2014

The Supreme Court Confirmation Process and Its Implications

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by

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A Thesis Submitted to the Honors Council
For Honors in Political Science
May 8, 2014

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Acknowledgements

First and foremost, I would like to thank my thesis advisor, Professor Meinke. Without his continued support and encouragement, this work would not have been possible. I was extremely lucky to have an advisor so willing to keep me grounded and to listen to my constant ramblings as I attempted to work my way through this subject matter. I have been fortunate enough to call Professor Meinke my academic advisor for four years, and am extremely grateful for all that he has done for me.

I would also like to thank my friends and family for your constant support throughout the course of the past year as this thesis came together. You have always encouraged my academic passions and helped me push myself further than I imagined was possible. A special thanks goes to my mom for her incredible proof-reading abilities and even more incredible patience.

I would also like to thank my defense committee for taking the time and effort to read through this study. Your thoughtful questions allowed me to analyze this material in new ways and to consider some of the implications that I would have otherwise overlooked.

Finally, I would like to thank the entire political science department here at Bucknell. I have never left a course without feeling a new sense of enlightenment and willingness to ask my own questions. It is that sense that led me to decide to write this thesis. I consider myself lucky to have spent four years learning from this group of excellent professors.

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Abstract

In recent history, there has been a trend of increasing partisan polarization throughout most of the American political system. Some of the impacts of this polarization are obvious; however, there is reason to believe that we miss some of the indirect effects of polarization. Accompanying the trend of increased polarization has been an increase in the contentiousness of the Supreme Court confirmation process. I believe that these two trends are related. Furthermore, I argue that these trends have an impact on judicial behavior. This is an issue worth exploring, since the Supreme Court is the most isolated branch of the federal government. The Constitution structured the Supreme Court to ensure that it was as isolated as possible from short-term political pressures and interests. This study attempts to show how it may be possible that those goals are no longer being fully achieved.

My first hypothesis in this study is that increases in partisan polarization are a direct cause of the increase in the level of contention during the confirmation process. I then hypothesize that the more contention a justice faces during his or her confirmation process, the more ideologically extreme that justice will then vote on the bench. This means that a nominee appointed by a Republican president will tend to vote even more conservatively than was anticipated following a contentious confirmation process, and vice versa for Democratic appointees.

In order to test these hypotheses, I developed a data set for every Supreme Court nominee dating back to President Franklin D. Roosevelt's appointments (1937). With this

data set, I ran a series of regression models to analyze these relationships. Statistically speaking, the results support my first hypothesis in a fairly robust manner. My regression results for my second hypothesis indicate that the trend I am looking for is present for Republican nominees. For Democratic nominees, the impacts are less robust. Nonetheless, as the results will show, contention during the confirmation process does seem to have *some* impact on judicial behavior.

Following my quantitative analysis, I analyze a series of case studies. These case studies serve to provide tangible examples of these statistical trends as well as to explore what else may be going on during the confirmation process and subsequent judicial decision-making. I use Justices Stevens, Rehnquist, and Alito as the subjects for these case studies. These cases will show that the trends described above do seem to be identifiable at the level of an individual case. These studies further help to indicate other potential impacts on judicial behavior. For example, following Justice Rehnquist's move from Associate to Chief Justice, we see a marked change in his behavior.

Overall, this study serves as a means of analyzing some of the more indirect impacts of partisan polarization in modern politics. Further, the study offers a means of exploring some of the possible constraints (both conscious and subconscious) that Supreme Court justices may feel while they decide how to cast a vote in a particular case. Given the wide-reaching implications of Supreme Court decisions, it is important to try to grasp a full view of how these decisions are made.

Chapter 1: Introduction

The Senate's Advice and Consent role serves as an important backdrop to the development of many of the government's institutions. Acting in this role, the Senate plays a crucial part in the Supreme Court nomination process. After the President has carefully selected his or her nominee to replace a vacancy on the Supreme Court bench, the Senate takes over. Beginning in the Senate Judiciary Committee, and proceeding to the Senate floor, the Senate has the ultimate vote in whether or not the President's appointment will reach the Supreme Court. In an era characterized by increased polarization, interest group participation, and lobbying efforts in politics, we see the confirmation process beginning to transform (McCarty and Razaghian 1999). Recent literature shows us that the confirmation process has become increasingly divisive over time (Cameron, Kastellec, and Park 2013). When looking at the Senate's debate surrounding nominees to one of the federal government's most powerful bodies, it may come as no surprise that there is a high level of contention when confirming a potential Supreme Court Justice. What does come as a surprise, though, is that this trend was not always present. In fact, contentiousness in the Senate with regard to voting on Supreme Court nominees has increased substantially between 1937 and the present (Cameron, Kastellec, and Park 2013).

In this study, I will analyze the dynamics of the confirmation process in an effort to determine what has generated this growing divisiveness. First, I will answer the simple question: why has contentiousness grown in the Senate confirmation process? Next, I will

examine the relationship between a justice's perceived ideology and his or her actual decision making on the Court. In doing this, I will attempt to answer the question: how does conflict during the confirmation process affect a Supreme Court justice's behavior on the Court?

Over time, Supreme Court nominees have been more and more associated with the appointing president's political ideology, which is seen as a point of contention for most senators (Epstein and Segal 2005). As presidents attempt to shape the Supreme Court for their political agendas, they appoint justices with ideologically similar points of view (Szmer and Songer 2005). What I intend to do in looking at this process is to examine what really happens *after* the appointment. After the Senate has held its debate and acted in the formal Advice and Consent role, do the Justices spend their tenures on the Supreme Court acting as the Senate had anticipated? In other words, I will try to analyze how the contentiousness of the process impacts what happens *after* the appointment. Some previous literature contends that the behavior of judicial appointments is relatively unpredictable (Cameron and Park 2009). Given the institutional context of the Supreme Court, this may be possible. With lifetime appointments, private deliberations, and an entirely self-selected set of cases, the Supreme Court is about as isolated as a branch of the federal government can be. Nonetheless, increased contention leads us to question what is causing the Senate Judiciary Committee to become more divided.

Description and Empirical Framework

This study is conducted through both a quantitative analysis and a case study analysis. In beginning, I develop a theoretical framework through which I attempt to answer the above questions. In order to help build this framework, I use a few ideas presented in previous literature on this topic, which are addressed in detail within the literature review.

My quantitative study consists of both the 'before' and 'after' dimensions of the confirmation process. To look at the divisiveness in the Senate, I depart from most previous literature in choosing my dependent variables. Rather than looking at the Senate floor in analyzing increased contention, I will turn my focus to the Senate Judiciary Committee. This standing committee of the United States Senate is in charge of discussing and conducting votes on Supreme Court nominees prior to reporting the nominees to the Senate floor. Members of the Senate Judiciary Committee are expected to be fully knowledgeable about nominees and discuss the nominees in great depth. Because this panel is fully vested in the confirmation process, I think that it is a more telling indicator of the true contention in the Supreme Court nomination process than is the Senate floor itself. On the actual Senate floor, the confirmation vote is sometimes seen as a mere technicality in which the Senate floor responds according to the recommendation of the Judiciary Committee without much deliberation. Only when a senator speaks out against a nominee does the Senate become more active in the process (McCarty and Razaghian 1999). If no senator speaks out, there is no point of contention, whereas in the Senate Judiciary Committee, debate is virtually guaranteed over the

nominees. For this reason, I think the more important body for analysis is the Senate Judiciary Committee. Statistically speaking, the contention on the Senate floor during confirmations tends to mimic the level of contention within the Judiciary Committee (see Figures 1 and 2).

Within the Judiciary Committee, I use three different dependent variables to indicate increased conflict in the process. These variables include the number of days that confirmation proceedings take, the number of nay votes that a nominee receives from the committee, and a scaled contention variable that helps to standardize the nay votes variable. Each of these will be outlined fully within the quantitative analysis portion of this paper.

Next, I turn to my independent variable in trying to explain the increased contention throughout the confirmation process. My ultimate goal in this study is to determine how the polarization in Congress, particularly the Senate (and the Judiciary Committee), has had an impact on contention during the process. Thus, I use a variable to indicate the polarization in the Senate Judiciary Committee over the time frame that I am studying. In order to do this, I will use previously calculated DW-NOMINATE scores to look at the ideological separation of the median Republican and Democratic senators (Cameron, Kastellec, and Park 2013).

Then, in order to determine whether or not a more contentious confirmation process yields justices that vote according to their ideology, I use the contentiousness of the confirmation process as my *independent* variable. I use that independent variable to evaluate the effect of contentiousness on the relationship between a Supreme Court

nominee's prior ideology and his or her future votes while on the Court. In other words, the goal of the second half of my study is to look at the impact of the growing divisiveness on the strength of the relationship between a Supreme Court nominee's prior ideology and how that nominee subsequently votes after confirmation. This idea will be discussed at length, again within the quantitative section of this paper. Ultimately, this method helps me to evaluate the overall significance of the increase in contentiousness during the Supreme Court confirmation process. These two quantitative studies, together, give me a good framework of both what creates the division in the confirmation process and whether that division ultimately matters with respect to judicial behavior.

Hypotheses

Hypothesis 1: Increasing political polarization has driven the increasing contentiousness in the Supreme Court nomination process within the Senate Judiciary Committee.

This hypothesis is at the core of my initial study, and helps me to evaluate the question: what has increased contention during Supreme Court confirmation proceedings? The quantitative study outlined above allows me to answer this question and test my hypothesis. In order to isolate political polarization, I created a regression that controls for a few other variables. Specifically, I control for whether or not Congress is unified, and the ideological gap between a nominee and the median member of the Senate Judiciary Committee. These variables serve as additional independent variables in

a regression in explaining the impact of increased Senate Judiciary Committee polarization on the confirmation process.

This hypothesis seems to be in line with recent political developments in Congress. As division in ideology has grown, so too has debate over most issues in the Senate. As Conditional Party Government theory (Rohde 1991) predicts, the increase in polarization means that the parties will consolidate as they have more to lose when they do not win legislative battles. This same idea seems to logically apply to the confirmation process.

Hypothesis 2: Increasing levels of contentiousness in the Supreme Court confirmation process yields Supreme Court justices that will behave in a more ideologically extreme way that is consistent with their perceived ideology.

As previous literature on this topic has indicated, the separation of powers creates a highly isolated and independent Supreme Court in our governmental system (Curry, Pacelle, and Marshall 2008, 225). Indeed, we have sometimes seen justices abandon their perceived political affiliation in their decision-making (see Chief Justice Roberts in the recent Affordable Care Act decision). Nonetheless, I predict that the overall trend of increasing and more contentious debate surrounding Supreme Court nominees does have implications. Theoretically, the Senate Judiciary Committee will be more contentious in debating these nominees because in modern government, the result of an appointment has real ideological consequences. With increased contentiousness, we may start to see

Frances E. Lee's (2009) idea of 'teamsmanship' start to play out on the Court. This idea contends that partisan politics creates a sense of teams (Republican versus Democrat) that tends to dominate much of our representatives' political thought process. I argue that this same sense of 'teamsmanship' applies to Supreme Court justices as well.

I think that contention will give a nominee the incentive to side with his or her 'team' both more aggressively and more frequently. Within the context of my study, then, I imagine that I will find justices that went through particularly controversial and contentious confirmation processes will become ideologically more extreme in line with their perceived ideology. This basically means that a conservative nominee that goes through a contentious confirmation process will tend to vote more conservatively during their tenure on the bench, and vice versa for liberal nominees. This hypothesis is interesting in that it does rely on a justice's *perception* of contention. If a justice faces a difficult confirmation process but feels that it was less contentious than some of his or her colleagues, it may be possible that the feeling of 'teamsmanship' will not quite develop as much.

Results: A Brief Overview

My evidence will show that, as predicted, political polarization plays a large role in the increased contention during the confirmation process. While other factors certainly contribute to the level of contention that a nominee faces during confirmation proceedings, polarization is arguably the primary factor in determining how much difficulty a nominee will have.

The second portion of my quantitative study yields results that are partially consistent with my hypothesis. I find that the 'teamsmanship' effect seems to apply to Republican appointees. Generally, these appointees will behave even more conservatively than anticipated following a particularly contentious confirmation process. For Democratic appointees, the statistical results are less robust. The broad results seem to indicate that there are elements of this effect present for liberal justices; however, the results are not significant at conventional levels and thus cannot warrant any substantial or wide-reaching conclusions.

After creating an empirical framework through quantitative analysis, I use case studies to examine the framework in more detail. In order to see if my predictions hold up, I evaluate a few specific nomination processes and see how they match up with my empirical framework. Additionally, case studies allow me to explore and investigate other trends that may not appear in the data. These case studies provide tangible and relatable evidence by which I can see my hypotheses at work. In order to select candidates for a case study, I made an effort to select justices that provide interesting cases within the context of contention and judicial ideology. As my quantitative results show, the effect I am researching is present with conservative justices more than liberal justices. I chose three justices to study, each of which was nominated by a Republican president. These cases are different from each other in unique ways, and offer an interesting look at how the effects I discover in my study really play out. The three cases that I focus on are those of John Paul Stevens, William Rehnquist, and Samuel Alito.

Through case studies of these three justices, I build on my quantitative analysis in an effort to bolster my conclusions and to add new details to the broader study.

Fitting into the Previous Scholarship

Supreme Court scholars have published a good amount of literature on the contentiousness of the confirmation process. Nonetheless, this study differentiates and expands on the existing literature. First, no studies that I have come across have utilized data from the Senate Judiciary Committee rather than the Senate floor. This is a departure from existing literature that turns out to be very enlightening with regard to this topic.

Further, this study links aspects of the confirmation process with Supreme Court decision making in a way that has not been done before. This study looks at the impact of ideological polarization on the confirmation process. In turn, I link the changing confirmation process to subsequent Supreme Court justice behavior. This is an approach that has not been taken in studying this subject. In their study, Cameron, Kastellec, and Park present four distinct categories, each of which impacts the confirmation process. These factors include: changes in the Senate, changes in nominees, changes in the political environment, and changes in how the Senators evaluate nominees (Cameron, Kastellec, and Park 2013). These authors find that multiple factors contribute to this process. While this evaluation helps to explain the increased division in the confirmation process, these conclusions stand on their own. As such, they offer us little predicting power for future nominations. In my study, I link polarization, the confirmation process, and Supreme Court judicial behavior in a way that allows us to anticipate how justices

may behave in the future. This method analyzes the relationship between a variety of factors illustrated in previous literature, but that are yet to be connected.

In addition to this, I also look at the implications that the confirmation process has on Supreme Court decision-making. Again, this is a topic that seems to have gotten little attention, but one that I think is important. In Cameron and Park's study, they derive the NSP scores that I will use in this paper in an effort to predict justices voting behavior. In essence, I take this concept and extend it. Cameron and Park found that ideological scores tended to allow us to predict what justices might do once they reached the bench (Cameron and Park 2009, 487). I take that concept and put it in the context of the confirmation process. Theoretically, Senators evaluate and attempt to interpret a nominee's ideology in their decision-making. This can create division in the confirmation process. It is interesting to take their predictions regarding a justice's voting behavior and put them to the test.

Chapter 2: Literature Review

The Supreme Court nomination and confirmation processes have gotten a good deal of focus in scholarly research. Additionally, much attention has been given to Supreme Court justices' decision making. Throughout the course of this study, both of these elements will be discussed, and eventually linked together in an effort to provide an explanation as to how the confirmation process itself eventually affects a Supreme Court Justice's decision making.

In this section of the text, I will review the previous work that pertains to my study. While a variety of different types of studies have been undertaken with respect to the Supreme Court, I will focus on three broad categories: the Supreme Court confirmation process and its increasing contentiousness, judicial decision making, and the connection between these two categories.

There are a number of works to draw upon to address the first two sections. The third, connecting section, though, has had little scholarly attention to date. I will look at the previous literature that relates to this topic, and point out where these studies fall short, and the implications that they have for future work.

The Supreme Court Confirmation Process and Its Increasing Contentiousness

The Supreme Court confirmation process is of great significance to the American political system. The separation of powers created by our Constitution authorizes great

power and responsibility to the Supreme Court. Additionally, the United States is characterized by a common law system, meaning that our law is dynamic and constantly updating according to judicial decisions. In the federal judicial system, the Supreme Court is the highest court, and thus its decisions, through the doctrine of *stare decisis*, are binding on all other federal courts.

Therefore, the nine sitting Supreme Court justices have a good deal of policy influence because of their collective power of checks on the legislative and executive branches through the doctrine of judicial review. As such, it may be no surprise that the confirmation process has recently been a point of contention in the Senate. What may be more surprising is the fact that this process has not always been this way. In fact, the increasingly contentious level of debate surrounding Supreme Court appointees is a relatively recent trend (Cameron, Kastellec, and Park 2013).

There are a number of methods by which to assess the 'contentiousness' of the Supreme Court nomination process. In the past, the confirmation process has served as little more than a technicality. Through limited debate, near-unanimous voice votes, and virtually no opposition, the Senate has often simply deferred to the President in appointing his nominee to the bench (Fenno 1959). Today, these types of occurrences are rare. One metric often used to show that the 'rubber stamp' job of the Senate is no longer such a formality is the number of days that it takes to confirm a justice. While most current Supreme Court nominees do end up being confirmed, the amount of time that the Senate debates over these justices has increased dramatically (McCarty and Razaghian 1999). In their study, McCarty and Razaghian find that even the most successful

nominees with respect to the final roll call vote tend to see lengthy confirmation processes. Some nominees take up an entire Senate session in order to get confirmed. These lengthy confirmation delays all seem to point to an increasingly contentious confirmation process.

In addition to the length of the confirmation process, the number of roll call votes helps to show that the process is no longer a mere formality. Epstein, Lindsadt, Segal, and Westerland find that in recent years, Supreme Court nominees have received an increasing number of 'nay' votes on the floor (2006). Not only do more nay votes signify an increasing amount of explicit opposition to nominees, they also indicate a lack of willingness to conduct simple voice votes in order to confirm Supreme Court justices. Since the late 1960s, Supreme Court nominees have been subject to roll call votes in every confirmation process (Rutkus and Bearden 2010).

In recent years, the increased contentiousness in the Senate does not stand alone. The Senate Judiciary Committee has also developed a more divisive and lengthy process. Not only do appointees take longer to make it through the committee itself and onto the Senate floor (Rutkus and Bearden 2010), but the committee also has started to increase the intensity of its hearings. Whereas in the past, the nominees often were not even called before the committee to testify, today they no longer enjoy such a luxury. Furthermore, the committee itself now questions and probes nominees more extensively in the hearing process (Ogundele and Keith 1999). Thus, we see the trend of increasing debate begin in the Senate Judiciary Committee and then continue on the full Senate floor.

Testimony before the Senate Judiciary committee has become increasingly important in modern day confirmations. Williams and Baum (2006) study the content of these hearings. They discovered a few trends in this analysis. First, nominees are asked about their previous decisions much more extensively than they were in the past. Second, the nominees, often receive questions categorized as "negative," meaning questions that contained some negative evaluation of the nominee's prior decisions. These trends again show that the confirmation process has become more divisive in the Judiciary Committee. It also shows that Senators today are more willing to utilize the tools that they are provided to evaluate potential Supreme Court justices.

Dion Farganis and Justin Wedeking present a description of the nature of nominee responses in Judiciary Committee hearings (2011). In this piece, they test the conventional belief that nominees have become exceedingly evasive in their responses to questions during the confirmation hearings. Farganis and Wedeking find that this trend is nowhere near as significant as most content. Rather, there is only a modest downtrend in nominee "candor". They attribute this trend not to nominee elusiveness, but rather to the fact that Senators are asking more difficult and ideologically charged questions than they used to. One particularly interesting aspect of this study is that Farganis and Wedeking say that confirmation hearings have become increasingly ideological and that Senators from the opposite party of the nominating president will be particularly "hostile". They expected nominees to be less forward in answering questions from the opposing party; however, found that there was no real difference. Much of this discussion is based on the idea that Supreme Court nominees will tend to favor their party, or "team", in how they

answer questions during hearings. As such, much of this resonates with my idea of 'teamsmanship' applying to the behavior of Supreme Court justices.

These studies all indicate, through a variety of measures, that the Senate confirmation process is becoming increasingly contentious in its entirety. It seems that modern day Senators are much less willing to automatically defer to the President than they used to be. This trend leads to the next question that the literature addresses: why do we see these increases in contentiousness?

The previously explored answers to these questions are extremely diverse. Some scholars claim that the big shift in the confirmation process came because of the Robert Bork nomination in 1987. According to scholars, the intense partisan debate surrounding Bork's nomination opened up an entirely new and untraveled avenue for Senators to present and debate their ideological stances (Epstein, Lindstadt, Segal, and Westerland 2006). Other studies discredit this claim, explaining that overall, the partisan debate surrounding Supreme Court nominees remains virtually unchanged. One study, analyzing the content of the hearings and debate during nomination processes in the pre-Bork versus post-Bork eras, finds that the Bork nomination neither signified nor caused a shift in the dynamics of the confirmation process (Guliuzza, Frank, Reagan, and Barret 1994).

While some specific explanations such as these exist, most studies have instead focused on the theoretical explanations that often seem intuitive when trying to answer this question. It is possible that the increasing contentiousness has little, if anything, to do with the actual nominees themselves. Instead, there has been some focus on the composition and mindset of the Senate in its advice and consent role. Krutz, Fleisher, and

Bond (1998) contend that the existence of more "policy entrepreneurs" in the Senate has led to the increased debate. They explain that these Senators are more willing to critically scrutinize nominees, and in doing so will find negative attributes that they will not hesitate to bring to the Senate floor. Without Senators of this mindset, the Senate's typically passive role in the confirmation process would be likely to persist.

Perhaps the most intuitive and seemingly straightforward explanation as to why the process has become so divisive comes from looking at the partisan relationship within the Senate. Partisan polarization in the Senate is at all-time high levels in recent years, and has been on a steady increase in recent decades (McCarty, Poole, and Rosenthal 2006). Given the importance of the Supreme Court in policy-making, it seems clear that increased polarization would lead to a more contentious confirmation process. As parties become more ideologically distinct, they will have more to lose if their counterparts win political battles. As such, we would probably expect to see Senators place more weight on the importance of Supreme Court nominees. Cameron, Kastellec, and Park find that polarization in the Senate has increased in tandem with an increasing number of 'nay' votes on the Senate floor, indicating a connection between polarization and the opposition to Supreme Court nominees (2013).

Finally, it is important to look at the nominees themselves. While the Senate is in charge of confirming nominees, the President is in charge of selecting these nominees. Often, Presidents will select nominees that they perceive to be ideologically similar to them and thus likely to be helpful in pushing through certain items of their agenda through favorable decisions (Szmer and Songer 2005). As such, we may expect to see

different Supreme Court nominees as Presidential goals alter. Here again, Cameron, Kastellec, and Park conducted a study. They find that there is a clear relationship between a candidate's ideological extremism and the amount of opposition that candidate receives in the confirmation process (2013). While this study does provide interesting implications, it is not fully compelling. The confirmation process has become steadily more contentious in recent years, yet according to the DW-NOMINATE scores (ideological gauges used in this study), the extremism of nominees has seen no such steady increase. It seems that there is more left to be discovered here.

The claim that the confirmation process has experienced an increase in divisiveness does not go entirely unchallenged. While statistics do show that the confirmation process itself has become much longer and Senators tend to vote against nominees more frequently than in the past, some researchers claim this may not necessarily indicate an increased level of contention. Stephen Carter claims that the confirmation process has actually become more of a "lovefest" in that while more questions are directed towards the nominees, they are less pointed and controversial than they ever have been before (1995). Nonetheless, he continues to point out that while the process may be becoming more contentious, it is just becoming less focused on ideology than ever before. He explains that this is because rather than focusing on a justice's qualifications, people are now only paying attention to "disqualifications". As such, we see nominees to the Supreme Court attacked based on mistakes they have made in the past, rather than anything substantively related to their ability as a Supreme Court justice. In addition to this study, Epstein and Segal indicate that the increased levels of media

coverage surrounding confirmation hearings do not necessarily indicate a more contentious process. Instead, these effects are just consequences of modern day media tendencies (Epstein and Segal 2005, 94). This book, however, does not discredit the changing nature of the confirmation process, and leaves the issue of overall contention relatively unaddressed.

Overall, the general trend is clear: the Supreme Court confirmation process has become much more contentious in recent decades. Through the use of a number of metrics, scholarly work on this topic seems to agree. When trying to decide why the process looks the way that it does, there is still disagreement among political scientists. While polarization seems to be consistent with the increases in divisiveness, a number of other factors seem to be notable. The inconsistencies in these studies provide an avenue for further research to consolidate previous theories.

Supreme Court Justices' Behavior and Decision Making

Following the completion of the confirmation process, Supreme Court justices are tasked with important legal decisions with significant policy implications. Clearly, as evidenced by the rigor of the confirmation process previously addressed, judicial decision making is of crucial importance to politicians in Washington and across the country. Supreme Court decisions are binding on all federal courts in the United States; thus the decisions made by the confirmed Supreme Court justices cast a wide umbrella over the nation's courts.

Given the implications of Supreme Court decisions, it comes as no surprise that scholars have aggressively attempted to understand how and why justices make the decisions that they do. A wide variety of explanations have been presented in an effort to explain and predict judicial behavior, though these explanations simplify down to the overarching debate: law versus politics.

On the 'law' side of the debate, the framework that is used to describe a justice's behavior is called the legal model. This model essentially states that the Court's decisions are based on the specific facts of the case in the context of written and common law (Segal and Spaeth 1993). Essentially, this model makes the claim that a justice's personal attitudes or opinions regarding the subject matter of a case are not a part of the consideration employed by a Supreme Court justice.

Within the legal model, a variety of interpretations and explanations of judicial behavior are available. Justices may decide according to the "plain meaning" of a written statute. They may also act in a way that they believe is in accord with the legislature's and framers' intent in the lawmaking process. Third, justices may act according to precedent, calling on the doctrine of *stare decisis*. Finally, Supreme Court justices may vote in order to remedy a perceived imbalance between individual rights and societal interests (Segal and Spaeth 1993).

On the 'politics' side of the debate, an attitudinal model is used. In contrast to the legal model, this model claims that justices interpret the specific facts of the case in the context of their own ideologies (Segal and Spaeth 1993). Given the isolated nature of the

Supreme Court, it is not unlikely that justices could choose to employ their own beliefs on a subject in their decision making.

More often than not, justices explain their voting choices based on a mixture of each of these models. Many scholars argue, however, that in reality, the legal model cannot be used to evaluate judicial decision making. In the substantial majority of cases that come before the Supreme Court, both sides are able to locate precedent in their favor, both sides argue that the imbalance of interests tips in their favor, both sides craft logical and reasonable arguments as to how the text and interpretation of written law supports their side (Segal and Spaeth 1993). Thus, according to the legal model, Supreme Court decisions cannot be made on the basis of law alone, as there is no conceivable way to identify the legally 'correct' decision in most cases.

This leaves the attitudinal model. Supreme Court justices are granted considerable leeway in their decision making in the Court. Justices are not constrained by any electoral or political accountability, they are isolated from an increasingly media-driven nation, and they have complete control over their docket (Segal and Spaeth 1993). Given these characteristics, justices have considerable control over pursuing their own policy objectives.

The attitudinal model manifests itself in a variety of ways. In order to determine if a justice votes according to his or her political ideology, their ideology prior to their Supreme Court appointment must be determined and compared to their subsequent voting on the Supreme Court. Segal and Cover use the content of newspaper editorials prior to a justice's appointment to determine their perceived prior ideology. They identify this

ideology with a numerical score, called the Segal-Cover scores. With this measure, they find that the most important factor in judicial decision making is political ideology prior to the appointment (Segal and Cover 1989).

This claim is further substantiated by Cameron and Park (2009). This study utilized a new ideological score, called the "NOMINATE-Scaled Perception" score. These scores utilize and compile results from previous attempts to determine a justice's prior ideology, including the Segal-Cover scores discussed above. Cameron and Park find that these scores not only help predict behavior more accurately than the Segal-Cover scores, but that their predicting power is steadily growing in recent years.

Despite a multitude of publications supporting the attitudinal model as the true framework through which judicial decision making can be evaluated, the legal model does not go undefended. Many scholars have dedicated studies to explaining the fact that the attitudinal model has been overemphasized. The narrow focus on the attitudinal model has led scholars to disregard the fact that Supreme Court justices are still constrained by precedent. Shapiro argues that the doctrine of *stare decisis* is a primary mode of common communication between all actors in the judicial system. To disregard this as a crucial explanatory variable in judicial decision making would be a glaring mistake (Shapiro 1972, Brenner and Stier 1996).

It is also important to note that Supreme Court decisions have substantial implications for the entire federal judicial system, and Supreme Court justices are aware of this. Charles Johnson explains that the "language of the law" through precedent is a

major constraint on Supreme Court justices as they make their decisions on the bench (1987, Richards and Kritzer 2002).

Judicial politics has clearly evolved with a changing society. Today's important issues are significantly different from issues of decades ago when the law versus politics debate originated. Furthermore, the nature of Supreme Court justices and the political process surrounding their appointment and confirmation is changing as well. Nonetheless, these two models still persist and the debate continues to be at the center of studies on judicial politics today (Lax and Rader 2010).

Using a goal-oriented explanatory framework to explain judicial behavior helps to shed more light on this subject. Through this framework, the 'legal' argument means that Supreme Court justices behave with their specific legal policy goals in mind (Baum 1997). To some, these policies may be related to interpretation of the Constitution. To others, the policies may allude to a justice's preference for defending *stare decisis.* Prior studies conclude that while these goals may not *cause* decisions, they go a long way to explain decisions (Goldman and Jahnige 1985). These studies, however, may not go far enough in explaining judicial decision making. First, a justice's legal policy preferences may be enhanced by other goals. Further, in looking exclusively at a justice's vote, one may miss other important aspects of Supreme Court behavior. For example, a justice's decision to grant certiorari or a justice's specific reasoning in a case are important elements of judicial behavior (Baum 1997, 41). Thus, even if legal policy goals are a crucial determinant in judicial behavior, it may not be the whole story.

Supreme Court justices offer an interesting subject for a study through the goal-oriented framework. While many other political representatives in the United States government may behave in a way that will fulfill goals of reelection, Supreme Court justices have no such motives. As lifetime appointees with a much higher degree of isolation than any other American governmental body, Supreme Court justices often have fewer outside goals than other actors. Supreme Court justices do occasionally seek higher office, though. For example, Associate justices often seek the Chief Justice position. Scholars of these goals do point out that they may offer some explanation as to how justices act on the Court, especially when justices seek other political offices, such as the Presidency (Baum 1997, 44). Nonetheless, the occasions in which a Supreme Court justice has pursued another political office are limited enough that this goal probably offers little explanation, and certainly is not applicable to the entire Supreme Court.

On the other end of the spectrum, justices may act in order to advance their public policy goals. According to Baum, in order to advance a public policy goal, a justice can do one of two things. First, he or she can simply vote according to what is perceived to be good public policy. Second, he or she can work strategically to move the Court ideologically closer to what he or she sees as an ideal policy standpoint (1997, 89). Thus, Supreme Court justices may, to an extent, ignore strictly legal factors in an argument. Further, Supreme Court justices may choose to go against his or her personal opinion in an effort to achieve the best political outcome given the circumstances. Certainly, Supreme Court justices are in a position to make decisions that can drastically alter the

political landscape. Given this reality, it is far from unreasonable to believe that public policy goals drive judicial behavior.

Other theories regarding judicial behavior have been more specifically tailored than the overall law versus politics debate. The President and the Solicitor General's office presumably each have influence in Supreme Court operations. However, the President's role as executor of Supreme Court decisions may offer some explanation in looking at Supreme Court justice's decisions. This argument is much more narrowly tailored than others. While it may help to explain a certain portion of a justice's mindset, it cannot be concluded that this really shows what causes a justice to vote the way that he does (Curry, Pacelle, and Marshall 2008). Instead, it seems that the majority of the influence that comes from the President's and the Solicitor General's offices manifests itself through the Supreme Court's docket (Curry, Pacelle, and Marshall 2008).

This is not to downplay the importance of the President in interpreting judicial behavior, though. Studies show that the President is very likely to select a nominee with a similar ideology to his (Szmer and Songer 2005). Presidents tend to do this in an attempt to advance their own policy and ideological preferences through the Supreme Court. Epstein and Segal do see a correlation between a President's ideology and a justice's subsequent ideology as well (2005). This finding indicates that there may be some explanatory power in the President's nomination itself. This relationship is not particularly strong though. Further, studies indicate that while the nomination and confirmation processes experience considerable presidential influence, once a justice is confirmed, he or she will pursue policies independent from the President's wishes

(McCarty and Razaghian 1999). Altogether, it seems likely the President may have some influence in Supreme Court outcomes; however, it does not appear to be the strongest indicator of judicial behavior.

If there is one thing that this substantial collection of judicial behavior literature tells us, it is that we still do not know definitively what drives judicial behavior. While literature seems to indicate that both attitudinal and legal models may help to explain judicial behavior, there is still no clear answer to this question. It is possible that all of these factors go into a justice's decision making. However, a more recent trend may indicate otherwise.

Since the 1960s, judicial behavior has becomes steadily more predictable (Cameron and Park 2009). This indicates that there may yet be something missing from the explanation. My study attempts to find these missing links. The correlation between the increasing contentiousness in the confirmation process and increasing predictability seems to offer rudimentary support to this paper's second hypothesis. The contentiousness of the Supreme Court confirmation process may be that missing link.

How the Increased Contentiousness is Affecting Judicial Behavior

In looking at my second hypothesis—that the increased contentiousness in the confirmation process is likely to yield justices that are more likely to vote at the ideological extremes compared to their perceived ideology—an increased level of predictability may make sense. If justices tend to vote more aggressively in the direction of their perceived ideology, their behavior may become more predictable, at least in that

direction. Supreme Court nominees are not isolated from the confirmation process. Whether they are present for hearings or not, nominees for spots on the Supreme Court understand the partisan-infused debate that surrounds their confirmations. Thus, a nominee is more likely to be influenced, to some degree, by the Senate in the confirmation process. When a nominee goes through a particularly contentious confirmation process, he or she will naturally become more associated with those Senators who supported the nominee. When the process is very divisive, Senators who are ideologically opposite from the nominee will tend to criticize the nominee heavily. To simplify this thinking, a contentious confirmation process that falls on partisan lines will tend to create two very distinct "teams." The confirmed justice will then have a tendency to support those that were on his or her 'team' during the confirmation. Thus, after a particularly contentious process, we may expect to see a justice become even more ideologically extreme than we would have expected. This being the case, we would certainly expect to see an increase in the ability to predict a justice's ideological voting behavior on the Court. For this reason, the trend in increased predictability may actually support my second hypothesis in this paper.

Predicting Supreme Court behavior is a topic that receives some attention in scholarly work, though very limited consensus has been reached. Furthermore, very little research has attempted to connect the confirmation process to subsequent judicial behavior.

One attempt at predicting and interpreting judicial behavior involves the analysis of human nature. Lawrence Baum (2006) simplifies judicial behavior into a basic

analysis of human nature. Essentially judges, like people, have an interest in being liked and respected by the people and audiences that are close to them. Supreme Court justices have a variety of audiences to whom they are accountable. For example, Supreme Court justices wish to earn the respect of their colleagues on the bench, other branches of government, various interest groups, and the general public (Baum 2006). The desire to please these groups offers a strong indication of how justices may behave. Thus, by analyzing how the audiences surrounding a justice would like that justice to behave on the Court, we may be able to predict a justice's decision making tendencies. In conjunction with my second hypothesis, this would make sense. If a justice begins to feel as if they are a member of a 'team', they will have an even stronger desire to try to please their surrounding audiences. Thus, a justice may tend to behave in more extreme ways, ideologically speaking, if they develop a certain connection with their political party.

This concept of "teamsmanship" has received some scholarly attention. Frances E. Lee (2009) attempts to explain the increase in contention within the Senate by using this concept. Rather than increased partisanship, the increasing division within the Senate can be attributed to the party's sense of being a team. Members of each party are concerned with their party's reputation. Furthermore, the President serves as the figurehead for the party that he represents. As such, the agenda that the President puts forth tends to be favored within the Senate through this source of 'teamsmanship'. Lee explains that there is, contrary to common belief, a general consensus among various partisan groups on a broad range of political issues. Thus, the increased divisiveness in the Senate seems to be attributable to something apart from ideological polarization. This

idea of identifying with a party as a team helps to explain this distinction (Lee 2009). Supreme Court justices, in accord with this concept, vote according to the way that their supporting party (team) would prefer them to vote. Theoretically speaking, if a justice comes through a difficult confirmation process, this sense of a 'team' would be stronger. This would be the case because during heated confirmation battles, the lines are clearly drawn between the Republican and the Democratic senators. This means that a justice will be strongly supported by one party, while attacked by the other. It would be natural for a justice to build a bond with their 'team' after this kind of relationship.

Many scholars claim that predicting future judicial behavior at the time of confirmation is extremely difficult. One of the most commonly used ideological score sets is the Segal-Cover scores. Using these ideological scores to predict judicial behavior has proven fairly unsuccessful (Epstein and Mershon 1996). However, recently revised scores have helped to offer greater ability in predicting judicial behavior. The NOMINATE-scaled perception scores, which this study will utilize, have proven to offer a relatively accurate prediction as to how justices will vote while on the court. Furthermore, as has been previously discussed, these scores are becoming increasingly successful in predicting judicial behavior (Cameron and Park 2009).

While it may be the case that judicial behavior is predictable according to perceived ideologies, this still does not directly address the connection between the confirmation process and subsequent judicial behavior. Indeed, there is virtually no literature that treats the contentiousness of the confirmation process as an independent variable in an attempt to describe judicial behavior.

The implications of the confirmation process have been studied in other respects. Often, the ideological composition of the Supreme Court is the most prominent point of discussion throughout the confirmation process. Future nominees are often discussed as having a more important impact on the dynamics of the American political system due to increasingly polarized parties (Epstein, Lindstadt, Segal, Westerland 2006).

Furthermore, the contentiousness of the Supreme Court confirmation process may have an impact on the overall quality of the Court. The general theory is that because the process has grown so contentious, Presidents are likely to nominate lesser known candidates, rather than prominent legal scholars who would be more suited for the position (Fein 1991). Recent studies have provided evidence that these claims are inaccurate, though (Comiskey 2006).

Binder and Maltzman (2009) add to the literature that attempts to analyze the implications of increased contentiousness. They make use of statistics pertaining to the number of days it takes for a nominee to be confirmed and the percentage of unsuccessful nominations (as based on nay votes). Additionally, they utilize a survey-based study in order to evaluate judicial and court performance. While this study focuses primarily on federal appellate courts, it has some structural similarities to the study I present here. In analyzing the implications of increased contention, Binder and Maltzman focus primarily on how citizens view judicial decisions, as well as how the courts themselves perform (due to longer lasting vacancies). Ultimately, these two conclude that increased contention has slowed down the courts' performance, and that judges who come out of contentious confirmation process tend to be negatively received by the average citizen.

These results, while interesting, do not extend into the content and ideological tendency of judicial decisions.

Most literature that discusses the contentiousness in the confirmation process points out the possible implications of this new dynamic. Cameron, Kastellec, and Park point out that interbranch and constitutional stability may be jeopardized due to increases in contention (2013). Nonetheless, most of these studies simply point out the potential implications of the changing process, but do not investigate those implications. I use the confirmation process as an explanatory variable, and in doing so, I will directly investigate the implications of the confirmation process.

Overall, the literature remains indecisive with regard to predicting judicial behavior. Any number of models can be used to describe decision making. The attitudinal and legal models offer considerable leverage in predicting Supreme Court behavior. In addition, treating Supreme Court justices as goal-oriented actors helps to substantiate these explanations. Nonetheless, as a glance into contemporary Supreme Court scholarship will indicate, the debate between law and politics as the driving factor in a justice's decision remains unsolved. Muddling through the attempts to resolve this debate seems to indicate a few things. First, it is likely that law and politics combine to play a role in most Supreme Court decisions. Second, decision making is becoming increasingly predictable, indicating that some contemporary issue may drive judicial behavior. Finally, it seems that something is missing from the puzzle. While previous literature goes a long way in explaining judicial behavior, there appears to be more to the story, especially

given the recent trends in predictability. These points lend themselves to further research, which this study, and this hypothesis specifically, is dedicated to.

Broadly speaking, the literature does not offer much insight into the connection between the confirmation process and subsequent judicial behavior. However, scholars such as Baum, Lee, and others have given strong reason to suspect a connection between these two issues. This paper attempts to fill that void. With this study, I will be able to link the confirmation process to judicial behavior in a way that has not been done before. In doing so, I will be able to determine how much a justice's behavior can be predicted when he or she comes out of a contentious confirmation process, and what the implications are for modern day justices, as well as future Supreme Court nominees.

Chapter 3: Quantitative Study

Introduction

I predict that political polarization tends to lead to an increase in the contentiousness of the confirmation process and that increased contention will tend to make justices behave more aggressively in line with their perceived ideology once they are confirmed. Prior to outlining the models that I use to test these claims, it is important to review these hypotheses.

While any number of factors can contribute to increased contention, I predict that political polarization is the primary factor that has led to this increase in contentiousness. Theoretically, as polarization drives the median members of each party farther apart, political defeat will result in more severe consequences (Smith and Gamm 2012). Since the Supreme Court's rulings have serious implications for legislation, positions on the bench are quite important in the eyes of lawmakers. As such, the confirmation process for Supreme Court justices marks an important political decision. With increasing distance between the political parties, we should expect to see more argument over whether or not a nominee is confirmed as a Supreme Court justice.

My second hypothesis states that the more contentious the confirmation process is, the more the confirmed justice will behave according to his or her *perceived* ideology during his or her tenure on the bench. Put more simply, if a justice is perceived to be liberal prior to confirmation and then is subject to a rigorous and divisive confirmation

process, that justice will then vote liberally. This idea stems from the aforementioned idea of 'teamsmanship' (Lee 2009).

In an effort to analyze these claims, I developed two sets of empirical models. The first set of models allows me to analyze the trends of Supreme Court confirmations dating back to 1937. The second set of models extends the data to analyze judicial behavior following the confirmation process.

Data: Hypothesis One

In developing my data set, the first issue to face was the time frame. While data on Supreme Court confirmations dates all the way back to the late 1700s, I have decided only to analyze confirmations starting in 1937 (Franklin D. Roosevelt's nominations). This decision was based on the fact that the Roosevelt New Deal era marked a shift in Supreme Court politics. Prior to the New Deal, the Court was primarily focused with economic rights; however, following Roosevelt's New Deal, the focus of the Supreme Court shifted to civil rights and liberties issues (Rosen 2006). This shift, then, marks a good place to begin my analysis. With this study, I hope to indicate which direction the confirmation process has been heading in and where it will continue to move, as well as to indicate potential implications for these shifts. Thus, it is useful to limit the study to the era in which the Supreme Court began to behave as it is today.

I will progress through the necessary data for the models in order. Beginning with the first model, I compiled data for my dependent variable (confirmation contentiousness) in accord with previous studies. The two main contention statistics are the number of nay

votes received and the number of days that it takes for deliberation on a candidate (Binder and Maltzman 2009, Rutkus and Bearden 2010). Unlike most studies before this, I chose to focus on the Judiciary Committee rather than the Senate floor. The Judiciary Committee's job is to thoroughly analyze and judge a nominee to the Supreme Court. As such, members of the committee are fully vested in the confirmation process. Often, with Judiciary Committee approval, the vote on the Senate floor will be a mere technicality. As such, I think it is more useful to focus on the Judiciary Committee as a point of analysis. I use the number of days within the committee, and the number of nay votes that a nominee receives when the committee voted on whether or not to report a nominee favorably. One crucial issue here is the number of cases available. Whereas the number of days has been amply recorded, the number of nay votes is more limited because, for a long time, Judiciary Committee votes went unrecorded. In order to work with this problem, I developed a four point (0-3) scaled contention variable that is based on the number of nay votes that a nominee received in the Judiciary Committee. See Table 1 for this scale. The data for each of these variables was easily compiled through the Congressional Research Service (Rutkus and Bearden 2010) [1].

This scale was based on a few observations. Ultimately, this scale is designed to capture how much contention there really was during the confirmation process within the Judiciary Committee. I had to make two key choices here. First, I had to decide where to

[1] I also experimented with a scale in which 0 nay votes were included within the 1 value for contention. Results did not differ between these models. Theoretically, this scale is stronger, since unanimous recorded votes (particularly today) are the main mark on a process with virtually no contention.

make the cut off that would classify the process with a maximum level of contention (or a '3'). Second, I had to decide whether to include nominees receiving zero nay votes within the '0' or '1' category. Often, when there is a voice vote, it is the ultimate indication of a lack of contention. However, since the 1960s, it has become the norm to conduct a recorded vote even when there is no contention (Rutkus and Bearden 2010). Thus, I decided that given the range of my study, it was theoretically more fitting to treat zero nay votes as minimum contention.

Turning to the independent variable of interest for this model, I used data that captured polarization. Particularly, I focused on the Judiciary Committee's polarization, since this study treats it as the main focus. Essentially, this data captures how polarization affects the first and highly important stages of the confirmation process. Committee polarization has also followed closely the trend of Senate polarization as a whole (see Figure 1). DW-NOMINATE scores are the useful gauges of ideological direction for politicians. In order to develop a committee polarization variable, I collected the DW-NOMINATE scores for each of the members on the Judiciary Committee at the time of the particular nomination. I then divided the committee along party lines, and calculated the median score for each party. The absolute value of the Democratic median subtracted from the Republican median then serves as a measure of political polarization for the committee. This variable is titled "$Comm_{Polar}$" The larger this number is, the wider the gap between the median member of each party, thus indicating a wider ideological gap and stronger levels of polarization.

In addition to my independent variable of focus, I included a few other explanatory variables within my models in order to control for certain factors. First, I included a time trend variable ("Number") that is related to the number of the total nominations within my time frame. As such, Hugo Black is a one on this scale, whereas Elena Kagan is a 45. The variable "$Comm_{Diff}$" is calculated by the NOMINATE-Scaled Perception score for each nominee minus the Judiciary Committee's median NOMINATE score. The NOMINATE-Scaled Perception score will be explained more fully shortly. This variable helps to capture a nominee's ideological distance from the median member of the Judiciary Committee. Finally, the variable "Unified" represents whether or not the majority membership of the Judiciary Committee lines up with the party that the nominee represents (as judged by the nominating President's ideology). This data is binary, meaning that if the Committee's majority representation and the nominating president's party lines up, the variable will equal one. All other cases result in the variable equaling zero. Compiling the data for each of these variables allows for the formulation of a model that will test the first hypothesis.

Models: Hypothesis One

The first set of models makes use of all of this data. I developed three regression models utilizing each of the available dependent variables for analysis. I used ordinary least squares regression analysis with each of these models.

1. $\widehat{Days} = \beta_0 + \beta_1 (Comm_{Polar}) + \beta_2(Comm_{Diff}) + \beta_3(Unified) + \beta_4(Number)$
2. $\widehat{Nay} = \beta_0 + \beta_1 (Comm_{Polar}) + \beta_2(Comm_{Diff}) + \beta_3(Unified) + \beta_4(Number)$
3. $\widehat{Contention} = \beta_0 + \beta_1 (Comm_{Polar}) + \beta_2(Comm_{Diff}) + \beta_3(Unified) + \beta_4(Number)$

Each of these models offers a different interpretation of contentiousness. The second and third models each capture the impact that polarization has on the number of nay votes that a nominee is likely to receive while in the Senate Judiciary Committee. Since the third model includes the scaled contention variable, I am able to include the nominees that were subject to voice votes. This allows for a larger number of cases than the model relying purely on nay votes.

Data: Hypothesis Two

The second hypothesis inverts my initial hypothesis. In this hypothesis, I anticipate how levels of contention impact judicial behavior. This involved using the levels of contention (Days, Nays, Contention) as independent variables in regression models. Additionally, I needed to devise a new variable that would capture the judicial behavior that I hope to observe. This dependent variable must capture ideological perception as well as subsequent judicial decisions that are evaluated on an ideological basis. There are a number of empirical scores available that evaluate judicial behavior; however, there are very few that attempt to evaluate a justice's *perceived* ideology prior to their term on the bench.

The most widely used scores to evaluate ideology in our political system are the NOMINATE scores. NOMINATE scores runs on a -1 to 1 range, where the most liberal ideology is a -1 and the most conservative ideology is a 1. While NOMINATE scores are not directly scored for Supreme Court justices, there are various scores that mimic what NOMINATE scores do (Martin and Quinn 2002). These scores are often converted back onto the NOMINATE scale as well. However, these types of scores cannot capture how justices were perceived prior to their various decisions while on the Supreme Court. Albert Cover and Jeffrey Segal attempt to capture a measure of a justice's ideology prior to the nomination (1989). These scores, commonly referred to as the Segal-Cover Scores, are made up of content analysis of newspaper editorials, written lower court opinions, speeches, and any other ideological positions the nominated justice may have taken publicly. These scores served to indicate a justice's perceived ideology on a similar positive-negative scale; however, subsequent studies have shown that they do not necessarily match up with a justice's actual ideology (Epstein and Mershon 1996, Martin, Quinn and Epstein 2005). Accordingly, new scores have been developed to make up for this imperfection. Charles Cameron and Jee-Kwang Park (2009) developed a new set of scores called the NOMINATE-Scaled Perception scores. These scores utilize the "best available NOMINATE scores" for the nominees. Essentially, these scores come from the nominee's previous political work. For example, if a justice previously served on the U.S. Court of Appeals, their decisions are analyzed within the context of the NOMINATE scores. In addition to this, Cameron and Park incorporate the aforementioned Segal-Cover scores. Essentially, these two scores are aggregated and then re-scaled to match the

NOMINATE score scale (from -1 to 1). This yields the NOMINATE-Scaled Perception scores, or NSP (Cameron and Park 2009).

I make use of the NSP scores to evaluate justices' behavior on the Court. My theory dictates that future judicial behavior will tend to vary based on the contentiousness of the process itself. As such, I needed to develop a measure that captures the difference between a nominee's perceived ideology (NSP) and that justice's subsequent ideological behavior while on the Court. I utilized two different ideological measures to capture this difference. The first of these measures are the Martin-Quinn Scores (Martin and Quinn 2002). Martin-Quinn scores, like the previously discussed scores, run on a negative to positive scale where scores below zero indicate liberal ideology and scores above zero indicate conservative ideology. These scores are calculated based on a justice's vote patterns entirely. Essentially, these two scholars group justices based on their whether they voted to affirm or reverse a decision. There is no ideological component yet. Based on these groupings, each justice is assigned a number. Martin and Quinn then arrange these numbers linearly according to groupings. Finally, they assume that each case presents the justices with a choice between a liberal and conservative vote. By designating liberal and conservative vote choices along this linear range, they are able to create an ideological numerical scale (Farmsworth 2007). This yields an ideological score that is based entirely on judicial decision-making. By subtracting this number from the justice's NSP, I am able to get a rough estimate for how far the justice differentiates (and in what direction) from their original perceived ideology.

The Martin-Quinn scores have one drawback in this context—they are calculated on a separate scale as the NSP scores. While both scores measure an ideological spectrum, the NSP scores operate on a -1 to 1 basis. The Martin-Quinn scores, on the other hand, are not restricted to any specified range. Most scores fall within an approximate -6 to 4 range, though. The fact that the scales do not add up creates a comparison problem. Lee Epstein and colleagues (2007) helped alleviate this problem by taking the commonly used Martin-Quinn scores and scaling them to a traditional NOMINATE ranged ideological score. They transform Martin-Quinn scores to an approximate -1 to 1 scale and use those calculations to estimate justices' location within the traditional NOMINATE common space scale (2007). Epstein and colleagues refer to these scores as the Judicial Common Space scores. I use these scores in place of the previously discussed Martin-Quinn scores in a series of separate regressions. Thus, the new "$Behavior_{JCS}$" variable is equal to the NSP scores minus these JCS scores. The theory behind this variable remains the same as with the "$Behavior_{MQ}$" variable. Together, these two variables help to approximate a justice's ideological behavior in comparison to his or her perceived ideology prior to confirmation. While ideological behavior can be difficult to quantify given the multidimensional structure of Supreme Court decisions, these two sets of data are widely accepted and do provide an adequate overview of judicial behavior.

As was previously mentioned, these models make use of the various estimates for contention as the independent variables of focus. I included the 'Number' variable in these models as a time series control as well. The structure of these models leaves some

complication in interpretation. I will specifically address these explanations upon my presentation of the results.

Models: Hypothesis Two

The three models that I use to test my second hypothesis are structured similarly. The models are as follows:

1. $\widehat{Behavior} = \beta_0 + \beta_1(Party) + \beta_2(Days) + \beta_3(PartyDays) + \beta_4(Number)$
2. $\widehat{Behavior} = \beta_0 + \beta_1(Party) + \beta_2(Nay) + \beta_3(PartyNay) + \beta_4(Number)$
3. $\widehat{Behavior} = \beta_0 + \beta_1(Party) + \beta_2(Contention) + \beta_3(PartyContention) + \beta_4(Number)$

Within these models, 'Party' represents the party of the nominating president. This is used in order to capture the party of the nominee that is up for confirmation. 'Contention', 'Days', and 'Nay' all represent measures of contention within the confirmation process, as was presented earlier. Finally, each of these models includes an interaction term. Given the importance of the *direction* of the impact on the dependent variable in these models, this interaction term is necessary. The Behavior variable is a measure of the NSP minus the MQ /JCS. This means that for a justice perceived to be conservative prior to confirmation (an NSP that is greater than 0) to become *more* conservative, we would expect a *negative* impact on the Behavior variable. This happens because in the equation (NSP – MQ/JCS) the right side of the equation would become more positive than the left, leaving us with a negative number. The exact opposite of this

relationship is true for nominees that are perceived to be liberal, since these justices start with NSPs that are negative.

The interaction term allows us to capture these differences. When Party is equal to one, the nominating president is a Democrat; when Party is equal to zero, the nominating president is a Republican. Thus, with a Republican president, the interaction term and party variables drop out of the equation, leaving us with our measure of contention. In each of these models, I expect to see a *negative* sign on the measures of contention. This will indicate a nominee that is perceived to be conservative tends to become more conservative due to a contentious confirmation process.

The inverse of this will support my hypothesis for liberal nominees. In this case, the interaction term and Party variables will both remain in the equation. This means that the overall impact that I will be measuring will be the sum of the coefficients on the interaction term and the measure of contention. To support my hypothesis, I expect this sum to be *positive*. This will indicate that a nominee perceived to be liberal will become more liberal. These effects will be further explained and clarified within the context of my regression analysis.

For a complete list of the variables and their definitions, please see Table 2.

Findings and Results

Hypothesis One

The results from my first set of models offer evidence in support of my claim. Table 1 lists the coefficient, standard error, and p-value results for my analysis. These regressions utilize three different measures of contention as the dependent variable. The first measure is the number of days it takes for the committee to deliberate, the second measure is the number of nay votes that a nominee receives in committee, and the third measure is my scaled contention variable based on nay votes received. The committee polarization variable is my independent variable of focus. The results are reported in Table 3.

Overall, these results provide support for the claim that increased polarization within the Senate Judiciary committee leads to a more contentious process. All three models provide some support for this claim; I will go through them one by one.

In the first model, the Days Model, the coefficient on the committee polarization variable indicates that for each unit increase in committee polarization, we expect the Judiciary Committee to take about an extra 86 days to report on a nominee. Because the polarization variable is measured according to the NOMINATE scale that ranges from -1 to 1, a one unit change is not realistic in explaining the true effect. The maximum value of polarization over this time period in the committee was 0.988 and the minimum value was 0.225. Thus, the largest change we could expect in polarization is 0.763. The polarization variable measures the distance between the median members of each party

within the committee. Thus, for every increase in that gap by just 0.1, we expect to see an increase in the time the committee takes to deliberate of 8.6 days. Additionally, an increase in the level of polarization by one standard deviation would result in a corresponding increase in the number of days by about 18.4 days. These results are statistically significant at the five percent level. Ultimately, what this shows us is that as the committee becomes more polarized, they take longer to decide on Supreme Court nominees. This is a clear indication of the process becoming more contentious. It is also important to note that the other independent variables that were included from a theoretical standpoint are not significant at any statistical level. The only variable within this regression that impacts the length of the Judiciary committee's deliberations is the level of polarization. Furthermore, the R^2 for this model is relatively high, indicating that this set of variables goes a long way in explaining the variance in the number of days it takes for a nominee to move through the Senate Judiciary Committee.

The second model, the Nay Model, provides the weakest evidence of all three. Nonetheless, the results of this model do indicate some support for this hypothesis. In this case, the coefficient on the polarization variable has a p-value of 0.065, which is outside of the five percent significance level. Nonetheless, the variable is statistically significant at the ten percent level and moves in the direction that I expect. At face value, this coefficient indicates that for every unit increase in polarization, we expect a nominee to receive about 13.5 more nay votes in the committee when the committee votes to report. Today, the committee only has 18 members, so these results are not very useful for the sake of interpretation. As with the previous model, it is more useful to analyze the result

according to an increase in polarization of 0.1. In this case, we would expect to see an increase in the number of nay votes by about 1.4. This means that an increase of 0.1 in polarization would cause between one and two more members of the committee to vote against a nominee. Additionally, a one standard deviation increase in the level of polarization would cause the number of nay votes to increase by about 2.9 votes. Thus, this model indicates mild support for the first hypothesis. Additionally, this model does not have any other independent variables that are statistically significant.

The third and final model uses the scaled contention variable that I designed. This model adds further evidence that supports this first hypothesis. What this model shows us is that with an increase in the level of polarization, we should see the confirmation process increase on the contention scale. As noted in footnote two (page 64), I ran this regression as an ordered probit model as well in order to substantiate these claims. I did this in order to test how robust the OLS results are due to the limited range dependent variable. According to the OLS results, an increase in polarization by 0.1 would result in a corresponding increase in my scaled contention variable of about 0.54. An increase in polarization by one standard deviation would cause an increase of about 1.15 along this scale. Within this model, the $Comm_{Diff}$ variable is also significant at the ten percent level. These results indicate that the larger the distance between a nominee's perceived ideology and the median member of the judiciary committee's ideology is, the more contentious the confirmation process will be. Once again, this model offers a relatively high R^2 of 0.387. This indicates that this model does help explain quite a bit of the general level of contention in the confirmation process.

It is important to note that these three models all include both the "Number" variable and the "$Comm_{Polar}$" variable. Given the general trend of increasing polarization over time, it is theoretically possible that these two variables are highly correlated. This could result in multicollinearity problems that may skew the results. In order to test these models for multicollinearity problems, I conducted variance inflation factor tests. These tests estimate how much the variance of a regression coefficient is inflated due to multicollinearity. The results of these tests did not indicate distinct problems. There is relatively clear relationship between these two variables, though not high enough to cause any significant problems. Additionally, I tested these models for autocorrelation, heteroskedasticity, and model specification. All three models passed these tests.

Overall, this evidence provides fairly strong support for the hypothesis that the increasing level of contentiousness in the Judiciary Committee can be attributed to polarization. As my data indicates, the committee is a fairly accurate resemblance of the Senate floor with regard to polarization over the period that I am observing (Cameron, Kastellec, and Park 2013). The general trend, then, is that as polarization increases (both on the Senate floor and within the committee), the confirmation process increases in contention. This leads me to the evidence provided in support of my second hypothesis.

Hypothesis Two

My second group of models takes the three main contention measures from the previous models as their primary independent variable. These models have my "Behavior" variables as their dependent variable. These variables are a measure of how

far a nominee differentiates from his or her perceived ideology once he or she is on the Supreme Court. Table 4 lists the coefficients, standard errors, and p-values for the "Behavior_{MQ}" models.

The presence of an interaction term makes these results slightly more difficult to comprehend, so I will examine them carefully. As was previously mentioned in the outline of these models, in order for the results to support my hypothesis, I would expect to see a negative sign in front of the coefficient that represents the level of contention (Days, Nay, Contention). I would also expect the sum of the coefficients on the interaction term and the contention terms to be positive. Broadly, this is the case in all three of these models. The conditional interaction term in these models allows me to analyze the impact of the contention of the confirmation process on subsequent judicial behavior, conditional on party.

Beginning with the Days model, we see some, albeit limited support. Importantly, the coefficient on the "Days" variable is not statistically significant. Nonetheless, the direction of the results is what I expected to see. The "Days" variable, standing alone, indicates the effect of contention on a nominee appointed by a Republican president. The interaction term in this model, "PartyDays", is significant at the ten percent level. The true effect of this variable, though, is the sum of the coefficients on the "Days" and "PartyDays" variables. In this case, the true interaction coefficient is about 0.026 (standard error of 0.0173). This means that the coefficient on the Days variable would be equal to 0.026 when the nominating president is a Democrat. By calculating the standard error of this interaction effect (Friedrich 1982), I was able to test the significance of the

interaction effect. In this model, the interactive effect was not statistically significant. This interactive effect captures the impact of contention on judicial behavior for nominees appointed by Democratic presidents. While the direction is technically what I had expected, these results are not conclusive.

Turning to the "Nay" model, the results are more supportive. The coefficient on the "Nay" variable is significant at the one percent level. This variable indicates that one additional nay vote in the Judiciary Committee will tend to cause a Republican appointee to behave more conservatively by 0.353 units. Again, this is on the NSP minus Martin-Quinn scale. Thus, as the contention increases, conservative nominees will become more conservative in their subsequent judicial behavior. Turning to the interactive effect, the true coefficient (Nay votes when the nominating president is a Democrat) is about 0.053 (standard error of 0.1746). This interactive effect is significant at the five percent level. What this tells us is that for nominees appointed by Democratic presidents, we expect each additional nay vote to cause subsequent judicial behavior to become more liberal by 0.053 units. Based on these initial results, it does appear that contention has some effect on subsequent judicial behavior; however, it seems to have a stronger impact for conservative appointees.

The third model uses my scaled contention variable as the primary measure of the contentiousness of the confirmation process. Beginning with the "Contention" variable, we see a coefficient of -0.589 that is statistically significant at the one percent level. This means that an increase in one unit along the contention scale will result in a Republican nominee becoming 0.589 units more conservative once they are on the Supreme Court.

The interactive effect has a coefficient of 0.227 (standard error of 0.261). This effect is the coefficient on Contention when the nominating president is a Democrat. This interactive effect is not statistically significant, though. Overall, these results mimic the findings from the previous model. It seems that the idea that contention will make a nominee behave more ideologically similar to their party in their subsequent behavior is more pertinent to Republican appointees than Democratic appointees.

Next, I will turn to the dependent variable that uses the Judicial Common Space scores as the primary measure. These results will provide a useful comparison, since the scaling of the Martin-Quinn differs from the NOMINATE (-1 to 1) scale. The coefficients, standard errors, and p-values for these regressions are listed in Table 5.

I will only briefly discuss the "Days" model, as none of the coefficients are statistically significant. It is interesting to note in this model is that the conditional interaction effect equals zero, meaning that in the case of Democratic appointees, it seems that contention does not impact judicial behavior. For Republican appointees, the impact is in the direction that we would expect to see. However, as noted above, this effect is not statistically significant.

The model using my scaled contention variable yields similar results. Here, the measure of contention and the conditional interaction effect are both not statistically significant. The true interaction effect is about 0.007 (standard error of 0.0619). This effect has the sign that I would expect to see; however, it is very close to zero. Republican appointees, on the other hand, have a coefficient in the direction that I would expect to see. This result is not statistically significant. In this model, there are two

statistically significant variables—"Number" and "Party". The slightly positive coefficient on "Number" indicates that over time, nominees will be more likely to vote according to their perceived party than before. The coefficient here tells us that for each additional appointee, we expect the gap between perceived ideology and subsequent behavior on the Court to widen by 0.008. The "Party" variable is also statistically significant at the ten percent level. The negative sign on this variable indicates that if the nominating president is a Democrat and the value for 'Contention' is equal to zero, the gap between the NSP and the JCS scores will decrease. Basically, this means that this gap will shrink, all else being equal, simply because the nominating president is a Democrat. A Democratic nominating president will tend to lead to a nominee acting 0.232 units *away* from their perceived ideology.

The third model is the "Nay" model. This model does provide statistically significant evidence in favor of my hypothesis. Much like in the "Contention" model, both "Number" and "Party" are statistically significant in the same directions. This means, once again, that over time, justices tend to behave in the direction of their perceived ideology. Again, this also indicates that holding all else equal, the gap between a justices JCS and NSP will be smaller if the nominating president is a Democrat. In this model, the "Nay" variable is statistically significant at the five percent level. The negative sign on the variable is what I would expect to see according to my theory. What this result tells us is that the more nay votes that a Republican nominee receives in committee, the more conservative that justice will behave once confirmed. For each additional nay vote, we see a justice become *more* conservative by 0.061. While this

coefficient is not huge to the naked eye, it is actually quite substantial. Thinking about this result in practical terms helps. It is not uncommon for the Judiciary Committee to report a nominee favorably with a unanimous vote. However, many nominees will receive multiple nay votes. Take recent appointee Samuel Alito, for example. Alito received eight nay votes when the Judiciary Committee reported him (as opposed to the likes of Breyer or Ginsburg, who received no nay votes). In the context of my results, this means that Alito would tend to act 0.488 units *more* conservative than he was already perceived once he was confirmed. This is a substantial impact, considering the scale that we are analyzing from is on a minimal -1 to 1 basis. Since the Behavior equation in these regressions is NSP minus JCS, the absolute largest difference we could expect to see would be if a justice was perceived to be extremely conservative (an NSP of 1), and flipped to become extremely liberal once confirmed (an NSP of -1). This would yield a difference of two. Even in this unlikely circumstance, a change in judicial behavior of 0.488 is substantively significant. The conditional interaction effect has a coefficient of 0.041 in this regression (standard error of 0.047). This measure picks up on these effects when the appointee was nominated by a Democratic president. This is the sign that we would expect to see; however, these results are not statistically significant. Overall, like previous models indicate, these results seem to indicate some support for my hypothesis for Republican appointees.

Summary of Results

These results point to a couple of important overall trends. First, it appears that the primary driving source behind the increased contention within the Judiciary Committee is polarization. This is in accordance with my hypothesis. These findings are not entirely surprising, as others have hypothesized similar trends and found support. Nonetheless, these findings are important. As the Senate and the Judiciary Committee become increasingly polarized, it means that we can expect to see an increasingly contentious process according to these results.

The second portion of my study provided less consistent support for the second hypothesis. The six models presented do seem to point to a general trend, though the overall results are not entirely significant. Overall, the general trend that we see throughout the course of those results is that Republican appointees will tend to become more conservative once confirmed if their confirmation process is particularly contentious. There is little evidence that this effect is present for Democratic appointees. Nonetheless, it is important to note that the direction of each effect in all six models is in line with what my theory says. It seems that there is *some* sort of effect present based on these results. This effect is clearly particularly strong for Republican nominees. This, combined with the results from the first models, provides an interesting discovery. The confirmation process is becoming more contentious and seems to be ready to continue along that trend. This, combined with the results from the second group of models, indicates the Republican appointees will continue to become increasingly conservative.

In order to try to understand why we may see this trend with Republican appointees and not Democratic appointees, I considered some of the corresponding trends in partisan politics. Some political science scholars argue that there was a party realignment in the mid-1960s following the civil rights movement. They argue that the 1964 Civil Rights Act caused many Southern Democrats to become Republicans (Sundquist 1983, Stanley 1988). According to this trend, it is possible that the effects are not realized for Democratic appointees because of the Democratic Party's consolidation and restructuring around the 1960s. In order to test this theory, I conducted my regressions for the second set of models, but broke them into pre-1968 and post-1968 groups. These results, however, provided very little statistical significance. In the areas in which the results were statistically significant, the outcomes were the same as the pooled models. This indicates that the party realignment probably does not account for the fact that Republican nominees support my hypothesis while Democratic appointees do not.

The implications for such a trend are far-reaching. We may expect to see increased focus on potential Supreme Court nominations and vacancies during presidential campaigns. Additionally, Republican appointees will, according to these results, move the Court in a decidedly conservative direction. This means that liberals will have more to lose when a conservative is nominated to the Court. Much like Smith and Gamm (2012) present in the context of widening ideological gaps in Congress, this can have implications for how Democrats attempt to construct the Supreme Court. In order to combat an increasingly conservative bench, they may be more willing to appoint nominees that are farther left on the ideological spectrum. We may also see liberal

justices less willing to step down from the bench, particularly with the prospect of a Republican president. Overall, the results from these studies are quite interesting and do seem to provide broad support for my claims.

Table 1. Scaled Contention Variable

Contention	Nay Votes
0	Voice vote, or 0 nay votes
1	1-2 nay votes
2	3-4 nay votes
3	5+ nay votes

Table 2. Variable Definitions and Means

Variable	Definition	Source	Mean
Days	Number of days between committee reception and vote	Congressional Research Service, Supreme Court Nominations	35.81
Nay	Number of nay votes received in vote to report favorably within Judiciary Committee	Congressional Research Service, Supreme Court Nominations	3.40
Contention	Scaled variable based on nay votes; 0-3 scale; indicates overall contention in the committee	N/A	1.07
Unified	Equals 1 if the nominating president and the majority representation in the Judiciary Committee are the same political party; Equals 0 if parties do not align	VoteView.com; DW-NOMINATE score database	
$Comm_{Diff}$	Difference between the nominee's NSP and the median member of the Judiciary Committee's DW-NOMINATE Score	Cameron and Park 2009; Voteview.Com; DW-NOMINATE score database	0.32

$Comm_{Polar}$	Difference (in DW-NOMINATE score) between median Republican and median Democrat in the Judiciary Committee	VoteView.com; DW-NOMINATE score database	0.52
Party	Equals 1 if the nominating president is a Democrat; 0 if the nominating president is a Republican	VoteView.com; DW-NOMINATE score database	0.51
PartyContention	Interaction term	N/A	0.37
PartyDays	Interaction term	N/A	12.90
PartyNay	Interaction term	N/A	1.15
$Behavior_{JCS}$	Equals a nominee's NSP minus eventual JCS	Cameron and Park 2009; Epstein 2007	-0.01
$Behavior_{MQ}$	Equals nominee's NSP minus eventual MQ	Cameron and Park 2009; Martin and Quinn 2002	-0.31
Number	Corresponding number of nominee; starting with Hugo Black	N/A	23
NSP	NOMINATE-Scaled Perception Scores	Cameron and Park 2009	-0.04
JCS	Judicial Common Space Scores	Epstein 2007	-0.05
MQ	Martin-Quinn Scores	Martin and Quinn 2002	0.24

Table 3. Model One Results

Variable	Days Model			Nay Model			Contention Model[2]		
	Coefficient	Standard Error	P-Value	Coefficient	Standard Error	P-Value	Coefficient	Standard Error	P-Value
$Comm_{Polar}$	85.669	41.186	0.045	13.493	6.935	0.065	5.369	2.079	0.014
Unified	-1.625	6.204	0.795	-0.255	0.948	0.791	0.299	0.315	0.347
$Comm_{Diff}$	25.809	17.127	0.14	3.225	2.739	0.252	1.452	0.848	0.095
Number	-0.144	0.686	0.835	-0.181	0.122	0.15	-0.038	0.035	0.284
Constant	-12.408	11.856	0.302	-0.577	2.14	0.79	-1.494	0.583	0.014
N	42			27			43		
R^2	0.454			0.219			0.387		

[2] Due to the limited range dependent variable, I also ran an ordered probit regression to ensure the robustness of these results. The ordered probit results confirmed the OLS regression.

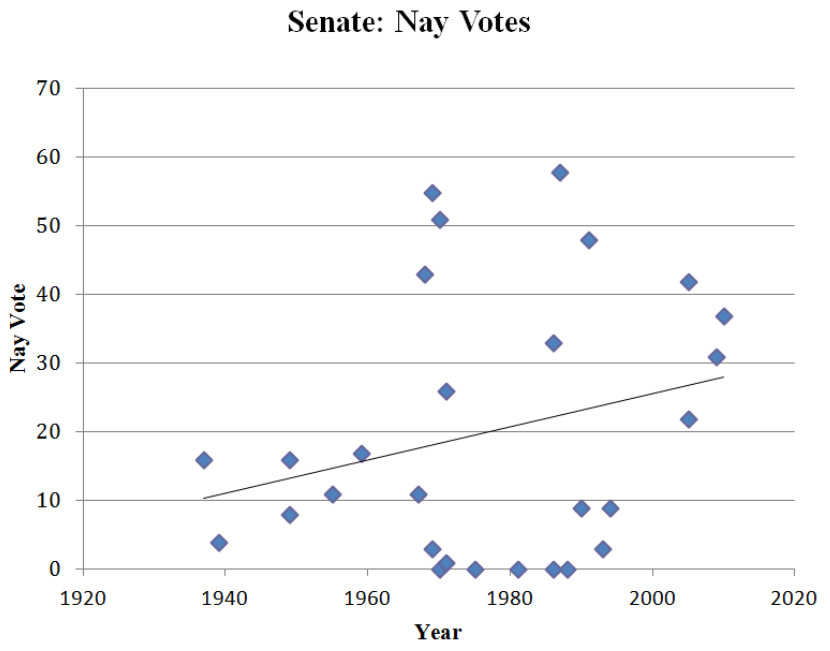
Table 4. Model Two, Behavior$_{MQ}$ Results

Variable	Days Model			Nay Model			Contention		
	Coefficient	Standard Error	P-Value	Coefficient	Standard Error	P-Value	Coefficient	Standard Error	P-Value
Party	-0.787	0.988	0.431	-0.049	0.865	0.956	-0.139	0.608	0.821
Days	-0.013	0.013	0.342						
PartyDays	0.039	0.021	0.076						
Nay				-0.353	0.123	0.01			
PartyNay				0.407	0.407	0.072			
Contention							-0.589	0.256	0.027
PartyContention							0.816	0.353	0.027
Number	-0.047	0.025	0.072	-0.02	0.022	0.379	-0.022	0.019	0.265
Constant	1.056	0.971	0.284	0.605	0.787	0.452	0.483	0.672	0.477
N	39			24			40		
R^2	0.226			0.443			0.282		

Table 5. Model Two, Behavior$_{JCS}$ Results

Variable	Days Model			Nay Model			Contention		
	Coefficient	Standard Error	P-Value	Coefficient	Standard Error	P-Value	Coefficient	Standard Error	P-Value
Party	-0.271	0.196	0.176	-0.414	0.177	0.032	-0.232	0.126	0.075
Days	-0.003	0.003	0.333						
PartyDays	0.003	0.004	0.567						
Nay				-0.061	0.025	0.026			
PartyNay				0.102	0.054	0.078			
Contention							-0.072	0.052	0.179
PartyContention							0.079	0.081	0.334
Number	0.008	0.005	0.141	0.014	0.006	0.028	0.008	0.004	0.074
Constant	0.012	0.012	0.954	-0.092	0.187	0.628	-0.02	0.147	0.89
N	37			22			37		
R^2	0.2961			0.4758			0.2961		

Figure 1. Nay Votes in the Senate vs. Senate Judiciary Committee



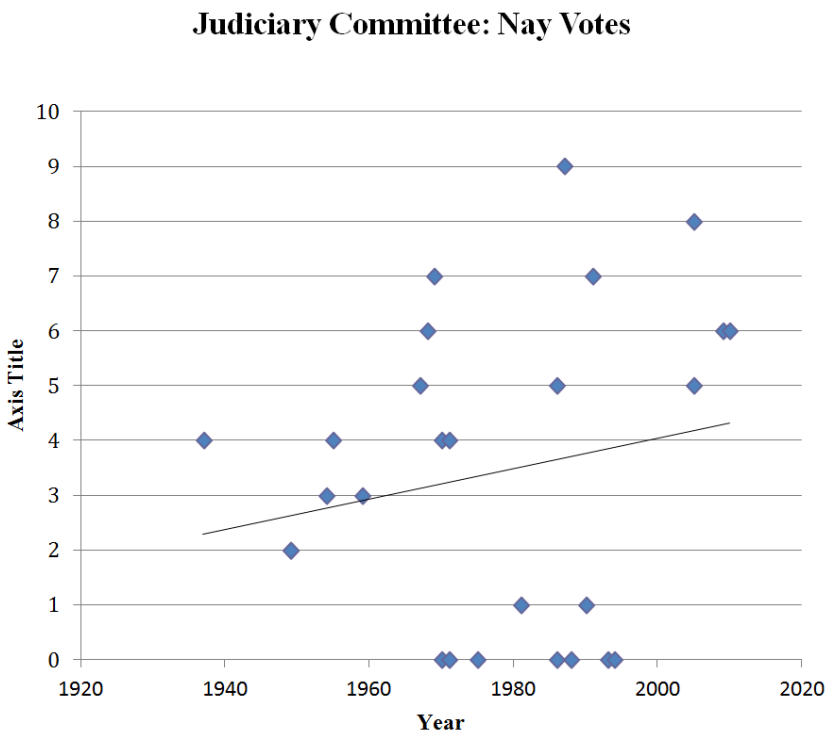
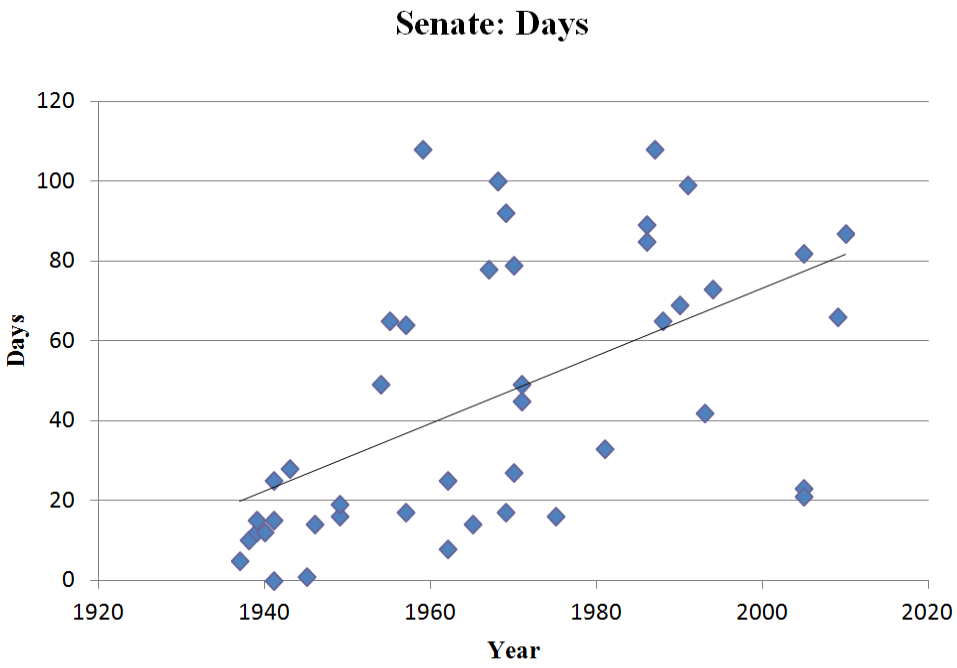


Figure 2. Days in the Senate vs. Senate Judiciary Committee



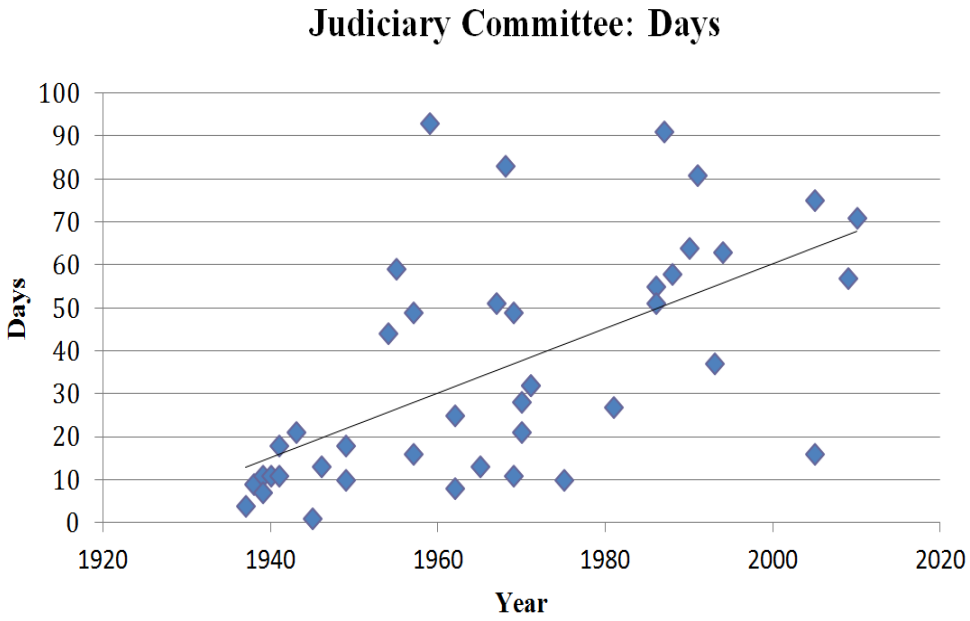
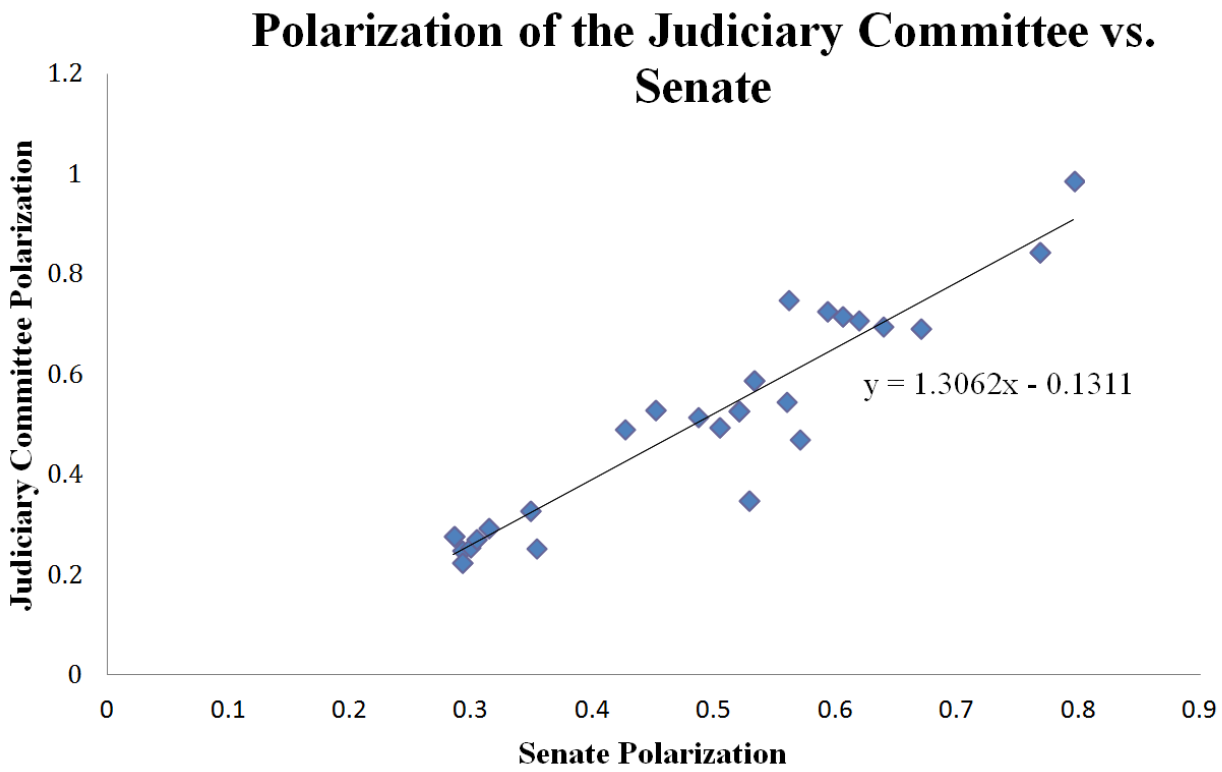


Figure 3. Committee Polarization vs. Senate Polarization



Chapter 4: Case Studies

Intro

In order to further expound on the evidence provided in the quantitative section, it is useful to look at real-world examples of these trends. In order to do this, I analyze three separate cases of Supreme Court confirmations. I selected these cases specifically in order to show examples of both contentious and non-contentious confirmation processes. The three cases that I analyze are Justices John Paul Stevens, William Rehnquist, and Samuel Alito. The goal of these case studies is to provide further, tangible support for the claims presented earlier in my paper. Additionally, I hope to discover other, more specific trends in the confirmation process and subsequent judicial behavior that the data analysis is unable to show.

Quantitatively speaking, these cases offer a range of contention. While Stevens had a virtually contention-free process, Rehnquist and Alito each had processes that were fairly contentious. It is also interesting to analyze these three Justices because of the timing of their nominations. The range of years spans from 1975 (Stevens) to 2006 (Alito). By picking a fairly broad gap in justices, I am able to analyze these effects over a fairly large time period. I did not take case studies dating back to the beginning of my quantitative study in an effort to frame the results in the contemporary era, defined by the Rehnquist and Roberts courts.

John Paul Stevens

President Gerald R. Ford nominated John Paul Stevens on November 28, 1975. Stevens was nominated to take the place of Justice William Douglas on the Supreme Court. While Stevens was a registered Republican, he had indicated that he was quite moderate during his five years on the federal appeals court. His moderate ideology attracted President Ford, a Republican as well. This nomination was the first following Nixon's Watergate scandal. As such, Ford wanted to avoid appointing an ideologically extreme candidate as his first Court appointee. Additionally, President Ford only became president because he was appointed as Nixon's vice president after Vice President Agnew was forced to step down. Once President Nixon resigned, Gerald Ford took over as an unelected president. Thus, he was already in a precarious situation from the outset. Shortly after he was sworn in as president, Ford granted a pardon to Richard Nixon for all of the crimes that he had been accused of. This, in combination with a two-year recession, left President Ford with very little public support. This all meant that President Ford needed to avoid appointing a controversial justice to the Supreme Court, leaving Stevens as a very attractive option. Additionally, with a Democratic controlled Senate, an extreme conservative stood very little chance of being confirmed. As it turned out, Stevens was Ford's only Supreme Court appointment during his time in office (Paddock 1996).

Justice Stevens' confirmation process was a non-event. From the day Stevens' name was received in the Senate Judiciary Committee to the day that they reported him to the Senate floor took only ten days. Stevens came into committee hearings with a broad

and glowing endorsement from the American Bar Association. In fact, President Ford selected Stevens as his nominee based on this endorsement when his list still had eleven names on it. Thus, once Stevens' name reached the committee, he was already widely popular and well liked. During hearings, Stevens faced virtually no difficult questions. There were only three groups that spoke out against him at all. The first two were women's groups called the National Organization for Women, or NOW, and the Women's Legal Defense Fund (CQ Almanac 1976). The primary reason for this opposition was because the organization wanted to see a female appointed rather than a male. This opposition came in the form of a petition to Senator Eastland, explaining that they did not support the nomination on the grounds that Stevens had displayed discriminating tendencies towards both women and minorities in his previous career (U.S. Congress 1975). In a 1975 interview, NOW president Karen DeCrow stated:

> We are saddened that it wasn't a woman. The thing the bothers me is that I've been reading about his decisions and I'm worried about his legal decisions and I'm worried about the kind of position that he will take on affirmative action. He seems to be very concerned with so-called reverse discrimination, which is a code word for not enforcing affirmative action guidelines (Karen DeCrow 1975).

Ironically, this same organization publicly thanked Justice Stevens in 2010 when he announced his retirement, saying that "NOW will be sorry to see Justice Stevens go, and we thank him for standing up for our rights for the last 35 years" (O'Neill 2010). Ultimately, this opposition was not all that significant.

The second source of opposition was also fairly insignificant. A Chicago man publicly claimed that earlier in his career, Stevens had intentionally covered up evidence in a case (CQ Almanac 1976). Very little credence was given to this claim, and it was brushed over almost entirely during the confirmation process. What we see in the case of Stevens is a confirmation process with virtually no contention at all. Not only was the process speedy, but Stevens was also reported favorably by a unanimous vote (13 to 0). Thus, Justice Stevens affords us a case in which a popular nominee was pushed through the confirmation process rapidly and with virtually no contention.

Once he was reported, the Senate floor received Stevens in the same way. Given the power that the Judiciary Committee has in influencing the Senate floor, this is unsurprising. Just six days after receiving the report from the Judiciary Committee, the Senate floor confirmed Justice Stevens by a unanimous vote of 98 to 0 (Rutkus and Bearden 2010). During this time period, the NOMINATE measure for the polarization in the Judiciary Committee was 0.546. The entire Senate had a similar polarization level of 0.559 during this confirmation. Relative to later years, this is a particularly low level of opposition. For example, the next appointment to come through the Senate (Sandra Day O'Connor) faced political polarization at a level of 0.749. These results seem to be in accordance with my quantitative results for my first hypothesis. During this time period, polarization was particularly low in the Senate Judiciary Committee, which helped assure a confirmation process with virtually no contention.

Now that it is clear that Justice Stevens went through a remarkably straightforward confirmation process, it is interesting to look into how this may have

affected his subsequent judicial behavior. Justice Stevens was perceived to be a very moderate conservative. As a registered Republican, people expected him to be conservative leaning. Additionally, the fact that Gerald Ford was a Republican gave Senators more reason to perceive Stevens as slightly conservative. In the 1975 *New York Times* article that introduced Stevens as a nominee, Robert McFadden wrote: "Judge Stevens is regarded as a moderate with nominally Republican credentials but little background or interest in politics" (Robert D. McFadden 1975). Thus, he was regarded at most as a moderate conservative, but primarily as a centrist. His track record on the federal court was extremely moderate. The NSP given to Stevens is a 0.167. This means that he was perceived to be very moderately conservative.

According to my second hypothesis, because Justice Stevens went through a particularly easy and minimally opposed confirmation process, we would not expect him to behave even more conservatively than predicted. Had he been subject to a vicious confirmation, he would have likely sided with his Republican supporters once on the Court. However, since this was not the case, I would expect to see Stevens behave how he pleases. On the federal appeals court, Stevens tended to vote right down the middle and was regarded as a true "centrist" (Oelsner 1975). Justice Stevens' Judicial Common Space score provides support that this was indeed the case. His score while on the court was a -0.427. This is actually quite a liberal ideological score. Stevens had a Martin-Quinn score of -1.493 during his time on the bench as well, once again indicating that he behaved liberally while he was on the Court. This is consistent with my hypothesis. While it is almost always the case that modern Republican appointees tend to behave

conservatively while on the bench, Stevens differs. After coming through the confirmation process in under three weeks and completely unscathed, he went on to become a moderate liberal justice. This provides some interesting additional insight that my quantitative results do not necessarily show. Not only is it the case that Justice Stevens does not go on to behave more conservatively, he actually tends to vote against the party that nominated him.

Now that I have analyzed Justice Stevens in a statistical context, it would be interesting to provide some substantive analysis of his behavior on the Court. These cases will give us detailed insight into what kinds of cases Justice Stevens decided and how he made those decisions. The specifics of the ideologically charged cases will provide more evidence that can help me to evaluate my hypotheses. In order to do this, I will look at some of the landmark decisions that he made while serving on the bench. I went through and selected a variety of ideologically charged cases that Justice Stevens heard during his tenure on the bench.

In 1985, the Court ruled in the case of *Wallace v. Jaffree*. This was a particularly significant case for the Court and American public. The facts of this case surrounded an Alabama law that let teachers conduct silent religious prayer in the classroom during the school day. This statute declared that public schools could allow for a moment of silence in the classroom that allowed for "meditation or voluntary prayer." Ishmael Jaffree had three children in the public school systems in Alabama. He brought suit against the Alabama school system to prevent them from allowing prayer in the classroom because he felt that his children were being taught religious beliefs that they may not have

necessarily subscribed to. He also said that, while students had the option to leave the room during prayer, it subjected students to ostracism (*Wallace v. Jaffree* 1985). Ultimately, this case turned into a discussion of the separation between church and state based on the interpretation of the Establishment Clause. While the Alabama statute did not mandate religious practice in school, it did allow for it. This meant that the case basically evolved into a discussion of whether or not to allow religious practices to take place in public schools.

This issue was ideologically charged in that most conservatives supported these types of statutes, whereas liberals tended to oppose statutes that allowed for any type of religion in the public schools. In this case, the Court ruled to strike down this Alabama provision. This holding thus said that the State could not endorse any prayer activity within public schools because it violated the First Amendment. Justice Stevens was in the majority and wrote the majority opinion in this case. Siding with him were Justices Brennan, Marshall, Blackmun, Powell, and O'Connor. Each of these justices, with the exception of Powell, was ideologically liberal. Justice Powell was a moderate conservative. Those that voted to uphold this statute included Justices Rehnquist, Burger, and White. Justices Rehnquist and Burger were quite conservative, and Justice White was only moderately conservative. In this case, we see that Justice Stevens sided with the liberal contingent of the Supreme Court. It is also interesting to note that Justice Stevens wrote the majority opinion for this case. In his reasoning, Stevens cited precedent heavily (*Lemon*) and relied on previous tests to interpret this state law in the context of the First Amendment. His primary reason for striking down the statute was that the "sole purpose"

of the provision was to foster religion in the public forum (*Wallace v. Jaffree* 1985). According to this, he believed that the provision was unconstitutional. This further indicates that Justice Stevens was able to decide cases according to his own Constitutional beliefs. This case provides evidence that Justice Stevens was not constrained by his previously perceived ideology, as he voted with the liberal contingent. It is also interesting to note that, despite this decision, Stevens remained moderate in his explanation of the decision. In a 1985 *New York Times* article, he was quoted as saying, "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day" (Greenhouse 1985). This point is interesting for a few reasons. First, it shows that his primary reason for deciding the case was the way in which it was argued, with a primary focus on religion in schools. From an ideological standpoint, this statement shows that Stevens was not pushed into voting along the lines of his appointing party. Instead, Stevens was able to abide by his interpretive preferences without letting them be shaped by partisan influences.

Another significant and ideologically divisive case that came before the Supreme Court occurred in 1990. The case *Hodgson v. Minnesota* dealt with abortion law. Abortion, a traditionally charged political issue, tends to divide the Court right along Party and ideological lines. This case fell closely along those lines as well. This case dealt with a Minnesota statute that restricted a minor's ability to seek an abortion. Essentially, the case focused on one section of the law. This section of the law stated that women under 18 years of age had to notify both of their parents that they intended to

have an abortion. Following parental notification, the minor still had to wait 48 hours. This case was decided in a 5 to 4 vote, which closely resembled party lines. The Court held that this law was unconstitutional, provided there was no option for judicial bypass, on the grounds that requiring a minor to notify both parents does not serve any legitimate state interest. Justices Rehnquist, White, Scalia, Kennedy, and O'Connor were in the majority of this opinion. All of these justices, with the exception of Justice O'Connor, were conservative-leaning justices. The four justices in the minority included: Justice Brennan, Justice Marshall, Justice Blackmun, and Justice Stevens. The ideological dividing issue in this case came down to an idea of judicial bypass. The majority held that when judicial bypass (seeking the approval of a judge in place of parental consent) was permitted in the cases in question, the provisions were constitutional. Essentially, this meant that the Court held in favor of a provision that would restrict a woman's ability to get an abortion—a decidedly conservative viewpoint. The liberal justices dissented from this thinking. Once again, we see here that Justice Stevens voted with the liberal faction in an ideologically significant case.

In the case *Texas v. Johnson*, decided in 1989, Justice Stevens sided with a more conservative interpretation of the First Amendment. This case discussed various laws that prohibited the desecration of the American flag. The Court held that laws that made it illegal to damage an American flag were unconstitutional violations of the First Amendment. In this case, Justice Stevens was in the minority and wrote a dissenting opinion. Justice Stevens sided with one of the most conservative justices on the Court, Justice Rehnquist. This decision was less ideologically divided, as conservative and

liberal justices fell on both sides of the decision. In his dissent, Justice Stevens explains that this type of prohibition is not a restriction on an opinion so much as it is a prohibition on conduct, which is not a constitutional violation. He explains that "the case has nothing to do with 'disagreeable ideas.' It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset" (*Texas v. Johnson* 1989). This case provides evidence that Justice Stevens was not always a liberal on ideologically divisive issues, especially those pertaining to civil liberties. In this case, he voted in what appears to be a more conservative manner by interpreting the freedom of speech in such a way that would allow for certain regulations on the "freedom of speech".

A more modern example, which the Court still feels the effect of today, came in 2008. In the case of *District of Columbia v. Heller*, the Court discussed the issue of gun control. This was close to the end of Stevens' term on the bench, yet it was a crucial case that fell along partisan lines again. Typical ideological politics would dictate that conservatives would be opposed to restrictions on the ability to possess firearms, whereas liberals would support gun control.

Specifically, this case dealt with a Washington, D.C. statute that restricted the ability for a private citizen to own a handgun. The case came from Dick Heller, a D.C. security guard who wanted to own a handgun for self-defense, but was denied. Here, the Court was presented with the opportunity to decide whether or not it was constitutional for private citizens to possess a handgun, directly implicating the Second Amendment. Ultimately, the Court ruled that this law was a constitutional violation in a 5 to 4

decision. Justices Scalia, Roberts, Kennedy, Thomas, and Alito were in the majority of this opinion. Ideologically speaking, all five of these justices fall on the conservative range of the spectrum. Justice Kennedy is considered to be the most moderate justice on the Court today; however, he does still tend to be statistically rightward leaning in his decision-making. The four in the minority were Justices Breyer, Ginsburg, Souter, and Stevens. The three justices joining Stevens are decidedly liberal in their voting behavior on the Court. Once again, in a case decided strictly along ideological lines, we see Justice Stevens siding with the liberal faction. In a dissenting opinion, Justice Stevens explained that the Second Amendment did not indicate what purposes were suitable for an individual to hold a weapon. He then cites *United States v. Miller,* explaining that the Court had already answered that question. According to this precedent, the Second Amendment protects the right to bear arms according to the need to maintain a state militia. Justice Stevens says that the Court has found no real evidence to overturn that decision and thus made this decision without heeding precedent and *stare decisis*. These principles, coupled with a possible preference for liberal outcomes, guided his decision in this case and prevented him from siding with the conservative faction, as is typically expected of Supreme Court justices who are appointed by Republicans. Instead, Justice Stevens voted with the liberal contingent because he felt that the Constitution should permit laws such as the District of Columbia statute.

The examples of Justice Stevens siding with the liberal contingent on the Court over the course of his 35 years are abundant. It seems that in cases that deal with some of the most ideologically charged issues, Stevens was a consistent vote for the liberal side.

Having been perceived to be slightly conservative and nominated by a Republican president, this may appear surprising. However, the lack of contention during his confirmation process did not leave Stevens with a strong tendency to side with his 'team', or his appointing party.

It is also interesting to note that Justice Stevens does not always vote with the liberal bloc. In cases that were not divided along fairly clear ideological lines, Justice Stevens voted with both blocs of justices. For example, in *Honda Motor Company v. Oberg*, a 1994 case dealing with an Oregon statute that prohibited judicial review of the size of punitive damages, Justice Stevens voted with Justices Scalia and Thomas, two far-right conservatives.

Overall, the case of Justice Stevens shows us an instance in which a moderately conservative nominee went through a relatively simple confirmation process and then proceeded to vote in a primarily liberal fashion; however, he was clearly willing to cross Party and ideological lines on some occasions. As my quantitative section indicated, the impacts of contention are particularly forceful for Republican appointees, and that is what we see here. It is also important to note that Justice Stevens went through his confirmation process during a period with relatively low levels of polarization. This seems to have lead to the lack of contention during his confirmation process.

So we see a full circle develop here. John Paul Stevens was nominated during a time in which polarization was low. This meant that he was not going to face a contentious confirmation process. The lack of contention then meant that he did not feel constrained to vote along his perceived "party" lines. As such, he tended to actually vote

against his party much more often than not. Justice Stevens provides evidence of a justice who behaved in a relatively unconstrained way with regard to ideological considerations.

William Rehnquist

President Richard Nixon nominated William Rehnquist to the Supreme Court as an Associate Justice on October 22, 1971. Rehnquist was slated to replace Justice John Harlan. Additionally, on June 1, 1986 President Ronald Reagan nominated Rehnquist as Chief Justice of the Supreme Court in order to replace Chief Justice Warren Burger. Thus, Rehnquist presents us with two separate examples of confirmation processes. Rehnquist was active in politics and was a declared Republican. He also served as a clerk under Justice Robert Jackson, a slightly conservative justice. This became an important issue during Rehnquist's confirmation. Rehnquist also served as an assistant attorney general in President Nixon's administration.

Richard Nixon was extremely concerned with restructuring the Supreme Court once he came to office. He was instrumental in encouraging a Senate filibuster over Abe Fortas' nomination to serve as Chief Justice under President Johnson. This gave him the ability to appoint the Chief Justice he wanted once he was elected president (Dean 2001). Nixon managed to manipulate the political process in ways like this in order to craft the Court to suit his political goals more successfully. Rehnquist's rise to the Court came through this restructuring.

In 1971, Justice Harlan retired due to health concerns. He died later that year of spinal cancer. President Nixon had been keeping a close eye on Harlan's health, and thus

was prepared with his next nomination to the Supreme Court once Harlan announced his retirement. He nominated Rehnquist as associate justice less than a month after Harlan's announcement. This marked another conservative nomination opportunity for President Nixon.

Amidst the restructuring of the Court, there was a good deal of controversy surrounding the Rehnquist nomination. In 1971, the Judiciary Committee was not particularly polarized. This, combined with some of Rehnquist's controversial opinions, led to a strong amount of contention during Rehnquist's confirmation. However, 15 years later when Rehnquist was prepared to go through the confirmation process again, this time as Chief Justice, the Judiciary Committee's polarization level was at 0.727. This is quite high, and Justice Rehnquist underwent an even more contentious confirmation process. This second time, though, the controversy over Nixon's efforts was not present, indicating that polarization had more to do with the contention in the process.

Returning to Rehnquist's first appointment, his confirmation process was quite contentious. When Rehnquist's name was first announced, most people were quite surprised. Many Senators claimed that he was not qualified to serve on the Supreme Court. Amidst quick opposition, Senators began to build an argument against Rehnquist. This nomination was received with quite a bit of opposition from other groups as well. Just days after the President Nixon announced Rehnquist's nomination, a *New York Times* article came out outlining some of Rehnquist's political and ideological views:

> He apparently just sat down and thought it out and decided intellectually that he is against anything liberal…Many Arizona Negroes considered Mr. Rehnquist to be a racist. In 1968, he was outspoken in his opposition to the civil rights bill pending before the Arizona Legislature…The Arizona chapter of the N.A.A.C.P., in a meeting in Phoenix last weekend, adopted a resolution to oppose Mr. Rehnquist's confirmation (Waldron 1971).

As some of the excerpts from this article make clear, Rehnquist's nomination came as a disappointment to a variety of groups and they were prepared to oppose the nomination to a great extent.

Once the Senate Judiciary Committee began their hearings, this opposition came to the forefront. Rehnquist's hearings, unlike the concurrent Powell hearings, received extreme interest and publication. The *New York Times* reported, "With lines of people in the corridor waiting for seats and the press tables packed with scores of reporters, the stage was set for a dramatic confrontation" (Shannon 1971).

During hearings, Senator Birch Bayh attacked Rehnquist for his "ultra-conservative" positions (CQ Almanac 1972). Specifically, Bayh explained that he was worried about Rehnquist's responses to questions regarding the powers that the Nixon administration had in domestic surveillance (Hudson 2007). The exchange between Bayh and Rehnquist was particularly heated. At one point in the hearings, Bayh said to Rehnquist, "From your mouth have come a number of statements that concern me very much, about whether the Government is going to be given carte blanche authority to bug and to wiretap, and yet there is no way I can find William Rehnquist's opinion about that" (U.S. Congress 1971). At a point, Senator Bayh's questions began coming so

quickly that Rehnquist had no chance to answer, until the Chairman of the committee stepped in to slow Bayh down. Bayh's questions were pointed and direct, citing words that Rehnquist had written and spoken nearly decades earlier. The statistics of this case seem to support these examples as well. From the day his nomination was received by the Judiciary Committee to the day that they reported him to the Senate floor took 32 days and in committee he received four nay votes when the committee voted to report him. Based on these numbers, it appears that the process was quite contentious.

Another source of opposition that Rehnquist felt came from the NAACP. During the committee hearings, allegations surfaced that Rehnquist had spoken out against certain African Americans being permitted to show up at the polls (Hudson 2007). Senator Bayh also pressed Rehnquist on the issue of civil rights, alluding to these issues. Additionally, a memo that Rehnquist wrote while clerking for Justice Jackson just before the landmark case *Brown v. Board of Education* surfaced. In that memo, Rehnquist stated that, "I think *Plessy v. Ferguson* was right and should be re-affirmed" (Paddock 1996). Rehnquist claimed that he was speaking on behalf of the views of Justice Jackson in this case; however, Senator Bayh attacked this document as well. Bolstered by the support of the groups like the NAACP and the AFL-CIO, this line of questioning was particularly heated.

Overall, Senator Bayh headed up the majority of the opposition to Rehnquist; however, a few other groups led quite a powerful opposition to his nomination. Rehnquist was able to cautiously and strategically maneuver around the difficult questions. At one point, he even declared a lawyer-client privilege between himself and President Nixon in

order to avoid answering questions regarding wire-tapping (Shannon 1971). Rehnquist emerged from the hearings with a favorable report, but he did not come out unscathed. As we will see, this did appear to impact his behavior once on the Court.

Between the time that he was confirmed by the Senate (by a 68 to 26 vote), and the time that he was up for confirmation again as Chief Justice, Justice Rehnquist behaved in an extremely conservative manner. Over the course of this period of time, his Martin-Quinn score was a very high 3.941. His Judicial Common Space score was similarly high, at a 0.658. These scores stand in stark contrast to his perceived ideology of 0.367. These scores indicate that Rehnquist was behaving in an aggressively rightward leaning manner following his contentious confirmation process. By selecting a couple of cases, we can see just how he voted specifically, as well as his reasoning.

An interesting place to start the analysis of Rehnquist's decision-making is with the ubiquitous and landmark Supreme Court abortion case—*Roe v. Wade*. This case, decided in 1973, dealt with state laws that prohibited women from being able to obtain an abortion if they chose. In a 7 to 2 decision, the Court held that statutes limiting a woman's ability to get an abortion are unconstitutional according to the 14th Amendment's implied right to privacy. The Court used a strict scrutiny test and decided that the state is permitted to regulate abortion as long as there is a "compelling state interest" in doing so. Based on this interpretation, they adopted a trimester framework. According to this framework, the farther into the pregnancy a woman is, the more 'compelling' the state's interest is in regulating the abortion. This is because of the dangers associated with late-term abortions and the state's interest in protecting potential

life (*Roe v. Wade* 1973). This ruling stands today as arguably the most controversial contemporary Supreme Court decision. In this landmark, highly ideological case, only two justices were in the minority. Justice White and Justice Rehnquist were these two justices. Justice White, a moderate conservative, wrote a mild-tempered dissent that explains that he sees no obvious support for the Court's decision within the Constitution. Justice Rehnquist, on the other hand, offers an impassioned dissent explaining that, basically, states should be able to regulate and limit abortion as much as they want. He explains that we must interpret the Fourteenth Amendment according to how the Framers would have wanted, which in this case means that the states must have the ability to legislate in cases of things like abortion. In this instance, Rehnquist puts his true conservative leaning on clear display. While his reasoning is firmly rooted in his interpretation of the Constitution, this decision is certainly ideologically right-of-center. Rehnquist was not afraid to dissent from majority opinions like this, even when he was just one of a few justices. Similarly, in 1973, he filed a solo dissent in the case *Keyes v. School District No. 1, Denver*. In this dissent, Rehnquist accused the Court of ignoring evidence in the case that labeled segregation in this school district as "less than total segregation" (Hudson Jr. 2007). There are multiple examples like these in which Rehnquist was happy to stand alone in his conservative ideology.

Justice Rehnquist also tended to vote with the most conservative justices, even in cases that were not clearly ideologically divisive. In 1973, the Court decided the case *Edelman v. Jordan*. This case dealt with whether or not a federal court was able to force a state to repay funds due to another party. At face value, this case is not clearly

ideologically weighted in either direction. Nonetheless, Justice Rehnquist sided with the other more conservative justices on the Court, such as Chief Justice Burger and Justice Powell. The Court held that the Eleventh Amendment authorized sovereign immunity that meant a federal court could not order a state court to pay back funds that had been held unconstitutionally. Justice Rehnquist wrote the majority opinion for this case, leaning heavily on the lack of any precedent his decision. It is also interesting to note that he voted against the most liberal justices in this case, such as Justices Douglas, Brennan, and Marshall. Here we see the same trend as in the previous case applied to a case in which party lines are not quite as distinct. It becomes more evident that Justice Rehnquist did tend to vote along with his ideological contingent much more often than not. The contentiousness that Rehnquist was subject to during his confirmation process probably contributed to this behavior.

In 1986, Justice Rehnquist was up for confirmation again, this time as Chief Justice. His perceived ideology was now in line with how he had behaved over the course of his first 15 years on the Court. The battle within the Senate Judiciary Committee was even more heated this time, with opposition coming from the liberal Senators in arguably more force than the first time around. This time, Democratic Senator Edward Kennedy led the charge. Many Senators expected this decision to be the most important decision that they ever made, and braced for a "grueling examination" (Taylor 1986). At one point during the confirmation hearings before the Judiciary Committee, Kennedy said:

> Mainstream or too extreme, that is the question. By his own record of massive, isolated dissent, Justice Rehnquist answers that question—he is too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be a Chief Justice. (U.S. Congress 1986)

With these early remarks, Senator Kennedy set the tone for the entire confirmation battle. Essentially, this was going to be a war between the two political parties. Following these remarks, Republican Senator Hatch labeled attacks on Rehnquist as a "Rehnquisition". Republican Senator Dole said, "I do not believe that anybody on the Judiciary Committee has a hunting license, but I do know that there will be efforts to dredge up a lot of things that happened 25, 30 years ago" (Hudson 2007). Indeed, Rehnquist's memo to Justice Powell seemingly in support of the decision in *Plessy v. Ferguson* came up again. This brought civil rights and minority groups into the fray, driving up opposition even more.

All told, this confirmation process garnered a significant amount of political attention and turned into quite a partisan battle. The hearings were actually televised publicly because of the heightened interest in the matter (Taylor 1986). It is unsurprising to see, then, that it took the Judiciary Committee all of 55 days to report Rehnquist, and there were five nay votes against him. Certainly, part of this can be explained by the importance of the Chief Justice position and Rehnquist's track record on the Supreme Court already. It is important to note that political polarization in the Senate was at the high level of 0.727. This, combined with the apparent ideological extremism of Justice Rehnquist created an intense confirmation battle. As has been discussed in this paper, Democratic Senators saw the potentially drastic policy implications that may come from

confirming a Chief Justice was a clear conservative voting record. As such, their opposition to Rehnquist skyrocketed, and Rehnquist came out of the confirmation battle beaten up. Nonetheless, he was able to secure confirmation on the Senate floor and became the next Chief Justice.

Chief Justice Rehnquist went on to complete his career on the Supreme Court with an overall Judicial Common Space score of 0.512 and a Martin-Quinn score of 4.092. Each of these scores is quite ideologically conservative; however, he did not tend to move even further right after his second confirmation process. Overall, Rehnquist's case shows us a justice who went through two bitter political confirmation battles. Coming out of his first confirmation, he was willing to vote according to his conservative ideology at all costs. While serving as Chief Justice, and towards the end of his tenure on the Court, Rehnquist did start to tone down his conservative behavior. This is an interesting trend to note for a few reasons. First, it is theoretically plausible that, within the context of my theory, the tough impact of the confirmation process had faded toward the end of Justice Rehnquist's tenure. Additionally, it seems that Justice Rehnquist treated his role as Associate Justice slightly differently from his role as Chief Justice. The other justices on the Court noticed a marked change in Rehnquist's demeanor once he took over the center seat. Rather than being the relatively unrestricted aggressor as associate justice, Rehnquist took a much more deliberative, diplomatic stance on the Court (Yarbrough 2000). Justice Rehnquist took on this role in an extremely effective manner, and helped to moderate debate on the Court immensely. Nonetheless, his conservative voting patterns did still persist.

For example, in the 1991 case *Rust v. Sullivan*, the Court discussed the issue of federal funded family planning. This case was another abortion case, though with First Amendment rights implicated, in which the point of debate was whether federal grants could be used to fund abortion procedures or counseling. A series of federal regulations prohibited the use of these federal funds for virtually all abortion-related activities. This case discussed the constitutionality of these provisions.

The Court decided that these regulations did not violate the Constitution. This decision basically allows increased federal regulation over abortion proceedings, which is a conservative victory in the debate over abortions. Once again, as in *Roe*, Chief Justice Rehnquist supported increased regulation over abortion. He voted with the conservative faction in this case, including Justice Scalia. Rehnquist wrote the majority opinion in this case, citing precedent (*Maher v. Roe* 1977) to provide the grounds for this decision. He explained that these prohibitions were not violations of the freedom of speech because they could not be interpreted to be discrimination. Public support of one view over another does not constitute discrimination. He also found that just because the government supported the viewpoint of abortion regulation, they were not necessarily required to support the opposing view as well. Finally, he explains that even if a woman's right to have an abortion is constitutionally protected by the Fifth Amendment, the government is not required to subsidize it. This opinion shows Rehnquist's willingness to support this conservative ideology; even though he acknowledges his decision may not be the one directly discussed within the Constitution. Instead, he relies on legislative context

to make this discussion. Overall, this case shows another example of Rehnquist voting according to a conservative ideology.

Despite cases like this, Rehnquist's tenure as Chief Justice on the Court did have a substantially different tone. He was more willing to step across the partisan aisle in the latter half of his career, and was much less likely to file solo dissents as he had early in his career (see *Dickerson v. U.S.* 2000; *Nevada Department of Human Resources v. Hibbs* 2003). The implications of this trend seem to point to a clear behavioral difference between a Chief Justice and an associate justice on the Supreme Court. While this paper does not investigate this difference, it does appear to be a strong influence, and is worth further study.

The case of William Rehnquist is enlightening in a few regards. First, his two confirmation processes were conducted in eras of different levels of polarization. While both were quite contentious, his confirmation as Chief Justice was decidedly more contentious. The combination of his conservative track record and the implications of the role as chief justice combined with this level of polarization to generate a heated battle. Furthermore, the Rehnquist case shows us the case of a justice who behaved in what can be called an extreme fashion during much of his time on the Supreme Court. After the contentious confirmation process, this may not come as a surprise. The idea of "teamsmanship" (Lee 2009) emerges once again here. All of Rehnquist's supporters and defenders in the confirmation proceedings were Republicans. Rehnquist became even more conservative than he was perceived to be (0.367) following the confirmation process. This is in line with my theory that a justice will be more likely to behave in a

way that will support his "team" after they defend him or her throughout a harsh confirmation battle. Rehnquist seems to indicate that this effect does come into play in a Supreme Court justice's behavior on the bench.

Samuel Alito

President George W. Bush nominated Samuel Alito to the Supreme Court on October 31, 2005. President Bush nominated two different justices before Alito. The first was John Roberts, who was quickly withdrawn and nominated as Chief Justice following the death of Chief Justice Rehnquist. The second nomination for the vacancy was Harriet Miers. Opposition to Miers mounted quickly and it became evident that her confirmation would be unsuccessful. Thus, Miers withdrew from the confirmation process, leaving President Bush to nominate his next potential justice, Samuel Alito (Mauro 2006).

Even before President Bush nominated Alito, there was opposition to Alito. Senator Harry Reid warned the president not to select Alito saying, "I think it would create a lot of problems" (Kirkpatrick 2005). Filibusters in the Senate were even threatened before Alito's name was officially announced.

The vacancy in question was for that of the first woman on the Supreme Court, Sandra Day O'Connor. O'Connor, a moderate swing vote, decided to retire on July 1, 2005. Since President Bush was appointing a new justice that would be a clear and distinct ideological shift, opposition to Alito was substantial. This nomination would have a significant impact on the ideological makeup of the entire court. A formal federal prosecutor, Larry Lustberg, was quoted saying "Make no mistake; he will move the court

the right, and this confirmation process is really going to be a question about whether Congress and the country wants to move this court to the right" (Lewis and Shane 2005). It is clear that the stage was set for a real battle between the Republican and Democratic parties in this case.

Samuel Alito previously served as a U.S. attorney in Newark, and a federal justice on the Third Circuit. This background gave people a fairly good look into what kind of behavior they could expect from Alito. Most of Alito's decisions had been along conservative lines. This gave liberal groups a good deal of material with which to attack Alito prior to the confirmation process itself. One liberal group explained that "while his words are carefully chosen and his demeanor is measured, Judge Alito's ultraconservative judicial philosophy is nothing short of radical" (Mauro 2006). Additionally, as Alito's confirmation proceedings drew closer to starting, he was caught up in a surveillance scandal that was reminiscent of the one that Rehnquist dealt with. Following the attacks of September 11, 2001, rumors circulated about a secret domestic surveillance program run by President Bush. Opponents of Alito feared that he would support and rule in favor of such a program based on a speech he delivered in 2000 that made clear that he supported the idea that the President should have such a power in times like the attacks of September 11, 2001 (Mauro 2006). These various oppositions to Alito fueled the fire for what turned into a particularly contentious confirmation battle within the Judiciary Committee.

From the very outset of the Senate Judiciary Committee hearing, Justice Alito was peppered with questions. Republican Senator Arlen Specter opened the questioning with

a variety of mild questions that were easily received by the conservative nominee. However, Democratic Senator Patrick Leahy was the next to question Alito. He opened with a pointed question about Alito's views surrounding the recent Bush surveillance "scandal". He pressed Alito for quite some time on this issue. As Alito attempted to dodge these questions, Leahy continued to press on relentlessly. Once he finally relented, Senator Leahy turned to Alito's involvement in an organization called the Concerned Alumni of Princeton (Alito was a Princeton graduate), or CAP. This organization has publicly spoken about the fact that it was unhappy with the admission of women and "unqualified minorities" into Princeton (Mauro 2006). Senator Leahy cites the fact that Alito had mentioned his involvement in this organization on a job application when he was 35 years old and asks him "why in heaven's name were you proud of being part of CAP?" (U.S. Congress 2006). This line of questioning continued until Senator Leahy's time expired. Democratic Senator Edward Kennedy delivered a difficult line of criticism to Alito when it is his turn for questioning. He said:

> The record shows time and again that you have been overly deferential to executive power, whether exercised by the president, the attorney general or law enforcement officials. And your record shows that, even over the strong objections of other federal judges—other federal judges—you bend over backward to find even the most aggressive exercise of executive power reasonable. But perhaps most disturbing is the almost total disregard in your record for the impact of these abuses of powers on the rights and liberties of individual citizens (U.S. Congress 2006).

This discussion is particularly heated and a clear example of the direct opposition that Alito faced during the confirmation hearings. These types of statements were made throughout the course of the quite lengthy hearing.

Ultimately, the Judiciary Committee took 75 days to report on Alito. When the committee voted to report Alito, there were a total of 8 nay votes. These numbers are extremely high, which is unsurprising given the content of the confirmation hearings. Thus, with Samuel Alito, we see an example of a confirmation process that was even more contentious than the two previous confirmations that I discussed regarding Justice Rehnquist. The level of polarization in the Judiciary Committee in 2005 was at a 0.845. This was the highest polarization level within the Judiciary Committee to date. Not only was polarization extremely high, but also President Bush had nominated a justice perceived to be quite conservative (an NSP of 0.509) to replace a previously moderate justice. All told, the stakes of this confirmation were high. Coupled with drastic political polarization, this nomination provided the perfect recipe for contention, which is exactly what we saw. Statistically, Alito went through one of the most contentious confirmations that we have seen in modern times. Substantively, Alito was pressed on a wide array of issues. The questions that he faced were particularly pointed and aggressive. Many Democratic Senators outwardly attacked Alito during the Judiciary Committee hearings, and did not relent throughout the course of the hearings.

Unfortunately, we do not have a strong measure of Alito's judicial behavior, as Epstein's Judicial Common Space scores are compiled only through 2007. We do have reports of Alito's NSP, which was quite conservative (0.509). This means that Alito was

perceived to be quite conservative. While Alito's JCS have not been recorded, there are records of his MQ scores, which average 2.599 to date. This means that Alito has behaved quite conservatively during his time on the Court. Since the data is limited for Alito's case, it is particularly useful to analyze some of the controversial cases that Alito has been a part of. Because Alito is one of the more recent appointees to the bench, he offers an interesting look into some of the more contemporary cases.

Justice Alito has had a tendency to stand in opposition to the Supreme Court stepping out of its role as interpreter and into the role of legislator. As such, whenever the Supreme Court seems to cross into the area of legislating, Justice Alito speaks out against its actions. For example in the 2008 case *Boumediene v. Bush*, the Court took on the issue of whether or not detainees at Guantanamo Bay were afforded constitutional rights to challenge their detention in United States courts. In a 5-4 decision, the Court held that there was a constitutionally guaranteed right to habeas corpus review that extended to detainees held captive in Guantanamo Bay. This meant that the Court held that any Guantanamo Bay detainee had the right to challenge his captivity within the courts of the United States. This case marked a victory for liberals on the Court, as it created a limitation on President Bush's War on Terror and the various methods that he used in order to try to root out threats of terrorism.

This case was decided strictly along partisan lines. Justices Ginsburg, Breyer, Souter, Stevens, and Kennedy were in the majority of the decision. Justices Alito, Scalia, Roberts, and Thomas were in the minority for this case. This meant that the justices who tended to vote liberally were all in the majority (with the exception of the swing-vote

Kennedy), and all of the consistently conservative justices were in the minority. Justice Alito joined Justice Scalia's dissent in this case, which argued that the Supreme Court had drastically overstepped its bounds. He claimed that the Court had stepped into the War on Terror and dictated how the prisoners of that war were to be handled. In the minority's opinion, this is an abuse of judicial power. This goes along with much of Justice Alito's tendency to avoid judicial intervention in executive decisions. Alito's decision in this case indicates his willingness to defer to executive power within the context of war.

Another case that falls along similar lines as these is the recent healthcare decision in the case *National Federation of Independent Business v. Sebelius*. This case, decided in 2012, ruled on the constitutional legitimacy of the Patient Protection and Affordable Care Act. The piece of this statute that received the most attention and was the point of the most controversy was the individual mandate. This part of the statute required most Americans to have health insurance by the year 2014. Most of the conservative faction of the Supreme Court held that this provision violated the Commerce Clause and should be held unconstitutional accordingly. Essentially, they claimed that any law requiring the purchase of a good or service was a violation of the Commerce Clause.

Justice Alito joined in a joint dissent in which the minority argued that the Court overstepped its powers and was regulating outside of the commerce clause. They also contended that the majority's decision to treat the individual mandate as a tax (and thus admissible under the Commerce Clause) was just a way of manipulating their

interpretation of the Constitution so as to permit the decision that they wished to see. This dissent concluded that the Court should have struck down the individual mandate as well as virtually all of the other provisions included in the Affordable Care Act.

Once again in this case, Justice Alito voted along with most of the conservative faction, although Chief Justice Roberts stepped across the aisle in this case. Justice Alito, though, voted with the two of the most conservative justices in Justice Thomas and Justice Scalia. Here, Justice Alito stood against this decision because of his ideological preference for limited government powers within the economy. This case provides an interesting contrast to *Boumediene* in that Alito's decision here speaks out against government intervention within an economic setting. In *Boumediene,* Justice Alito wanted to grant power to the executive because it was within the context of war. These are both broadly conservative views of government power.

Another case in which Justice Alito displayed his voting tendencies was the very recent case *United States v. Windsor*. This case, decided in June of 2013, dealt with the constitutionality of the Defense of Marriage Act. The Defense of Marriage Act, or DOMA, was enacted in 1996 under President Bill Clinton. This act provides a federal law that allows states to refuse to recognize same-sex marriages as legal unions, thus denying the federal benefits afforded to legal, same-sex marriages. The issue of same-sex marriage tends to divide people ideologically. The facts of this case were that two women, Edith Windsor and Thea Spyer, were legally married in Canada. After this, they moved to and became residents of New York. When Spyer passed away, Windsor was told that she was legally obligated to pay taxes on Spyer's estate. This would not have

been the case had the two been legally recognized as married in New York, thus allowing them to avoid inheritance taxes.

In a 5-4 ruling, the Court held that DOMA was unconstitutional. They held that that the inconsistency created by DOMA and various state laws that recognized same-sex marriage created a violation of the Equal Protection Clause of the Fifth Amendment. Essentially, the laws that states enact are designed to protect their citizens, and this contradictory federal law hurt people that were operating under their specific state's laws (*US v. Windsor* 2013). Justice Alito, the consistent conservative, was in the minority of this case. Alito was joined by Chief Justice Roberts and Justices Thomas and Scalia. As is expected, this case fell strictly along ideological lines. Justice Kennedy, the swing vote, ended up being the crucial vote in *Windsor*. Once again, we see Justice Alito siding with his conservative faction in this case.

Justice Alito wrote a dissent in this case and was joined in his dissent by Justice Thomas, the most conservative justice on the bench. In this dissent, Justice Alito addressed the importance of the issue of same-sex marriage as a matter of public policy, but completely wrote it off as a constitutional matter. He wrote, "the Constitution does not guarantee the right to enter into a same-sex marriage…the silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned" (*U.S. v. Windsor* 2013). This is an interesting point to note, as Justice Alito believes the Court should have had an easy time with this case. In his opinion, there was absolutely no constitutional bearing that warranted such a decision. With this case, Justices Alito and Thomas seemed to distance themselves ideologically even more from the rest of the

justices on the Court with this dissent. Alito continues, "It is beyond dispute that the right to same-sex marriage is not deeply rooted in this nation's history and tradition" (*U.S. v. Windsor* 2013).

In addition to these cases, Justice Alito has ruled even farther to the right than many of his conservative companions on the court in one area. This area is free speech. In 2011, the Court ruled on the case *Snyder v. Phelps*. This case dealt with a Westboro Baptist protest outside of U.S. Marine Lance Corporal Matthew Snyder's funeral with signs reading things like "God Hates You" and "Thank God for Dead Soldiers". Snyder was killed in Iraq, and the Westboro Baptist Church picketed the funeral, arguing that the United States' increasing tolerance of homosexuality had caused God to punish us through deaths like Snyder's. Clearly, this was a highly controversial issue and particularly difficult free speech case, given the offensive nature of the Westboro Baptist Church's political stance. The Court ruled 8-1 that because Phelps (the head of the Westboro Baptist Church) had been on a public sidewalk protesting a public issue, he was afforded protection of the First Amendment. The lone dissenter in this case was Justice Alito.

Justice Alito held that in cases such as these, which lead to immense emotional distress, there should be limits on the freedom of speech. This is a particularly conservative viewpoint, and one that not even his fellow conservatives (Justice Scalia or Justice Thomas) could join him on. Justice Alito wrote: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case" (*Snyder v. Phelps* 2011). In the rest of his brief dissent, Justice

Alito does not rely on constitutional interpretation in his argument. Instead, he seems to indicate that he simply cannot agree with protecting such hate-filled speech. This gives one instance of his willingness to move farther to the right of even the other conservative justices on the bench.

In the 2010 case *United States v. Stevens*, the Court ruled that videos showing images of animal cruelty are technically offered protection under the First Amendment's freedom of speech. Again, the Court decided this case 8-1 with Justice Alito as the lone dissent. In recent years, there have been a good number of cases like these, involving free speech issues, which Justice Alito has voted particularly conservatively on. This implies yet another dimension in which Justice Alito is willing to move to the right in his decision-making, even when all eight other justices disagree with him.

Justice Alito's case is quite fascinating. He provides quite a bit of qualitative evidence for my hypotheses. After having come through a rigorous and combative confirmation process, he eventually became a consistent conservative voter on the bench. In fact, Alito, much like Rehnquist, tended to behave more conservatively than his NSP had predicted. In ideological issues, especially contemporary issues like the ones I have presented, Justice Alito has almost always sided with the highly conservative faction. Unlike the Rehnquist case, Justice Alito has not had to deal with the apparent constraints of the position of Chief Justice. As such, Justice Alito has been willing and able to write dissenting opinions whenever he feels the need. This is clearly the case in *Windsor*, in which Alito wrote a relatively curt opinion that dismissed the court's jurisdiction over such an issue almost immediately.

While Justice Alito explains almost all of his opinions through a constitutional interpretation, there is no missing the ideological slant of his cases. When looking at the content of these various cases, it becomes clear that Justice Alito's conservative ideology pervades much of his decision making. This helps give credence to my hypothesis, as well as to add some tangible content to the statistical analysis presented in the previous section.

Conclusion

The cases of Justices Stevens, Rehnquist, and Alito had served to offer a new perspective on this study. The content of much of the cases that these justices were a part of helps to add depth to the raw data that I previously analyzed. Looking at specific cases helps to not only evaluate the ideological content, but also to see *how* these justices decided their cases and who they tended to vote with. It is quite interesting to see that the two justices who went through highly contentious confirmation processes (Rehnquist and Alito) tended to vote consistently with the conservative faction of the Court, particularly in cases with clear ideological implications. This tendency provides fairly robust support for my hypothesis. On the other end of the discussion, Justice Stevens presents an example of a justice who went through the confirmation process unscathed. For Justice Stevens, the confirmation process was a mere formality. Following such a process, he went on to diverge from his perceived ideology of a moderate conservative, and went on to become a fairly liberal justice.

The divergent paths of those like Justice Alito and Justice Stevens (or Justice Rehnquist and Justice Stevens), must have some explanation. I believe that by looking at the impact of the contention during the confirmation process (which is influenced heavily by political polarization), offers a good look into what is going on. Lee's idea of 'teamsmanship' (2009) seems to be at work. While the degree of that influence may be indeterminate, in cases like those that I have presented, there seems to be a fairly strong effect. It is also interesting to note that Justice Rehnquist, following his highly contentious confirmation as Chief Justice, did not actually move farther to the right. Instead, he stuck to his ideology, and even moved a little bit back towards the middle. This could possibly be explained by the fact that most of the issues that drew contention in Rehnquist's second confirmation process were the same as those that he faced in his first. Perhaps he had lost his sense of anger or defensiveness by the second confirmation. What is more likely, I think, is that the position of Chief Justice requires more responsibility from a Supreme Court justice. As such, I think that we see Justice Rehnquist resist filing solo dissents or voting against heavy majorities, like he had regularly done earlier in his career. This topic would offer an interesting avenue to explore academically.

It is important to note some of the limitations of these case studies. As mentioned in the introduction, it is difficult to control for many aspects of these cases. As such, the perceived ideology of most justices varies in such a way that it is difficult to control for. Nonetheless, on a broad level, Justices Alito and Rehnquist could arguably be perceived to have been 'extreme' conservatives prior to confirmation. Justice Alito's NSP was

larger than Rehnquist's, but both were perceived to be quite conservative. Within the context of the limitations of these case studies, there seems to be support for my quantitative studies.

Overall, these case studies seem to substantiate the claims that I have already made in my quantitative study. Furthermore, these stories offer a new, more detailed look, into how justices make up their minds and what effect ideology seems to have on those decisions. With increased contention, it is not improbable to expect a justice to vote according to his perceived 'party', especially given the aggressive content of many of the Senate Judiciary Committee hearings.

Chapter 5: Conclusion

In 1941, Harlan Stone was nominated by President Coolidge to be an Associate Justice on the Supreme Court. His confirmation proceedings in the Senate Judiciary Committee took only 11 days. Stone received no nay votes within the Committee. At this time, political polarization was at one of the lowest levels we have ever seen, and polarization within the Senate Judiciary Committee was the lowest that it has ever been. Fifty years later, with polarization nearly three times as high as in 1941, President Bush (senior) nominated Clarence Thomas to the Supreme Court. His proceedings lasted 70 days longer in the Judiciary Committee, and he received seven nay votes in the committee. This trend has only continued. What drives these changes and what kinds of consequences might this increase in contentiousness have? These questions are the purpose of this study.

The Supreme Court, as the highest federal judicial body in the American political system, is charged with immense responsibilities. Many of the most substantial social changes that we have undergone as a country came because of the Supreme Court's decision making. Cases involving school desegregation, abortion rights, gun control, and many other issues have all come before the Supreme Court. Thus, the Court is able to cast an overarching opinion on many social issues that create a policy-making framework moving forward.

With this amount of power, it is no wonder why we see such an extensive body of literature surrounding Supreme Court activity. This branch of the government is a body of nine unelected officials that operate in a political environment that is far more isolated

than any other arm of the government. Because the Supreme Court operates largely behind closed doors, it provides a series of questions that we often overlook. Primarily, how do justices make the decisions that they do? We are generally offered only two pieces of evidence when the Supreme Court makes their decision—a numerical vote tally and an opinion. Nonetheless, when it is time for the Court to decide, they slip behind closed doors to deliberate. Given the Court's immense power in policy and constitutional interpretation, it is important to try to get a more in-depth look into some of the forces constraining justices in their behavior. This study offers one new look into this very issue.

Recent trends of increased partisan polarization have created a number of effects on our political system. Many of these effects are obvious to the average American citizen, such as the government shutdown in 2013. However, I believe that polarization has wider reaching implications than those at the surface. Along with the recent trends in increased levels of polarization, there has been a corresponding increase in the level of contention during the Supreme Court confirmation process. My study attempts to draw a connection between polarization and this increased contention. I then extend the study to how those effects may impact judicial behavior. This study offers an inside look into some of the less apparent and possibly even subconscious motives that drive Supreme Court decision-making.

The study begins with the first question: how does political polarization affect the confirmation process. The simple answer to this question is that polarization has increased the level of contention for Supreme Court nominees during the confirmation process. As measured quantitatively by both the length of the confirmation process and

the number of nay votes that a nominee receives, the data supports the idea that political polarization has increased the overall contentiousness of the confirmation process. These findings were not entirely surprising, as previous literature has pointed to a similar trend. Nonetheless, the results were robust, indicating that not only does political polarization increase the level of contention, but also that it is arguably the primary factor that has increased the level of contention.

The second element of my study then takes this increase in contention and tries to use that effect as an explanatory variable for judicial behavior. Using the framework of Frances E. Lee's idea of 'teamsmanship' (2009) and Lawrence Baum's concept of pleasing audiences (2006), I hypothesized that Supreme Court nominees are subject to the subtle forces of political "teams" as well. As such, those that go through highly contentious confirmation processes will tend to feel a stronger allegiance to their party and will then vote more aggressively in that ideological direction.

The results for this portion of the quantitative study were not as robust as the first portion. Nonetheless, the results do point to a trend that seems to be present. For conservative appointees, this effect does appear to affect judicial decision-making. The results indicate that justices nominated by Republican presidents will tend to vote more conservatively than they were perceived to be following a particularly contentious confirmation process. The results for the nominees appointed by Democratic presidents were not statistically significant for this portion of the study. Nonetheless, the direction of the results in every single study was consistent with this theory. While these results may not directly explain what the relationship is between contention and judicial behavior for

liberal nominees, there seems to be some relationship that is along the lines of what I hypothesize within this paper.

The analysis of the specific cases of Justices Stevens, Rehnquist, and Alito offer a new look into the impacts of contention on judicial behavior. These justices offer different experiences to analyze. Justice Stevens did not deal with much contention at all during his confirmation process, and as we see in much of his decision-making on the bench, he did not appear to be particularly oriented to the party that nominated him to the bench. Justices Rehnquist and Alito, on the other hand, dealt with a lot of contention during their confirmation processes. Their subsequent behavior on the Court turned out to be more conservative than they had been predicted to be. Justice Rehnquist provides an interesting case in that he had to go through two different confirmation processes—as Associate Justice and as Chief Justice. While both of these confirmation processes were highly contentious, Justice Rehnquist did not become more conservative following his confirmation as Chief Justice. At that point, Chief Justice Rehnquist altered his role on the Court. Whereas he had previously been more than willing to be a solo dissenter in ideologically charged cases, Chief Justice Rehnquist stepped into what appeared to be a more leadership-oriented position on the Court. He became more of a moderator on the Court, and stayed away from decisions that appeared to be particularly controversial. This tendency offers an interesting point for further research.

Overall, while these cases serve an illustrative function and do not prove any causal relationship, this study does offer some support for my theories. The initial portion of the paper provides fairly substantial evidence for the fact that polarization does appear

to be a cause of the steady increase in the level of contention in the confirmation process. The second part of my study seems to point in the right direction. For Republican appointees, the "teamsmanship" effect certainly appears to be at work. For Democratic appointees, the statistical support is not as strong, but seems to imply that confirmation contention does have some impact on judicial behavior. It is likely that there are more factors at work than just the level of contention that liberal nominees face. This is another interesting avenue for subsequent literature on this topic.

It is important to consider these results in a broad context. Overall the results indicate that polarization increased contention and that contention, at least for Republican appointees, increases ideological extremism on the bench. Thus, to return to the idea of partisan politics, perhaps polarization has wider reaching effects and implications than we may be aware of. Of course, the Supreme Court is just one of many different forums that are potentially affected by political polarization. However, given the institutional isolation of the Supreme Court, it is important to try to gather an in-depth look at what kinds of forces and influences tend to constrain judicial behavior.

This study and this topic generally are of great importance to the American governmental system. The Supreme Court serves to interpret the Constitution and law more broadly, as well as to check on the powers of the Executive and the Legislature. The appointment and confirmation of Supreme Court justices, thus, is an integral part in the maintenance of our political stability. In the past, this process was nearly a formality. The Senate and the Senate Judiciary Committee often accepted presidential nominees

unanimously, such that roll call votes were not necessary. Today, this occurrence has all but disappeared.

These changes in the confirmation process, according to the results of this study, seem to be here to stay. Statistically, polarization in the Senate has been on a steady increase for over thirty years. These trends are no different within the Senate Judiciary Committee. If the government shutdown of 2013 is any evidence, partisan politics is much more than just a trend. Rather, it seems to be a fundamental change in the political process, for better or for worse. This means that, in all likelihood, the rise in contentiousness during the confirmation process is going to become a fixture in the appointment process. The potential implications of this change are endless. Perhaps we will see presidents refrain from appointing ideologically extreme nominees to the bench in anticipation of such a confirmation process. Perhaps further, in anticipation of creating an extremely ideologically polarized Supreme Court, presidents will fret at the idea of appointing nominees that have NSPs on one extreme of the scale or the other. On the other hand, it is also possible that a president who wants to ensure a consistent outcome for his 'team' in Supreme Court cases will appoint a controversial nominee, assuming he or she could be successfully confirmed.

The implications for the makeup of the Court itself are also interesting. Many of the most controversial and publicly important cases in recent history have come down to a 5-4 decision (*Citizens United v. FEC, US v. Windsor, National Federation of Independent Business v. Sebelius,* etc.). As such, there is often one justice, the swing justice, who is afforded a considerable amount of power. Recently, Justice Kennedy has

been tasked with that responsibility. If trends continue, the power of a swing justice will only grow. However, it is also possible that we may find a Court composed of nine justices with ideologically extreme stances in one direction or the other. In this case, Supreme Court decision-making would become entirely predictable.

Whether or not such trends are a good thing or a bad thing is up for debate. Perhaps the increased contention just indicates that Senators are becoming aware of the gravity of Supreme Court composition and decisions, and are thus taking it more seriously than in the past. In this case, it may be a good thing that contention is increasing, as it indicates that our elected representatives are actively engaged in the selection of the members of the highest judicial body in the country. Given that Supreme Court justices are unelected, we must trust our senators to make determinations in this regard that are consistent with our beliefs. From this perspective, perhaps the increased contention is a good thing.

On the other hand, there are certainly arguments to be made that this trend is detrimental. The Founders, of course, established the structure of our government quite deliberately. Thus, it is no mistake that the Supreme Court is isolated from politics as much as is possible within the federal government. Through lifetime appointments and the ability to operate behind closed doors, the Supreme Court is able to stay above many of the partisan issues that accompany elected positions. The new trends in political polarization, at the surface, do not necessarily appear to have an impact on Supreme Court justices. This seems to have been the goal of the Founders based on their design of the federal judiciary. However, as this study indicates, polarization seems to have some

wider reaching effects than may have been previously noticed. While the impacts on the Supreme Court are indirect, they are nonetheless present. If this is the case, one could certainly argue that polarization is subtly undermining the very premise on which the Supreme Court was built. Needless to say, this is a decidedly harmful movement. All in all, it is difficult to subjectively evaluate these trends; rather, it is up to the reader to decide whether or not increases in polarization and confirmation contention are good things or bad things.

It is also interesting to discuss the results of this study within the context of the Senate Judiciary Committee's role in the confirmation process. As we can see from Figures 1, 2, and 3, the levels of polarization and contention are quite similar within the Senate Judiciary Committee and the Senate floor as a whole. There are potentially two ways to interpret this information. Perhaps the Judiciary Committee is merely acting as a microcosm of the entire Senate floor. This would theoretically make sense, given that the Judiciary Committee is made up of senators that also help make up the Senate floor. However, it is also possible that the Senate Judiciary Committee as acting as a sort of indicator to the Senate floor. If the confirmation proceedings are contentious in the Judiciary Committee, it is possible that it will signal to the rest of the Senate that they should brace for a contentious process once the committee reports. In this way, the Senate Judiciary Committee would set a trend for contention. It is very difficult to tell which of these trends is at work based on the data. However, this may be an interesting avenue for subsequent research, likely through a series of case studies. An analysis of the points of contention during Judiciary Committee hearings and Senate floor debates could help shed

some light on this issue. For example, Justice Rehnquist's primary source of contention was the infamous memo which he wrote for Justice Jackson in which he explained that he thought *Plessy v. Ferguson* was a good decision and that *Brown v. Board of Education* should be overturned. This was also a primary source of contention on the Senate floor. Examples like this may offer preliminary evidence that the Judiciary Committee does help set the tone for the confirmation proceedings on the Senate floor.

The implications of this sort of study could be quite interesting. This may indicate that the Judiciary Committee has an even more powerful role in the confirmation process than we think. This idea is consistent with some of the previous literature on this topic (see Farganis and Wedeking 2011). If the Judiciary Committee can increase or decrease the level of contention on the Senate floor, it is theoretically possible (according to the findings in this study), that they have a substantive affect on judicial behavior. In looking at the power of the Supreme Court, perhaps it is a good thing to have as much debate as possible surrounding nominees to the bench. Since Supreme Court justices are not elected, the American citizens must rely on their elected representatives to provide substantial representation in testing the candidates.

This study may even point to arguments of the legitimacy of the modern day Supreme Court. If the Supreme Court is affected by political polarization indirectly, as my study indicates, their institutional isolation appears to be breaking down. Giving Supreme Court justices lifetime appointments, stable salaries, the ability to deliberate and decide behind closed doors, and an entirely self-selected docket allows them to remain impartial to outside political pressures. This study shows that modern trends in

polarization are finding their way into the Supreme Court. This may arguably undermine the legitimacy of the Court as it was structured in our political system.

The goal of this study is not a normative one. Instead, I have simply tried to illustrate a few historical trends in the Supreme Court and the confirmation process. Contention does appear to create some constraints on judicial behavior. To be sure, the issues that a justice must consider in his or her voting decision are vast. By no means am I making the claim that contention during the confirmation process dictates a justice's voting pattern. Rather, this study offers a new angle of interpretation into judicial behavior. The effect of contention in creating a judicial sense of 'teamsmanship' seems to be at work, at least to an extent. It is possible, even probably, that justices are unaware of such constraints during their term. Nonetheless, it is important to scholars as well as average Americans to try to understand why justices vote the way that they do.

References

Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior.* Ann Arbor: University of Michigan Press.

Baum, Lawrence. 2006. *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton: Princeton University Press.

Binder, Sarah A. and Forrest Maltzman. 2009. *Advice and Dissent: The Struggle to Shape the Federal Judiciary*. Washington, D.C.: The Brookings Institute.

Brenner, Saul and Marc Stier. 1996. "Retesting Segal and Spaeth's Stare Decisis Model." *American Journal of Political Science* 40 (4): 1036-1048.

Cameron, Charles, and Jee-Kwang Park. 2009. "How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006." *Journal of Empirical Legal Studies* 6 (September): 485-511.

Cameron, Charles, Jonathan Kastellec and Jee-Kwang Park. 2013. "Voting for Justices: Change and Continuity in Confirmation Voting 1937-2010." *The Journal of Politics* 75 (April): 283-299.

Carter, Stephen L. 1995. *The Confirmation Mess: Cleaning Up the Federal Appointments Process.* Jackson: The Perseus Books Group.

Comiskey, Michael. 2006. "The Senate Confirmation Process and the Quality of U.S. Supreme Court Justices." *Polity* 38 (3): 295-313.

CQ Almanac. 1972. "Court Nominees: Powell and Rehnquist Confirmed." *Congressional Quarterly* 27: 851-859.

CQ Almanac. 1976. "Supreme Court Choice Easily Approved." *Congressional Quarterly* 31: 536-538.

Curry, Brett, Richard Pacelle and Bryan Marshall. 2008. "An Informal and Limited Alliance: The President and the Supreme Court." *Presidential Studies Quarterly* 38 (June): 223-247.

David D. Kirkpatrick, "Parties Set Stage for a Showdown on Court Choice," *New York Times*, 31 October 2005.

Dean, John W. 2002. *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court*. New York: Free Press.

Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal and Chad Westerland. 2007. "The Judicial Commonspace." *The Journal of Law, Economics, & Organization* 23: 303-325.

Epstein, Lee and Carol Mershon. 1996. "Measuring Political Preferences." *American Journal of Political Science* 40 (1): 261-294.

Epstein, Lee, and Jeffrey Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford University Press.

Epstein, Lee, Rene Lindstadt, Jeffrey A. Segal, and Chad Westerland. 2006. "The Changing Dynamics of Senate Voting on Supreme Court Nominees." *Journal of Politics* 68 (2):296-307.

Farganis, Dion and Justin Wedeking. 2011. "'No Hints, No Forecasts, No Previews': An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan." *Law & Society Review* 45 (3): 525-559.

Farmsworth, Ward. 2007. "The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, With Special Attention to the Problem of Ideological Drift." *Northwestern University Law Review* 101: 1891-1903.

Fein, Bruce. 1991. "A Court of Mediocrities." *A.B.A. Journal* 77 (10): 74-79.

Fenno Jr., Richard F. 1959. *The President's Cabinet: An Analysis in the Period from Wilson to Eisenhower.* Cambridge: Harvard University Press.

Goldman, Sheldon and Thomas P. Jahnige. 1985. *The Federal Courts as a Political System.* New York: Harper & Row.

Guliuzza III, Frank, Daniel J. Reagan, and David M. Barrett. 1994. "The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria." *The Journal of Politics* 56 (August): 773-787.

Harold, Stanley W. "Southern Partisan Changes: Dealignment, Realignment or Both?" 1988. *The Journal of Politics* 50 (1): 64-88.

Hudson Jr., David L. 2007. *The Rehnquist Court: Understanding its Impact and Legacy.* Westport: Praeger Publishers.

Johnson, Charles A. 1987. "Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions." *Law and Society Review* 21 (2): 325-340.

Karen Decrow, "NOW Leader is 'Saddened' Woman Wasn't Put on Court," *New York Times,* 1 December 1975.

Krutz, Glen S., Richard Fleisher, and Jon R. Bond. 1998. "From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate." *The American Political Science Review* 92 (December): 871-881.

Lax, Jeffrey R. and Kelly T. Rader. 2010. "Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?" *The Journal of Politics* 72 (2): 273-284.

Lee, Frances E. 2009. *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*. Chicago: The University of Chicago Press.

Lesley Oelsner, "Ford Chooses a Chicagoan for Supreme Court Seat; Nominee is Appeals Judge," *New York Times,* 29 November 1975.

Linda Greenhouse, "High Court Upsets Moment's Silence for Pupil Prayer," *New York Times*, 5 June 1985.

Maher v. Roe. 1977. 432 U.S. 464.

Martin, Andrew D. and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis.* 10: 134-153.

Martin, Andrew D., Kevin M. Quinn and Lee Epstein. 2005. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review* 83: 1275-1321.

Martin Waldron, "Rehnquist is Described as a Firm Conservative," *New York Times,* 28 October, 1971.

Mauro, Tony. 2006. "Samuel Anthony Alito, Jr." In *Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices,* eds. Melvin I. Urofsky. Los Angeles: Sage Publications.

McCarty, Nolan, Keith T. Poole and Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches.* Cambridge: The MIT Press.

McCarty, Nolan, and Rose Razaghian. 1999. "Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996." *American Journal of Political Science* 43 (October): 1122-1143.

Neil A. Lewis and Scott Shane, "The Methodical Jurist," *New York Times,* 1 November 2005.

Ogundele, Ayo and Linda Camp Keith. 1999. "Reexamining the Impact of the Bork Nomination to the Supreme Court." *Political Research Quarterly* 52 (June): 403-420.

O'Neill, Terry. 2010. "NOW Thanks Justice John Paul Stevens for 35 Years of Protection." April 9. www.now.org/press/04-10/04-09-b.html (February 27, 2014).

Paddock, Lisa. *Facts about the Supreme Court of the United States.* New York: New England Publishing Associates.

Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96 (2): 305-320.

Robert D. McFadden, "The President's Choice: John Paul Stevens," *New York Times,* 29 November 1975.

Roe v. Wade. 1973. 410 U.S. 113.

Rohde, David. 1991. *Parties and Leaders in the Postreform House*. Chicago: The University of Chicago Press.

Rosen, Jeffrey. 2006. "Expanding Civil Rights." http://www.pbs.org/wnet/supremecourt/rights/history.html (November 2013).

Rutkus, Denis Steven, and Maureen Bearden. 2010. "Supreme Court Nominations, 1789-2010: Action by the Senate, the Judiciary Committee, and the President." *Congressional Research Service* (May).

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *The American Political Science Review* 83 (June): 557-565.

Segal, Jefferey A. and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* New York: Cambridge University Press.

Shapiro, Martin. 1972. "Toward a Theory of Stare Decisis." *Journal of Legal Studies* 125 (1972): 125-134.

Smith, Steven S. and Gerald Gamm. 2012. "The Dynamics of Party Government in Congress." In *Congress Reconsidered* eds. Lawrence C. Dodd and Bruce I. Oppenheimer. Los Angeles: Sage Publications, 167-192.

Snyder v. Phelps. 2011. 131 S. Ct. 1207.

Stuart Taylor Jr., "Senate Open Rehnquist Hearing, and the Lines of Battle are Drawn," *New York Times,* 30 July 1986.

Sundquist, James L. 1983. *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States.* Washington, D.C.: Brookings Institution Press.

Szmer, John, and Donald Songer. 2005. "The Effects of Information on the Accuracy of Presidential Assessments of Supreme Court Nominee Preferences." *Political Research Quarterly* 58 (March): 151-160.

Texas v. Johnson. 1989. 491 U.S. 397.

U.S. Congress. Senate. Committee on the Judiciary. 2006. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States.* 109th Cong., 2d sess., 10 January.

U.S. Congress. Senate. Committee on the Judiciary. 1986. *Nomination of Justice William Hubbs Rehnquist*. 99th Cong., 2d sess., 29 July.

U.S. Congress. Senate. Committee on the Judiciary. 1971. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.* 92nd Cong., 1st sess., 4 November.

U.S. Congress. Senate. Committee on the Judiciary. 1975. *Statement of Opposition to the Nomination of Judge John Paul Stevens to the Supreme Court of the United States.* 94th Cong., 2d sess.

U.S. v. Windsor. 2013. 570 U.S. 12.

Wallace v. Jaffree. 1985. 472 U.S. 38.

William V. Shannon, "A Question or Three for Nominee Rehnquist," *New York Times,* 7 November 1971.

Williams, Margaret and Lawrence Baum. 2006. "Questioning judges about their decisions:Supreme Court nominees before the Senate Judiciary Committee." *Judicature* 90 (2): 73- 80.

Yarbrough, Tinsley E. 2000. *The Rehnquist Court and the Constitution.* Oxford: Oxford University Press.