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Senate Confirmation of Supreme Court Justices

The Role of Ideology in Senate Confirmation of Supreme Court Justices

BY JEFFREY A. SEGAL,* ALBERT D. COVER,** AND
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ABSTRACT

This paper develops and tests a model of roll-call voting on Senate confirmation of Supreme Court justices. The model assumes that senators prefer to vote for nominees ideologically close to them and against nominees who are ideologically distant. However, under normal circumstances in which the nominee appears qualified and the political environment favors the president, a senator is not likely to cast an ideologically motivated vote against a nominee. Such a vote will probably not lead to the defeat of the nominee, and yet it might come back to haunt a senator at re-election time. The decision calculus of an ideologically distant senator changes as an objective case can be made against a nominee's qualifications. In this case the costs of opposing a vulnerable nominee are lower. At the same time the benefits of opposition rise as the odds increase that the

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disliked nominee can indeed be defeated. Similarly, the benefits of opposition increase when the political environment is hostile to the president, for defeat may again be likely. The model is tested with probit on the 2,048 confirmation votes from Earl Warren to Anthony Kennedy. The interactions of ideological distance with candidate quality and the political environment have powerful effects on confirmation votes.

INTRODUCTION

Article II, section 2 of the United States Constitution provides the president with the power to appoint "judges of the Supreme Court" with the "advice and consent of the Senate." Though the Senate frequently withheld its consent during the latter part of the Nineteenth Century,[1] 43 of the first 44 nominees this century were approved.[2] As recently as 1983, Richard Friedman was able to write that "the confirmation process has, for the most part, become routine."[3] Yet, three of four nominees were rejected between 1968 and 1970,[4] and President Reagan failed in his attempts to place both Robert Bork and Douglas Ginsburg on the Court. Further, nine of the 20 post *Brown v. Board of Education*[5] confirmations can be labeled controversial,[6] compared to only four of the 19 prior to *Brown*.[7]

As of this writing the Reagan revolution has not included the end of affirmative action, the overturning of *Roe v. Wade*,[8] or the reimposition of school prayer. If it does not, the reason may well be the inability to seat Robert Bork. Explanations for why senators voted as they did on Bork and other nominees are incomplete. The goal of this project is to develop and test a

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[1] Cole, *The Role of the Senate in Confirmation of Judicial Nominations*, 28 AM. POL. SCI. REV. 875 (1934).

[2] L. BAUM, THE SUPREME COURT at 257-60 (1989).

[3] Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 1 (1983).

[4] *Id.*

[5] 347 U.S. 483 (1954).

[6] *See* Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 L. & SOC'Y. REV. 927-48 (1979); L. BAUM, *supra* note 2.

[7] *Id.*

[8] 410 U.S. 113 (1972).

model of Supreme Court confirmation votes. The proposed model assumes an interactive relationship between a senator's ideology and both the nominee's characteristics and the political environment. Specifically, a senator will increasingly prefer to vote against a nominee the greater the ideological distance between the nominee and the senator. However, there are costs to such a vote, for purely ideological opposition to a well-qualified nominee may come back to haunt a senator at re-election time. Senators will restrain their proclivities unless the benefits of a negative vote are higher (e.g., there is a substantial probability of rejecting a disliked nominee) or the costs of a negative vote are lower (e.g., a case can be made against the nominee on nonideological grounds). Under these circumstances, we expect a senator's vote to be closely related to measures of his or her ideology. The model is tested on the 2,048 confirmation votes cast by senators since the appointment of Earl Warren.

LITERATURE REVIEW

The political science literature is filled with historical analyses of Senate confirmation of Supreme Court justices.[9] In these works, each appointment is examined individually, with a focus on the particular factors affecting each decision. Though some factors are idiosyncratic, others are more general. Charles Warren,[10] Daniel McHargue,[11] and Henry Abraham[12] all cite the qualifications of the nominee, the politics of the nominee, and the politics of the president as frequent causes of rejection.[13]

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[9] H. ABRAHAM, JUSTICES AND PRESIDENTS (1974); A. BLAUSTEIN & R. MERSKY, THE FIRST ONE HUNDRED JUSTICES (1978); D. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964); J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE (1953); J. SCHMIDHAUSER, JUDGES AND JUSTICES (1979); R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY (1971); C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1923); Cole, supra note 1; Friedman, supra note 3; Grossman & Wasby, The Senate and Supreme Court Nominations: Some Reflections, 1972 DUKE L.J. 557-91; D. McHarque, Appointments to the Supreme Court of the United States: The Factors that Have Affected Appointments, 1789-1932, (unpublished dissertation, University of California at Los Angeles, 1949).

[10] C. WARREN, supra note 9.

[11] D. McHarque, supra note 9.

[12] H. ABRAHAM, supra note 9.

[13] Segal, Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics, 49 J. POL. 998, 999 (1987).

A few scholars have attempted to analyze the population of confirmation outcomes from a behavioral perspective. Robert Scigliano's bivariate analysis finds that partisan control of the Senate, the timing of the nomination, and the potential for Senatorial courtesy have affected the likelihood of confirmation.[14] Jan Palmer proposes an economic theory of confirmation, with legislators selling "their 'product' to those who outbid rival groups or coalitions."[15] His logistic model found that the time into the president's term and the percent of the Senate composed of the president's party were significant,[16] while the age and party of the nominee and elevation to chief justice were not.[17] Jeffrey Segal's multivariate analysis demonstrated the negative impact for the president of lame duck appointments,[18] not controlling the Senate,[19] nominating a cabinet member,[20] and promoting an associate justice.[21]

The historical and empirical studies described all rely on the confirmation decision as the unit of analysis. Far fewer studies have disaggregated the results and examined the actual votes of senators. The best known of these is David Danelski's study of the Pierce Butler nomination.[22] However influential Danelski's work may be, it studies but one nomination, and its findings, therefore, must be viewed with caution. David Rohde and Harold Spaeth examined the Senate roll call votes in the nominations of Abe Fortas, Clement Haynsworth, G. Harrold Carswell, and William Rehnquist.[23] They first found that the votes on these nominations formed an acceptable cumulative scale.[24] They then hypothesized that ideology was the underlying dimension of that scale.[25] Measuring ideology by the Conservative Coalition Sup-

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[14] R. SCIGLIANO, *supra* note 9, at 98-103.

[15] Palmer, *Senate Confirmation of Appointments to the U.S. Supreme Court*, 41 REV. SOC. ECON. 152, 153 (1983).

[16] *Id.* at 155.

[17] *Id.* at 160.

[18] Segal, *supra* note 13, at 999, 1008.

[19] *Id.* at 1007.

[20] *Id.* at 1008-09.

[21] *Id.* at 1009.

[22] D. DANELSKI, *supra* note 9.

[23] D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 105-06 (1976).

[24] *Id.* at 105.

[25] *Id.*

port score,[26] they found strong relationships between ideology and votes.[27] The relationships held after controls for party.[28]

A broader study was conducted by Donald Songer, who examined the fourteen most controversial twentieth-century nominations.[29] Songer argued that ideology would be the decisive factor in determining a senator's vote in controversial nominations. Specifically, he claims that "[f]or each controversial nomination, the policy positions of senators supporting the nominee will be different from the positions of those in opposition on the most salient issues with which the Court is expected to deal."[30]

Given the presumption of confirmation, those in support of the nominee will include senators who agree with the nominee's views and those who do not. On the other hand, those who oppose the nominee will consist mainly of those who disagree with the nominee's views. Therefore, "[o]n the most salient issue with which the Court is expected to deal, opponents of the nomination will be more homogeneous as a group in regard to the issue than will supporters of the nomination."[31]

In all fourteen nominations, those favoring the nominee differed in roll-call votes on salient issues from those opposing the nominee, even after controls for party were made.[32] Ethics, widely debated in the Fortas, Haynsworth, and Carswell nominations, appear to be related to votes only in the Carswell case.[33] The evidence suggests that opposing senators were more clustered at ideologically extreme positions than supporting senators.[34]

Herbert Weisberg and John Felice conducted the most extensive study to date,[35] re-examining the Rohde and Spaeth and

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[26] The conservative coalition support score is the most widely used measure of the liberalism of members of Congress. It is compiled annually by Congressional Quarterly, Inc. *Id.*

[27] D. ROHDE & H. SPAETH, *supra* note 23, at 105.

[28] *Id.* at 106.

[29] Songer, *supra* note 6, at 930.

[30] *Id.* at 931.

[31] *Id.*

[32] *Id.* at 935.

[33] *Id.* at 939-41.

[34] *Id.* at 941-42.

[35] H. Weisberg & J. Felice, An Ideological Model of Senate Voting on Supreme Court Nominations, 1955-1988, (1988) (paper presented at the annual meeting of Midwest Political Science Association, Chicago, Illinois).

Songer hypothesis that ideology plays a crucial role in controversial nominations. Using proximity scaling, regression, and probit analysis, they achieve impressive results: the data fit the proximity scale; the R^2s in the regression models are consistently high; and the proportion predicted correctly in the probit models are above the .9 range. Yet, there is much that their model does not tell us. The model focuses only on nominations on which at least ten percent of the senators cast "no" votes, and therefore makes no attempt to explain which nominations will become controversial and which will not. What Songer declared is still true: "There have been no systematic explanations why a majority of nominations remain essentially noncontroversial. . . ."[36] Second, their model has incomplete explanatory value. By running separate equations for each vote, the result is a unique constant and unique slopes for each nominee, with no explanation for the particular values that are achieved. Thus, while their statistical model can tell us why some senators voted for Bork and others did not, it cannot tell us in advance where the breakpoint will be, nor can it ever tell us why some who were against Bork voted for Rehnquist, and why all who voted against Rehnquist voted for Scalia. Notably, their model cannot take into account either the political environment or the nominee's characteristics. These same limits likewise apply to the Rohde and Spaeth[37] and Songer[38] studies. We propose to improve on these earlier works by developing and testing an interactive model of Senate confirmation. We hold that the votes of senators can be explained by the interactions of ideology with the political environment and the nominee's characteristics. We begin with the rationale for our interactive model.

ON SENATE GOALS IN THE CONFIRMATION PROCESS

Although the balance of factors that affect a senator's decision on supporting or opposing a judicial nomination is not well known—indeed that is the focus of the proposed project— at a general level we can assume that voting in this area is

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[36] Songer, *supra* note 6, at 929.
[37] D. ROHDE & H. SPAETH, *supra* note 23.
[38] Songer, *supra* note 6.

influenced by concerns similar to those that arise in other areas. More generally, we can assume that the decision-making *process* leading up to a vote on judicial nominations will be similar to that preceding votes on other issues. There are, of course, many different models that have been proposed to explain legislative voting behavior, either generally or in particular policy domains. For our purposes an appropriate model of the decision-making process has been developed by John Kingdon.[39]

Kingdon lays out what he describes as "the consensus mode of decision" in which legislators attempt to achieve their goals in an environment where the degree of controversy surrounding each voting decision varies.[40] The amount of controversy surrounding a given vote determines the particular factors that enter into each legislator's voting calculations. For the significant number of noncontroversial issues, *i.e.*, issues for which there seem to be no disagreement as far as a legislator can determine, then the voting rule is simple: follow the herd.[41] With no intrinsic incentive to stand out as different, members will go with the crowd when the crowd moves, without complaining, in a given direction. In contrast, the existence of controversy on an issue requires a more difficult rule of decision.

For a controversial issue, legislators must implicitly ask themselves whether their personal goals are likely to be affected by their positions on the issue. If one or more of their goals might be affected, then legislators must assess the risks and rewards of each position with respect to the relevant goal or goals.[42]

Adapting a set of goals originally presented by Richard Fenno,[43] Kingdon argues that the primary goals likely to interest members are: satisfying constituents, developing intra-Washington influence, and fostering good public policy.[44] Although the ranking among these goals may differ from one member to another, Kingdon plausibly argues that for salient issues in which constituents have an interest (or in which members think their

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[39] J. KINGDON, CONGRESSMEN'S VOTING DECISIONS (1981).

[40] *Id.* at 242-61.

[41] *Id.* at 243.

[42] *Id.* at 243-46.

[43] R. FENNO, CONGRESSMEN IN COMMITTEES (1973).

[44] J. KINGDON, *supra* note 39, at 246.

constituents *might* develop one), the incentive to satisfy constituents and hence improve re-election prospects is likely to prove most powerful.[45] As one senior member purportedly told a newly elected member, "You have two duties. Number one - get re-elected. Number two - let nothing get in the way of number one."

Thus far the discussion of decision-making has been rather general. How does all this apply to the situation confronting a senator who must decide how to vote on a nominee to the Supreme Court?

Typically, we would assume that the process of filling a vacancy on the Court will be well covered by the news media. Although not generally the sort of issue eliciting intense interest among constituents, the process is one that members are likely to consider fairly salient, or at least *potentially* salient, to constituents. Hence, whatever other goals may be affected by a confirmation vote, the goal of satisfying constituents should be a priority for members contemplating their position with respect to Supreme Court nominees. If so, then the question facing senators is what their constituents want out of the confirmation process.

For the most part the background and philosophy of nominees will not be well-known to constituents, so they will have little or no specific information on nominees in evaluating prospective new Court members. As long as this remains the case throughout the confirmation process, few constituents will care very much about the fate of particular nominees. The relative invisibility of nominees is assured to the extent that a consensus develops among senators that there is nothing in the nominee's background likely to prove controversial. The consensus mode of decision-making will lead to overwhelming support for nominees if the confirmation process is uneventful. In contrast, a senator may begin seriously considering opposition to a nominee if conflict does arise during the confirmation process. With a breakdown of consensus each member must more actively consider how his or her goals are affected since the "herd" gives some preliminary signs of splitting apart. Each member must

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[45] *Id.* at 249.

carefully assess the costs and rewards of opposition. How will a vote against a nominee play back in Peoria?

The costs of opposition largely arise from the presumption of competence afforded Supreme Court nominees. In general the Court is a respected institution, and people assume that only qualified individuals will be nominated for positions on it. Hence, the assumption is that opposition to a nominee will not be undertaken lightly but will spring from serious reservations about the ability of a nominee to meet the high expectations people have of Supreme Court justices. If the burden of proof does lie with those who oppose a nominee, then for senators contemplating opposition, what factors will help satisfy constituency concerns about frivolous opposition to a nominee?

One factor that will help free a concerned senator to oppose a nominee is the existence of an issue or issues that would be perceived as legitimate grounds for opposition by constituents. A trivial issue will not do. Something casting doubt on the ability of a nominee or on the nominee's character might well suffice. Traditionally, a nominee's ideology has *not* been considered adequate grounds for opposition. Senate debates on Supreme Court nominees make it clear that ideological arguments are generally taboo.[46] A liberal senator may find the conservative nominee repugnant because of the nominee's ideology, but that has not been perceived as a legitimate rationale for opposition, except in the most extreme cases. A large ideological gulf between a senator and a nominee may predispose the senator to oppose the nomination, but the public arguments almost invariably focus on other grounds. The ability or character of the nominee, not the nominee's ideology, have been sanctioned by custom as appropriate grounds for debate and opposition.

If such issues do arise, then that should act as an instigator of ideological voting. Senators who favor the policies of the nominee will, as before, have an incentive to support the nominee, in this case helping to protect the endangered nomination. Senators who oppose the policies of the nominee will have an incentive to move from acquiescence to active opposition of the nominee. Senators who disagree with the nominee and who want

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[46] *Ideology as Court Issue*, N.Y. Times, July 3, 1987, at A1.

to make good public policy can further their policy goals by opposing the nominee, and do so without potentially antagonizing constituents. Further, there is a large potential benefit in opposing less-than-distinguished nominees, for such persons can possibly be defeated. Hence, the existence of controversy should foster ideological voting among senators as those senators who agree with the nominee's policy positions and those who disagree square off in their attempt to implement favored policies through Supreme Court nominations.

Finally, there may be some circumstances where senators will vote on purely ideological grounds. As noted previously, satisfying constituents is a major concern, but it is not the only concern of senators. Freed from the necessity of running for re-election every second year, senators have the luxury of pursuing other goals more readily than do their colleagues in the House. (That, at least, was the hope expressed by Madison and Hamilton as they argued for the wisdom of bicameralism in *The Federalist*.)[47] For many senators the goal of fostering what they perceive to be good public policy may also be significant. To what extent is this goal likely to be relevant as senators consider a Supreme Court nominee? It depends on the circumstances. In particular, the benefits that a senator attaches to pursuing good public policy depends on the political context surrounding the nomination process.

In general, if the nomination is not controversial, a senator's policy preferences are of little consequence. A senator pleased at the prospect of the nominee's confirmation will naturally vote for the nominee, but even a senator unhappy about the policies espoused by the nominee is unlikely to oppose the nominee if there are no legitimating issues raised concerning the nominee's character or ability. Such opposition would likely prove ineffective, and thus, from the perspective of the unhappy senator, would fail to move the Court toward "better" decisions.

Opposition could, however, prove fruitful if the political situation made the nomination more vulnerable than otherwise. For example, as a president's term of office approaches its end, the incumbent's clout with the Senate will likely decline. Outright

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[47] THE FEDERALIST Nos. 51, 61, 62 (P. Ford ed. 1898).

opposition or stalling the nomination in this circumstance might
well produce a real policy impact since a new president might
send to the Senate the names of nominees who have different
policy preferences than those from the old regime. Another
political factor that might make opposition fruitful for a senator
displeased with the policies of a nominee is which party controls
the Senate. If the president's party does not control the Senate,
then on balance the odds of successfully fighting a nomination
improve. Hence, opposition control should increase the odds
that ideological voting will occur on nominations.

We conclude from our analysis that while senators will gen-
erally support Supreme Court nominees, opposition is likely to
arise under certain circumstances. The discovery of issues con-
cerning a nominee's character or ability will make legitimate
opposition, particularly from those ideologically opposed to the
nominee. A further spur to opposition among senators unsym-
pathetic to a nomination is the possibility that their opposition
might realistically have an impact on public policy. Ideological
voting is likely to emerge if the party controlling the White
House is a minority in the Senate. It is also likely to develop as
presidents approach the end of their time in office.

BUILDING A MODEL OF SENATE CONFIRMATION

The first step in building a model of Senate confirmation
involves measuring the distance between any given senator and
the nominee. We proceed as follows: A senator's ideology may
be measured fairly easily by the support scores given by the
Americans for Democratic Action (ADA). Scores range from 0
(most conservative) to 100 (most liberal). These scores have been
found to be highly stable over time.[48] Scores for the ideology
and qualifications of the nominees are not so easy to determine.
Because there are no ready made scores on the nominee, we
conducted a content analysis from a source that contains com-
parable information on each nominee since Earl Warren: state-
ments from newspaper editorials published from the nomination
by the president until the vote by the Senate. We selected four

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[48] Poole, *Dimensions of Interest Group Evaluation of the U.S. Senate, 1969-1978*,
25 AM. J. POL. SCI. 49, 65-66 (1981).

of the nations leading papers, two with a liberal stance (The New York *Times* and The Washington *Post*) and two with a more conservative outlook (The Chicago *Tribune* and The Los Angeles *Times*).

To conduct the content analysis we trained three students to code each paragraph for both ideology and qualifications. On ideology, paragraphs were coded as liberal, moderate, conservative, or not applicable. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, of women and racial minorities in equality cases, and of the individual against the government in privacy and first amendment cases. Conservative statements are those in the opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values. The nominees' ideology (NI) was then measured by the formula NI = (Liberal-Conservative)/(Liberal + Moderate + Conservative). This formula leads to a scale from +1.0 (unanimously liberal) through 0.0 (moderate) to −1.0 (unanimously conservative).

On qualifications, paragraphs were coded as positive, neutral, negative, and not applicable. Qualifications include statements as to integrity, temperament, achievement, and education, but explicitly exclude statements that claim qualifications or lack thereof based on ideology. Thus, the statement "Robert Bork has an outstanding academic record" would lead to a positive coding on qualifications, but the statement "Robert Bork is too conservative to be qualified for the Supreme Court" would lead to a not applicable qualifications coding. The measure for the qualifications of the nominee (NQ) is NQ = (Positive-Negative)/(Positive + Neutral + Negative). This score also ranges from +1.0 (unanimously positive) to −1.0 (unanimously negative).

The measures, presented in Table 1, *infra*, are reliable and valid. We assessed reliability by using multiple coders on a twenty-five percent random sample of the data. Using "n" as our index of intercoder reliability,[49] results of 0.72 for ideology and 0.87 for qualifications were achieved. Both figures are significant at p < .001.

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[49] K. KRIPPENDORFF, CONTENT ANALYSIS 129-36 (1980).

Validity is not as straightforwardly determined. We do note the following: First, the measures have construct validity—they measure what they are supposed to measure. We do not measure the actual ideology and qualifications of the nominees, but rather, the *perceptions* of their ideology and qualifications. Nominee Blackmun was perceived to be a conservative, yet has turned out to be a moderate.[50] Unless senators had information that neither the newspapers nor President Nixon had, their votes could only be based on his apparent ideology. Second, the scores have facial validity. While not everyone would agree that every score precisely measures the perceived ideology of each nominee, Fortas, Marshall, and Brennan are, as expected, the most liberal, and Scalia, Rehnquist, Carswell, and Bork are the most conservative. Harlan and Stewart come out liberal, but the debate about them centered around their support for the overriding issue of the day, desegregation.[51] O'Connor comes out a moderate, given her previous support for women's rights and abortion.[52] Indeed, the only hint of opposition to her came from the right.[53] On qualifications, Carswell has by far the lowest qualifications score, followed by Haynsworth, the second Rehnquist nomination (where numerous questions to Rehnquist's integrity were made), White (a political appointee), and the second Fortas nomination (where some complaints were heard about the propriety of lecture fees and presidential advising).[54] Finally, the ideological variable passes the most stringent test for validity, predictive ability. For the confirmed nominees, the correlation between our ideological measure and their later votes as justices on civil rights and civil liberties cases is 0.80,[55] an impressive figure given the potential for measurement error inherent in content analysis.

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[50] Segal & Spaeth, *Decisional Trends on the Warren and Burger Courts*, JUDICATURE (forthcoming 1989).

[51] *Four Against Harlan*, Wash. Post, March 11, 1955, editorial page; *Badgering Judges*, Wash. Post, April 11, 1959, editorial page.

[52] 39 CONG. QTR. WEEKLY REPORT 1234-5 (1981).

[53] *Id.*

[54] 44 CONG. QTR. WEEKLY REPORT 1764-5 (1986); *The Fortas Testimony*, N.Y. Times, July 20, 1968, at A26; *Justice Fortas and Propriety*, Los Angeles Times, June 28, 1968, editorial page.

[55] Segal & Cover, *Ideological Values and the Votes of Supreme Court Justices*, AM. POL. SCI. REV. (forthcoming 1989).

TABLE 1

Ideological and Qualification Scores of Nominees

Nominee	Ideology	Qualifications
Warren	.50	.48
Harlan	.75	.71
Brennan	1.00	1.00
Whitaker	.00	1.00
Stewart	.50	1.00
White	.00	.00
Goldberg	.50	.83
Fortas 1	1.00	1.00
Marshall	1.00	.67
Fortas 2	.69	− .27
Burger	− .77	− .92
Haynsworth	− .68	− .33
Carswell	− .92	− .78
Blackmun	− .77	.94
Powell	− .67	1.00
Rehnquist 1	− .91	.77
Stevens	− .50	.92
O'Connor	− .17	1.00
Rehnquist 2	− .91	-.20
Scalia	− 1.00	1.00
Bork	− .81	.58
Kennedy	− .27	.78

We now have a score for each senator and a score for each nominee. Before we can combine them to obtain an ideological distance score of each senator from a nominee, the scores must be standardized to control for the different range and variance between the two measures. Once this is accomplished, we can compute

$$ID = (SI - NI)^2$$

where:

ID is the standardized ideological distance between a senator and a nominee;

SI is the senator's standardized ideology; and

NI is the nominee's standardized ideology.

Since distances must be positive we must use either the absolute or squared value of the distance. Given norms against strictly

ideological voting, we use squared distance, as only those extremely far from the nominee are likely to oppose confirmation.

At this point a simple ideological model of Senate voting could be tested:

$$P(Y_i = 1) = F(a + B_1 ID + E_i)$$

where:

Y_i is the vote of a senator on a nomination;

F represents the cumulative normal probability function;[56]

a and B are parameters to be estimated; and

E_i is an error term.

While we expect ideology to be the most important factor affecting the votes of senators, we do not expect this simple model to do very well. A recent example points out the problem. Liberal senators were very willing to vote against William Rehnquist but quite unwilling to vote against the equally conservative Antonin Scalia.[57] As discussed earlier, there are costs to voting against a nominee on ideological grounds. Ideological distance is a necessary but not a sufficient condition for opposition. For ideological opposition to arise, either the costs of opposition must be lowered (e.g., an objective case can be made against the nominee) or the benefits of opposition must be increased (e.g., political conditions make defeat possible). First we examine the political conditions that make defeat possible.

Segal views the confirmation process in terms of partisan and institutional politics.[58] Through the history of the Court, twenty-six nominees have been rejected by the Senate.[59] Fifteen of thirty-six nominees were rejected when the president's party did not control the Senate, while only eleven of 106 were rejected when the president retained partisan control.[60] Opposition is also likely to occur during the fourth year of a president's term.

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[56] McKelvey & Zavoina, *A Statistical Model for the Analysis of Ordinal Level Dependent Variables*, 4 J. MATH. Soc. 103, 105-06 (1979).

[57] That the opposition to Rehnquist was ideological is easily demonstrated. The average ADA score for Rehnquist opponents was 81. For supporters, the score averaged 20. The point biserial correlation is .83.

[58] Segal, *supra* note 13, at 998.

[59] L. BAUM, *supra* note 2.

[60] Segal & Spaeth, *If a Supreme Court Vacancy Occurs, Will the Senate Confirm a Reagan Nominee*, 69 JUDICATURE 186-91 (1986).

Historically, eleven of twenty-five candidates were rejected during the fourth year of a president's term, while only fifteen of 117 were otherwise defeated.[61] We expect ideological distance to affect senators when the president's party does not control the Senate or during the fourth year of the president's term. Our model at this point would be

$$P(Y_i = 1) = F(a + B_1ID + B_2 (ID*PE) + E_i)$$

where:

PE is the Political Environment, and equals 1 if the president does not control the Senate or if the president is in the fourth year of his term, 0 otherwise. The main effect, B_1, should be negligible; the interaction, B_2, should be strongly negative.

There is considerable scholarly debate on whether the quality of the nominee affects confirmation. According to Friedman, rejected nominees during the 19th Century were "no less fit to serve on the Court than many whose nominations have been approved."[62] Abraham, on the other hand, claims qualifications to be a vital factor in Senate confirmation decisions.[63] We believe that ideological opposition by a senator will occur when an objective case can be made against the candidate's quality. Our model at this point is:

$$P(Y_i = 1) = F(a + B_1ID + B_2 (PE*ID) + B_3NQ + B_4 (NQ*ID) + E_i)$$

where:

NQ is our measure of nominee quality. The estimate B_3 represents the effect of candidate quality on those closest to the candidate. According to our model, these are people likely to vote for the candidate anyway, and thus changes in candidate quality should have only a minor effect on the probability of a "yes" vote. A perceived lack of qualifications should have the greatest effect on those ideologically distant to the nominee, for it provides a ready justification for those who would like to see the nominee defeated for ideological reasons. In order for this interaction to work correctly, NQ must be uniformly negative

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[61] *Id.*

[62] Friedman, *supra* note 3, at 2.

[63] H. ABRAHAM, *supra* note 9, at 38-39.

with those having the highest qualifications having a candidate quality score of 0.0. Thus, the interaction term for them is zero regardless of ideological distance. We accomplished the latter by subtracting NQ from 1.0. As ideological distance increases and candidate quality decreases, the interaction term decreases and the probability of a "yes" vote decreases. Thus, B_4 should be strongly positive.

Finally, a control variable for whether the senator is of the president's party is added. Studies of roll-call votes have long demonstrated the paramount importance of party identification to Congress. Herbert Weisberg, for example, found that a simple model in which each legislator is predicted to vote along with the majority of the legislator's party is quite successful, correctly predicting eighty-two percent of the House votes in a large sample of roll calls.[64] Other studies, perhaps most notably Julius Turner's, have stressed the importance of partisanship as a voting cue in the U.S. Congress.[65] Partisanship is a complex cue, affecting roll-call voting in many ways. For our purposes it is important to note, as John Kingdon observes, that the administration wields more influence over its own partisans in Congress than it has with members of the opposition.[66] There are several reasons for the extra measure of deference accorded to presidential wishes by members of the president's party in Congress. These partisans often feel that they have a stake (electoral and otherwise) in the president's success. They are often unwilling to embarrass the president. A significant number may feel a personal sense of obligation to the president, especially if they feel the president was instrumental in their election to the Congress. Reinforcing the sense of loyalty to the president is an acute sense of distrust for positions adopted by the opposition. Thus, for a variety of reasons members of the president's party are likely to be more amenable to presidential persuasion than are members of the other party.[67] The model to be tested then is

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[64] Weisberg, *Evaluating Theories of Congressional Roll-Call Voting*, 22 AM. J. POL. SCI. 554, 559-60 (1968).

[65] J. TURNER, PARTY AND CONSTITUENCY 15 (1970).

[66] J. KINGDON, *supra* note 39, at 180.

[67] *Id.*

$P(Y_i = 1) = F(a + B_1 ID + B_2 (PE^*ID) + B_3 NQ + B_4 (NQ^*ID) + B_5 SP + E_i)$

where SP equals 1 if the senator is of the same party as the president. The variables are presented in Table 2.

TABLE 2

Dependent and Independent Variables

Variable	Mean	S.D.	Min	Max
Vote	.85	.36	0.00	1.00
Ideological Distance (ID)	2.17	2.37	0.00	8.92
Pol. Env x ID	1.35	2.07	0.00	8.92
Adj. Nominee Quality (NQ)	−.38	.50	−1.78	0.00
NQ x ID	−.85	1.84	−13.63	0.00
Same Party	.50	.50	0.00	1.00

Given limitations on the availability of required data, we test our model on all votes from the nomination of Earl Warren in 1953 through Anthony Kennedy in 1988. The number of observations is 2,048. The model is tested with probit analysis.[68] To facilitate interpretability, we also provide results using regression.[69]

RESULTS

The results of the model are provided in Table 3. The overall fit of the model is extremely high: the X^2 in the probit and the F in the regression are significant at $p < .0001$;[70] the estimated R^2 for probit and the R^2 for the regression are .68 and 0.49

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[68] Probit is a multivariate technique that, similar to regression, assigns weight to several variables simultaneously while attempting to forecast the values of the dependent variable. For further information see McKelvey & Zavoina, *supra* note 56; *see also* Aldrich & Cnudde, *Probing the Grounds of Conventional Wisdom: A Comparison of Regression, Probit and Discriminant Analysis*, 19 AM. J. POL. SCI. 571 (1975) (nontechnical summary of probit and regression).

[69] *See* Aldrich & Cnudde, *supra* note 68.

[70] This means that less than 1 time in 10,000 could we have observed these results if there were no relationship between the votes of senators and the independent variables.

respectively.[71] The proportion predicted correctly for the probit model is .93, a fifty-three percent reduction in error.[72]

TABLE 3

Estimates For Confirmation Model

Variable	Estimate	Z	Estimate	t
Ideol Dist	.037	.991	.003	.826
ID x Pol Env.	−.221	−7.433	−.038	−10.321
Nom Qual	.601	4.515	.079	5.256
NQ x ID	.508	9.266	.094	19.787
Same Party	.733	6.878	.079	6.776
Constant	1.989	17.157	.966	81.695
X^2/F		923.033	389.938	
(Estimated) R^2		.68	.49	
Percent Predicted Correctly		.93		
Percent Reduction in Error		.53		

All estimates except Ideological Distance significant at $p < .0001$

As the relative magnitudes of the probit and regression coefficients are fairly similar, we discuss the regression coefficients to aid interpretation. The constant, .96, represents the probability of a positive vote for a senator not of the president's party with no ideological distance from a candidate of the highest quality under the most favorable political environment. The simple effect for ideological distance is not different from zero. Thus, under these circumstances there is no difference between ideologically distant and ideologically consonant senators. If control of the Senate changes to the opposition, as it did between the Scalia and Bork votes, probabilities change dramatically for dissonant senators. The slope for the ideological distance/political environment interaction is -.038. Ideological distance ranges from 0 to 8.92. Under these most extreme conditions, the prob-

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[71] R^2 measures the fit of model and ranges from .00 (no fit) to 1.00 (perfect fit). An R^2 of .68 means that 68% of the variation in the votes of the senators is explained by the independent variables.

[72] With no information we could predict 85% of the votes correctly by predicting a "yes" vote for every senator. With our variables we are able to predict 93% of the votes of senators correctly, a 53% [(100-93)/(100-85)] reduction in error.

ability of voting for a nominee decreases by .313. Under a more moderate distance, 6.00, the probability decreases by .21.

The qualifications of the nominee has modest effects on ideologically close senators. The most extreme case is Carswell, with an adjusted quality score of -1.78. An ideologically similar senator would have a .11 less probability of voting for Carswell than the senator would a nominee of average qualifications. For a less extreme example, Haynsworth, the probability decreases by only .07. The situation differs considerably for those ideologically opposed to the nominee. In the case of Carswell, a senator with a moderate ideological distance score of four has lowered the probability of a positive vote by .68, compared to a senator ideologically close to the judge. In more moderate situations, a senator with an ideological distance score of four would be thirty-three percent less likely to vote for a nominee one standard deviation below the mean in qualifications than would a senator ideologically close to the nominee.

Finally, for reasons outlined earlier, senators are more likely to support those appointed by presidents of their own party than they are nominees appointed by presidents of the other party, even after ideology is controlled. The increase in probability is approximately .08.

JUSTICE ROBERT BORK?

Chief Justice Warren Burger announced his retirement at the end of the 1985-86 term of the Court. At the time, the Republicans held a six-seat edge in the Senate. President Reagan then nominated William Rehnquist Chief Justice and Antonin Scalia Associate Justice. At the time, Scalia might have been the most confirmable nominee in the country.[73] Brilliant, affable, experienced, and Italian, Scalia's confirmation might have sailed through even as late as the Summer of 1988.

A more prescient White House might have foreseen another vacancy on the Court, especially given the age of the justices. With twenty-two of the thirty-four Senate seats up in 1986 held by Republicans, they might also have foreseen the real possibility

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[73] Segal & Spaeth, *If a Supreme Court Vacancy Occurs, Will the Senate Confirm a Reagan Nominee?*, 69 JUDICATURE 186, 190 (1986).

of Democrats taking control. Regardless, if the expected vacancy
did not occur until 1988, confirmation of a controversial figure
such as Bork would be impossible. What would the result have
been if Bork had been nominated in 1986 and Scalia in 1987?

Bork would have had numerous advantages in 1986: the
Republicans would have controlled the Senate; there would have
been eight more members of the president's party in the Senate;
and the Senate was thus more conservative. These circumstances
would have made a successful campaign against Bork difficult.
Ideology alone has no main effect under the political environ-
ment in 1986; its impact is limited to an interaction with can-
didate quality. While there were concerns about the propriety of
his behavior during Watergate and his candor at the Judiciary
Committee hearings, he was still about average in candidate
quality. Thus, the most liberal Democrats—Senators Metzen-
baum, Mikulski, Reigle, and Sarbanes—whose probability of a
"yes" vote on Bork was .12 in 1987, would have had a proba-
bility of a "yes" vote of .65 in 1986. The probability of a "yes"
vote from Senator Kennedy, who praised Bork effusively when
he was nominated for the Court of Appeals, jumps from .31 to
.76. Even accepting the model's inability to account for the
emotional reaction against Bork, it is simple to find eight or
more votes for Bork, and thus his confirmation, in the more
conservative and Republican 1986 Senate.

Alternatively, Scalia would have faced far more difficult
circumstances in 1987. Yet, given his extraordinary credentials,
it is difficult to imagine his defeat. When Scalia was nominated
in 1986, ideology played no role in the vote, because there is no
main effect, the Republicans controlled the Senate, and he had
the highest possible qualifications, eliminating any interactions.
In 1987 there would have been some effect for ideology, for the
Democrats controlled the Senate. This, though, would not have
been enough to overcome his spotless record. We can again look
at Metzenbaum, the Democrat with the most liberal voting rec-
ord. His probability of voting for Scalia in 1986 was 0.99. The
effect of ideology in 1987 would lower that probability to .87.
Without the faintest argument of improper past behavior, Scalia
would have breezed through the Senate. Thus, changing the
sequence of the Bork and Scalia nominations might well have
put both on the Court.

SUMMARY AND CONCLUSIONS

We proposed and tested a model of senators voting on the confirmation of Supreme Court justices. The model states that senators prefer to vote ideologically on Supreme Court nominations but in most circumstances find the political costs too high. If the nominee is highly qualified, voters might react adversely to purely ideological opposition. Further, under most circumstances, the benefits of such opposition are miniscule. As most confirmation votes are routine, solitary opposition does little to advance the senator's policy goals. These costs of ideological opposition are reduced significantly if an objective case can be made against the qualifications of the nominee. In such cases, a "no" vote can be easily justified. The benefits of ideological opposition can be increased if there is a reasonable chance the nomination will fail. Then, a senator's opposition might affect the outcome. Furthermore, a senator will not incur the costs of voting alone in such circumstances. Historically, the likelihood of defeat is greatest when the president's party does not control the Senate or when the president is in the fourth year of the term in office.

Our cost/benefit approach to senate voting proved fruitful. The model was tested on the 2,048 confirmation votes from Earl Warren through Anthony Kennedy. The overall fit was quite high: Sixty-eight percent of the variance was explained and ninety-three percent of the cases were correctly categorized. The variables performed exactly as predicted: weak or no simple effects were found for ideological distance and candidate quality; substantial effects were found for the interactions between ideological distance and both candidate quality and the political environment. Thus, ideological distance between a senator and the nominee will play a sizable role in the senator's voting calculus when and only when the nominee is of less than sterling quality or the political environment is hostile to the president.

The model does not account for all factors that have affected the votes of senators. Southern opposition to Harlan and Stewart goes beyond what one would expect from ideology alone. Obviously, the single issue of desegregation controlled the votes of these senators. Unfortunately, the "racial ideology" of senators

and nominees cannot be consistently measured. And no model can or should measure Senator Langer's (R.-ND) opposition to all nominees not from North Dakota.[74]

There are more questions to be answered, but they go beyond the scope of the current study. The president is successful in getting agreement from senators, even after controlling for ideology. Surely the effect must vary across senators. What factors affect presidential influence in these votes? The opinions of constituents are not measured, nor can they be. Yet, senators' ADA scores substantially reflect state ideology.[75] To what extent do senators vote the district, and to what extent do they "shirk" by voting their personal preferences? Answers to these questions will help us understand not just Senate voting on Supreme Court justices, but more general concerns about roll-call voting.

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[74] H. ABRAHAM, *supra* note 9, at 238.
[75] Carson & Oppenheimer, *A Method of Estimating the Personal Ideology of Political Representatives*, 78 AM. POL. SCI. REV. 163-78 (1984).