

Judicial Selection and Judicial Choice

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Abstract: The divisiveness of the lower federal court confirmation process has been the focus of extensive scholarly and popular commentary. The engine driving the controversy is the notion that who sits on the federal bench makes a difference for subsequent policy outcomes. However, little attention has been paid to whether the concerns of actors involved in the process have been borne out in the behavior of nominees who were controversial at the time of their nomination to the bench (but ultimately were successful in securing confirmation). Using data from 1977-2002 on nominations to the U.S. Courts of Appeals and the voting behavior of court of appeals jurists for the same period, here we empirically investigate whether judges who were considered more controversial during their confirmation process are more ideologically-driven in their voting behavior than other (less controversial) judges.

Note: This manuscript reflects the views of the authors and does not necessarily reflect the views of Administrative Office of the U.S. Courts. We offer our thanks to David C. Clark, Paul M. Collins, Jr., Harold J. Spaeth, Margaret Williams and the members of the Comparative-American Workshop at Binghamton University for their thoughts on this and related projects. We are especially grateful to Brandon Bartels, Nancy Scherer, and Amy Steigerwalt, who graciously and with alacrity shared their data on U.S. Courts of Appeals confirmations. We are also indebted to Susan Haire, who provided much advice and assistance regarding the U.S. Courts of Appeals Database and its update.

Introduction

Law and courts scholarship is no longer dominated by the study of the U.S. Supreme Court. While the Supreme Court still looms large on the scholarly horizon, the collective research agendas of students of judicial politics and behavior have become much more inclusive in terms of the courts included in their purview.ⁱ The proliferation of analyses of the U.S. courts of appeals evidences that trend. These most important of appellate courts have always attracted the attention of at least some scholars (e.g., Goldman 1966; Howard 1981) but the volume of this research has grown exponentially in the past decade, as even a casual perusal of recent literature makes clear (e.g., Benesh 2002; Klein 2002).

Concurrently, there has been an ever-increasing amount of attention paid to nomination and confirmation politics at the lower federal court level. As with the case of analyses of judicial behavior, studies of selection politics were once exclusively focused on the selection of jurists for the Supreme Court (e.g., Abraham 1974). While interest in the politics associated with staffing that court continues unabated (e.g., Krehbiel 2007), the selection of individuals to fill vacancies on the lower federal courts (especially the U.S. courts of appeals) now arguably garners the same amount of scholarly time and attention as that devoted to staffing the Supreme Court. Indeed, such studies represent a veritable cottage industry at present.ⁱⁱ

The correspondence of these two trends – increased attention to lower federal court selection and increased attention to lower federal court decision making – is not mere happenstance. Rather, much of the Sturm und Drang associated with the lower federal court selection process reflects the growing appreciation of the important policymaking

role played by the lower federal courts (Scherer 2005). Further, as Hartley and Holmes note, “The long political life of the lower judiciary is often viewed as an opportunity to indirectly shape policy well after a president leaves Pennsylvania Avenue” (1997, 274). In short, key actors in the selection and confirmation process (presidents, senators, interest groups) have become even more sensitive to the relevance of Peltason’s astute observation that “the decision as to who will make the decisions affects what decisions will be made” (1955, 29). As a consequence, they have paid a great deal more attention to the selection of these future (and long-lived) decision makers. The same is true with regard to academics.

Interestingly, however, there is little work that explicitly connects the selection of judges with the decisions they make once on the bench. There are exceptions, of course. For example, Giles et al. (2002) link senatorial courtesy at the selection stage to the consistency of judges’ behavior with the agendas of the presidents who selected them (see, also, Kuersten and Songer 2003; Segal et al. 2000). In addition, there is a small but informative literature that connects conditions of divided government at the time of selection to later behavior on the bench (e.g., Scherer 2001).ⁱⁱⁱ Nonetheless, there is a great deal of concern expressed about how extremist judges will behave once on the bench but little systematic evidence brought to bear in that debate. Our intention is to help remediate this state of affairs. Drawing on the extant literature, we construct a model of senatorial confirmation for court of appeals jurists and link that model, through the adaptation of a Heckman-type selection model (Heckman 1979), to a judicial decision making model. In doing so, we hope to shed light on whether what happens at the selection stage matters for anticipating what will happen at the decision stage, both as a

practical matter (i.e., is there a selection bias in standard decision-making models?) and as a substantive matter (i.e., are judges who are tagged as extremists during the confirmation process more ideologically motivated in their vote choices once on the bench?).

Judicial Selection & Judicial Behavior

Judicial selection has always been a staple of academic research agendas and certainly the public has paid particular attention when the selection of a future Supreme Court justice has been at stake (Maltese 1995). Only recently, however, have the public and the academy become virtually obsessed with the political spectacle that characterizes modern confirmation politics. A number of scholars have identified a new era of politicization in the confirmation process beginning as early as the Nixon Administration, or, at the very latest, with the nomination of Judge Robert H. Bork to the Supreme Court by President Reagan (Bell 2002; Hartley and Holmes 1997). Arguably this politicization of the process became even more intense during the Clinton Administration.

President Clinton began his first term of office in the enviable position of having a Senate majority of his own party. He lost that advantage when the Republicans took control of the Senate in 1995. In some regards, the resulting delay in filling vacancies on the federal bench represented a continuation of previous trends, as the length of time between nomination and confirmation for lower federal court judgeships had been ever-increasing (American Bar Association 1997; Citizens for Independent Courts 2000). But, while there was a preexisting trend toward increased delay before Clinton ever took office, the rate of increase took a sharp turn in an upward direction during his presidency. As Haire and her co-authors opined, “The ‘hostile’ environment for Clinton’s judicial

nominees in the Senate [after the Republicans took control] likely contributed to the selection of candidates for the appeals courts whose views and backgrounds could survive the confirmation process” (2001, 277).

Put in other words, Haire et al. (2001) argued that an unfavorable political climate necessitated the selection of more palatable (that is, more moderate) judges. Earlier, Richardson and Scheb (1993) had considered the so-called moderation hypothesis in the context of Supreme Court nominations. On the basis of their analyses, Richardson and Scheb concluded that “justices appointed under divided government have tended to be more moderate than their colleagues appointed under unified government. The moderating effect of divided government may be weak, but it is appreciable” (468). Given this empirical evidence at the Supreme Court level, anecdotal and journalistic accounts of the applicability of the moderation hypothesis to the lower court selection process seemed not unreasonable. Scherer, however, felt otherwise. Her analysis of search and seizure, race discrimination, and federalism cases led her to conclude that the conventional wisdom was simply wrong. She argued that opposition senators lack the necessary resources to wage the kind of partisan battle with the President that they did in the case of Ronnie White^{iv} and others on each and every lower court nominee (Scherer 2001, 215).

Given the limited resources available to senators, a natural question that arises is why some nominees face a tough fight in the Senate while others do not. Recent work by Scherer and her collaborators demonstrates that interest groups play a key role in activating senatorial opposition. Borrowing from the literature regarding interest groups and administrative agencies (McCubbins and Schwartz 1984), they advance a fire alarm

theory to explain the relationship between interest groups and the Senate in the context of lower federal court confirmations:

Because of low public salience and limited resources, senators who oppose the president cannot engage in the type of thorough confirmation proceedings we typically see at the Supreme Court level. Senators must rely on interest groups with stakes in the outcomes of federal court litigation to inform them when the president makes a troublesome nomination (Scherer et al. 2008, 1029).

To test this theory, Scherer and her co-authors analyzed the effect of interest group opposition on both the length of time it takes the Senate to act on a nominee and whether a nominee is confirmed. They found that interest group opposition structures both confirmation timing and confirmation outcomes, making senatorial processing take longer and confirmation less likely.

Interest group opposition serves as a useful indicator of anticipated extreme behavior on the part of nominees. Controversial nominees, who are the nominees most likely to draw interest group opposition, are almost always labeled as extremists. Whether it is the opposition of Earth Justice to Brett Kavanaugh's nomination to the D.C. Circuit by President George W. Bush^v or the opposition of the Judicial Confirmation Network to David Hamilton's nomination to the 7th Circuit by President Obama,^{vi} interest groups label nominees as extreme and use their public opposition to such nominees to good effect, according to the evidence presented by Scherer and her colleagues.

Despite the attention given the judicial confirmation process both by politicians and by scholars, and the awareness during that process of the likely impact of a particular

nominee or class of nominees on the federal judiciary, students of judicial behavior have not, aside from the exceptions noted above, attempted to ascertain what the confirmation process suggests for the behavior of federal judges. If the interest groups who oppose particular nominees are correct, confirmation of controversial nominees will lead to a judiciary full of ideologues intent on enacting their policy preferences into law via their decisions.^{vii} Accordingly, if the Senate manages to prevent the confirmation of the most ideological nominees, then, once the filtering that occurs during the confirmation process is accounted for, the impact of ideology on decision making should be less than if the nonrandom selection of the confirmation process is not considered.

Furthermore, assessing the relationship between the confirmation process and the decision making process of federal judges offers the opportunity to assess whether the nominees opposed by interest groups do, once confirmed (that is, for those who are confirmed), behave differently on the bench than those nominees who did not raise the ire of interest groups. In this context, scholars may be able to begin to assess how interest groups select nominees to oppose. If groups correctly identify those nominees inimical to their issue agenda, then failing to account for those nominees they successfully oppose (those whose confirmations they prevent) would incorrectly estimate the degree to which those nominees who interest groups oppose (but who are ultimately confirmed) differ from those whose nominations are not opposed by interest groups.

Once the role of the confirmation process is accounted for, those nominees opposed by liberal interest groups should be less likely to cast a liberal vote in a given case, and those opposed by conservative interest groups should be more likely to cast a liberal vote, in comparison to their colleagues on the bench whose confirmations were not opposed by

interest groups. In this case, acknowledging the implications of the confirmation process on the behavior of court of appeals judges is pivotal; ignoring the nominees who are not confirmed (due to interest group opposition or any other combination of possible influences on senatorial confirmation) can lead to an incorrect estimate of the role interest groups play in the confirmation process.

One way to think about this situation is as follows: The court of appeals votes we observe are cast by individuals who are not a random draw from the population of individuals who are nominated to fill a court of appeals vacancy. While the factors structuring confirmation success differ from those that structure the vote choice of judges once they ascend to the bench, the outcome of the confirmation process is likely to affect the judicial decision-making stage. In particular, nominees who are controversial will be less likely to be confirmed to the bench, *ceteris paribus*, resulting in a non-random sample of individuals (i.e., judges) who can go on to cast votes in court of appeals cases. This does not mean that controversial nominees will never be confirmed. But it does mean that there are likely to be systematic differences between the population of nominees and the population of confirmed judges that may result in biased estimates of the influence of ideology on judicial vote choice. This represents a classic instance of selection bias (Heckman 1979).^{viii} Our purpose is to investigate whether there is empirical evidence to suggest that there is, in fact, such a selection bias.

Selection & Decision-Making Models

Drawing on the rich bodies of literature regarding judicial selection and judicial decision making, we, first, construct a model of the former and, then, incorporate information from that model into a model of the latter. The model of judicial selection we construct estimates the probability of senatorial confirmation; i.e., whether a nominee to a vacancy on the U.S. courts of appeals is confirmed by the Senate. The model of judicial decision making we construct estimates the probability of a liberal vote; i.e., whether a court of appeals judge's vote in a case is in a liberal or conservative direction.^{ix}

We begin with the model of senatorial confirmation. Following a host of other scholars (e.g., Bell 2002, Martinek et al. 2002, but particularly Scherer et al. 2008), we first include a variety of attributes associated with the nominee. Key in this regard is a pair of measures of interest group opposition to a nominee: (1) opposition by conservative groups to nominations made by Democratic presidents and (2) opposition by liberal groups to nominations made by Republican presidents.^x In either case, the prospects for the confirmation of a nominee are dim in comparison to those of nominees who face no such opposition for a very important reason: interest groups raise the political salience of a lower court nomination and, hence, can induce senators to “move away from the norm of deference [to the president] and instead delay and possibly prevent confirmation” (Scherer et al. 2008, 1029).

We further include the American Bar Association (ABA) rating, race, and gender of the nominee in addition to the presence of a Judiciary Committee patron. Though they are not without controversy, ABA ratings offer a measure of a nominee's professional qualifications.^{xi} These ratings run from “not qualified” to “qualified” and, accordingly,

our expectation is that higher ABA ratings will enhance the likelihood of a nominee's confirmation by the Senate. With regard to race and gender, for the period under investigation here (1977-2000), minority and female judges are expected to have a more difficult time securing confirmation based on the experiences of minority nominees such as Enrique Moreno and Richard Paez as well as female nominees such as Helene White and Marsha Berzon (more generally, see Solowiej et al. 2005).^{xii} Committees serve as key gatekeepers for legislative action (Weingast and Marshall 1988), and the Senate Judiciary Committee is no exception when it comes to action on court of appeals nominations. Accordingly, we expect that nominees who have a patron – that is, a home-state senator sitting on the Senate Judiciary Committee who supports the nominee – will find the confirmation path smoothed by that patron and, hence, will be more likely to be confirmed.

An additional characteristic that can be considered nominee-related (because it is about the circuit to which that individual is being nominated) is whether that circuit is ideologically balanced.^{xiii} Scholars have long recognized that appointments to closely divided courts can and do result in policy shifts (e.g., Ruckman 1993). Republican senators are loathe to permit appointments likely to yield shifts in a liberal direction while Democratic senators are no doubt equally averse to permitting shifts in a conservative direction. When circuits are ideologically balanced, confirmation battles are expected to be fierce, as any given nomination may shift that balance. As a result, those nominated for a position on a closely balanced circuit are less likely to be confirmed.

We next include a set of factors that tap into political conditions at the time a nomination is made. One is specifically related to the nominee: ideological distance

between the nominee and the median senator. The basic logic is that the Senate will be less favorably disposed to a nominee with whom it disagrees.^{xiv} Three additional political condition variables are related to the president: (1) president-opposing party ideological distance, (2) presidential approval, and (3) point in presidential term. Just as the Senate is likely to be less receptive to a nominee who is ideologically distant from it, the Senate is also likely to be less receptive to any nominee put forward by a president who is ideologically distant from it.^{xv} With regard to presidential approval,^{xvi} it represents a valuable “resource[] at the president’s disposal to achieve his desired goals, including securing confirmation for his chosen nominees to the lower federal bench as a means of pursuing policy goals (or, at the very least, protecting policy agenda advances secured in the legislative arena)” (Martinek et al. 2002, 347). And, the later in a president’s term, the less favorable the climate he faces as the honeymoon period fades and members of the opposition party begin to think about the possibility of stalling to permit a president of their own party to fill judicial vacancies (Rutkus and Scott 2008; Solowiej et al. 2005). In sum, the closer a nominee is to the Senate, the closer a president is to the opposition party, the greater the level of presidential approval, and the earlier in the presidential term, the greater the likelihood of confirmation.

A further variable related to political conditions at the time of nomination is divided government. Divided government has been demonstrated to be an important (though not necessarily uniformly consistent) factor that structures legislative behavior (e.g., Edwards et al. 1997), including judicial confirmation (e.g., Binder and Maltzman 2002). Simply put, divided government represents a less conducive environment for the achievement of presidential priorities, whether those priorities are part of a president’s legislative agenda

or related to his choices to staff the federal bench. Hence, divided government should make confirmation of any given nominee less likely.

More pedestrian factors that are likely to contribute to confirmation success relate to the Senate's workload. In particular, the greater the number of nominations that are pending, the less likely confirmation will be simply because the Senate may not get to a nomination before the term ends (Martinek et al. 2002). Likewise, the closer to the end of the congressional session, the less likely confirmation will be because time for senatorial action is limited (Martinek et al. 2002). In contrast, however, nominations that are really re-nominations of the same individual – rather than new nominations of individuals not nominated before – are more likely to result in confirmation because they do not require the same effort on the part of the Senate given that they have already been vetted by that body (Martinek et al. 2002).^{xvii}

Having articulated the model of confirmation we rely upon here, we now lay out a model of ideological vote choice (i.e., liberal versus conservative judge vote). As was the case with the confirmation model, there is an extensive literature from which to draw in the construction of a model of vote choice (see, e.g., Benesh 2002; Kaheny et al. 2008). A key variable in any such model is the ideology of the judge. All things being equal, liberal judges are more likely to cast liberal votes while conservative judges are more likely to cast conservative votes.^{xviii} The interest group opposition variables (conservative group opposition, liberal group opposition) are also relevant for our purposes. Judges on the courts of appeals who were opposed by conservative interest groups are presumably more liberal in their voting behavior than those who were not. Likewise, judges who were opposed by liberal interest groups are anticipated to be more conservative in their voting

behavior than those who were not. In either case, the expectation (given that interest groups are assumed to target who they see as extremist judges) is that interest group opposition at the time of confirmation will exert an influence over and above the basic ideology measure.

Other judge characteristics are also likely to matter. In particular, there is at least some evidence (albeit mixed evidence) to suggest that the race and gender of a judge influences the vote choice of that judge. For example, while Uhlman (1978) and Walker and Barrow (1985) found no evidence of differences in the voting of black and white judges, Scherer (2005, 99-104) did. With regard to gender, there are similarly uneven results, with, for example, Songer et al. (1994) finding gender effects in some areas of law, and Westergren (2004) finding no such effects. The mixed results suggest that, at the very least, it is important to control for the possible effects of judge race and gender on vote choice. Our (tentative) expectation is that both minority judges and female judges will be more likely to cast liberal votes.^{xix}

Individual judge characteristics are by no means the only factors likely to exert influence on a judge's vote. First, court of appeals judges do not cast their votes in a vacuum. Rather, most individual judge votes are cast in the context of a particular case that is decided in conjunction with panel mates.^{xx} This suggests the potential for a judge to be influenced by his or her fellow judges on the panel (e.g., Martinek 2010). Accordingly, all things being equal, a judge may be influenced by his or her own ideology but also by that of the judges with whom he is deciding a case; i.e., the more liberal [conservative] a judge's fellow panelists, the greater the likelihood of the judge casting a liberal [conservative] vote.^{xxi} The evidence also suggests that court of appeals

judges may be sensitive to the preferences of both the particular circuit of which they are members (Giles et al. 2007) and the U.S. Supreme Court (Benesh 2002). This is not surprising since the circuit en banc and the Supreme Court each have the authority to review (and overturn) panel decisions. As with panel effects, the expectation is that the more liberal [conservative] the circuit or the Supreme Court, the more likely a liberal [conservative] vote is.^{xxii}

Finally, we consider four case-related variables in our model of ideological vote choice: liberal litigant resources, conservative litigant resources, criminal case, and lower court decision. Litigant resources are well established as influences on judicial decision making (e.g., Galanter 1974; Songer and Sheehan 1992). Liberal litigants will do better in inducing judges to vote liberally if they are well heeled, while conservative litigants will do better in inducing judges to vote conservatively if they possess high levels of resources.^{xxiii} In addition to litigant resources, the type of case – in particular, if the case in question is a criminal case – ought to matter for the outcomes we observe. Simply put, criminal cases – in which a liberal outcome is associated with voting in favor of the criminally accused or convicted – only infrequently raise legally consequential issues and, as a result, are much less likely to result in a vote in favor of the defendant (i.e., are less likely to result in a liberal vote). And, finally, it is important to consider the decision of the court below. Specifically, since the courts of appeals overwhelmingly affirm lower court decisions given their mandatory dockets (Howard 1981; Songer et al. 2000), a liberal decision in the court below is more likely to be associated with a liberal vote cast by a judge in the courts of appeals.

With our model of confirmation outcome and vote choice now in hand, we can turn to developing an estimation strategy that will permit us to link the former to the latter. Doing so is intended to provide insight into whether and how what happens at the confirmation stage is suggestive for how judges will behave. As noted earlier, our approach is to adapt a Heckman-type selection model, with confirmation outcome as the first (i.e., selection stage) and ideological vote choice as the second stage.

Method & Data

Models intended to account for selection bias are particularly popular in the international relations literature (e.g., Clark and Reed 2003) but they are also commonplace in the American politics literature (e.g., Solowiej and Brunell 2003). In the domain of law and courts research, recent examples include Hall and Bonneau (2006) and Nicholson and Collins (2008). Though it is standard in discussions of these models to refer to the first stage as the selection stage, here the first stage is quite literally the selection stage: the confirmation of judges to the bench. The second stage consists of the ideological direction of the votes cast by judges once they are on the bench. This yields the following model structure:

$$y_1^* = \omega' \alpha + \varepsilon \quad [\text{Equation 1}]$$

$$y_2^* = X' \beta + \nu \quad [\text{Equation 2}]$$

Where y_1^* represents a latent variable measuring the likelihood of confirmation by the Senate and y_2^* represents a latent variable measuring the likelihood of a liberal vote.

While we do not observe either of these latent variables directly, we do observe whether a nominee is confirmed or not (y_1) and, assuming $y_1^* > 0$, whether a judge casts a liberal or

conservative vote (y_2). Jointly estimating a probit model for both stages is easily accomplished with a Heckman-style selection model.^{xxiv} “Such a selection model is useful for studying phenomena that are only observed for cases that meet some selection criteria, particularly when the selection process might be systematically related to the primary phenomenon of interest” (Mitchell and Hensel 2007, 730).

The first stage of the Heckman model estimates the effect of a set of covariates on the probability of the confirmation of a court of appeals nominee. From this first stage, the inverse mills ratio, or the nonselection hazard, can be calculated. Specifically, the inverse mills ratio takes from Equation 1 above:

$$\hat{\lambda}_i = \frac{\phi(-\hat{\omega}_i a)}{\Phi(-\hat{\omega}_i a)} \text{ [Equation 3]}$$

Allowing the second, outcome equation above to be estimated as:

$$y_2^* = X'\beta + \gamma\hat{\lambda} + \nu \text{ [Equation 4]}$$

The second stage estimates the effect of a set of covariates on the probability of a liberal vote given that the judge casting the vote was confirmed.^{xxv}

The data for the first stage includes all individuals (both successful and unsuccessful) nominated to the courts of appeals (excluding the Federal Circuit) between 1977 and 2000, covering the Carter through Clinton administrations.^{xxvi} From these data, a probit model estimating likelihood of confirmation was estimated, and, for each nomination, the inverse mills ratio (the “nonselection hazard”) was estimated. For those judges who were confirmed, the inverse mills ratio of the nomination on which they were confirmed, was then merged with the “flipped” court of appeals database.^{xxvii}

To estimate the decision-making model, we used the database first compiled by Donald R. Songer and subsequently updated by Ashlyn Kuersten and Susan Haire. Specifically, we used decisions made by court of appeals judges confirmed since 1977 (through 2002, the most recent date of the court of appeals database). The unit of analysis is the judge-vote. As noted above, to account for the selection bias, we included, for each judge-vote, the inverse mills ratio estimated from the selection equation. To address the heterogeneity of the data given repeated observations within case and across judges, we calculated robust standard errors.^{xxviii} The results of our model estimations appear in Table 1, where we separately report the results from a standard probit estimation of the decision-making model (Model 1) as well as the results from a selection-type model linking confirmation and vote choice (Model 2).^{xxix}

[Table 1 Here]

Results

The most straightforward test for the presence of a selection effect is the statistical significance of the inverse mills ratio (λ) in the outcome equation. The coefficient, γ , on λ is statistically significant, suggesting that there is a selection effect at work and that estimates of coefficients at the outcome stage may be biased if the selection effect is ignored. However, a comparison of the outcome equation with and without the selection effect included indicates that the consequence of the selection bias is quite modest. None of the parameter estimates differ between the two models in terms of their statistical significance.

[Table 2 Here]

Our first hypothesis suggested that, if there is a selection effect influencing the outcome equation, ideology should matter less once that selection effect is accounted for in the outcome equation. As Table 2 indicates, that effect is not observed. A one-unit increase in ideology in the model with the selection effect reduces the probability of a liberal vote by 11.4%, somewhat greater than the effect of ideology in the model without the selection effect (where a one-unit increase in ideology reduces the probability of a liberal vote by 10.8%).^{xxx}

We further hypothesized that, to the extent that interest groups identify judicial nominees likely to be ideological extremists, those nominees should exhibit ideological tendencies that make them more liberal or conservative relative to their colleagues who were not targeted by interest groups. Accordingly, that should mean that nominees opposed by liberal interest groups should be more conservative than their colleagues, *ceteris paribus*, and nominees opposed by conservative interest groups should be more liberal than their colleagues, *ceteris paribus*. Neither effect is observed; judges opposed at confirmation by liberal interest groups are no more conservative than their colleagues, while judges opposed by conservative interest groups are no more liberal than their colleagues. At one level, this may suggest that interest groups do not correctly identify those nominees who might prove problematic once confirmed. But, as the selection model indicates, nominees opposed by liberal and conservative interest groups are significantly less likely to be confirmed than those who garner no such opposition. Holding all other independent variables at their median values, opposition by liberal interest groups results in a 29.4% decrease in the probability of confirmation; opposition by conservative interest groups results in a 22.9% decrease. Taken together, these results

suggest that the success of interest groups is found at the confirmation stage, where their efforts to prevent nominees they consider dangerous from being confirmed pay off. Once these objectionable nominees are denied confirmation by the Senate, nominees who attract the objection of liberal and conservative interest groups but are nonetheless confirmed are no more likely to cast a conservative (liberal) vote than their colleagues.

Turning briefly to the other variables in the confirmation model, we find that several of the nominee characteristics are significant predictors of confirmation. The gender and race of the nominee do not affect the probability of confirmation, but ABA rating, balanced circuit, and the presence of a Judiciary Committee patron all do. A one-unit increase in ABA Rating (from majority well-qualified/minority qualified to well qualified or better) increases the probability of confirmation by 3.6%. Nominees to balanced circuits are 12.5% less likely to be confirmed than nominees to unbalanced circuits, and the presence of a patron on the Judiciary Committee increases the probability of confirmation by 9.6%.

The political factors surrounding nominations collectively offer less predictive power than the nominee's characteristics. Neither the distance between the nominee and the Senate median nor the distance between the president and the median of the opposing party are significant predictors of the likelihood of confirmation. Divided government also does not contribute to the likelihood that a nomination will be confirmed by the Senate. But the later in the president's term a nomination is considered, the less likely that nomination will be confirmed; each year of a president's term reduces the probability of Senate confirmation by 14.1%. Presidential approval at the time of final Senate action also has no effect on the probability of confirmation. Compared to the baseline of

President George H.W. Bush, the nominees of President Clinton were less likely to be confirmed by the Senate; nominees of Presidents Reagan or Carter were neither more nor less likely to have their nominations confirmed. While renomination and number of court of appeals nominations pending do not affect the probability of confirmation, nominations made later in a Congress are less likely to be confirmed than those made earlier in a Congress.

In the outcome (decision) model, both ideology and case-related factors play significant roles in determining judges' votes. Judges on more conservative circuits are 14.7% less likely to vote in the liberal direction on a given case; judges sitting with more conservative co-panelists are 8.5% less likely to vote liberally, and more conservative judges are 10.8% less likely to vote in the liberal direction on a case. Case factors also shape judges' votes; as the resources of the liberal litigant increase (from individual to corporation), the probability of a liberal vote increases by 5.0%. Conservative litigant resources are not a significant predictor of vote choice. Judges are 14.2% less likely to cast a liberal vote in criminal cases than in other case types, and a liberal lower court decision translates into a 19.5% increase in the probability of casting a liberal vote compared to a conservative lower court decision.

Conclusion

The riotous and quarrelsome process by which judges are selected for the lower federal courts is seemingly here to stay. Though there are no doubt subtle historical trends that have served to contribute to this development, the role of interest groups in the process is surely one of the most proximate causes of the intense politicization that attends the contemporary process by which these courts are staffed. Groups may no

longer be permitted to testify before the Senate Judiciary Committee (Scherer et al. 2008, 1028 fn. 4), but they avail themselves of other less formal mechanisms to voice their opposition. The standard claim is that a particular nominee is an “extremist,” a label relied on by both liberal and conservative groups alike. The contention that then ensues during the senatorial consideration of the nomination of an individual so labeled (or, not infrequently, before the nomination is even made) rises to seemingly new levels of rancor with each successive nomination. The evidence that is brought to bear in these debates is almost always anecdotal and attempts to validate claims of extremism once judges ascend to the bench are virtually non-existent.

Our purpose here has been to bring evidence to bear precisely on the question of whether individuals characterized as extreme during the confirmation process are more ideological in their behavior on the bench compared to their colleagues who were not so labeled. Drawing from the well-developed literature on judicial selection in addition to the extensive scholarship on judicial behavior, we developed models of senatorial confirmation and judicial decision making and linked them with the use of a Heckman-style selection model. Our key findings are two-fold. First, the statistical evidence indicates that there is a selection effect that links confirmation success and judicial vote choice. Second, though interest group opposition matters in terms of shaping the likelihood of senatorial confirmation, individuals who attracted interest group opposition but were nonetheless successful in securing confirmation are no more or less ideological in their voting behavior than their colleagues on the bench who did not attract interest group opposition during their own confirmation process. Considered jointly, these findings indicate that interest groups are largely successful in preventing nominees who

they consider objectionable from taking a seat on the bench but that objectionable nominees who get through the process are no more extreme in their behavior than other (nonobjectionable) judges.

Table 1: Predictors of Judicial Vote Choice

Variables	Model 1	Model 2	
	Vote Choice	Confirmation	Vote Choice
Nominee-Senate Median Distance	--	0.039 (0.710)	--
ABA Rating	--	0.136 [†] (0.073)	--
Balanced Circuit	--	-0.436 [†] (0.236)	--
Judiciary Committee Patron	--	0.567* (0.252)	--
Divided Government	--	-0.676 (0.410)	--
President-Opposing Party Median Distance	--	-0.762 (10.891)	--
Presidential Approval at Time of Final Action	--	0.009 (0.013)	--
Year of Presidential Term	--	-1.267*** (0.287)	--
Number of Nominations Pending	--	-0.020 (0.030)	--
Month of Session	--	-0.085*** (0.023)	--
Renomination	--	0.120 (0.387)	--
Carter	--	0.502 (0.812)	--
Reagan	--	0.079 (0.705)	--
Clinton	--	-1.208 [†] (0.674)	--
Conservative Interest Group Opposition	0.143 (0.082)	-0.726 [†] (0.387)	0.108 (0.082)
Liberal Interest Group Opposition	0.042 (0.100)	-0.893* (0.439)	-0.012 (0.105)
Female	-0.027 (0.045)	-0.095 (0.255)	-0.038 (0.046)
Minority	-0.009 (0.049)	-0.001 (0.286)	-0.010 (0.049)
Supreme Court Median	0.008 (0.248)	--	0.017 (0.248)
Circuit Median	-0.411*** (0.075)	--	-0.414*** (0.076)

Table 1. Predictors of Judicial Vote Choice (continued)

Variables	Model 1	Model 2	
	Vote Choice	Confirmatio n	Vote Choice
Ideology of Other Panel Members	-0.233*** (0.060)	--	-0.232*** (0.060)
Judge Ideology	-0.303*** (0.050)	--	-0.322*** (0.051)
Resources of Liberal Litigant	0.140*** (0.018)	--	0.141*** (0.018)
Resources of Conservative Litigant	0.019 (0.018)	--	0.019 (0.018)
Criminal Case	-0.456*** (0.039)	--	-0.454*** (0.039)
Lower Court Decision Liberal	0.507*** (0.038)	--	0.507*** (0.038)
λ	--	--	0.179* (0.085)
Constant	-0.615*** (0.073)	3.246 (8.781)	-0.638*** (0.074)
Observations	9440	296	9440

Note: Standard errors appear in parentheses; *** p<0.001, ** p<0.01, * p<0.05, † p<0.10, two-tailed tests.

Table 2: Marginal Effects of Selected Variables

Influences on Confirmation

Judiciary Committee Patron	9.64%
ABA Rating	3.64%
Balanced Circuit	-12.48%
Year of Presidential Term	-14.08%
Month of Session	-1.99%
Liberal Interest Group Opposition	-29.40%
Conservative Interest Group Opposition	-22.93%

Note: Only significant marginal effects are included. Marginal effects calculated at median values for all variables.

Influences on Vote Choice

	Without Selection Effect	With Selection Effect
Circuit Median	-14.70%	-14.70%
Ideology of Other Panel Members	-8.38%	-8.45%
Judge Ideology	-11.38%	-10.79%
Resources of Liberal Litigant	5.02%	5.01%
Criminal Case	-14.06%	-14.23%
Lower Court Decision Liberal	19.43%	19.50%

Note: Only significant marginal effects are included. Marginal effects calculated at median values for all variables.

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ⁱ This a very good thing from the perspective of theory building. As Hall and Brace observe, “[W]hile studies of single courts, such as the United States Supreme Court, are enormously important in their own right and are appropriate for developing theories of particular institutions, case studies necessarily generate a body of findings and theories that are highly circumscribed by time and place” (1999, 281). The analysis of other courts aids scholars in gaining purchase on the generalizability of theories and in identifying important modifications thereof.

ⁱⁱ The seminal contribution to this scholarship is Goldman (1997). This literature is by now too voluminous to catalogue completely but a representative sample includes Bell (2002), Binder and Maltzman (2002), Hartley and Holmes (1997), Martinek et al. (2002), and Scherer et al. (2008).

ⁱⁱⁱ Further, we would be remiss if we did not acknowledge that any work that relies on measures of judicial ideology based on the preferences of presidents and/or senators involved in the selection of those judges (e.g., Giles et al. 2002, Epstein et al. 2007) implicitly connects the politics of selection with the politics of judicial choice.

^{iv} White was a member of the Missouri Supreme Court when he was nominated by President Clinton for a seat on the U.S. District Court. White was accused of being lenient with criminals, particularly by then-U.S. Attorney General John Ashcroft. Though most unsuccessful nominations do not receive a floor vote but, instead, die when the Senate adjourns sine die, White’s nomination was voted down on the Senate floor by a 54 to 45 vote.

^v Earth Justice is a non-profit public interest law firm focused on strengthening environmental laws (<http://www.earthjustice.org/>). A former member of Kenneth Starr’s staff, Kavanaugh played an instrumental role in the Bush Administration’s vetting process for nominees to the lower federal courts before he himself was nominated by President Bush.

^{vi} The Judicial Confirmation Network is a conservative grassroots group focused on issues of judicial selection (<http://judicialnetwork.com/>). Hamilton, a U.S. District Court judge, was nominated by President Obama in March of 2009.

^{vii} To cite just one of many examples, Senator Leahy said of Carolyn Kuhl, an unsuccessful nominee to the Ninth Circuit nominated by President George W. Bush, that “as a lawyer in the Reagan Administration, a lawyer in private practice, and as a state court judge, Judge Kuhl has demonstrated an extreme philosophy that threatens the rights and interests of Americans, particularly women’s rights, other civil rights, and access to justice...” (Leahy 2003, 28859).

^{viii} See Winship and Mare (1992) for an accessible discussion of selection models.

^{ix} In the analyses that we present below, we define liberal and conservative votes consistent with the standard approaches in the judicial decision-making literature. So, for example, votes in favor of claims made by the criminally accused or convicted are considered liberal votes whereas votes to the contrary are considered conservative votes. In civil rights and liberties cases, liberal votes are those cast in support of those alleging a violation of their civil rights or liberties, with votes that are against such a finding considered conservative votes. And, in economics cases, liberal votes are those in favor

of labor, the government, or the economic underdog and conservative votes are those against labor, the government, or the economic underdog.

^x See Scherer et al. (2008, 1032) regarding the coding of this variable. In brief, it is based on systematic Lexis-Nexis and Westlaw searches.

^{xi} In particular, critics argue that the ABA ratings are systematically lower for conservative nominees than for liberal nominees (see Lindgren 2001; but see Saks and Vidmar 2001).

^{xii} As previously noted, Ronnie White was ultimately unsuccessful in securing confirmation. Paez (a U.S. District Court judge nominated for a seat on the 9th Circuit), Helene White (a former member of the Michigan Supreme Court nominated for a seat on the 6th Circuit), and Marsha Berzon (a private practice attorney nominated for a seat on the 9th Circuit) were all ultimately confirmed to the bench but only after lengthy delays.

^{xiii} Following Scherer et al. (2008), a circuit is considered balanced if 40 to 60% of its sitting judges have been appointed by Democratic presidents.

^{xiv} This is derived as the absolute value of the difference between the median senator's ideology, based on Poole (1998) Common Space scores, and the nominee's ideology, based on the Giles et al. (2002) ideology measure. Though there is no perfect measure of judge ideology, the Giles et al. measure is a useful (and widely used) one. Based on Poole's (1998) first dimension common space scores, a judge's ideology on this measure is equal to that of the president when senatorial courtesy is not in place, that of the home state senator when there is one such senator of the president's party, and that of the

average of the two home state senators when both such senators are of the president's party.

^{xv} This is derived as the absolute value of the difference between the median senator's ideology and the president's ideology as measured by Common Space scores. We recognize, however, that presidents can and do on occasion put forward nominees who are closer in ideological terms to the Senate than to himself. These are exceptions to the general rule.

^{xvi} Presidential approval is measured as the president's approval rating in the Gallup Poll taken immediately preceding the nomination.

^{xvii} In addition, presidents certainly can – out of sheer contrariness – renominate an individual who was not successful in securing confirmation on his or her initial nomination. But, presumably, presidents are more likely to renominate individuals who have a good chance of being confirmed but who were originally not confirmed due to non-political reasons (e.g., senatorial workload).

^{xviii} As in the confirmation model, judge ideology is measured using the scores developed by Giles et al. (2002).

^{xix} It is worth noting that if race and/or gender matter at the confirmation stage, it may be that the mixed results with regard to race and gender on vote choice are partially attributable to neglecting to account for selection bias.

^{xx} The overwhelming majority of cases decided in the U.S. Courts of Appeals rely on three-judge panels (Songer et al. 2000). En banc proceedings, in which the entire complement of appeals court judges on a circuit hears (or rehears) a case, are used

sparingly in the circuits (Giles et al. 2007). Due to its size, the U.S. Court of Appeals for the 9th Circuit currently uses a mini-en banc proceeding in which the chief judge and 14 randomly selected active judges serve as the en banc panel. Any other circuit with more than 15 judges has the statutory authorization to do likewise but at present no other circuit uses the mini-en banc mechanism.

^{xxi} We measure this as the average of the Giles et al. (2002) scores for the other judges on the panel.

^{xxii} Circuit ideology is measured as the median Giles et al. (2002) ideology score of the regular, active duty court of appeals judges in the circuit while Supreme Court ideology is measured as the median Judicial Common Space score (Epstein et al. 2007) of the justices on the Court

^{xxiii} We coded these variables as follows: if the liberal [conservative] litigant was the federal government, a value of 4 was assigned; for state governments, a value of 3 was assigned; for private businesses, a value of 2 was assigned; and, for individuals, a value of 1 was assigned.

^{xxiv} This model is also commonly referred to as a probit model with sample selection.

^{xxv} Typically, the observations selected in the first stage enter into the second stage once and only once. For example, a political candidate makes a decision to target women during a campaign (in the first, or selection, stage) and then must make a choice as to the strategy to be used to target women (Schaffner 2005)

^{xxvi} We began with data generously provided by Nancy Scherer, Brandon Bartels, and Amy Steigerwalt and described in a data appendix available at

<http://ms.cc.sunysb.edu/~bbartels/research/JOPfirealarmappendix.pdf>. We then updated this data for nominations made between 1977 and 1984.

^{xxvii} The court of appeals database is archived at <http://www.cas.sc.edu/poli/juri/appct.htm>. We used the “flipped” data (where the unit of analysis is the judge-vote), last updated on Oct. 29, 2008. For judges who were confirmed to the Court of Appeals for the Fifth Circuit and subsequently transferred to the Eleventh Circuit, the inverse mills ratio was also applied to those cases they decided as Eleventh Circuit judges.

^{xxviii} In addition, we weighted the judges’ votes by the probability that they were selected into the court of appeals database. We considered models that use a more complex error correlation structure, including a population-average GEE model, but the results were largely similar to those reported here.

^{xxix} We also included dichotomous variables (in the confirmation model) for Presidents Carter, Reagan, and Clinton (with President George H. Bush as the excluded category) to control for any unaccounted for factors that may be systematically related to presidential administrations.

^{xxx} All marginal effects are calculated holding the other variables at their median values. For the ideology score, the median is -0.114 on a scale where -1 is the most liberal and 1 is the most conservative.