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# Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests\*

BY GREGORY A. CALDEIRA\*\*

## INTRODUCTION

Much controversy and concern has arisen over the nomination and appointment of justices to the Supreme Court with three justices of the "liberal" coalition eighty or more years old and with at least four or more years of Republican control of the White House. Indeed, during the presidential election of 1988, both candidates spoke of the importance of appointments to the Court and promised to choose men and women who would "interpret the law" or "protect the rights of all citizens." In light of the precarious ideological balance of force within the federal judiciary, appointments to the Supreme Court and the lower courts become even more important in the next few years. President Reagan did not achieve his desired major shifts in the decisions of the Supreme Court,<sup>1</sup> but President Bush will undoubtedly have this opportunity.

Clearly, at this crucial juncture, more and better research is needed into the dynamics of senatorial decision-making on nominations to the Supreme Court. Actually, political scientists have

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\* This article represents an expansion of remarks originally delivered as a reaction to two papers delivered at the Symposium on "The Selection of Judges in the United States" at the University of Kentucky, September 15-16, 1988.

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<sup>1</sup> See, e.g., Baum, *Explaining the Burger Court's Support for Civil Liberties*, 20 *POL. SCI.* 21 (1987).

already addressed this issue.<sup>2</sup> But there still is a great deal to learn, as my comments will suggest.

In the scholarship on nominations to the Supreme Court to this date, party, ideology, and region have figured most prominently.<sup>3</sup> The gravamen of my argument is that more attention ought to be given to the influence of constituencies<sup>4</sup> and mobilization by organized interests. Over the past two decades, the number of interest groups in American politics has exploded,<sup>5</sup> and therefore, there is potential impact not only on Congress and the executive branch but there is also impact on the courts.<sup>6</sup> There is much historical evidence on the potent roles of constituencies and organized groups in the consideration of nominees to the Supreme Court. Empirically oriented political scientists need to analyze this information. This criticism is not directed against particular scholars but, rather, more generally against those who study the phenomenon of judicial selection at the national level.

## I. CRITIQUE

The articles by Segal<sup>7</sup> and Felice and Weisberg<sup>8</sup> address two different facets of the same basic question: How and why do

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<sup>2</sup> Felice & Weisberg, *The Changing Importance of Ideology, Party, and Region in Confirmation of Supreme Court Nominees, 1953-1988*, 77 KY. L.J. 509 (1988-89); Segal, Cover, & Cameron, *The Role of Ideology in Senate Confirmation of Supreme Court Justices*, 77 KY. L.J. 485 (1988-89).

<sup>3</sup> See, e.g., H. ABRAHAM, *JUSTICES AND PRESIDENTS* (1974); Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1 (1983-84); Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998 (1987); Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 L. & SOC'Y REV. 927 (1978-79); Sulfridge, *Ideology as a Factor in Senate Confirmation of Supreme Court Nominations*, 42 J. POL. 560 (1980).

For general literature on legislative voting, see Collie, *Voting Behavior in Legislatures*, in HANDBOOK OF LEGISLATIVE RESEARCH (Loewenberg, Patterson, and Jewell, eds., 1985).

<sup>4</sup> As used in this article, "constituencies" means unorganized interests, such as blacks, farmers, women, etc.

<sup>5</sup> See, e.g., J. BERRY, *THE INTEREST GROUP SOCIETY* (1984).

<sup>6</sup> On organized interests, see K. SCHLOZMAN AND J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

<sup>7</sup> Segal, Cover, and Cameron, *supra* note 2.

<sup>8</sup> Felice & Weisberg, *supra* note 2.

senators vote as they do on nominations to the Supreme Court? First, I will discuss the article by Felice and Weisberg and then the article by Segal. Out of deference to the lengthy expositions of their views put forth elsewhere in this *Journal*, I shall make no attempt to summarize their articles in an authoritative fashion, but rather, will reiterate only enough to put my criticism and comments in context.

Felice and Weisberg ask the questions of how and why senators voted on controversial nominations to the Supreme Court since the administration of Eisenhower. Straightforward and familiar measures of key variables are used: partisanship, region, and ideology—as measured by roll calls tallied by the Americans for Constitutional Action—and degree of support by the senator for the president's program as compiled by *Congressional Quarterly*. Their results strongly suggest ideology was a motivating force in the nominations of Fortas as chief justice, Haynsworth, Carswell, and Rehnquist as associate justices, and again with Rehnquist as chief justice. In the nominations of Stewart and Marshall, region played the prominent role, with southern senators voting against those nominations in response to desegregation. Strikingly, in the nomination of Bork, partisanship was the most important determinant, with ideology being somewhat less important.

The preeminence of ideology across this set of nominations, together with the minimal role of party and region is, in my view, remarkable. For, at least in the nominations of Carswell, Haynsworth, and Fortas, one would have suspected regionalism to play an important role. Of course, the party is always important in voting in Congress. To a certain extent, the above results contradict my notions of voting on most matters before Congress. I shall discuss the reason for this contradiction after I review Segal's article.

Like Felice and Weisberg, Segal also deals with senate voting on the nomination of Supreme Court justices. Whereas Felice and Weisberg take the controversial nature of a nomination more or less as a given, Segal focuses on how and under what circumstances a senator will cast a negative vote. Segal suggests that a vote against a president's nominee is costly and that senators will vote against the nominee only if they believe that there is a

chance of defeat. Opposition to the president is costly and that is why presidents' nominations are seldom rejected.

The political environment, whether the nomination comes late in a president's term and whether the president's party controls the Senate, will have an influence on whether a senator votes to reject. Two variables—ideological distance between the nominee and a senator and the candidate's qualifications—should provide reasons for a senator's vote. The notion is that a senator will not vote purely on partisan or ideological grounds absent some plausible reason. Segal specifies that party, qualifications, and ideological distance will affect senate choices in a linear manner. Interestingly, the political environment will condition the use of ideological distance as part of the senatorial calculus, and qualifications and ideological distance will have a multiplicative effect on senate voting.

What is striking and new about Segal's article is the use of new measures, multiplicative terms, and cost in voting against a presidential nomination. Some of the results are straightforward, while others are somewhat surprising. Clearly, senators who are members of the president's party are more likely to vote for a nomination. A favorable political environment for the president, together with ideological distance, has an impact on senate voting. Also, a candidate's qualifications influence confirmation. The combination of a nominee's qualifications and ideological distance markedly affects the senatorial calculus. But, interestingly, ideological distance has no direct effect on voting; its influence is conditioned by the political environment. Thus, senators do not, except under certain, well-specified conditions, cast votes on ideological grounds in considering nominations to the Supreme Court. That strikes this author as an appealing and counterintuitive finding.

Both articles are important and well-done, but, as always, there are a number of points in the two articles about which reasonable people will disagree. In some cases the authors have done what anyone would have, given the data available, and I intend not so much to take them to task but rather to muse about our collective difficulties as scholars who wish to understand the politics of senate voting on nominations to the Supreme Court. I shall first discuss technical issues and then move to more substantive questions.

Segal takes an ingenious approach. But the measure of qualifications and ideological distance will cause controversy. Some people will simply not believe that one can measure a candidate's qualifications or ideology, or even perceptions of them, by content analysis of editorial reactions in leading newspapers. Should we expect the *New York Times* and the *Chicago Tribune* to agree on Bork's ideology and qualifications? If the various newspapers do not agree, do we nevertheless simply lump the scores together? Which newspaper's editorials best capture the public's and Senate's *perceptions* of the nominees? Further, I doubt that these measures are really independent of other variables in the model. For instance, there is evidence that the White House makes a systematic effort to influence editorial reactions by sending out "press kits" and mocked up editorials to the newspapers. Obviously, the newspapers in Segal's study are not the sort one would expect to crib heavily from the White House's packet, but they may react to telephone calls and letters, for example.<sup>9</sup> More importantly, it is likely that the White House's and its opponents' attempts to influence public perceptions are themselves a result of their own perceptions of the political environment and partisan situation.

Segal engaged in intriguing speculation about the consequences of the Reagan Administration nominating Scalia first and Bork second. Based on statistical analysis, Segal suggests the distinct possibility of both Bork and Scalia winning confirmation if Bork had gone before the Senate first. The flaw in this analysis is the assumption that evaluations of Scalia's political ideology and qualifications would have remained the same in 1987. In the fall of 1987, with the Democrats controlling the Senate and President Reagan in lame-duck state, those who opposed Bork surely would have made an attempt to manipulate public and elite perceptions of Scalia's political ideology and qualifications. After all, Bork's enemies pursued precisely that strategy in 1987. Advertising on television and in newspapers, press conferences, direct mail, and grass-roots lobbying were

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<sup>9</sup> For example, President Johnson and his staff made calls and wrote letters to editors in the fight over Fortas' nomination as Chief Justice. See generally B. MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (1988); N. MCFEELEY, *APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY* (1987).

used in order to cast doubt on whether Bork's judicial philosophy was in the mainstream of American politics. To reiterate a previous point: evaluations of qualifications and political ideology may be endogenous variables—that is, themselves the result of variables inside or outside the statistical model.

Another technical criticism is that the Senate took only voice votes in some of the nominations. Felice and Weisberg disregarded those nominations. However, Segal included the nominations decided on voice votes, but it is not clear whether the voice votes were counted as unanimous. It is clear that voice votes are often meant to override significant opposition and make it unnecessary for senators to take a position on a controversial matter. Thus, for example, in the confirmation of Fortas as associate justice, the Senate took a voice vote but several senators made their opposition well known.

Moving on to more substantive issues, the use of summary indices of roll calls, whether it be from the Americans for Democratic Action (ADA) or the Americans for Constitutional Action (ACA), as measures of senate political ideology raises important and troublesome issues. Both articles use summary indices of roll calls to stand for the ideological predispositions of a senator. Unfortunately, ADA and ACA scores, based on votes on a set of important issues, are the result of many of the same processes the authors hypothesize as determinants of votes on nominations to the Supreme Court. Surely, in part, ADA and ACA scores summarize the representational linkage on prior measures. Those who formulate such ratings would undoubtedly include a vote on a nomination to the Supreme Court in their indices. If that is correct, then both sets of authors probably overestimate the effects of ideology and underestimate the impact of party and constituency. This may explain Felice and Weisberg's position on several nominations in which region should have made a big difference but did not.

## II. POINT OF DEPARTURE: ORGANIZED AND UNORGANIZED INTERESTS

I do not have a quick or easy solution to the problems I have outlined. But I do think my comments point out the need to understand the impact of organized and unorganized constituencies on the politics of nominations to the Supreme Court. In

both articles, constituency as a variable plays a relatively minor role in the modeling process. This is partly a result of the inability to measure the effects of constituency and partly a result of scholarly perceptions of senators and the White House on nominations to the Court. Until recently, nominations to the Supreme Court have been debated almost entirely within elite circles. The president and Senate have, traditionally, dealt directly with one another on these nominations. Somewhere along the line, perhaps during the Nixon Administration or during the fight over Fortas' elevation to chief justice, the president and various organized interests began to mobilize senatorial constituencies in favor of and in opposition to nominations to the Supreme Court.<sup>10</sup> No longer did the president and interest groups engage only in direct lobbying of senators; they began to draw on and mobilize key people and groups back home in the states. During the latter part of the 1980s, culminating in the massive mobilization of interests to defeat Bork in 1987, fights over controversial nominations to the federal courts have increasingly become constituency-driven events.<sup>11</sup>

### CONCLUSION

Over the last nine months, a colleague<sup>12</sup> and I have researched the involvement and influence of various interest groups

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<sup>10</sup> Mobilizations of this sort do have a precedent in the twentieth century. Labor and various black interest groups used tactics such as writing letters and telegrams and placing advertisements in newspapers in order to defeat the nomination of Parker to the Supreme Court in 1930. See W. BURRIS, *DUTY AND THE LAW: JUDGE JOHN J. PARKER AND THE CONSTITUTION* (1987); Fish, *Spite Nominations to the Supreme Court: Herbert Hoover, Owen J. Roberts, and the Politics of Political Vengeance in Retrospect*, 77 *KY. L.J.* 545 (1988-89); Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 *MISSISSIPPI VALLEY HIST. REV.* 213 (1963-64).

Qualitatively, the strategies and tactics used against Parker resemble those mustered against Carswell, Haynsworth, and Bork. But efforts on previous nominations differ in important respects from the mobilizations against Bork and others. Today, many more organizations are involved in supporting or defeating nominations. These organizations approach work on nominations more systematically than did their predecessors, and more importantly, both liberal and conservative organizations "interested" in judicial nominations have become well institutionalized in our society.

<sup>11</sup> See P. MCGUIGAN AND J. O'CONNELL, *THE JUDGES WAR* (1987); H. SCHWARZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988); see also TWENTIETH CENTURY FUND, *JUDICIAL ROULETTE: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE APPOINTMENT OF FEDERAL JUDGES* (1988).

<sup>12</sup> Professor John R. Wright, Department of Political Science, University of Iowa.



in the confirmation and rejection of federal judicial nominations. We began our research by studying the defeat of Bork. But, as we have interviewed participants and reviewed the evidence, it has become apparent that the fight over Bork's nomination was not an isolated, idiosyncratic event. It is simply the high-water mark, for now at least, of the influence of organized interests in federal judicial nominations. I believe, however, that organized group mobilization and pressure on controversial judicial nominations has become a permanent feature of our political landscape. Presently, there are over 100 conservative and around 300 liberal organizations that take or have taken a position on nominations. This conflict has become institutionalized. More importantly, these coalitions remain poised to do battle on the next controversial nomination. No longer do the Senate and the White House have control over the decision to reject or confirm; interest groups have injected themselves into the process, and they have brought constituency politics with them. As we study the politics of judicial confirmations, we need to integrate this new phenomenon into our models and analyses.