opinion in *United States v. Nixon*³⁶ (an unanimous decision which rejected President Richard Nixon's assertions of absolute privilege involved White House audiotapes and led to Nixon's resignation and subsequent pardon by Gerald Ford), no contemporary sources tie the absence of the justices to these high profile events or suggest that the Court was boycotting the address to show their displeasure with the executive branch.

The justices' absence at President Clinton's last State of the Union Address on January 27, 2000 also defies obvious explanation. One might assume that this was related to his impeachment, but that is unlikely. The State of the Union Address the previous year occurred on January 19, 1999 and was

³² Interestingly, a few of the retired Supreme Court justices continued to attend the annual address. Despite leaving the Supreme Court in 1957, Reed donned his judicial robes and attended the State of the Union Addresses of four subsequent Presidents: Dwight Eisenhower (1959 and 1960); John F. Kennedy (1963); Lyndon Johnson (1965, 1966, and 1966); and Richard Nixon (1970 and 1974). Retired Justice Potter Stewart attended Ronald Reagan's 1982 and 1983 addresses, retired Justice Lewis F. Powell, Jr. attended speeches by Ronald Reagan (1988) and George H.W. Bush (1990), while retired Justices Harry Blackmun and Byron White each attended a State of the Union Address by President Bill Clinton (Blackmun in 1996 and White in 1997).

³³ 1989, 1993, 2001 and 2009.

³⁴ 1973 and 1981.

³⁵ A similar, last-minute change in the scheduling of the State of the Union Address resulted in only two justices – Harry Blackmun and William H. Rehnquist – being able to attend the 1985 State of the Union Address. Phil Gailey and Warren Weaver, Jr., "Order in the Court," *New York Times*, February 8, 1985.

³⁶ 418 U.S. 683 (1974).

bracketed by Clinton's impeachment by the House of Representatives on December 19, 1998 and his acquittal by the Senate on February 12, 1999. Despite this timing only three of the justices - William Rehnquist, Antonin Scalia, and John Paul Stevens - were absent. It is not surprising that the Chief Justice effectively "recused" himself from attending the 1999 State of the Union Address, since he was currently presiding over the impeachment trial in the United States Senate.

If the Clinton's political and legal "troubles" did not reduce judicial attendance in the midst of the impeachment proceedings, however, it is doubtful that it did a year later. Contemporary newspaper accounts cite a combination of illness and scheduling conflicts as contributing to the absence of the justices, although Washington insider Ted Olson offered a different explanation: "'Maybe...enough of them saw what the chief justice went through during the impeachment trial that they decided they didn't want to go near the place.'"³⁷

The general pattern revealed in Figure 1 suggests the operation of a strong norm that Supreme Court Justices attend the State of the Union Address that has subsequently dissipated. In the period beginning in 1965 (President Johnson's second address) and ending in 1980 (President Carter's last address), on average 84 percent of the justices attended the State of the Union Address. In eleven of these fifteen years eight or more of the justices were present. If one takes into account the Supreme Court's schedule, then this pattern of high attendance rates extends back to 1957.

In the period from 1982 (there was no address in 1981) through 1999, however, on average only 56 percent of the justices attended³⁸ and no more than six justices attended any of the addresses (save for two years early in this period, 1982 and 1984). In the period from 2000 forward, on average only 32 percent of the justices attended the State of the Union Address. This includes a three-year time period when only a single justice – Stephen Breyer – represented the Court at the annual address. While there has been an uptick in attendance during this period (with six justices attending the two most recent addresses), the contrast to the earlier time periods is quite remarkable.

³⁷ Lizette Alvarez, "The State of the Union – the Scene: Alas, Justices All Absent and No Truant Officers," *New York Times*, January 27, 2000.

³⁸ If this period is extended through 2000 the percentage drops to 53%.

Our historical survey of attendance of the justices at the State of the Union Address brings several points to light. First, to the extent that judicial attendance at the State of the Union address is a ‘tradition,’ it is not one whose roots extend deep into the soil of American political history. While members of the Court attended the State of the Union Address in 1917 and 1918, as far as we can determine, there is a 40 year hiatus before there is definitive evidence that members of the Court regularly attended the annual address. Scheduling conflicts between the timing of the State of the Union Address and the calendar for oral arguments appear to have raised an institutional hindrance to judicial attendance. We say hindrance and not barrier, however, because the Court can alter its schedule – as did the Warren Court on two occasions. Second of all, while attendance over approximately the next fifteen years was quite high among the justices, attendance by the justices in subsequent years has declined markedly - reaching its nadir in the 2000 to 2005 period. This pattern offers two unforeseen questions: why did the Supreme Court under Chief Justice Warren begin to attend the State of the Union in force in 1957, and why did this pattern of attendance deteriorate in the period beginning with the Presidency of Ronald Reagan? While we have little basis other than speculation with which to address the first question (perhaps Chief Justice Warren urged members of his Court to present a unified front in the face of political hostility from conservative members of Congress), we begin to address the second by examining factors that might influence the decisions of individual justices to attend the address.

Before we consider the second question, a brief side note on judicial decorum is in order. Another unchallenged assumption about judicial attendance at the State of the Union Address has to do with etiquette. Justice Alito’s reaction at the 2010 State of the Union Address was noteworthy to some because it violated a widely accepted norm of judicial decorum, to wit, that the justices cannot applaud or engage in any behavior smacking of political partisanship. We do not know the origin of this institutional norm, but our review of newspaper accounts and videotapes of past State of the Union Addresses reveals that the justices have not always sat in frozen silence at the annual addresses. When President Woodrow Wilson asked Congress for a declaration of war against Austro-Hungary during his December 4, 1917 State of the Union Address, the *New York Times* observed that Chief Justice Edward Douglass White,

sitting directly in front of the President, “rose with the rest [of the cheering members of Congress] and swept the audience behind him with a beaming smile that left no doubt of the satisfaction he felt.”³⁹ This was not the first time that the Chief Justice wore his emotions on his sleeve during a joint session of Congress. When President Wilson called for a declaration of war against Germany during an April 2, 1917 joint session of Congress, and promised his audience that the United States would not submit to German military might, it was reported that “Chief Justice White, with an expression of joy and thankfulness on his face, dropped the big soft hat he had been holding, raised his hands high in the air, and brought them together with a heartfelt bang.”⁴⁰

Yet one year later, the Supreme Court appeared to be confused as to their proper role at the State of the Union Address. During the December 2, 1918 State of the Union Address, as President Wilson announced his controversial plan to attend a peace conference in Europe and sparked a partisan reaction from the members of Congress, the *New York Times* commented that the justices appeared lost without head cheerleader Edward Douglass White. “Some of the Supreme Court justices - Chief Justice White, who led in the demonstration when President Wilson read the armistice terms, was absent - were apparently undetermined as to what course to follow while the demonstration was in progress. They had seats in the well in front of the Speaker’s rostrum in front of the first row of benches occupied by the Senators. Finally one of them arose, and the others followed his example hesitatingly.”⁴¹

It was not only the White Court justices who have publicly applauded the President. While watching videos of State of the Union Addresses from the 1960’s, we discovered several examples of the justices applauding proclamations and policy proposals made by President Johnson. During the 1964 State of the Union Address, Chief Justice Earl Warren and Associate Justices Hugo Black, William O. Douglas, Tom C. Clark, and John Marshall Harlan applauded President Johnson’s statement “let this session of Congress be known as the session which did more for civil rights than the last 100 sessions

³⁹ Wilson for Victory First,” *New York Times*, December 5, 1917.

⁴⁰ “Must Exert All Our Power,” *New York Times*, April 3, 1917.

⁴¹ “Address Fails to Stir,” *New York Times*, December 3, 1918.

combined.” During Johnson’s 1965 State of the Union Address, Justice Arthur Goldberg joined Justices Clark, Douglas and Stewart in applauding the President’s announcement that he “will seek new ways to use our knowledge to help deal with the explosion in world population and the growing scarcity in world resources.” And during the 1966, 1967, and 1969 State of the Union Addresses, Chief Justice Warren applauded President Johnson’s statements about shrinking budget deficits (1966), the United States’ efforts to seek a trade agreement with Soviet bloc countries (1967), and the success of the Head Start program (1969).

Examples of the justices applauding the President’s policy proposals seemingly end with the Warren Court – although our failure to find examples in the later period could be as much a function of when the television cameras decided to focus on the justices as a change in an institutional norm. Whatever the explanation, it is only since the Warren Court era that the justices appear to have assumed the role of passive and apolitical observers.

Why Do Supreme Court Justices Attend the State of the Union Address?

In our analysis of the decisions of individual justices to attend the State of the Union Address, we focus on the period from 1965 forward. This eliminates the role of conflict between the scheduling of the State of the Union Address and the Supreme Court's scheduled sessions. With the justice-year as the unit of analysis, the maximum number of observations is 367.⁴² Caution, however, must be used in interpreting the results. Only 27 justices served during the study period and several of those justices had lengthy tenures. For example, Justices John Paul Stevens, William Rehnquist and Byron White generate 30, 29 and 25 observations respectively. In short, the attendance patterns of a few justices may have inordinate weight on the results.

We begin by breaking out the aggregate data presented in Figure 1 by justice. The percentage of State of the Union addresses attended by each justice serving in the period since 1965 is arrayed in Table 1. A number of justices never missed an address. Most of these justices, however, were only on the Court for a short period after 1965 or have been recently appointed to the Court. Only two justices with perfect attendance served five or more years of the study period: Chief Justice John Roberts, Jr. and Associate Justice John Marshall Harlan II. If we expanded our assessment to include the period from 1957 forward, Justice Tom C. Clark would also be included in this group. Justice Breyer stands out for having attended 93 percent of the fifteen addresses for which he was eligible. He only missed the 2000 address, when he was sick with the flu.⁴³ The low water mark for attendance is set by Justice Stevens who attended only 23 percent of the thirty addresses for which he was eligible. Justices Ruth Bader Ginsburg, Antonin Scalia and David Souter are not far behind Justice Stevens, having attended fewer than 40 percent of the addresses. Between these extremes there is a good deal of variation in the attendance levels of the justices.

For some of the justices, there does not appear to be any temporal pattern to their absences. For example, Justice William O. Douglas had an absentee rate of 50 percent across ten addresses, but those

⁴² There were 41 addresses from 1965 through 2010. In two years, 1970 and 1988 there was a vacancy on the Supreme Court. $(41 * 9) - 2 = 367$.

⁴³ Alvarez, "The State of the Union."

absences were scattered across his period of service. In contrast, Justice Thurgood Marshall's absenteeism increased after 1974, and he did not attend any of the addresses from 1985 through 1991 (when he left the Court). Likewise, Justice Scalia's perfect attendance record from 1987 through 1992 was followed by absences in 1994 and 1996, and he has not attended a single address since 1997. Justice Byron White after missing only two of the first fifteen addresses in his lengthy tenure, attended only two of the last ten annual addresses while an active justice.

The pattern of declining attendance across the tenure of some of the justices suggests that increasing age might be a factor in the willingness or ability of justices to attend the State of the Union Address. In Table 2 the attendance of justices is arrayed by age. Not surprisingly, there is clearly a decline in attendance with age. For justices under 55 years of age the rate of attendance is 84 percent, for those between 60 and 65 it falls to 63 percent, and for those over 75 it further declines to 43 percent. In part, this attendance pattern is attributable to the general low attendance levels in the post-1999 era; most of the justices with attendance levels below 60 percent served a portion of their tenure during this period. However, while the effects of age are somewhat diminished if the period of study is limited to the years between 1965 and 1999, the decline in attendance with age is still apparent - with those justices under 55 years of age having an attendance rate of 88 percent and those over 75 having an attendance rate of only 53 percent.

The decline in attendance across the tenure of justices may also reflect a decrease in the marginal utility (to wit, the novelty or intellectual pleasure) that occurs after attending a number of the addresses. In the words of the aforementioned Ted Olson, the State of the Union Addresses ““have become so ritualistic and boring that it would be easy to find more entertaining alternatives.””⁴⁴

The attendance of justices by their years of service on the Supreme Court is presented in Table 3. Quite clearly attendance declines with tenure on the Court, falling to 44 percent or less as tenure exceeds fifteen years. This decline remains if the post-1999 years are excluded, but it is substantially diminished.

⁴⁴ Alvarez, “The State of the Union.” During the 1984 State of the Union Address, the more appealing alternative for Chief Justice William Rehnquist was a painting class.

Attendance among justices with tenure in excess of 15 years is 54 percent for the 1965 through 1999 period. Given the correlation between the age and tenure of justices ($r=.77$), it is difficult to separate the independent effects of age related factors and diminished utility on the decisions of justices to attend the State of the Union Address.

As noted earlier in this article, Justice Scalia commented that it is difficult for a justice not to attend the State of the Union Address when it is being given by the President who appointed him. Consistent with Justice Scalia's observation, the attendance of justices at the annual addresses given by the president who appointed them is 85 percent; this is in stark contrast to the 56 percent attendance rate when the Address is given by a non-appointing president. This pattern also partially explains the high attendance rate when tenure is less than five years. When the President giving the address is not their appointing president, 73 percent of the justices with less than five years of tenure attend the address. This is still high, but less than the 83 percent reported in Table 3.

Does higher attendance by justices at addresses given by their appointing president reflect personal loyalty, as suggested by Justice Scalia, or is it only a reflection of a more general partisan loyalty - a greater likelihood that a Justice will attend addresses when the current president is of their party?⁴⁵ The answer to this query appears to be personal loyalty. Attendance at State of the Union Addresses given by Democratic Presidents is roughly 15 percent higher than that for addresses by Republican Presidents, and the attendance of justices appointed by Democratic presidents is slightly higher than that of justices appointed by Republican presidents. However, when the president presenting the address is not the president who appointed the justice, namely, when no personal loyalty effect is present, the difference in the attendance patterns by Democratic and Republican justices does not differ by the party of the President giving the address. When a Democratic president is giving the speech Democratic justices are 11 percent more likely than Republican justices to attend. They are 9 percent more likely to attend than are Republican justices when a Republican president is giving the address.

⁴⁵ We assume that the Justices share party identification with the President who appointed them which for the time period examined we believe to be a reasonable assumption.

The party of the appointing president was treated in the preceding analysis as an indicator of the partisan identity of the justices, but it also is assumed to capture ideological agreement between Presidents and Justices of the same party. Co-partisanship, however, is at best a rough indicator of ideological agreement between the President giving the State of the Union Address and justices even of the same political party. The link between co-partisanship and ideological agreement can be undermined in several ways. Presidents even of the same party clearly differ ideologically (e.g. Eisenhower and Reagan), and may appoint justices who reflect those diverse ideological positions. Moreover, even if justices at appointment closely reflect the ideological position of the appointing President, they may drift ideologically across their tenure on the Court (e.g. Harry Blackmun).⁴⁶ Of course, Presidents may also simply fail to appoint justices who reflect their ideological positions or that of their party (e.g. Eisenhower's appointment of Warren and William J. Brennan, Jr.). Thus, while the preceding analysis suggests that co-partisanship does not influence the decisions of justices to attend the State of the Union Address, it provides uncertain evidence with regard to the effect ideological agreement between the justice and the sitting president on that decision.

We address this issue directly by employing ideological scores developed by Michael Bailey.⁴⁷ The scores provide a measure on a common scale of the ideological positions of justices and presidents by year.⁴⁸ We calculated the absolute difference between the ideological position of each justice and that of the president giving the address. The correlation between attendance and the ideological distance of a justice from the president is a meager $-.0852$, and this is further reduced to $-.0176$ when the analysis is confined to instances where the sitting president is not the president who appointed the justice (i.e. the

⁴⁶ See Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?", *Northwestern University Law Review* vol. 101, no. 4 (2007): 1483-1541.

⁴⁷We are grateful to Michael Bailey for making these data available at his website http://www9.georgetown.edu/faculty/baileyma/Data/Data_BookIdealPoints_Oct2009.htm. For a discussion of the measures see Michael Bailey, "Comparable Preference Estimates Across Time and Institutions for the Court, Congress and Presidency," *American Journal of Political Science* 51 (2007):433-448.

⁴⁸ The scores are only available through 2008, hence, reducing the scope of the study slightly.

effects of loyalty are absent).⁴⁹ Thus, neither co-partisanship nor ideological distance appears to influence systematically the decisions of justices to attend the State of the Union Address – a surprising finding that is counter to our expectations.

As noted above, justices have suggested that attendance at the State of the Union Address has been negatively affected by the Supreme Court becoming part of the “conversation” of the speech and/or by the increasing partisan political environment of the address. Turning first to the issue of inclusion of the Supreme Court as a topic of the speech, we reviewed the text of every State of the Union Address from FDR through Barack Obama, looking for specific mentions of the Supreme Court, courts and/or judges. In this survey President Obama’s reference in his 2010 address to a specific case decided recently by the Supreme Court does depart from common practice in terms of the subject matter of addresses. A close parallel is found in President Roosevelt’s 1937 and 1938 addresses at the height of his conflict with the Supreme Court. Even in those instances, however, the President’s references are general and oblique. For example, in the 1938 address President Roosevelt states “The judicial branch also is asked by the people to do its part in making democracy successful. We do not ask the Courts to call non-existent powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective instruments for the common good.” President Reagan in his 1984 and 1988 addresses also noted dissatisfaction with the Supreme Court’s constitutional positions in two specific areas, abortion and school prayer. With the justices in attendance, he urged Congress to pass a “human life” and a “school prayer” amendment to the Constitution. Given the rarity of these comments about Supreme Court decisions, and the fact that Obama’s comments only appear to have influenced Justice Alito’s attendance at the 2011 State of the Union Address, the Court becoming a part of the “conversation” during the annual address appears at best to be a rhetorical justification for non-attendance.⁵⁰

⁴⁹ Analysis using a logit model with attendance as the dependent variable renders a comparable result. The effects of absolute ideological distance are substantively trivial and statistically non-significant.

⁵⁰ See, also, Tony Mauro, “High Court is Rare Topic for State of the Union Speeches,” The Blog of Legal Times, January 27, 2010.

However, if we broaden this argument beyond specific references to the Supreme Court, we find several State of the Union Addresses that reference courts and judges. Generally, these are positive in tone asserting the need for Congress to increase the number of federal judges,⁵¹ to support the Courts decisions in the area of civil rights⁵² and calls to use or strengthen the power of federal courts.⁵³ In recent decades, however, Presidents have taken the opportunity of the Address to chide the Senate for the slow pace or refusal to move on the confirmation of federal judges nominated by the president.⁵⁴ In this sense the conflictual politics of judicial selection has received reference in the presidents' addresses. In several of the State of the Union Addresses given by President George W. Bush, this language was joined with a criticism of "activist" judges with specific reference to the actions of courts in the area of the definition of marriage.⁵⁵ While the courts and decisions referenced were state courts, one could claim that this fine distinction would be cold comfort for the Justices sitting in the addresses. Yet as we have noted above, only Justice Breyer was in attendance at the 2004 address (where this theme first appeared) and the 2005 address (when it was repeated). Moreover, the dearth in attendance began with the last State of the Union Address given by President Clinton and continued during the first two addresses of President Bush before he employed these themes. Thus, in this more general form, the selection of judges and the making of controversial policy by courts did become a more frequent element of recent State of the Union addresses, but it is by no means clear that this negatively influenced attendance of the justices.

Apart from specific comments in the speeches, it might be argued that hostile relations with the political branches might deleteriously affect the willingness of justices to attend. We address this possibility by examining a relative direct expression of Congressional hostility toward the Supreme

⁵¹ Ford 1976 and 1977.

⁵² Eisenhower 1959.

⁵³ Eisenhower 1958; Johnson 1966.

⁵⁴ Reagan 1988; Clinton 1998.

⁵⁵ George W. Bush 2004; 2005; 2006; 2007; 2008.

Court, namely, the introduction of court curbing bills. These bills range from statutes to strip the jurisdiction of the Court to constitutional amendments to alter the composition of the Court.⁵⁶

The distribution of court-curbing legislation introduced in Congress across the study years is presented in Figure 2. A comparison of this distribution with the distribution of the aggregate attendance of justices in Figure 1 suggests that hostility toward the Supreme Court expressed concretely in terms of the introduction of court curbing legislation has not been a deterrent to the attendance of Supreme Court Justices at the State of the Union Address. Hostility toward the Court was at its highest in the 1965 to 1980 period, when attendance by justices was also at its highest level. Between 1980 and 1999, the period when attendance by the Justices at the annual address declined, Congressional attacks on the Court were comparatively few. Court curbing action trended upward in the years immediately following 2000, but the volume of this activity did not exceed that common in the years between 1980 and 1999 until 2005 - when 25 bills were introduced. Eleven court curbing bills were introduced in 2006 and 21 in 2007. Notably, in 2006, Justice Breyer, after three years as the only justice attending the State of the Union, was joined by Chief Justice Roberts and Justices Thomas and Samuel Alito. In sum, there is little evidence in this pattern to suggest that hostile relations with Congress, at least as measured by court curbing activity, negatively affected the attendance of Justices at the State of the Union. Indeed, if there is a relationship between court-curbing and attendance, it may be that a hostile Congress generates higher attendance by the justices.

Finally, the Justices' comments suggest that apart from a hostile environment toward the Court, the increased partisan environment of the address has decreased their willingness to attend and serve as "potted plants." We have no direct measure of the partisanship of the President's speech and/or its reception. We examine instead a measure of polarization in Congress, the forum for the address. Our assumption is that partisan behavior at the address either reflects the more general level of partisanship in Congress, or alternatively, that the justices, while speaking of behavior at the address, may actually be

⁵⁶ We are grateful to Tom Clark of Emory University for making these data available. The data are available through 2008. For a discussion of the coding and defining of 'court curbing' legislation see Tom S. Clark, *The Limits of Judicial Independence*. New York: Cambridge University Press. 2011 pp. 35-46.

reacting to the more general level of partisanship evidenced in Congress. The measure of polarization that we employ is the annual difference in the ideological means of Democrats and Republicans in the House of Representative.⁵⁷ These data are made available by Keith Poole.⁵⁸

As can be seen in Figure 3, polarization in the House of Representatives, after a slow rise in the 1960's and 1970's, took off beginning in roughly 1980 - almost doubling in the following three decades. The rise in polarization generally parallels the decline in attendance of Supreme Court Justices at the State of the Union Address (see Figure 1). Thus, we cannot immediately dismiss the possibility that the intensification of the partisan climate discouraged attendance of the Justices. Despite the overall congruence in patterns, however, there are substantial reasons to doubt that increasing partisan polarization is a major factor in the decline in attendance by the justices. First, if sensitivity to the partisan environment were the cause of judicial absences, then we would expect that absences would increase relatively smoothly throughout the post-1980 period as polarization increased. To the contrary, while attendance was clearly lower in the post-1980 period, there is no clear pattern of growing absences between 1980 and 1999. Omitting 1986 (when re-scheduling of the annual address resulted in the absence of all of the justices), attendance in this period generally fluctuated between two and six justices. The low points for attendance were toward the beginning of this period (two justices in 1985 and three justices in 1990), not toward the end when polarization had increased substantially. As noted previously, six justices were in attendance in 1999 while attendance dropped to zero in 2000. This was followed by a three year nadir of attendance in 2003 through 2005, with only Justice Breyer present at the address. Neither the suddenness of this decline nor the subsequent rise in attendance in 2006 and beyond conforms to the pattern expected if polarization is driving absences.

Second, assuming that justices have different thresholds of sensitivity to partisan conflict (i.e. different thresholds of comfort), there should be a clear pattern of absences among justices -with those with lower thresholds ceasing to attend and not returning as polarization increased. However, in the 1980

⁵⁷ Polarization in the Senate and the House are strongly correlated.

⁵⁸ We are grateful to Keith Poole who makes these data available at his website, <http://voteview.com>.

to 1999 period, only the attendance patterns of Justices Thurgood Marshall and John Paul Stevens follow the pattern expected if the increasingly polarized setting for the speech is producing the decline in attendance. Both justices attended the address in 1984 and don't appear again before leaving the Court. Justices Scalia and Thomas, who voice complaints about the tenor of the speech and the environment in which it is given, do not have notable patterns of absences in the period from their appointments in 1986 and 1991 respectively through 1999. Scalia attended seven of eleven addresses (64%) in this period and Thomas six of seven (86%). Thomas' attendance was the third highest among the justices in this period and Scalia's was comparable to that Ginsburg, Kennedy and Rehnquist. While Scalia has not attended an address since 1998, Justice Thomas did attend the 2006 address. Thus, apart from Justices Marshall and Stevens, we do not see the expected pattern of absences that would occur if the decline in attendance in the post-1980 period was a product of an increasingly polarized environment in Congress.⁵⁹

To this point our analysis has focused on examining the factors possibly influencing attendance individually in tabular and graphic form. This has necessitated categorizing age and tenure with the consequent loss of information and has not allowed for possible correlation among the measures. To overcome these shortcomings we re-examined the effects of the factors using a multivariate logit approach. The details of this analysis, which are contained in the Appendix, confirm and reinforce our conclusions. Most significantly, they reinforce two key points. First, the pattern of declines in attendance are captured by two regime shifts, one beginning with Reagan's first address in 1982 and the second with Clinton's last address in 2000. With these regime shifts modeled increasing partisan polarization across the study period is unrelated to the attendance behavior of the justices. Second, while age, tenure, and whether the president giving the address appointed the justice are appropriately signed and statistically significant, the regime shifts powerfully capture the changes in the behavior of the justices even with these variables taken into account. In sum, age, tenure and loyalty to the appointing president do not explain the declining attendance at the State of the Union Address across time.

⁵⁹Both age and lengthy tenure rather than a low threshold for partisan conflict may just as easily explain the observed pattern for Justices Marshall and Stevens.

Final Thoughts on the Disappearance of the Supreme Court from the State of the Union Address

We had two major goals in writing this paper: (1) to provide descriptive statistics on judicial attendance at the State of the Union Address; and (2) to propose and test possible explanations for variation in attendance. Our success in achieving these goals is mixed. Regarding the first goal, we have successfully collected and presented original data on which Supreme Court justices have attended the State of the Union Address from 1917 to 2011. The picture which emerges is undeniable and clear: over time, fewer and fewer justices are coming to the House Chamber to hear the President's annual address. From 1965 to 1980, approximately 84% of the active justices attended the State of the Union Address. This number fell to 56% for the time period 1982 to 1999, and dropped again to 32% from 2000 to present.

For justices who have sat on the Supreme Court bench for five years or longer, three rate a "gold star" for attendance: Chief Justice John Roberts and Associate Justice John Marshall Harlan II never missed an annual address, while Justice Steven Breyer has faithfully attended all address but one. On the other end of the spectrum are several justices who have established the benchmark for judicial absenteeism - recently retired Justice John Paul Stevens attended the annual address only 23% of the time, while Antonin Scalia, David Souter, and Ruth Bader Ginsburg have attended less than 40% of all possible addresses. Given his current attendance patterns, Justice Clarence Thomas is in danger of joining this group.

Understanding why attendance rates vary is a more difficult task. On the margins, judicial attendance can be partially explained by a justice's age and/or length of tenure on the Supreme Court. Whether it is increasing infirmity or boredom, justices attend fewer State of the Union Addresses as they grow older. Moreover, it appears that personal loyalty to the appointing president plays a modest role in determining attendance; justices are more likely to attend the State of the Union Address if the sitting president has appointed them to the bench. Surprisingly, attendance does not appear to be driven by ideological agreement between the sitting president and the justices of the same political party, by

hostility between the three branches of government, or by political polarization. Nor does attendance appear to turn on whether the Supreme Court has become part of the “political conversation.”

The factors we have identified as influencing the decisions of individual justices to attend the State of the Union Address (age of the justices and personal loyalty), however, provide little explanation for the significant drop in attendance in the period after 1982, the sudden decline of attendance in 2000, or the subsequent three year lonely vigil of Justice Breyer. It is conceivable that the extraordinarily low attendance records from 2002 to 2005 were the result of (1) a significant core of justices holding “principled” objections to attendance, and (2) a confluence of myriad factors (illness, family emergencies, scheduling conflicts, etc.) which caused the remaining four or five justices – who did not object to the institutional norm of attendance – being unable to attend.⁶⁰

On the other hand, the length and depth of the drought in attendance in the post-1999 period suggests that the ‘confluence’ explanation alone is improbable. While given the timing of the decision, it could not have affected absences at the 2000 State of the Union Address; it is possible that the Supreme Court’s decision in *Bush v. Gore*⁶¹ played a role in dampening attendance by justices at subsequent addresses. The Court’s standing among the public clearly weathered the storm created by the decision, but many congressmen and senators saw the Supreme Court’s action in the case in raw partisan terms and it may also have opened wounds within the Court itself.⁶² Absent interviews with the justices, of course, this is speculation.⁶³

⁶⁰ Lizette Alvarez, “The State of the Union.” According to the article, Justice Ruth Bader Ginsburg was absent because of radiation treatments related to her colon cancer, Justice Stephen Breyer had the flu, Justice John Paul Stevens was tending to his wife after her hip replacement surgery, Justice Clarence Thomas was out of town because of a death in the family, and Justice Anthony Kennedy was giving a speech.

⁶¹ 531 U.S. 98 (2000). This case was decided in December of 2000 almost a year after the 2000 State of the Union Address.

⁶² In the book *The Nine: Inside the Secret World of the Supreme Court*, author Jeffrey Toobin writes that Justice David Souter was “shattered” by the decision. “His colleagues’ actions were so transparently, so crudely partisan that Souter thought he might not be able to serve with them anymore...he decided to stay on, but his attitude toward the Court was never the same. There were times when David Souter thought of *Bush v. Gore* and wept.” Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007): 177.

⁶³ We requested interviews with all active and retired Supreme Court justices, but only received three responses – all declined our requests.

The ‘confluence’ argument is unsatisfying at a deeper level as an explanation for the observed decline in attendance across the entire study period. When the justices started to attend the State of the Union Address in the late 1950’s and early 1960’s, there was an apparent expectation (or norm) of attendance and as we have documented that pattern held firmly through 1980. No doubt, the justices during this period were sometimes ill on the date of the address or experienced family emergencies which produced occasional absences. But in the post-1980 period the justices in addition to ill-health and family emergencies have sometimes chosen to accept speaking engagements, “Jurist in Residence” opportunities and, on one occasion, attendance at a painting class⁶⁴ over attendance at the State of the Union Address. Undoubtedly, the justices of the Warren Court era could have done likewise but opted to prioritize attendance at the address.⁶⁵ It is true that partisan polarization has intensified dramatically since 1980, but justices in the Warren Court era were threatened with impeachment and, as we have documented, with a barrage of court curbing legislation and, yet, their attendance did not falter. The ‘confluence’ argument, thus, rests on the implicit foundation that the priority the justices place on the institutional representation of the Court at the State of the Union Address has declined.

Should this decline be a cause for concern? Did Chief Justice Warren and his colleagues err in the priority they placed on attendance at the State of the Union Address? Chief Justice Roberts is obviously correct in stating that the decision to attend the State of the Union Address is a decision to be made by the individual justices. But cumulatively those individual decisions have institutional consequences. Most directly they impact the image that the public has of the Supreme Court. The State of the Union Address is a rare tableau where the connection between the Supreme Court, the President and Congress is visible to the American public. What is the viewing public to assume when the House Sergeant of Arms announces to the House chamber that the Justices of the Supreme Court have arrived, and then a single justice – Stephen Breyer – enters as the sole representative of the Court?

⁶⁴ Phil Gailey and Warren Weaver, Jr., “Order in the Court,” *New York Times*, February 8, 1985 (noting that then-Justice Rehnquist had skipped the 1984 State of the Union Address to attending a painting class).

⁶⁵ As one example we note Justice Harlan’s remarkable attendance despite his wife’s health problems and his own slow descent into blindness.

Justice Stephen Breyer, speaking in defense of the attendance at the address, succinctly expressed this view. “I think it's very, very, very important...for us to show up at that State of the Union, because people today, as you know, are more and more visual,” Justice Breyer stated. “I'd like them to read, but they are visual. And what they see in front of them in that State of the Union is the federal government, every part -- the president, the Congress, the cabinet, the military, and I would like them to see the judges, too, because federal judges are also part of that government. And I want to be there.”⁶⁶ Justice Breyer's position echoes the rationale that President Woodrow Wilson offered to Congress in 1913 for requesting to address a joint session, something that no president had done in over one hundred years. He noted that his goal was to “verify the impression that the President is a person, not a mere department of the government hailing Congress from some isolated island of jealous power.”⁶⁷

The power of the Supreme Court, more than that of any other branch of government, rests on support of the American public. What image more favorably captures the unique position held by the Court in the American separation of powers system than its members' presence at the State of the Union Address? Having been invited to an ‘indignity’ they sit as part of the political leadership of the nation but are set apart from the electoral branches and the partisan behavior of the forum by their robes of judicial office and dignified conduct. Chief Justice Roberts' willingness to attend the annual address strongly suggests that he recognizes the opportunity that the presence of the Court at this highly visible event provides to underscore that it is not “some isolated island of jealous power” but rather a key but distinctive player in the dynamic of American government.⁶⁸

⁶⁶ Lee Ross, “Supreme Court Justices Could be No-Shows for Obama's State of the Union Address,” FoxNews.com, January 24, 2011.

⁶⁷ This joint session was not technically a State of the Union Address but Wilson subsequently delivered the State of the Union to a joint session of Congress later that same year. “Congress Cheers Greet Wilson,” *New York Times*, April 9, 1913.

⁶⁸ Justice Stevens in his recent memoir suggests that Robert's attendance “reflected and supported” Stevens' view that “our [Executive and Judicial] common interest in administering justice impartially is far more important than any individual's interest in advancing his or her own point of view.” John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (Little, Brown & Co., 2011): 208.

Figure 1: Percentage of Justices Attending the State of the Union Address by Year

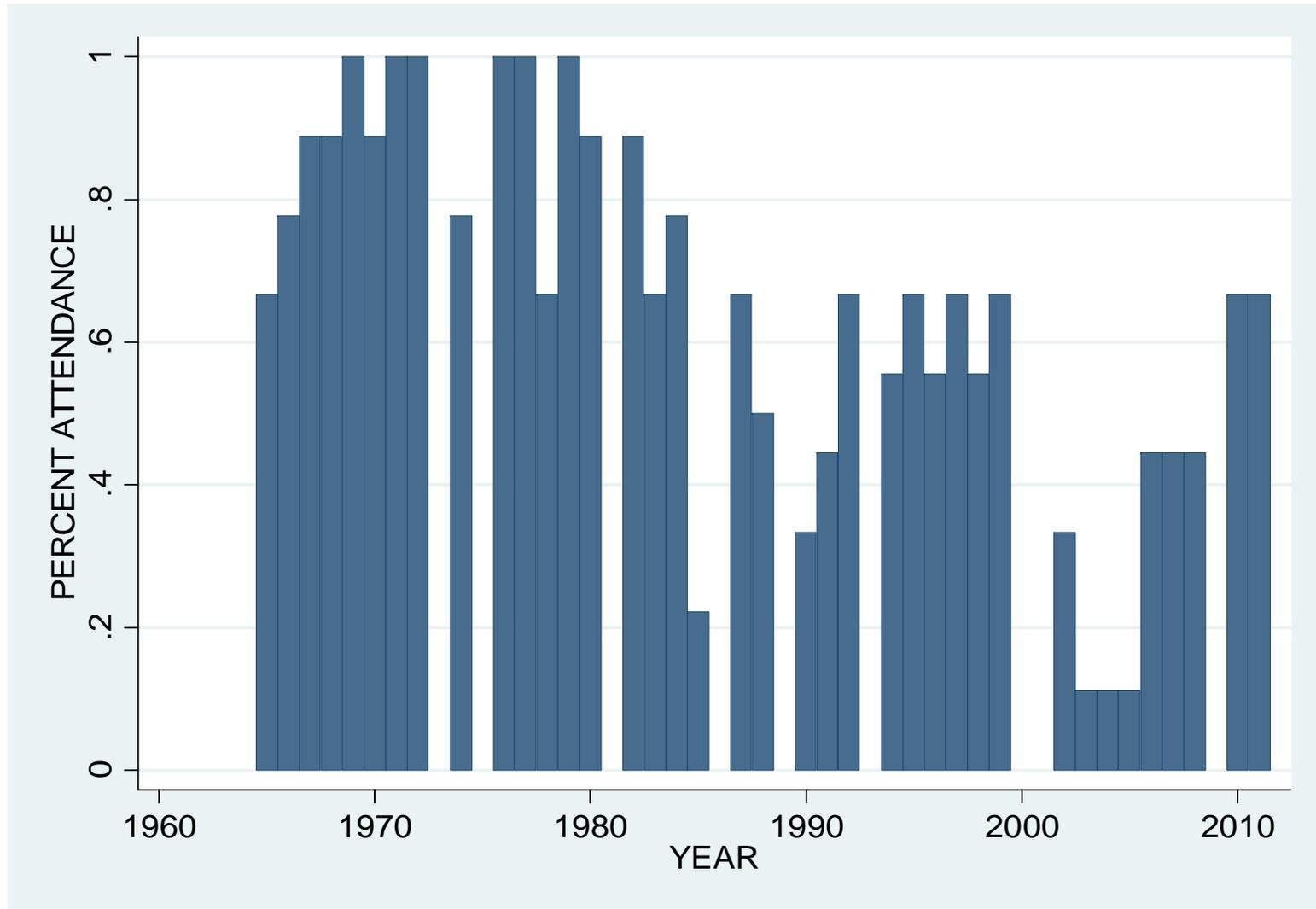


Figure 2: Number of Court Curbing Bills Introduced by Year

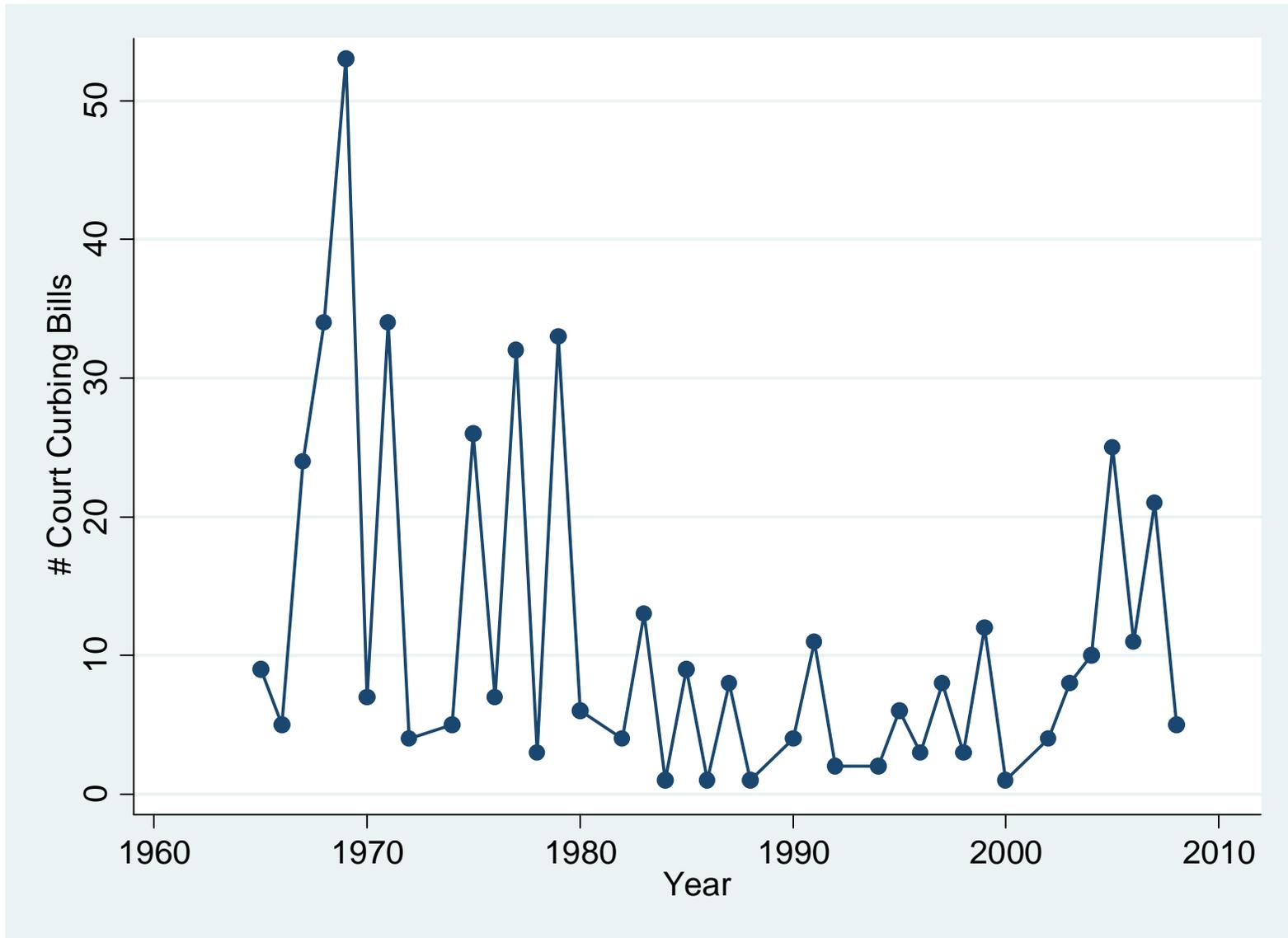


Figure 3: Polarization in the House of Representatives by Year

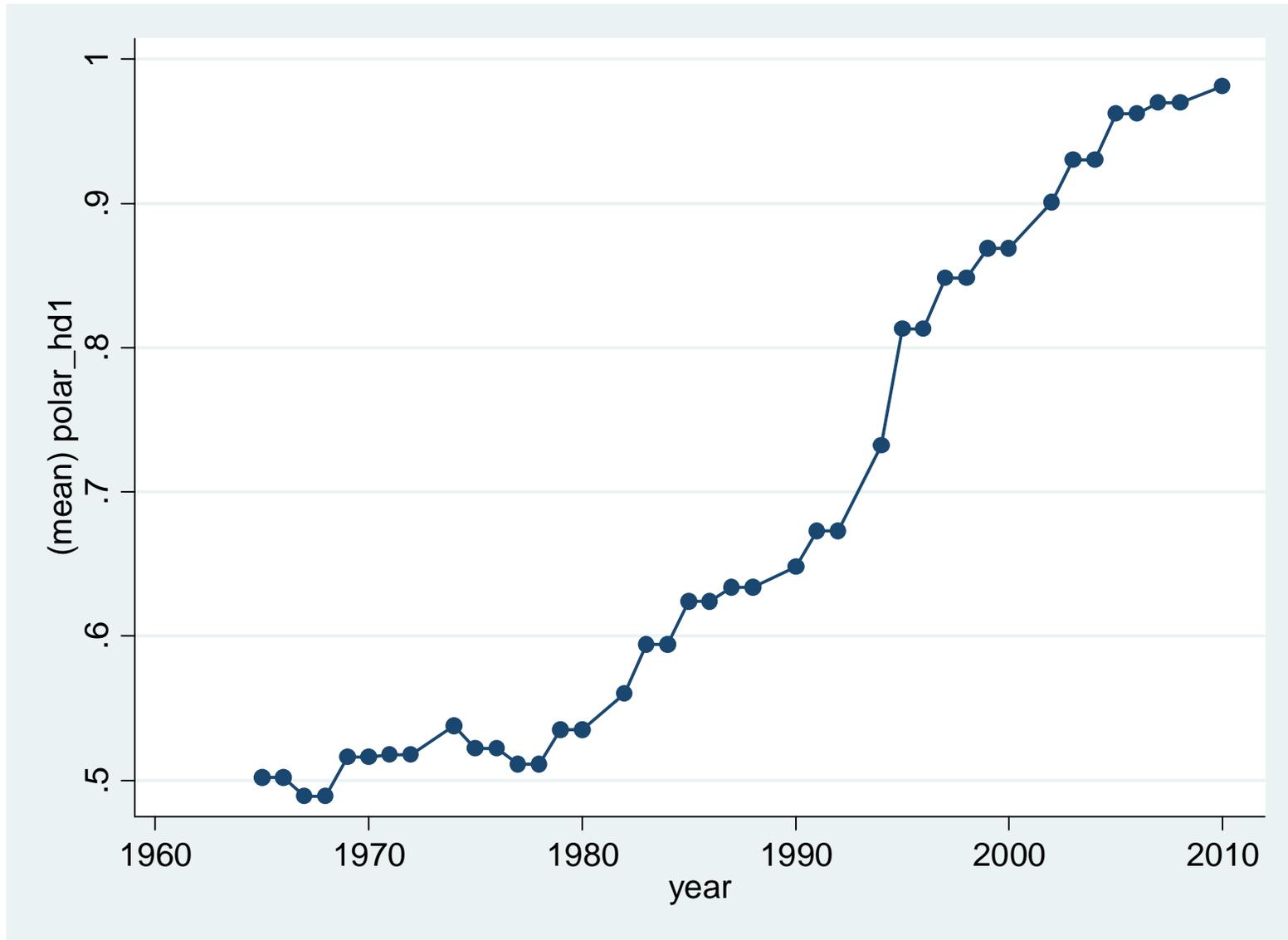


Table 1: State of Union Attendance by Justice Serving Since 1965

Justice	Percent Attendance	N⁶⁹
Alito	.80	5
Black	85.7	7
Blackmun	.80	20
Brennan	73.9	23
Breyer	93.3	15
Burger	73.3	15
Clark	100	3
Douglas	.50	10
Fortas	100	4
Ginsburg	37.5	16
Goldberg	100	1
Harlan	100	7
Kagan	100	1
Kennedy	57.9	19
Marshall	52.4	21
O'Connor	42.9	21
Powell	78.6	14
Rehnquist	62.1	29
Roberts	100	5
Scalia	33.3	21
Sotomayor	100	2
Souter	37.5	16
Stevens	23.3	30
Stewart	86.7	15
Thomas	41.2	17
Warren	.80	5
White	.60	25
		367

⁶⁹ Number of State of the Union Addresses justices were eligible to attend (i.e actually held and. not written) while in active service.

Table 2: Percentage of Justices Attending the State of the Union Address by Age, 1965-2011

Age of Justice	Percent Attending	N
55 or Under	84	49
55-60	72	58
60-65	63	60
65-70	52	75
70-75	55	60
Over 75	43	65
	60	367

Table 3: Percentage of Justices Attending the State of the Union Address by Tenure, 1965-2011

Years of Service	Percent Attending	N
5 or under	83	77
5-10	73	70
10-15	60	79
15-20	44	62
20-25	43	35
Over 25	37	43
	60	367

APPENDIX

The effects of factors thought to influence the attendance of the justices were re-examined using a multivariate logit analysis. The results are presented in Table 1A. We remind the reader that the findings of this analysis may also be sensitive to the fact that some justices contribute disproportionately to the observations.

The results in Table 1A confirm and reinforce our conclusions drawn from the tabular and graphic analysis. Examining first the results from Model 1, attendance declines with advancing tenure/age⁷⁰ and is higher when the president giving the address appointed the justice. The absolute ideological distance of the justice from the president is actually positive in sign. The volume of court-curbing legislation has a positive and statistically significant effect on attendance. Polarization in Congress, as suggested by the graphical analysis, is associated with lower attendance and statistically significant. We have argued that rather than increasing in the fashion that would be expected if polarization was driving attendance, there have been two regime shifts in attendance, one beginning with Reagan's first address in 1982 and the second with Clinton's last address in 2000. We test that argument in Model 2 where we have included dummy variables for each of these time periods. The period from 1965 through President Carter (i.e. 1980) is the suppressed category. Consistent with our argument the coefficients for the dummy variables are negative and statistically significant and with these regime shift accounted for the effect of polarization is no longer statistically significant.⁷¹ The significant dummies for the time periods not only support our argument against the importance of polarization to

⁷⁰ The age is negative and statistically significant if substituted for tenure. If both are included in the model both are appropriately signed, but the effect of age is not statistically significant.

⁷¹ Interactions between the dummy variables and polarization are also not significant if added to Model 2 indicating that the effect of polarization does not vary within the time periods.

explaining absences but also indicate that while tenure/age and loyalty influence attendance they fall very short of explaining the extent of the observed decline in attendance by justices.

Table 1A: Logit Effects for Predictors of Justices' Attendance

Variable	Model # 1	Model#2
Tenure	-.088*	-.077***
Appointing President	1.038#	1.126*
Ideological Distance from President	.367#	.367#
Court Curbing Bills	.028*	.538
Polarization in House	-5.352**	.793
1982-1999		-1.294**
2000-2011		-3.183***
Constant	4.625**	1.760
N=	349	349

#sign. at .10 *sign. at .05 **sign. at .01 ***sign. at .001