

**SENATE CONFIRMATION OF SUPREME COURT
NOMINATIONS FROM WASHINGTON TO REAGAN**

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Abstract

One of a president's most enduring legacies is the Supreme Court Justices he appoints. Yet, despite the seeming long-term significance of the membership of the Court, a mere twenty-six of the 134 replacement appointments made by presidents from Washington to Reagan have failed to be confirmed by the Senate of the United States. In this paper we propose a theory of the confirmation process and test it by attempting to predict the success or failure of each of these nominations.

Examining the costs and benefits to senators of opposing Court nominees shows why so many are confirmed: opposition is costly; the business of the Court is poorly understood by most voters; and, most importantly, very few nominations offer the opportunity to alter Court decisions significantly. This last argument is based on the well-known fact that majority voting by committees over unidimensional issue spaces grants dictatorial power to the voter located at the median of the committee's preferences. We infer that, to the extent that Court decisions fit this median voter model, most appointments fail to shift the ideological balance of power on the Court and thus do not arouse widespread senatorial opposition.

We embed this hypothesis within a multivariate model of Senatorial decisions that we test against the historical record. We find that the Senate is more likely to defeat a nomination whenever the balance of Democratic and Republican appointees to the Court is close, when the Senate is controlled by the opposition party, when the Senate delays action on the nomination for a long period of time, when the nominee is substantially younger than the current Court average, or when the president has already seen an earlier nominee go down to defeat. We discuss the implications of these results for our theoretical argument and examine in detail whether the nomination of Robert Bork conforms to historical experience.

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Senate Confirmation of Supreme Court Nominations from Washington to Reagan

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One of a president's most enduring legacies is the Supreme Court Justices he¹ appoints. Over the years 36 of the 39 presidents have nominated a total of 134 different men and one woman to be a Justice, of whom a mere twenty-six have failed to be confirmed by the Senate of the United States. Obviously presidents have maintained a very high success rate over the past two centuries, despite the seeming long-term significance of the members of the Court. In this paper we will put forth a theory of the confirmation process and test it by attempting to predict the success or failure of the 131 replacement appointments made by presidents from Washington to Reagan.

Historical accounts of the confirmation process generally stress the idiosyncratic features of each appointment that accounted for its success or failure. Abraham (1985: 41), for instance, argues that Madison failed in appointing Alexander Wolcott to the Court in 1811 because "the Federalist senators, eagerly backed by the press, opposed Wolcott's vigorous enforcement of the embargo and non-intercourse acts when he was U.S. Collector of Customs in Connecticut." Yet such an explanation seems implausible when one compares Wolcott's losing margin of 9 votes to 24 with Madison's Democratic-Republican majority of 26 to 6 in the Senate.² Why would an overwhelmingly Republican Senate not take great joy in appointing a man Abraham (1985: 88) describes as "obnoxious to the Federalists through what they regarded as his extreme partisanship both in and out of office?"

One recent statistical study of this question, that by Jeffrey Segal (1987), tends to incorporate a similarly idiosyncratic approach despite its appearance as systematic analysis. Segal employs variables like "senatorial courtesy," defined as the concurrence of those senators from the nominee's state that belong to the president's party. He also includes an effect for different centuries as a "control," though, as Przeworski and Teune (1970) observe, a strong theory would account for this difference with variables that take on appropriate values in the different centuries.³

We intend to build a theory of the confirmation process by positing a basic goal for both the president and the Senate, that of influencing future Court decisions by controlling the identities of its members. However rational politicians, both presidents and senators alike, cannot invest an unlimited amount of political effort in promoting or opposing any single nominee. In fact, we believe that only

*The authors appear alphabetically.

¹We will use the masculine pronoun to refer to the President throughout for historical accuracy. Both authors hope to see a female President in our lifetimes.

²To be fair to Abraham (1985: 33) he also points to some "genuine question as to Wolcott's legal qualifications," but he would agree with us that formal qualifications rarely bear on a nominee's success or failure.

³Twentieth-century senators have confirmed 88 percent of nominees while their predecessors cooperated with the president only 76 percent of the time.

a relatively few nominations matter sufficiently to become a topic of political controversy. Presidents win so often in this process because neither side generally has much to gain from nomination fights. Yet there are certain types of nominations where the stakes are high enough that rational senators will invest the effort needed to oppose, and often defeat, a president's choice for the Supreme Court.

A Theory of Nomination Politics

In developing and testing a positive theory about Supreme Court nominations, it is important to specify first what presidents and senators wish to accomplish through the nomination process. This task is more difficult than it might initially seem given the substantial conflict over the appropriate criteria for Supreme Court nominees. For instance, since the establishment of its Standing Committee on the Federal Judiciary in 1945/46, the American Bar Association has fought a difficult battle to promote impartial competence in Supreme Court nominees. Likewise, during the recent nomination battles over nominees Robert Bork, Benjamin Ginsburg, and Anthony Kennedy, many voices argued that the decision about confirmation should be based on their credentials, and not on the substance of their past rulings or predictions about their future decisions. Yet the role of the Court in national policy-making leads us to conclude that the nature of nomination process is intrinsically political. Since most important matters that come before the Court have a strong political content, these conflicts will usually be expressed as conflicts over the Court's membership. Presidents and senators are most likely to be concerned about Supreme Court nominees whenever judicial decisions can affect the outcome of national political questions. More value-neutral considerations like competence may set minimal constraints on the choice of nominees, but presidents expect the people they appoint will make particular types of decisions if they serve on the Court, and senators judge those nominees accordingly.⁴

The importance of political, and in fact partisan, criteria is illustrated by two facts: First, eighty-nine percent of all nominees have shared the same party affiliation as the president. Moreover, while Senates controlled by the president's party have confirmed 88 percent of the nominees they have considered, opposition Senates have consented in only 59 percent of the cases.⁵ Judgments of competence seem an unlikely explanation of this difference in confirmation rates, especially when compared to an explanation based on the differences in public policy goals expressed by competing political parties. Indeed nominees sent to opposition Senates might be expected to be *especially* competent since hyper-competence is one tool the president might use to persuade an otherwise balky Senate.

Why Most Nominees Pass. Yet if partisanship has been a strong ingredient in the mix of nomination politics, why then have opposition Senates still approved three out of every five presidential nominations sent them? Perhaps opposition Senates do bow to executive prerogative or accept presidential promises of impartial competence, but a more parsimonious explanation lies in an analysis of the costs and benefits accruing to presidents and senators in confirmation battles. Despite the seeming institutional significance of Supreme Court appointments, most senators probably view Court nominations as relatively unimportant for a variety of reasons. First of all, senators' votes on

⁴In an early study of appointments, Warren (1923) argued that the nominee's qualifications played a role in only two cases (Williams in 1873 and Cushing in 1874), while being used as an excuse in two others (Rutledge in 1795 and Wolcott in 1811). A later review by McHargue (1949) generally agreed with Warren about the irrelevance of formal qualifications except in the case of Wolcott. Abraham's (1985) contemporary study also takes this view.

⁵These figures are based on the data set that is used in the empirical analysis that follows with the addition of the six justices that Washington initially appointed to the Supreme Court in 1789. We omit those instances where an associate justice is nominated to become chief justice, and we have omitted two other cases that are explained below. Thirty-four nominations were made when the Senate was not controlled by the President's party, while 103 cases occurred when both branches were controlled by the same party. Overall 26 of the 137 nominations have failed, or 19 percent.

Court nominees generally play little role in the electoral calculus of their constituents. The business of the Court is arcane, conducted among a small group of elite professionals, and employs a language and terms of art that are inaccessible to most voters. Although electoral implications are sometimes attributed to confirmation votes, most recently in the case of Southern Democrats opposing Bork to retain the support of newly-enfranchised black voters, most confirmation battles will have only minor effects at the polls.

On the other hand, senators, even opposition senators, as players in a high-stakes game of Washington influence, may risk much more by opposing a president's Supreme Court nominee. Waging a battle against the president is costly, and most senators would probably prefer to deploy their political resources to secure direct, visible benefits for their states than to oppose the diffuse threat presented by a single nominee. Moreover presidents have many favors to offer senators should they cooperate with the president's wishes. Thus senators can easily curry favor with the president by voting in support of an important presidential nominee, whose influence on public policy will be imperceptible to most voters.

Finally it is crucial to realize that most nominations to the Court can have only a limited significance because they will usually not change the direction of judicial policy. When the Court has a relatively lopsided majority supporting a particular line of policy-making, changing the identity of a single justice will likely have no substantive effect. Nominations take on greater significance when they will affect the identity of the median, or "swing," vote on the Court. Because the vast majority of individual nominations do not alter the course of Supreme Court decisions, senators can defer to the president without serious concern.

Thus, if we consider the rational calculus facing senators, we can explain why most Court nominees are confirmed: opposition is costly; the business of the Court is poorly understood by most voters; and very few nominations offer the opportunity to alter Court decisions significantly. Overall, then, we would expect the president to get his way in most nomination proceedings. Yet some nominations still fail, and these failures demand a theoretical explanation.

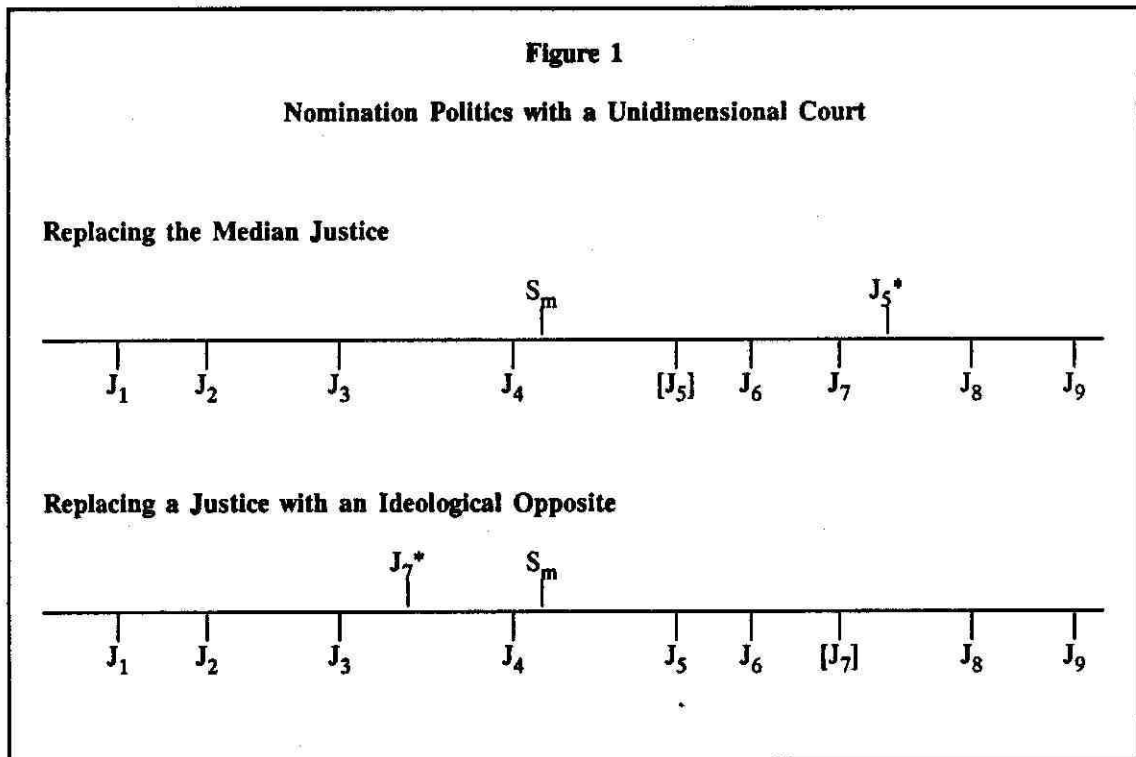
When Nomination Fights Matter. Formal theories of voting behavior in committees and legislatures have demonstrated that not all voters have equal influence in majority rule settings. In fact the "social" preference of the entire body can often be equated directly with the position held by the individual located at the median of the group's preferences (Black, 1958; Downs, 1957; Plott, 1967). Whenever the preferences of the group's members can be arrayed along a single dimension, and the group size is an odd number, then under majority rule the outcome will match the preference of the person who is in the middle. The outcome will change *only* if the preference of the median voter changes. Thus, the preferences of the individuals to the right and left of the median voter are immaterial to the result.⁶

Voting by Supreme Court justices fits these assumptions especially well since the Court is presented with a simple binary choice (for or against the appellee) and must choose between these two alternatives. Lacking the ability to offer amendments which can subvert the unidimensionality necessary to yield a stable median outcome (Riker, 1982), the median voter on an appeals court must agree with the final result or no majority will ensue. Thus nominations which would change the median of the Court should be inherently more controversial than those which do not affect the median. There are two ways this might happen.

⁶Preference orderings for individuals must also be restricted to require "transitive" orderings or, in Black's (1958) terms, "single-peakedness." If alternatives are arranged from left to right along the dimension, the "utility" voters derive from each outcome must not have a "U"-shape, where extreme outcomes on either sides of a central outcome are both more preferred. Substantial complications also arise as soon as the voters' preferences do not fall neatly along a single dimension. Extrapolations to a multidimensional issue space have been undertaken (Davis, Hinich, Ordeshook, 1970), but it can be shown that in many situations no stable equilibrium outcome can be derived (McKelvey, 1976). We return to the unidimensionality assumption below.

First, the current median justice may die or resign. In this case, it is virtually guaranteed that Supreme Court decisions will change in the future. If the nominee will become the new median voter, decisions will change to the extent that the nominee holds positions that differ from the previous incumbent. If the nominee will not be the new median, then the justice immediately to the right or left of the old median will take on that role, depending on the placement of the new justice. This latter situation is the more intriguing, since regardless of how extreme the new nominee is, Court decisions will shift only so far as to satisfy the criteria of the new *median* justice, not the new justice.

Consider the example in Figure 1, which arrays nine justices along some hypothetical dimension, numbering them from left to right as J_1 to J_9 . Imagine now that J_5 , the median justice, leaves the Court and the president nominates J_5^* to replace him. In order to predict how each senator would vote on this nomination, we must also know the distribution of senatorial preferences. We have assumed that the senators can be located along the same dimension as the Court, with the median senator denoted as S_m ; that is, half the senators lie to the left of S_m and half to the right.



Each senator chooses whether to vote for the nominee by making the following comparison: If J_5^* is confirmed, the new median justice will become J_6 . If J_5^* fails to be confirmed, the Court will continue to have an even number of members, and future decisions will range somewhere between the position of J_4 and J_6 , centered on average at the midpoint between them. In this particular instance the Senate would fail to confirm the nominee, since the median senator is closer to the midpoint position of the deadlocked court than to J_6 . In other words, a majority of senators prefer the deadlocked court to one with J_5^* included.

A second possibility for changing the direction of the Court arises when a nominee would occupy a position on the opposite side of the median from the justice being replaced. This alternative is shown in the second row of the figure where J_7 is replaced by J_7^* , and J_4 becomes the new median justice. Again, we would expect that the Senate's collective decision to confirm or reject depends upon the distance between S_m and either J_4 , the new median, or the midpoint of J_4 and J_5 . As before, the Senate's reaction to this nominee is not based on a comparison of J_7 and J_7^* , but on the likely judicial outcomes of a Court with or without J_7^* . Depending on the distance between J_4 and J_5 the new Court may or may not be different from the old one. In this case depicted in Figure 1 the

Senate would confirm the nominee as the median senator would prefer decisions by J_4 , the new median justice if J_7^* is confirmed, compared to a lottery over the space between J_4 and J_5 .

This median voter argument, which has been most frequently been applied to legislative settings, is the key to a theoretical understanding of Supreme Court nomination politics. It directs our attention to those cases where the replacement of a justice can lead to a change in the direction of Court decisions. In these instances we would expect nominees to succeed less often because the Senate is more likely to object to the implied future direction of judicial policy. Before we continue, however, we must first examine the realism of the assumptions on which this model is based.

The most important, and perhaps least plausible, assumption is that there is a single dimension underlying all Court decisions. Theorists have shown (McKelvey, 1976; Enelow and Hinich, 1984) that the introduction of a second dimension of issue evaluation destroys the simple equilibrium outcome of the dictatorial median voter. In a multidimensional issue space not only is there not a single equilibrium, *any* outcome becomes possible, and there is no single identifiable voter who is decisive. However it may be possible to identify two or three of the justices who are decisive when certain alternatives are under review, so we might expect conflict whenever any one of these few seats become vacant. This caveat would expand the number of nominations that senators and presidents might consider important beyond a single median justice. We intend to explore the deeper implications of Court decisions over a multidimensional issue space in future work.

Yet we also believe that, historically, most American political conflicts that have been expressed in our national political institutions have been underpinned by a series of single policy dimensions, whether they be the federal/state and rural/urban cleavages that dominated politics early in the nation's history or the liberal/conservative dimension of more recent years. While there have been periods of "realignment" (Burnham, 1970) when antiquated dimensions are replaced by more contemporary political alignments, in periods of "normal" politics most important issues can be located along a single core dimension, with secondary issues either cutting across the dominant dimension or eventually being absorbed within the core. Recent empirical studies by Poole and Rosenthal (1987) indicate that Senate roll-call voting since 1789 can be parsimoniously modelled along a single dimension, though not of course necessarily the *same* dimension throughout the two centuries of American politics. We might therefore expect that justices, as well as elected politicians, can be located along the currently dominant dimension.

Many commentators have identified liberal and conservative voting blocs on the Court and identified particular "swing votes." The free-market conservative "Four Horseman" of Van Devanter, McReynolds, Sutherland and Butler are famous for their adamant opposition to Franklin Roosevelt's attempts at expanding state power during the New Deal. Court analysts such as Rohde and Spaeth (1976) have successfully used scaling techniques to locate twentieth-century justices along a liberal to conservative dimension. Finally, the importance of median voters on the Court (as well as minimum winning coalitions) has been acknowledged in the *Harvard Law Review's* annual report on Supreme Court activity, which now presents a frequency count of the appearance of various five-person majority blocs, from which one can easily calculate who the most frequent "swing voter" is.

While unidimensionality may have some empirical merit and serve well for an exploratory study like this one, we must make note of some of its limitations. Some cases that come before the Court will not correspond with the dominant political dimension, while others may not correspond with any conspicuous political dimension at all, for instance many of those falling within the Court's original jurisdiction. Moreover those cases that do correspond with the dominant political dimension may not align perfectly with it, involving other material or procedural issues. Finally we cannot expect justices to adhere to a single location across all the cases they must decide, but instead to vary their opinions somewhat as facts and the climate of opinion change. Thus placing justices on a dimension and identifying a median justice must be an error-filled process. A more elaborate theory would conceptualize the location of justices as a probability distribution around a central point, similar to Shepsle's (1972) theory of candidate ambiguity. These distributions might also be expected to have larger variances for those justices nearest the median of the Court than for justices located at the

ideological extremes.⁷ Senators, too, are likely to commit errors of judgement in their perceptions of judicial ideologies, both because the justices do not stick to a constant location, and because of perceptual errors by the senators themselves. This uncertainty about the specific locations of justices, combined with the possibility that some conflicts will spill over onto other issue dimensions, means that senators probably concentrate their attention on a small group of two or three justices that appear to represent the "middle" of the Court.

Strategic Action by the President. Up to now we have ignored the question of how the president comes to choose a particular nominee, yet few presidents would fail to take senatorial attitudes into account when making such a choice. Since presidents are surely as aware of the political composition of the Court and the Senate as senators are, rational presidents would use that information to choose nominees that are highly likely to be confirmed. As a result the identity of the nominee must be seen as endogenous to the confirmation process. No doubt this is another reason why so many nominations succeed, even in the face of adverse partisan control of the Senate. Therefore, although we are concerned in this paper with *senatorial* action in the confirmation of Supreme Court justices, we need to consider momentarily the president's calculus in choosing a nominee.

We illustrate this point with another spatial diagram (Figure 2) where we have added the position of the president, P. The example presents a Court where the balance of power is to the right of center, with a somewhat more right-wing President and a slightly left-of-center Senate. Assume that the median justice, J₅, must be replaced. In this example, the president would most want to appoint a justice to the right of J₆, making J₆ the new median. However, a sophisticated president would not nominate a justice with preferences P, since this would result in defeat by the Senate: P makes the median senator worse off than the status quo, which lies in the interval between J₄ and J₆. The vertical bar denotes the midpoint between these two justices. Appointments to the left of the midpoint should be confirmed by the Senate, while those to the right of the midpoint should be rejected.⁸

The logic behind this argument can be seen by contrasting Gerald Ford's nomination of John Paul Stevens, a moderate Republican, with Ronald Reagan's appointment of Robert Bork, a staunch conservative. Both presidents faced Senates with Democratic majorities, tempered ideologically to some degree by a conservative bloc of Southern Democrats. Bork represented a case of the president trying to appoint someone near his own position in an effort to move the court further to right. Moreover the justice he was replacing, Lewis Powell, was a conservative Democrat located near the median of the Court. Ford, in contrast, was faced with choosing a replacement for the most liberal

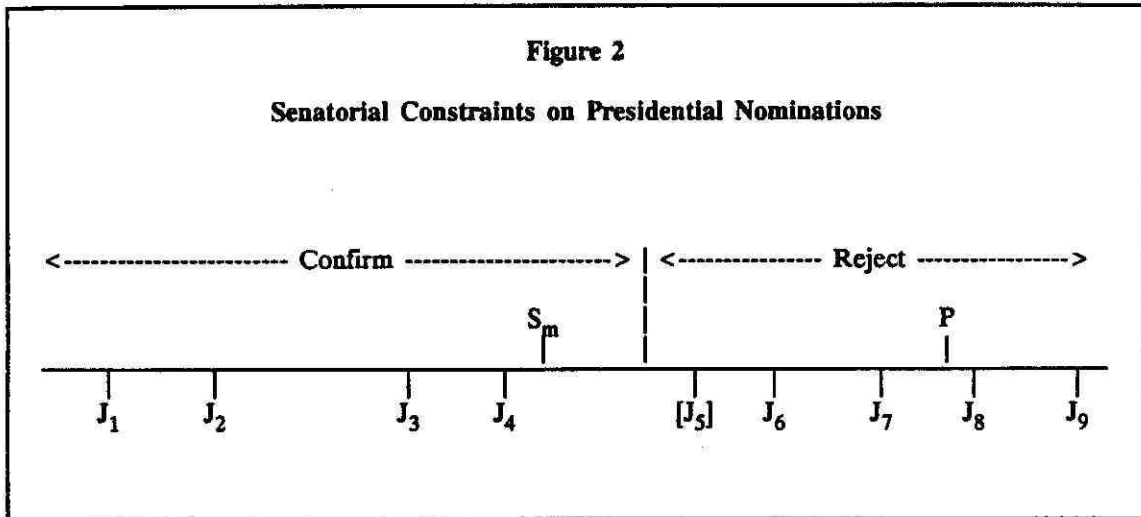
⁷The nominee should also be conceptualized as a probability distribution, typically one with a much larger variance than those of the sitting justices, since the Senate (and indeed sometimes even the President) must estimate where the new justice would be positioned based on fairly limited information.

⁸The president presumably would prefer to appoint a justice as close to P as possible, although it would not shift the median any further to the right, since the new justice could be expected to advocate the president's own position in the Court's deliberations. Moreover a future-minded president might foresee the possibility of moving the Court even further in his direction if other seats to the right of J₆ become vacant.

One criticism of the line of argument presented in the text is that the only justice acceptable to both the Senate and the president is one located at the midpoint between J₄ and J₆, which is precisely the expected outcome of the deadlocked Court. Thus a President could put up even fairly extreme nominees, knowing he would at least get the deadlocked outcome if the Senate fails to confirm. However two factors make this strategy unattractive. First, deadlocked votes (e.g., 4-4) do not create a precedent for future decisions and thus have less value to policy-minded presidents and senators. Second, even a mildly risk-averse president would prefer having a ninth, decisive justice located at the midpoint compared to a lottery over the entire space between J₄ and J₆, since some of the decisions handed down by the deadlocked Court will be to the left of the midpoint position and thus even less attractive to the president.

Figure 2

Senatorial Constraints on Presidential Nominations



member of the Court, William Douglas. Conservatives like Barry Goldwater also lobbied Ford on Bork's behalf in 1976, but Ford declined to appoint him feeling that the nomination would fail in the Senate and tarnish his presidency just before the 1976 election. He turned instead to the advice of more moderate Republicans like Charles Percy and appointed Stevens (O'Brien, 1985). In the end, Ford's appointment was a success, while Reagan's lost.

These examples also illustrate the importance of uncertainty in the nomination process. Bork not only espoused views that would have placed him on the right wing of the Court, but the extensive senatorial and media investigations into his background, as well as Bork's own public statements, left little doubt as to his stands on most major issues that might come before the Court. In contrast the views of the ultimately successful nominee, Anthony Kennedy, were much less certain. In terms of our model, the estimated location of Bork had a fairly small variance, while the estimate of Kennedy spread over a much wider region. As a result even if Kennedy's actual ideological location was only slightly to the left of Bork, the possible range of views that might be attributed to him may have reached into the confirmation area shown in the diagram above.

Finally this discussion illustrates the limits on a president's ability to "play chicken" with the nomination process. For instance, in the Bork nomination battle, voices were occasionally heard suggesting that if the Senate were to defeat Bork, the president would send up a nominee who was even "worse," such as Orrin Hatch. The analysis offered here by spatial voting theory demonstrates that such threats are idle. If the Senate fails to confirm a nominee, the result is the status quo of decisions ranging between the justices on either side of the new median which may (or may not) be "better" than the decisions that would obtain had the nomination passed. If the Senate rejects one nominee as being too extreme for a majority's tastes, it would be perverse to believe that they would accept a subsequent nominee that was even more extreme.

Our theory of nomination politics assumes a world of perfect information where presidents would never nominate justices who would fail to be confirmed. However the uncertainties inherent in the confirmation process suggest that presidents may sometimes err.⁹ Rational presidents would use this information to recalibrate their expectations about Senate behavior so that they can be more successful the next time. Thus we would expect that if a Supreme Court nomination is rejected by

⁹For instance, one important difference between the Stevens and Bork nominations was the size of the Democratic majorities facing each president. Republicans held only 38 of the 100 seats when Ford nominated Stevens, while Reagan faced a much smaller adverse margin of 45 to 55. Reagan probably calculated that some conservative Southern Democrats could be persuaded to join the Republicans in support of Bork, which would have placed the Senate median nearer his own position. Ford's much smaller contingent of Republican senators made such a strategy implausible.

the Senate, the next nominee offered by the same president should have a higher probability of passing.

Strategic Delay by the Senate. The president is not the only actor in nomination battles who can engage in strategic behavior. While the president's strategy relies upon his choice of nominee, senatorial strategists can employ the institutional rules and structures of the Senate itself during the confirmation process. The single most valuable weapon available to senators who wish to oppose a presidential nominee is delaying consideration of the prospective justice for as long as possible. Delay serves a variety of purposes. First it gives opposition forces both within the Senate and throughout the polity at large the time to organize and mobilize their resources against the nomination. Delays also permit opponents to gather and publicize information about the nominee's positions which can be used to influence marginal senators who might otherwise support the appointment. Nominees that move quickly through the Senate either have widespread support or are being hurried through by floor managers anxious to forestall potential opponents.

Given the high success rate of Supreme Court nominations it should not be surprising that the time between nomination and the final action in the Senate is usually fairly brief. Fifty of the 131 nominations considered here were acted upon in seven or fewer days by the Senate, while only 38 took more than 30 days. Moreover, as Table 1 shows, the delay between nomination and Senate action strongly predicts whether the final vote will confirm or reject the nominee. Seven of the eleven nominees who were considered by the Senate for more than ninety days failed confirmation, while only one of the fifty acted upon in seven or fewer days was rejected. Of course, it might be argued that long delays result when nominees are perceived as likely to fail; that is, that the causal direction runs from likely failure to longer delays rather than the reverse. We test this notion in the empirical section to follow.

Table 1
The Relationship between Delay and Confirmation

Days Between Nomination and Final Action	Total Nominated	Nominations Rejected
0 - 7	50	1 (2%)
8 - 30	43	9 (21%)
31 - 90	27	9 (33%)
91 or more	11	7 (64%)

Other considerations. While we have spent the bulk of this discussion developing a model of nomination politics based on a dimensional analysis of the Court and Senate, a variety of other factors should also be expected to play a role in determining the success of Supreme Court nominees. Two of these are presidential characteristics: whether he is a "lame duck" at the time of the nomination, and whether he succeeded to the presidency from the vice presidency. Since we have argued earlier that the president's ability to dispense tangible and intangible favors directly affects his chances of influencing senators to support his nominees, presidents who command fewer resources should naturally be less successful. Vice presidents typically are chosen for various "balancing" reasons, like regional or factional representation, rather than for their own innate strength as political entrepreneurs. Elected presidents, in contrast, have successfully built coalitions of support both within their own party and across the electorate as a whole, placing them in a better position to offer

senators important political goods. Vice presidents, having done neither of these things, typically cannot call upon the same host of resources. We would thus expect nominations by presidents who succeeded from the vice presidency to fail more often than those made by presidents elected to office.

Similar arguments can be made about "lame duck" presidents, those still in office after a new president has been elected. Lame ducks should generally have less success in securing Supreme Court appointments because they have fewer resources upon which to draw. Moreover Senates facing lame duck presidents can simply wait for the change in office holder if this would yield a more propitious partisan situation. Lame duck presidents succeeded in making Court appointments in only six of thirteen cases, well below the average confirmation rate of 81 percent.¹⁰

A third factor that senators might employ in their decision-making is the age of the nominee. Since Supreme Court justices hold life tenures, younger nominees will likely have a longer influence over future Court decisions. We would thus expect younger nominees to receive special scrutiny and be somewhat less likely to be confirmed. Tempering this effect is the fact that senators would also prefer that appointees serve for a reasonable period of time before having to reconsider the same seat. We thus expect that younger than average nominees fare less well in the nomination process, but the relationship between success and age may not be directly linear. This senatorial predisposition leads us to predict that substantially older nominees may also have a lower probability of confirmation.

To summarize, our theoretical statements predict that, while most Supreme Court nominees should pass confirmation, nominees will be more likely to fail in the following circumstances:

- 1) when the nomination threatens to shift the median voter on the Court;
- 2) when the nomination comes from a president who is either a lame duck, or who has succeeded to the presidency from the vice presidency;
- 3) when the nominee is substantially younger than a "normal" candidate for the Court, and perhaps, when the nominee is substantially older than a "normal" candidate; and,
- 4) when Senate action on the nomination has been delayed for a substantial period of time.

¹⁰We further predict that lame ducks will have the most difficult time getting their nominees confirmed when they face an opposition Senate, and the presidency is about to change parties. Conversely lame ducks will have the easiest time getting their nominees confirmed when they share the same partisanship with a majority of the Senate, and both the Senate *and* the presidency are about to change parties (i.e., "midnight" appointees). The marginals seem to bear this hypothesis out:

	Nominations	Confirmed
President and Senate of <i>different</i> parties, presidency about to change to that of the Senate	5	1
President and Senate of the <i>same</i> party, both about to turn over to the opposition.	3	2
All others	5	3

Unfortunately, the numbers of nominations in each category is so small that our statistical models are unable to discriminate among these situations. We have thus been forced to treat all lame duck situations equivalently.

We have also identified one situation that should generate higher than average confirmation rates, when the president appoints subsequent nominees following a failed nomination. The remainder of this paper tests these hypotheses using a statistical model based on historical data.

A Statistical Model of the Nomination Process

While all of the elements of our theory can be tested in principle, we must confront some serious problems of measurement, especially with regard to the spatial locations of justices, nominees, presidents and Senates. To test our theory we must be able to measure the ideological balance on the Court with and without the nominee, and whether the median senator prefers the ideological balance under both possible situations. Yet, as far as we know, no reliable ideological measures have been developed that describe all Supreme Court justices back to 1789, much less that identify the positions of the nominees who were rejected. Moreover even if such a measure were available we would also need to map the location of the median senator on the same scale. Lacking such a basic measure, any empirical analysis that relates Court balance to the probability of nominee confirmation must always keep in mind the difficulties imposed by measurement error.

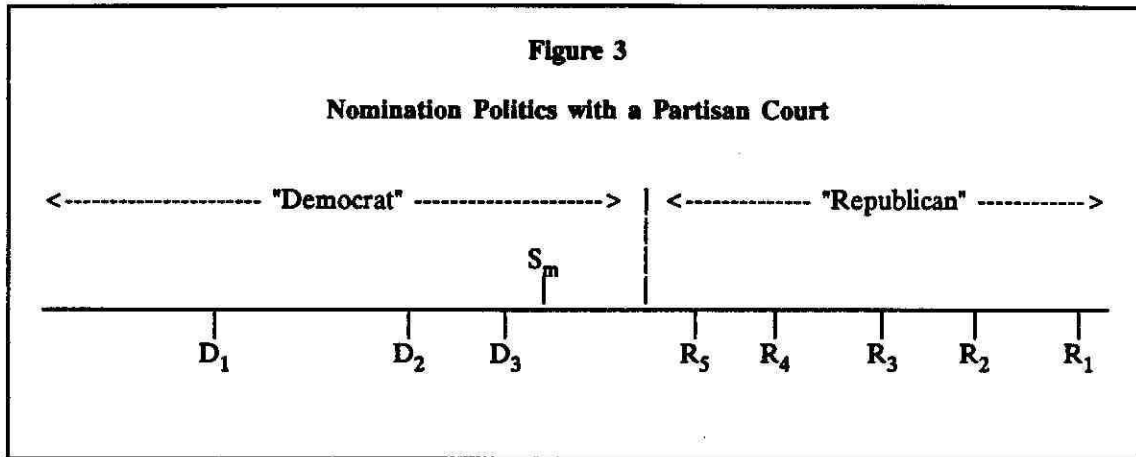
In the absence of such a well-defined measure of ideological positions, we have chosen to use *partisanship* as the basis for testing our theory. While this approach has some drawbacks, we believe partisanship serves as a reasonable basis for a dimensional analysis not only because the parties have historically taken conflicting positions on important issues that have come before the Court, but also because the use of partisanship allows us to place senators, justices, nominees, and presidents on the same scale. We have no illusions about partisanship being a perfect measure of general political ideology, and we are well aware that it is a better measure in some periods (e.g., the 1890s) than in others (e.g., the 1950s). Yet, partisanship remains the best measure we have that is valid across time and across institutions.

However since partisanship is, in the American setting, dichotomous, we are obviously unable to discern gradations of position along a scale. We can, however, measure the extent to which the partisan balance on the Court was fairly close or fairly lopsided. Evenly balanced situations, those where the Court has four Democrats and four Republicans after the vacancy occurs, will automatically produce a shift in the median justice, since any nominee will forge a new majority for one party or the other.

Another situation can be identified that might also generate controversy over a nomination to the Court. Consider the case illustrated in Figure 3, where the justices are now identified as "Democrats" (D) or "Republicans" (R), and where the departure of a justice leaves the Court with only three Democrats. In this case the appointment of any Republican justice to the right of the midpoint between R_5 and R_4 will move the median on the Court to the right. Since most of the Republican justices fall to the right of this point it seems reasonable to assume that a "normal" Republican justice will also be located there. Thus if the Senate is controlled by the Democrats it seems quite unlikely that any Republican nominee will be confirmed.

Yet even *Democratic* presidents may have a difficult time getting nominees through in this situation despite having an advantageous position in the Senate. The addition of another Democrat will not change the balance of power on the Court, since the median justice will continue to be R_5 . However Democratic nominations may be subject to considerable intraparty factional conflict, since the location of the new Democratic justice will play a key role in determining where the *future* median of the Court would lie if another Republican is replaced by a Democrat. A nominee to the right of D_3 would likely become the median justice if another Republican were replaced by a more "normal" Democrat, one nearer the center of the Democratic region of the political spectrum. Similarly the appointment of a justice to the left of D_2 would make it quite likely that D_3 would become the future median voter on a Court with a Democratic majority.

Grover Cleveland's unsuccessful nominations of William Hornblower and Wheeler Peckham in late 1893 and early 1894, when the Republicans held a 5-3 majority on the Court, provide a fine



example of this phenomenon. Despite his majority in the Senate, Cleveland failed to secure both these nominations because they were opposed by the anti-Cleveland faction within the Democratic party. Cleveland eventually succumbed to pressure and nominated the Majority Leader of the Senate, Edward Douglass White, who passed easily.¹¹

In calculating the partisan balance on the Court for each year, we had to contend with the problem of new political parties arriving on the scene: having more than two political parties represented on the Court at any given time would complicate our calculations. Still, the lineages of the parties that have controlled the presidency and the Senate are fairly straightforward, and we have coded Federalist, Whig, and Republican justices as opposing Jeffersonian, Democrat-Republican, and Democratic justices. The more problematic political genealogy concerns that running from the Federalists to the Republicans. Luckily, the last Federalist (John Marshall, died 1835) did not overlap with the only Whig to serve (Benjamin Curtis, confirmed 1851), and Curtis resigned well before the arrival of the first Republican (Noah Swayne, confirmed 1862). Jeffersonians, Democrat-Republicans, and Democrats served on the Supreme Court with each other, but this partisan evolution is generally considered to be that of one continuous party.

To summarize we computed the partisan balance on the Court by counting the number of justices of each party and subtracting the smaller value from the larger. In all cases the justice's own partisanship was used when it differed from the partisanship of the president. A binary, or "dummy" variable was coded one whenever the parties had equal representations on the Court, or when the party controlling the Senate was in the minority by a net difference of one or two seats. All other states of partisan balance were coded zero on this variable.¹²

We have employed two different methods of measuring the partisanship of the Senate. One approach uses a binary variable to represent cases of split control when the president and the Senate

¹¹These two nominations are often regarded as cases where "senatorial courtesy" prevailed, in that Cleveland failed to appoint nominees favored by David Hill, the Democratic senator from New York and a leader of the anti-Cleveland faction (Abraham, 1985: 143). Nevertheless the argument presented in the text suggests that no appeals to such additional factors as "courtesy" need be made to explain Cleveland's difficulties. Notice also that the successful nominee White probably achieved his position as Senate Majority Leader by holding a position at or near the median of the Democratic party, where intraparty support is maximized.

¹²We have attempted to cross-validate our partisanship measure by comparing it to Rohde and Spaeth's (1976: 114-115) tripartite division of twentieth-century justices into "liberals," "moderates," and "conservatives." Overall the two measures track each other well over the years since 1912 except for the period from 1940 to 1960, when large Democratic Court majorities failed to generate substantially more "liberal" Courts. See Lemieux and Stewart (1988) for details.

were of opposite parties. The other method was simply to measure the percent of the seats in the Senate held by the president's party as a fraction of all the seats. Various nonlinear transformations of this measure like the logistic function were tried but the simple percent generally yielded the best fits to the data. This percent was transformed by subtracting fifty from each value so that the constant reflects an evenly divided Senate.¹³

Both of the measures of partisanship are included to test propositions concerning conflict between the president and the Senate majority over the direction of Supreme Court decisions. However the two measures reflect different avenues through which partisanship might affect confirmation. The partisan *split* between the two institutions measures the effect that party control itself has on nomination success: when the president's party chairs the Judiciary Committee, hires and guides the committee staff, and is in charge of scheduling business on the floor, the president's nominee will probably have smoother sailing. Thus the binary variable primarily measures factors that have an effect before the nomination actually reaches a vote in the Judiciary Committee. The continuous variable of *size* of partisan margin is more relevant for assessing how the nominee should fare in votes by the Committee and on the floor. We examine both measures because the Senate's relatively informal character and the threat of filibuster may make partisan control in that chamber less significant than it would be in the House of Representatives.

The other variables in our model were measured in relatively straightforward ways. Binary variables were used to measure presidential characteristics like being a lame duck or succeeding from the vice presidency, and to indicate whether a particular nomination was the second or third attempt. In our calculation of the number of attempts we excluded instances where a nomination passed the Senate but the nominee declined the appointment, and we only counted repeated attempts by the same president.

The age of the nominee also presented a problem since life expectancies improved over the 200 year period of our study. To some degree this problem is mitigated by the fact that Supreme Court justices represent an elite group with, presumably, much higher than average life expectancies. However age alone has been found a poor predictor of success of nominees (Palmer, 1983). We hypothesize that senators take into consideration the age of the nominee only in comparison to the ages of the other justices on the Court. We thus computed the difference between the nominee's age and the average age of the remaining justices. We further examined separately cases where the nominee was younger than the average and those where he or she was older than the average. Finally on the belief that senators might be especially sensitive to cases where the nominee was at the extreme ends of the age range, and to model the possible nonlinear relationship discussed earlier, we included the squared age difference as well.¹⁴

Our measure of delay is simply the number of days that elapsed between the nomination of the potential Justice and action by the Senate. A variety of transformations of this variable proved unproductive, including one that took into consideration the amount of time remaining in the Congressional session. In other words, the effect of "days elapsed" appears to be the same regardless of whether the nomination is made at the beginning or at the end of the Congress.

¹³For purposes of this analysis we have considered both John Tyler and Andrew Johnson to have been Democrats, although they had been originally elected vice presidents of Whig and Republican presidents (respectively). This practice, which follows Segal (1987), is justified as follows: Tyler's loyalty to the Whigs was always suspect, and after he succeeded to the presidency a major rift developed between him and Whig congressional leaders like Henry Clay (Peterson, 1987). Tyler subsequently sought the Democratic presidential nomination in 1844. Johnson, while Lincoln's running mate for two terms, never changed his affiliation to the Republican Party, and always considered himself a "Union Democrat." As with Tyler, Johnson was treated in the Senate as if he were a president of the opposite party.

¹⁴Another justification for this approach is the common use of "quadratic loss" utility functions in formal models of voting (e.g., Davis, Hinich, Ordeshook, 1970).

Finally, our dependent measure is the dichotomous outcome of confirmation or rejection. While some nominations resulted in a recorded vote, many more were either subject to a voice vote or were withdrawn, postponed, or otherwise failed to reach a vote. Because this outcome variable is truncated at both zero and one, we cannot treat it as a continuous variable and use the additional information available for those cases where a recorded vote took place. As a result we employed logit analysis to estimate the effects of the various independent variables. Logit assumes that the probability of an event occurring is related in a nonlinear fashion to a linear combination of independent variables, a structural model parallel to ordinary least squares regression. A maximum-likelihood method was used to estimate the parameters.¹⁵

The data set we have gathered includes every nomination to fill a vacancy on the Supreme Court from 1790 to the present, with only a few exceptions:

- a) Promotions from Associate Justice to Chief Justice are excluded on the grounds that such nominations differ fundamentally from cases where the nominee has no record as a Supreme Court Justice, and that such a promotion does not *per se* alter the ideological composition of the Court.¹⁶ This represents a loss of five cases.
- b) Washington's appointment of Senator William Paterson was withdrawn the next day until the constitutional question about whether sitting members of the Senate were eligible for nomination to the Supreme Court was decided. Paterson was allowed to resign from the Senate, and when he was renominated a week later, the appointment was approved in a day. We have included the Paterson nomination only once in the analysis, counting him as a successful confirmation, but we consider his date of nomination to have been the *first* time his nomination was sent up.
- c) Finally, we excluded Lyndon Johnson's appointment of Homer Thornberry to fill the associate justice seat of Chief Justice nominee Abe Fortas because Thornberry's nomination was contingent on Fortas's promotion.

Using as our basic source Congressional Quarterly's (1983) *Supreme Court: Justice and the Law* we have identified 131 eligible nominations to the Court, of whom 26 have failed and the remaining 105 have succeeded.

¹⁵The nonlinear logit transformation converts the bounded probability interval [0,1] into the unbounded interval $(-\infty, \infty)$ using the functional form:

$$\ln (p/(1-p)),$$

where p is the probability of an event occurring. Thus, the model that is fit has the form:

$$\ln (p/(1-p)) = X\beta + U,$$

where X is the $(N \times k)$ matrix of independent variables (including the constant), β is the $(k \times 1)$ vector of structural coefficients, and U is an $(N \times 1)$ vector of errors. For a detailed discussion see Hanushek and Jackson (1975). We employed the algorithms found in MicroTSP 5.0 for this task.

¹⁶Whenever an Associate Justice is promoted to Chief Justice, there is also a nomination to fill the vacancy created by the new Chief's promotion; such a vacancy, of course, has the potential to change the Court's ideological makeup. Therefore, in instances where an Associate Justice is promoted to Chief, we count the new Associate as a replacement for the former Chief Justice.

Table 2
Factors Influencing the Success of Court Nominations
Model 1: Excluding Delay

Logit Analysis	(1a)	(1b)	(1c)
Partisan balance of Court is "close"	-1.691* (0.698)	-1.685* (0.724)	-1.616* (0.671)
Years nominee is younger than Court average	0.245+ (0.132)	0.200 (0.126)	0.244+ (0.129)
Years younger than average squared	-0.012* (0.005)	-0.010* (0.005)	-0.012* (0.005)
Lame duck	-2.646** (0.850)	-2.647** (0.844)	-2.781** (0.853)
Vice presidential successor	-1.102 (0.778)	-1.422+ (0.741)	-1.261+ (0.754)
Second attempt	-1.849* (0.774)	-1.838* (0.758)	-1.734* (0.768)
Third attempt	1.446 (1.288)	1.303 (1.294)	1.588 (1.322)
Split control of Presidency and Senate	-1.048 (0.800)		-1.547* (0.697)
Percent belonging to president's party	0.035 (0.028)	0.054* (0.026)	
Constant	2.233** (0.720)	1.980** (0.696)	2.619** (0.663)
Log likelihood	-43.055	-43.883	-43.854

+p < 0.10; *p < 0.05; **p < 0.01. Standard errors in parentheses.

Results

Table 2 presents the results of our analysis with all explanatory factors included except delay, for reasons we shall explain shortly. We have estimated three different forms of the model using various combinations of the size of the president's majority in the Senate and whether partisan control

was split. The "log likelihood" figure at the bottom of the table measures goodness of fit, with smaller absolute values indicating higher explanatory power.

Most of the variables our theory identifies as influencing the success of Supreme Court nominations have statistically significant effects. Nominees put forth when the Senate is controlled by the opposing party, when the partisan balance on the Court is close, or by lame duck presidents have a much lower probability of success. Nominations by presidents who have succeeded from the vice presidency may also fail more often, but the coefficient only achieves the 10 percent level of significance. The age of the nominee also matters, but only in cases where the nominee is younger than the average on the Court. Furthermore the relationship between the nominee's age and likely success is a curvilinear one. We shall return to this finding below. Older nominations had no significant effect, but the results are not included here for brevity.

However in one area our theoretical expectation strikingly fails to be supported by the empirical analysis. We hypothesized that presidents who fail on their first attempt at filling a Court vacancy would be more successful on later attempts because they could recalibrate their expectations about the distribution of senatorial preferences and choose a new nominee more to the Senate's liking. For second attempts this hypothesis is not only fails to be supported by the data, but the result is the *reverse* of our expectations. Second attempts at nomination are considerably more likely to fail, though third attempts may be slightly more likely to succeed. With only seven instances of third attempts the estimate uniformly fails to reach conventional significance levels, but since it is of the correct sign and generally as large as its standard error, we have chosen to retain it in further specifications of the model. We return to the question of second attempts below.

The one remaining issue concerns the choice of the "best" measure of partisanship within the Senate. Columns (1a) through (1c) present various combinations of the dichotomous measure of split partisan control and the continuous measure of the size of the president's party in the Senate. While the collinearity between these variables makes it impossible for them both to reach significance when included together, the close similarity of the values for the log-likelihood function indicate that all three specifications have about equal explanatory power. We have chosen to retain model (1c) using the dichotomous measure of split control because of its relative simplicity.¹⁷

Table 3 presents the results of adding the delay factor to model (1c). This addition improves our model's fit to the data, but at the cost of rendering some theoretically important variables less significant. One good example of this is the effect of a closely balanced court: When delay is excluded, the Court balance has a substantial and significant effect on the success of nominations; but when delay is introduced, the effect of close courts declines, falling to the 10 percent level of statistical significance. An even more drastic effect is seen for split partisan control: After delay is controlled for, split control is rendered insignificant. A similar, though more muted result holds for the age of the nominee.

These results indicate that factors like the partisan balance of the court or the partisanship of Senate must themselves help predict the extent to which a nomination will be delayed. Opponents to the nomination invest greater effort at slowing down the process when it might change the balance of power on the Court, while nominees whose addition will not tip the balance move through the process more quickly. Similarly, opponents will be more successful at delaying a confirmation vote when the president's party is in the minority. These arguments suggest that a more attractive model for the nomination process is a two-equation, recursive specification with delay modelled explicitly. The model for delay appears in Table 4.

¹⁷We can test for the equivalence of the models by comparing the log-likelihood values of model (1a) including both partisan split and majority size and model (1c) with only split included. -2 times the difference between these values, 1.6, is approximately distributed as chi-squared. This value fails to achieve even the 10 percent level of significance, for which the critical value is 2.72 with one degree of freedom.

Table 3
Factors Influencing the Success of Court Nominations
Model 2: Including Delay

Logit Analysis	(1c)	(2a)	(2b)
Partisan balance of Court is "close"	-1.616* (0.671)	-1.303+ (0.732)	-1.225+ (0.727)
Years nominee is younger than Court average	0.244+ (0.129)	0.191 (0.140)	0.140 (0.131)
Years younger than average squared	-0.012* (0.005)	-0.010+ (0.006)	-0.008 (0.005)
Lame duck	-2.781** (0.853)	-3.032** (0.926)	-3.166** (0.926)
Vice presidential successor	-1.261+ (0.754)	-1.739+ (0.931)	-2.180** (0.862)
Second attempt	-1.734* (0.768)	-1.828* (0.801)	-1.794* (0.777)
Third attempt	1.588 (1.322)	1.588 (1.362)	1.504 (1.404)
Split control of Presidency and Senate	-1.547* (0.697)	-0.874 (0.748)	
Delay between nomination and final action		-0.025** (0.008)	-0.028** (0.008)
Constant	2.619** (0.663)	3.520** (0.808)	3.601** (0.826)
Log likelihood	-43.854	-38.027	-38.680

+p < 0.10; *p < 0.05; **p < 0.01. Standard errors in parentheses.

The left-hand column in Table 4 presents the estimated effects for all the variables in our basic nomination model, while the right-hand column includes only those whose coefficient is at least as large as its standard error. Notice that we have included two additional variables in the model for delay, a binary variable for reviews by the American Bar Association, which became practically mandatory after 1956 (Abraham, 1985: 35ff.), and a binary variable indicating whether the nomination was sent to Senate within the last thirty days of the Congressional term. This variable was included to adjust the intercept for nominations that had to be processed just before the end of the term. We

Table 4
Factors Influencing Delays in Senate Action on Court Nominations

Ordinary Least Squares Analysis	(3a)	(3b)	(3c)
Partisan balance of Court is "close"	22.146* (9.299)	14.625 (9.670)	22.148* (8.872)
Years nominee is younger than Court average	-2.118 (1.434)	-2.633 ⁺ (1.514)	-2.229 (1.384)
Years younger than average squared	0.086 (0.058)	0.108 ⁺ (0.062)	0.091 (0.057)
ABA review	13.445 (11.140)	11.523 (10.870)	
Lame duck	12.885 (13.333)		
Vice presidential successor	6.410 (11.132)		
Second attempt	-1.300 (10.250)		
Third attempt	-15.866 (15.600)		
Split control of Presidency and Senate	-4.495 (11.098)	23.527** (8.573)	
Percent belonging to president's party	-1.403** (0.327)		-1.505** (0.252)
Thirty or fewer days remaining in term	-23.812* (10.921)	-19.497 ⁺ (10.551)	-22.999* (9.605)
Constant	44.968** (8.482)	31.078** (7.869)	47.798** (7.479)
R-squared	0.291	0.156	0.275
Adjusted R-squared	0.226	0.115	0.246

+p < 0.10; *p < 0.05; **p < 0.01. Standard errors in parentheses.

tried various specifications to account for this constraint, but none proved more effective than this binary variable.

The coefficients in Table 4 are directly interpretable as changes in the number of days required for consideration as a function of the various factors. For example, it takes an average of 22 additional days to reach a vote on nominees for a seat on closely balanced Courts, while an increase of one percent in the size of the President's majority in the Senate reduces the length of time required to reach a vote by a day and a half. The Senate also appears to take longer to decide on younger nominees, as we would expect given their likely longer term of service, though the effect just fails to reach the 10 percent level of statistical significance. We find no significant effect for ABA reviews.¹⁸

These results argue for a model of the nomination process where delay represents a major strategic option available to opposition senators. More importantly, opponents calculate that efforts to delay a nomination are worth the substantial costs involved only when the nomination "matters," such as when the Court is evenly balanced, when the Senate is controlled by the opposition, or when the nominee is likely to serve a long term on the Court. Thus our key theoretical variables for determining the importance of nominations not only influence whether the nomination succeeds or fails, but also the length of time it takes to act on the nomination.

Discussion

The Nature of Senatorial Delay. To some readers the finding that delays are influenced by the same factors that affect the success or failure of nominations may come as no surprise. After all, it may be argued that senators employ delaying tactics precisely when they think the nominee can be defeated. From this perspective the strong relationship between delay and defeat shown in Table 3 misrepresents the direction of causality: Long delays result when nominees are perceived to be in trouble, rather than delays being an exogenous stratagem of opposition senators.

We address this concern in Table 5, which presents a second model for delays including as a predictor the actual success or failure of the nominee as a measure of senatorial perceptions of the candidate's chances. However we cannot employ ordinary least squares to estimate this model because of the assumed simultaneity between delay and nomination outcome; we use instead the consistent estimation technique known as two-stage least squares to resolve this problem.¹⁹

The estimated direct effect for the outcome of the nomination, though of the correct sign, fails even to equal its standard error much less achieve conventional levels of statistical significance. Meanwhile the results for the remaining factors are essentially unchanged from the earlier estimates. These findings imply that, while senators may delay action on nominees they perceive to be weak, that perception is based on precisely those factors that we have identified as key influences on the success of the nomination, namely, the partisanship of the Senate, the ideological balance of the Court, and, perhaps, the age of the nominee. Once these factors are controlled, the perceived outcome of the

¹⁸While the coefficient for ABA reviews exceeded its standard error in the full model (3a), it fails to do so when added to the constrained model (3c).

¹⁹The instrument list for this analysis includes all the variables used as predictors in either Table 2 or Table 3 except, of course, for delay. The two-stage least squares results for the model without the nomination outcome included are identical to those produced by ordinary least squares.

Table 5
Modelling Delay as Endogenous to the Confirmation Process

	Estimation Technique	
	OLS	2SLS
Partisan balance of Court is "close"	22.148* (8.872)	20.125* (9.400)
Years nominee is younger than Court average	-2.229 (1.384)	-1.994 (1.416)
Years younger than average squared	0.091 (0.057)	0.079 (0.059)
Percent belonging to president's party	-1.505** (0.252)	-1.406** (0.305)
Thirty or fewer days remaining in term	-22.999* (9.605)	-23.622* (9.440)
Nominee confirmed by the Senate		-9.895 (17.920)
Constant	47.798** (7.479)	54.849** (14.707)
R-squared	0.275	0.315
Adjusted R-squared	0.246	0.282

+p < 0.10; *p < 0.05; **p < 0.01. Standard errors in parentheses.

nomination process, as measured by the actual outcome, has little bearing on the length of time it takes for the Senate to decide.²⁰

One other aspect of the model for delay deserves comment. In the nomination model it mattered little whether we used the dichotomous measure of split control or the continuous measure of size of the president's majority to predict whether a nominee was confirmed. For delay, however,

²⁰One caveat to this argument is the fact that the goodness of fit measures, particularly adjusted R² which accounts for the difference in the number of predictors, are larger in the model that includes the nomination outcome. Thus this model actually does a slightly better job of predicting the length of time a nomination is delayed, despite the fact that the only added factor is the insignificant outcome variable. A careful study of the predicted values and associated residuals from the two models failed to identify any systematic differences that could account for this fact, including examining only those cases where the nominee failed to be confirmed.

the size of the majority clearly outperforms the split control variable. As Table 4 shows, the model using size explains nearly twice as much of the variance in delays as the model using split control. This finding suggests that the ability of opposition senators to delay nominations depends on more than just whether the opposition party organizes the Senate. Perhaps because of the more informal character of the Senate, and the opportunity for filibuster, a larger opposition party appears to result in longer delays for nominees, with consequently greater chances of defeat.

Another plausible explanation for this finding is that the confirmation process can be drawn out through a variety of mechanisms, so that opponents have a number of avenues through which to put off action on a candidate. If partisan opponents of the president substantially outnumber his allies, they may be able to wield their advantage in a number of arenas. In Table 6 we have decomposed the delay in voting on nominees since Thurgood Marshall into three components: the time between the nomination and the hearing, the length of the hearing, and the time between the hearing and the floor vote. On the whole, if opponents are able to stall a nomination, they are able to stall it at every point: long pre-hearing periods lead to long Judiciary Committee hearings and long delays between the hearing and the final vote.

Table 6
Components of Delay for Supreme Court Nominations, 1967-1988

Nominee	Year	Nomination and Hearing	Hearing start and end	Hearing end and vote	Total
Bork	1987	77	16	24	117
Haynsworth	1969	31	10	57	98
Rehnquist (Associate)	1971	43	4	48	95
Scalia	1986	50	2	43	95
Rehnquist (Chief)	1986	43	4	48	95
Kennedy	1987	34	3	50	87
Carswell	1970	9	8	65	82
Marshall	1967	31	12	38	81
Powell	1971	14	8	27	49
O'Connor	1981	22	3	11	36
Blackmun	1970	16	1	14	31
Stevens	1975	11	3	8	22
Burger	1969	14	1	7	22
Fortas	1969	16	13	--*	--
Thornberry	1969	16	13	--*	--
Average*		28.2	6.1	32.5	66.8

*The nominations of Fortas and Thornberry were withdrawn without Senate action. They are excluded from the computation of the averages.

The biggest exception to this pattern was the Carswell nomination, where the steps up to the committee hearing were expedited, but the transition from the hearing room to the Senate floor took over two months. The Carswell case demonstrates the value of delays from any source. Liberal Democrats expressed skepticism at their chances of defeating Carswell immediately upon the conclusion of the hearings (*New York Times*, 1970a, 1970b). However the vote on Carswell was delayed because of an unrelated civil rights filibuster. Liberals used this period to their advantage, building support for Carswell's rejection. Thus, ironically, a conservative filibuster on civil rights by Carswell's natural supporters provided the opportunity for liberal opponents to rally against him. Ultimately the conservatives lost both battles as the civil rights bill passed, while Carswell was defeated.

The Impact of Partisan Divisions. With the role of delay clarified, we turn our attention once again to the models of the success of nominations in Table 3. The most important variable from a theoretical point of view is the partisan margin on the Court. Our results show, as expected, that nominees to closely divided Courts were more likely to be defeated, probably because such nominations were a source of greater political contention. We can estimate the effect of close partisan situations on the probability of nomination by using model (1c) in Table 3. Because of the nonlinear relationship between the probability of success and the logit coefficients, the effect of any one factor depends on the values assigned to the other factors in the model. We thus assume that the nominee is at least as old as the Court average; that the president is neither a lame duck nor a vice presidential successor; and, that the nominee is the first appointment to the vacancy in question.

The simplest approach to estimating the effects of partisan divisions both on the Court and between the president and the Senate is to use equation (1c) in Table 3, which uses the dichotomous measure of split partisanship. Under the assumptions just made, this equation generates the following set of probabilities:²¹

Estimated Probability of Confirmation		
Senate Controlled by	Partisan Division on the Court	
	Not Close	Close
President's Party	0.93	0.73
Opposition Party	0.74	0.37

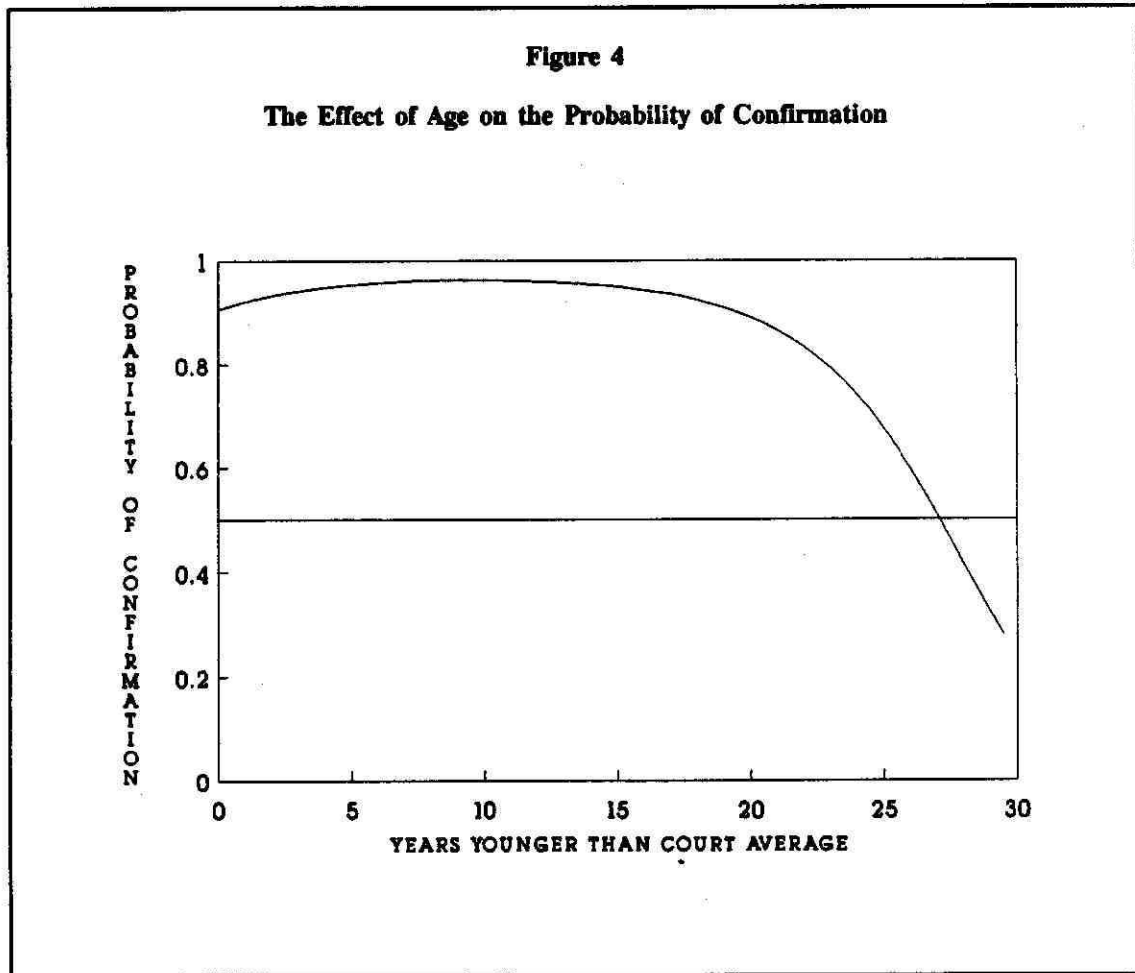
In the most propitious circumstance, when the president sends a nominee for an unbalanced Court to a Senate his party controls, the Senate accepts the president's choice 93 percent of the time. If *either one* of these factors is changed, the Senate is predicted to reject one out of every four nominees they consider. However when *both* the partisan balance on the Court is narrow *and* the Senate is in the hands of the opposition party, nominees will generally *fail* to be confirmed, with a predicted success rate of just over one nominee in three. Not surprisingly, therefore, whenever the Senate is controlled by the opposition party and the president is given the chance of reorienting the direction of the Court, the Senate has historically balked.

²¹The predicted values from equation (1c) are substituted into the formula:

$$p = 1/(1 + e^{-L}),$$

where p is the estimated probability, L is the predicted value from equation (1c), and e is the transcendental number 2.718....

The Effects of Other Factors. Turning now to the effects of the other variables, the curvilinear relationship found for the age of the nominee indicates that the chances of confirmation do not get progressively worse as the nominee gets younger. Rather, if a nominee is slightly younger than the current Court average, his chances actually get *better* up to a point, after which they drop precipitously. Using the coefficients in equations (2b) and (3c) of Tables 3 and 4 results in the plot shown in Figure 4.²² We can also use these values to compute the optimal age of a Supreme Court nominee, which is about ten years younger than the current Court average. Someone younger than that is either likely to be on the Court "too long" or to be too inexperienced; someone older than that is not likely to be on the Court "long enough."



Because the age variable is expressed as a deviation from the current average Court age, the optimal age of appointees has varied over time. In recent years, as the average age of sitting justices has crept up, both the optimal age has increased and the range of ages that constitute potential nominees who are "too young" has widened (i.e., older appointees look "better" all the time, while more and more people become "too young"). When John Kennedy entered office the optimal age for an Supreme Court appointee was 52; at the end of 1987, the optimal age was 58.

One recurring puzzle concerning Supreme Court nominations is that presidents have been much more successful in securing nominations in the twentieth century (88 percent) than in the

²²Because of the recursive structure of our model, the total effect of age on the probability of confirmation combines both the direct effects given in model (2b) as well as the indirect effects resulting from the increased delays associated with younger candidates as measured in model (3c).

nineteenth (76 percent). Segal (1987), for instance, resorts to using a binary variable called "century" to account for this difference in his statistical models of the nomination process. However our model highlights a plausible theoretical reason for this difference, namely, the relatively poorer performance of lame duck appointees. Lame duck nominations have become quite rare in this century largely because of the change in the date when a new Senate convenes. Senates now convene in the first three months following an election, while during most of the nineteenth century they did not convene until two Decembers following a November election. In fact our model performs equally well in both centuries: adding a binary variable for appointments in the twentieth century adds no significant explanatory power to our models.

The result most clearly at variance with our initial hypotheses concerns appointments made after a first nomination to the vacancy has failed. We expected that the president would incorporate the information provided by his earlier failure in his choice of a new candidate who would thus have a better chance of being confirmed. In actuality we find that second attempts fail much more often than first tries. Moreover in six other cases that we do not count as multiple attempts presidents were unable to make a second appointment before the end of their terms of office. Overall, then, in the seventeen instances where presidents failed to fill a vacancy on the first try, they eventually succeeded in appointing only ten justices, or just 59 percent. The phenomenon of jinxed second tries is particularly interesting when paired with our finding that *third* attempts have no less a chance of success than first attempts and perhaps are somewhat more likely to succeed. Whatever egregious mistakes presidents make the second time, they are not prone to repeat for a third. However we suspect a major reason why third nominations are so successful is a combination of presidential learning and senatorial exhaustion.

We can think of at least three explanations for the relatively high failure rates of second appointees. The first might be termed "*revenge*." This line of argument claims that presidents who lose the first time want to "teach the Senate a lesson" by submitting a second nomination that is at least as objectionable as the first. While we find the apparent "irrationality" of such behavior difficult to account for theoretically, historians have claimed that a number of nominations fall into this category, including Jackson's appointment of Roger Taney, Cleveland's nomination of Wheeler Peckham discussed earlier, and, of course, Nixon's appointment of G. Harold Carswell.²³ Yet, if presidents send up objectionable second nominations to revenge themselves upon the Senate, this is very peculiar revenge indeed, since most of these nominees are defeated.

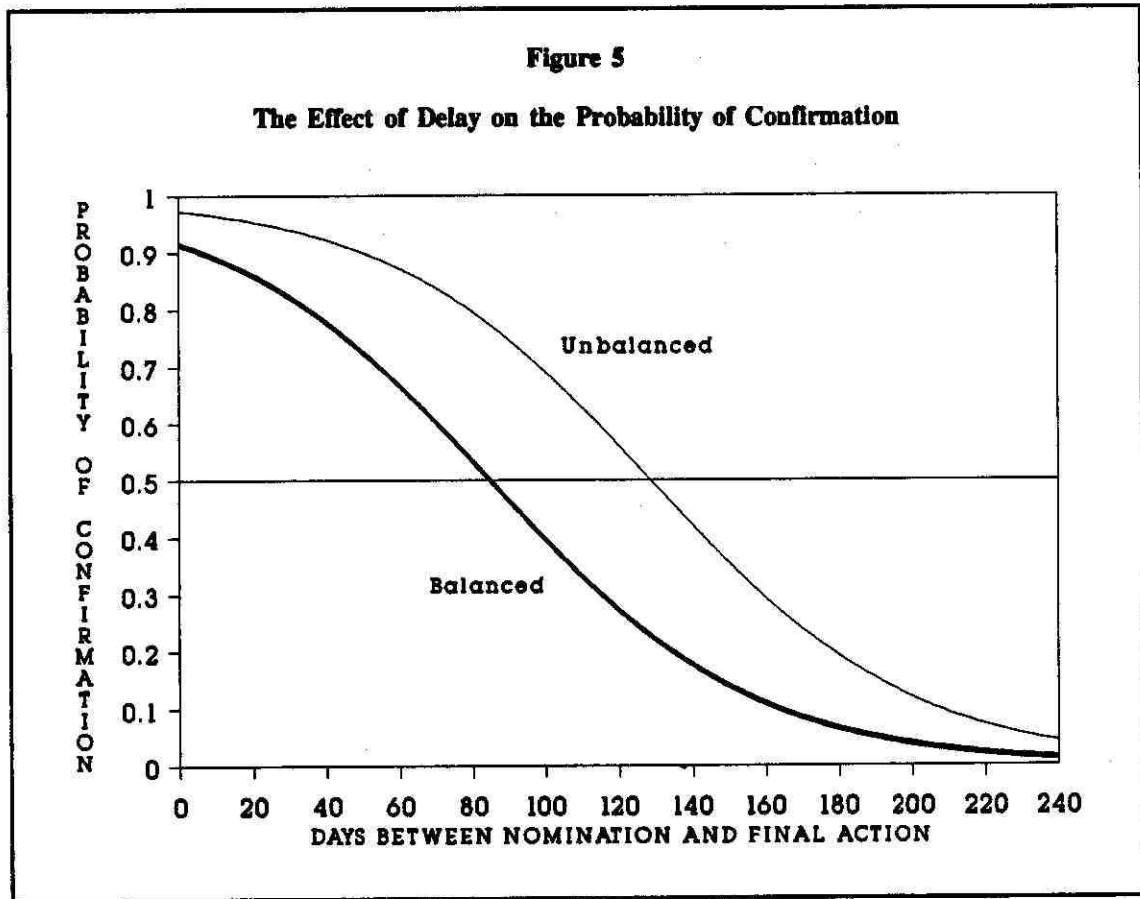
Another, and more theoretically attractive possibility, is that the high failure rate of second nominations results from presidential *miscalculation*. First, very few failed first attempts ever reached a floor vote, so that the presidents involved had only limited information about the breadth of Senate opposition. Many presidents may thus believe they can succeed the second time with a nominee only marginally different from the first. Moreover those first nominees who were defeated on the Senate floor lost by fairly narrow margins. Robert Bork holds the record for the most lopsided first nomination roll-call defeat, a margin of 16 votes (42-58), and even that margin is probably overstated since many wavering senators joined the opposition once Bork's defeat was assured. Reagan thus could nominate Benjamin Ginsburg in the hopes of moving just nine senators to his side, while other presidents faced with similar situations have had even fewer swing votes to mobilize. Thus, even when presidents have actual roll call results on which to base their calculations, they may overestimate the ease with which they can sway swing Senators the next time.

A third explanation is based on our earlier discussion of the costs to senators of opposing the president. The substantial degree of effort required to build an successful opposition coalition might carry over to the next appointee through a process of *opposition learning*. Senatorial opponents would know which of their colleagues can be counted on to resist the next nominee, and which of their

²³While Ronald Reagan threatened to send a second nomination up to the Senate who was "worse" than Bork, it is unclear whether Benjamin Ginsburg fits the bill, since Ginsburg's libertarian attitudes made him difficult to compare with Bork. However, Reagan's public contrition upon nominating Anthony Kennedy (CQ, 1987:2830) suggests that part of the calculus in the Ginsburg nomination may have been something approaching "revenge."

colleagues will remain solidly in the president's camp. And, unlike the president, they may be able to determine this without the need of a roll call vote through the normal course of discussion in the cloakrooms and on the floor. Armed with this information opponents may be able to identify key marginal senators who might be influenced to vote against a subsequent nominee through logrolling.

Finally we turn to the impact of senatorial delay. This is best demonstrated by plotting the relationship between the predicted probability of confirmation and the length of the delay, as we do in Figure 5. We again set all the other variables (lame duck status, etc.) to zero as before. We have plotted separate results for Courts with balanced and unbalanced partisan divisions. Nominees to unbalanced Courts clearly have an easier time of it. Even delays of as many as 130 days in these cases fail to generate a probability of success below 0.5. When the Court is closely balanced, however, even a delay of as little as 85 days reduces the chances of success to a coin flip.



A Note about Robert Bork

The inspiration for this paper came from watching the nomination battle of Robert Bork. The debate over his nomination and the manner in which he was considered raised questions about how Supreme Court nominees had been received historically and whether Bork conformed to the historical pattern. Bork's supporters, as well as the nominee himself, claimed he was scrutinized in a manner unique in the annals of American history, that his confirmation was subjected to unusual outside pressures, and that these events represented a sea change in how Supreme Court nominees were evaluated. Yet the existing historical literature suggests that Bork's situation was not entirely unique, though the intensity of the proceedings may have had few rivals in history. Certainly, partisan

nomination battles had been fought many times before, with history offering numerous examples of a nominee being rejected on partisan grounds (Abraham, 1985).

We have used our models to see whether the Bork nomination fits the historical trends. We can generate two estimates of the probability of Bork being confirmed: one based on equation (1c), which excludes delay, yields a value of 0.66, while equation (2b) where delay is taken into account produces the substantially lower estimate of 0.45, or the prediction that he should be defeated. This estimate is quite close to his actual margin in the Senate of 42 percent.

The close fit between our prediction and Bork's actual vote derives from the circumstances of his nomination: his party was a minority in the Senate; the Court's partisan balance was close; and, the Senate took an extremely long time to process his nomination. All of these are, of course, key features of our model for confirmations. We might ask what would have happened had Bork been considered under more conducive circumstances, such as those that greeted Sandra Day O'Connor in 1981. O'Connor faced a majority Senate (55-45, versus 46-54 for Bork), and as a result, her nomination was expedited, requiring only 33 days, about half the average in the last three decades. Model (2b) including delay generates a probability of 0.80 that she would be confirmed. In contrast, final action on Bork did not take place until 114 days had passed. A Republican Senate would certainly have moved much more quickly, giving the opposition a more limited opportunity to organize. If Bork's nomination had taken only 33 days, like O'Connor's, our model predicts his chances of success to be 0.89. Thus what defeated Bork was partisanship and the lengthened process that resulted, but Bork was certainly not the first to fall victim to these two factors.

While Bork appears to fit the historical pattern well, nevertheless our model for delay substantially underpredicts the actual length of time his nomination required, even given the partisanship of the Senate and the presence of a closely balanced Court. In fact, Bork was delayed nearly twice as long as we predict, 64 days versus the actual 114. Most of this time elapsed during an extraordinarily long pre-hearing phase of 77 days, or about three times longer than the average since 1967. This extended period undoubtedly allowed Judiciary Committee staff time to prepare Bork's committee opponents by researching his record, developing contrary testimony, and allowing constituency groups time to organize letter-writing efforts against the nomination.

These efforts paid off: A record 110 people testified at the Bork hearings, more than double the previous record of 46 at the hearings on whether to elevate William Rehnquist to Chief Justice. While the hearings have yet to be published almost a year after they were held, Judiciary Committee staffers report that they will require at least six volumes (personal communication); the previous record was again held by Rehnquist's Chief Justice hearings which produced 1165 printed pages. The committee report alone concerning Bork ran to 407 pages, compared to 114 for Rehnquist and a mere single page for Antonin Scalia.

Finally, the slow pace of consideration allowed partisans on both sides to organize popular expressions of support and opposition. Since Supreme Court nominations rarely excite constituents sufficiently to communicate with their Senators, any mobilization against Bork was likely to hurt his chances. Interviews with senatorial staff members produced the consensus opinion that the volume of mail they received concerning the Bork nomination was rivaled only by that received during the deliberations on the tax withholding of interest payments in 1983.²⁴ The volume of incoming mail concerning Bork gradually rose over the first two months after his nomination was announced, then skyrocketed during the two weeks of the hearings, only to recede again after they concluded. While

²⁴Informal interviews were held with staff members from approximately thirty Senate offices in January, 1988, concerning the volume of constituency response to the Bork nomination. About a half dozen interviewees were able (or willing) to produce records showing weekly mail counts for and against Bork; we cite these figures here. We, of course, make no claims as to the representativeness of these figures, other than to note that the patterns that emerged matched the qualitative descriptions rendered by most of the other offices. Due to promises of confidentiality, we are unable to identify the sources of the figures cited here. However none of these results come from obviously atypical senators.

about half of the mail seems to have been "spontaneous," the volume of post card and other "generated" contacts with senators would undoubtedly have been much less had interest groups been given the more typical two or three weeks to organize before hearings began, rather than the actual two months.

Conclusion

A final test of our theoretical and modelling efforts is their ability to predict the success or failure of individual nominees. We have used the coefficients from equations (1c) without delay and (2b) with delay to generate the expected probability of success for each of the 131 nominees in our data set. These results, along with actual outcome of each nomination, appear as Appendix A and can be summarized as follows:

Actual Outcome	Predicted Outcome			
	Without Delay		With Delay	
	Confirmed	Rejected	Confirmed	Rejected
Confirmed	99	6	98	7
Rejected	14	12	13	13
Lambda	0.23		0.23	

Using the partisanship model that excludes delay, we incorrectly predict the failure of six of the 105 successful nominees and fail to predict the rejection of 14 of the 26 failures. The model employing delay errs in one more actual confirmation, or seven of the 105, but commits one fewer error in predicting failures, 13 of the 26. Using a conservative measure of goodness of fit, the coefficient known as lambda, yields identical values of 0.23 for both models, meaning we have reduced the total number of errors committed by 23 percent.

Dichotomizing the predictions into simple confirmations or rejections sets a rather high standard for success. Take, for example, the Carswell nomination. The model excluding delay generates a probability of confirmation of just 0.55, whereas Carswell received the support of 45 of the 96 senators voting, or 47 percent. In this case the model errs in the dichotomous sense, but the actual numerical error is obviously fairly small. On the other hand we do often miss by a wide margin. Madison mustered only nine of 33 senators in support of his nomination of Alexander Wolcott, despite holding an enormous majority in the Senate. While our model using split partisanship generates a relatively low 0.73 probability of success for this nomination because the Court was evenly balanced between Federalists and Republicans, this still substantially overestimates Wolcott's actual level of support. We expect that future examination of such errors will help us identify additional factors that must be included in a comprehensive model of confirmations.

Overall, then, our statistical test of a choice-theoretic model of the nomination process does reasonably well in explaining the historical record of nomination successes and rejections. Further refinements in the measures of presidential, Court, nominee, and senatorial ideology would probably increase our explanatory power even further. These findings demonstrate that the nomination process is played out over political goals, not formal qualifications, and that the assumption that presidents and senators behave rationally in deciding whether to support or oppose nominees has substantial predictive power.

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Appendix A

Actual and Predicted Outcomes of Supreme Court Nominations

<i>Nominee</i>	<i>Predicted Outcome</i>		<i>Actual Outcome</i> ¹
	<i>Without Delay</i>	<i>With Delay</i>	
Iredell	0.976	0.982	Unanimous
Johnson, Thomas	0.932	0.969	Unanimous
Paterson	0.970	0.983	Unanimous
Rutledge, John	0.460	0.014	10-14
Chase, Samuel	0.932	0.973	Unanimous
Ellsworth	0.800	0.772	21-1
Washington	0.943	0.965	Unanimous
Moore	0.979	0.983	Unanimous
Marshall, John	0.886	0.902	Unanimous
Johnson, William	0.808	0.908	Unanimous
Livingston	0.971	0.982	Unanimous
Todd	0.978	0.983	Unanimous
Lincoln	0.731	0.913	Unanimous
Wolcott	0.731	0.893	9-24
Adams	0.613	0.762	Unanimous
Story	0.296	0.499	Unanimous
Duvall	0.731	0.908	Unanimous
Thompson	0.968	0.976	Unanimous
Trimble	0.978	0.967	27-5
Crittenden	0.083	0.112	No Action
McLean	0.923	0.956	Unanimous
Baldwin	0.978	0.983	41-2
Wayne	0.929	0.957	Unanimous
Taney (postponed)	0.943	0.917	No Action
Taney (confirmed)	0.932	0.805	29-15
Barbour	0.808	0.484	30-11
Smith	0.932	0.970	23-18
Catron	0.974	0.982	28-15
McKinley	0.932	0.968	Unanimous
Daniel	0.628	0.669	22-5
Spencer	0.684	0.790	21-26
Walworth	0.276	0.073	No Action
King (postponed)	0.715	0.833	No Action
King (withdrawn)	0.027	0.007	No Action
Nelson	0.456	0.522	Unanimous
Read	0.434	0.392	No Action
Woodward	0.755	0.783	20-29
Woodbury	0.968	0.977	Unanimous
Grier	0.889	0.916	Unanimous
Curtis	0.261	0.474	Unanimous

**Appendix A
(Continued)**

Actual and Predicted Outcomes of Supreme Court Nominations

<i>Nominee</i>	<i>Predicted Outcome</i>		<i>Actual Outcome</i> ¹
	<i>Without Delay</i>	<i>With Delay</i>	
Bradford	0.238	0.003	No Action
Badger	0.023	0.020	No Action
Micou	0.340	0.287	No Action
Campbell	0.905	0.945	Unanimous
Clifford	0.976	0.957	26-23
Black, Jeremiah	0.579	0.486	25-26
Swayne	0.979	0.984	38-1
Miller	0.905	0.949	Unanimous
Davis	0.935	0.954	Unanimous
Field	0.950	0.965	Unanimous
Chase, Salmon	0.975	0.985	Unanimous
Stanbery	0.436	0.002	No Action
Hoar	0.902	0.828	24-33
Stanton	0.886	0.950	46-11
Strong	0.936	0.966	Unanimous
Bradley	0.862	0.759	46-9
Hunt	0.932	0.967	Unanimous
Williams	0.977	0.954	No Action
Cushing, Caleb	0.708	0.845	No Action
Waite	0.994	0.996	Unanimous
Harlan (elder)	0.881	0.824	Unanimous
Woods	0.380	0.703	39-8
Matthews (no action)	0.364	0.507	No Action
Matthews (confirmed)	0.902	0.928	24-23
Gray	0.735	0.881	51-5
Conkling	0.725	0.865	39-12
Blatchford	0.453	0.737	Unanimous
Lamar, Lucius	0.869	0.948	32-28
Fuller	0.907	0.870	41-20
Brewer	0.974	0.973	53-11
Brown	0.979	0.982	Unanimous
Shiras	0.965	0.978	Unanimous
Jackson, Howell	0.228	0.284	Unanimous
Hornblower	0.724	0.205	24-30
Peckham, Wheeler	0.433	0.536	32-41
White, Edward	0.973	0.986	Unanimous
Peckham, Rufus	0.605	0.939	Unanimous
McKenna	0.897	0.878	Unanimous
Holmes	0.893	0.857	Unanimous
Day	0.929	0.868	Unanimous

**Appendix A
(Continued)**

Actual and Predicted Outcomes of Supreme Court Nominations

<i>Nominee</i>	<i>Predicted Outcome</i>		<i>Actual Outcome</i> ¹
	<i>Without Delay</i>	<i>With Delay</i>	
Moody	0.976	0.978	Unanimous
Lurton	0.957	0.975	Unanimous
Hughes (1st term)	0.940	0.957	Unanimous
Van Devanter	0.971	0.978	Unanimous
Lamar, Joseph	0.978	0.983	Unanimous
Pitney	0.979	0.972	50-26
McReynolds	0.978	0.979	44-6
Brandeis	0.975	0.662	47-22
Clarke	0.978	0.981	Unanimous
Taft	0.972	0.984	Unanimous
Sutherland	0.979	0.985	Unanimous
Butler	0.977	0.965	61-8
Sanford	0.979	0.983	Unanimous
Stone	0.972	0.955	71-6
Hughes (2nd term)	0.967	0.977	52-26
Parker	0.586	0.563	39-41
Roberts	0.821	0.829	Unanimous
Cardozo	0.977	0.981	Unanimous
Black, Hugo	0.881	0.931	63-16
Reed	0.829	0.893	Unanimous
Frankfurter	0.976	0.976	Unanimous
Douglas	0.647	0.791	62-4
Murphy	0.974	0.975	Unanimous
Byrnes	0.932	0.960	Unanimous
Jackson, Robert	0.978	0.985	Unanimous
Rutledge, Wiley	0.979	0.969	Unanimous
Burton	0.823	0.821	Unanimous
Vinson	0.823	0.756	Unanimous
Clark	0.979	0.977	73-8
Minton	0.934	0.956	48-16
Warren	0.947	0.377	Unanimous
Harlan (younger)	0.908	0.915	71-11
Brennan	0.864	0.880	Unanimous
Whittaker	0.905	0.977	Unanimous
Stewart	0.712	0.514	70-17
White, Byron	0.916	0.937	Unanimous
Goldberg	0.977	0.969	Unanimous
Fortas	0.979	0.978	Unanimous
Marshall, Thurgood	0.975	0.878	69-11
Burger	0.845	0.968	74-3

Appendix A
(Continued)

Actual and Predicted Outcomes of Supreme Court Nominations

<i>Nominee</i>	<i>Predicted Outcome</i>		<i>Actual Outcome</i> ¹
	<i>Without Delay</i>	<i>With Delay</i>	
Haynsworth	0.905	0.825	45-55
Carswell	0.550	0.463	45-51
Blackmun	0.971	0.992	Unanimous
Powell	0.772	0.917	89-1
Rehnquist	0.868	0.918	68-26
Stevens	0.732	0.817	Unanimous
O'Connor	0.811	0.801	Unanimous
Scalia	0.677	0.311	Unanimous
Bork	0.655	0.449	42-58
Ginsburg	0.009	0.136	No Action
Kennedy	0.831	0.824	Unanimous

¹"Unanimous" decisions include unrecorded voice votes. Numerical values indicate the Senatorial vote on confirmation. Failed nominations, both actual and predicted, are in boldfaced type.

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