THE RELEVANCE OF POLICY VALUES FOR THE CONFIRMATION OF SUPREME COURT NOMINEES

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The confirmation votes on the fourteen most controversial Supreme Court nominees of the twentieth century were analyzed. The data supported the conclusion that Senate opposition to Supreme Court nominees is due primarily to a predicted dissatisfaction with the policy-relevant voting of the nominee after confirmation. The policy position of senators supporting confirmation was found to be significantly different from the policy position of senators opposing confirmation even after controls were introduced for the political party and ethical standards position of senators.

I. INTRODUCTION

Scigliano writes that every president "has been aware that the men he puts on the Court will, through their decisions, help shape public policy and perhaps basic relations between the Supreme Court and the Presidency itself"(1971: 85). Surely it must be presumed that most, if not all, senators who have voted on the confirmation of a Supreme Court justice during this century share this awareness that the Court is an important policy-maker. In many cases with political significance, judges have considerable discretion, and it is widely believed that when such discretion exists the political values of judges influence their decision. Therefore, if senators are concerned about the policy consequences of judges' decisions, they should be interested in the political values of nominees for the Supreme Court. The research reported below was designed to test the general proposition that senators are concerned with the policy implications of judicial behavior and, further, that opposition to Supreme Court nominees in this century has been due primarily to a predicted dissatisfaction with the policy-relevant voting of the nominee after confirmation.

In spite of the concern that senators presumably have about the political values of nominees for the Supreme Court,

those values are often not publicly discussed in confirmation proceedings. This failure to publicly debate the political values of nominees may be due to the "official theory" of judicial behavior which holds that judges stand apart from politics. Good judges are expected to make decisions according to a fixed body of legal rules and the inexorable commands of logic. They are the spokesmen for "the law." Politics should, therefore, not be allowed to influence their selection, or we would "cease to have a government of laws and not of men" (Peltason, 1955: 21). The normative expectations of this "official theory" have resulted in the entire selection process being "surrounded by conventions which make it difficult to discuss openly the conflict of values" (Peltason, 1955: 30).

Reinforcing the conventions which proscribe open discussion of political values is the notion, subscribed to at least in public by most senators, that recruiting Supreme Court justices is a presidential prerogative. There seems to be widespread, bipartisan, publicly expressed support for the expectation that the Senate's confirmation role is "limited to reviewing the fitness of the nominee rather than his political desirability, his qualifications, or the wisdom of choosing him" (Grossman and Wasby, 1971: 346-347). Even a casual reading of the public debate during most confirmation proceedings will turn up many comments which express these sentiments.[1]

Abraham and Goldberg argue that because of these Senate norms against overt political opposition to Supreme Court nominees, it is difficult to make generalizations about the real cause of opposition to confirmation. Whether opposition is really based on personal or political grounds or both, overt opposition to a nomination is usually expressed in more "respectable" terms (1960: 222). Competence is the most easily defended rationale (Halper, 1973: 104). Even if partisan and ideological dissatisfaction are the real motives for opposition to Supreme Court nominees, the reasons publicly given for the opposition are likely to deal with alleged defects in qualifications of the nominee such as ethical impropriety or lack of legal

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[1] For example, Republican Senator Marlow Cook has been quoted as saying, "The ideology of the nominee is the responsibility of the President. The Senate's judgment should be made, therefore, solely upon grounds of qualifications" (McConnell, 1970: 15). On the other side of the aisle, Democratic Senator Edward Kennedy is quoted as saying, "I believe it is recognized by most Senators that we are not charged with the responsibilities of approving a man to be associate Justice of the Supreme Court only if his views always coincide with our own. . . . we are interested really in knowing whether the nominee has the background, experience, qualifications, temperament and integrity to handle this most sensitive, important, responsible job" (McConnell, 1970: 13).

ability. A search for an explanation of the basis of senators' opposition to Supreme Court nominees must therefore go beyond the reasons they offer publicly. My analysis of the voting record of senators on economic and civil liberties policy was designed to explore the "real" reasons for senatorial opposition to Supreme Court nominees.

There appear to be two steps in the process of decision-making used by most senators in voting on Supreme Court nominations. First, each senator must decide whether the nomination is a controversial one. If not, the senator is likely to feel compelled to vote for confirmation regardless of his personal preferences or his private view of the merits of the nomination. When a consensus exists that the nominee is not controversial, a unanimous vote for confirmation will occur in spite of the fact that some senators may privately prefer that the nominee not sit on the Court.[2] However, a senator who concludes that a nomination is controversial may then proceed to evaluate the merits of the nomination, his own preferences, and relevant political factors before deciding whether to vote for or against confirmation.

Inertia is a critical factor. Senators are predisposed to vote for confirmation and may only be deflected into opposition if they have a specific, salient reason for doing so—for example, if they believe that there is some prospect for tangible benefit from opposition, and have a nonpolitical rationalization which makes opposition politically safe. As Grossman and Wasby put it, the burden of proof is consistently on the opponents of a Supreme Court nomination (1972: 566).

There have been no systematic explanations for why a majority of nominations remain essentially noncontroversial and are unanimously confirmed. A number of case studies of controversial nominations have shed little light on the subject. The most comprehensive work, Joseph Harris' classic book, *The Advice and Consent of the Senate* (1953), was written before half of the controversial nominations of the twentieth century were made. In addition, most studies seem to rely on an analysis of the behavior and motives of leaders in a confirmation fight while neglecting senators who voted but were not audible participants in the struggle.

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[2] There were 35 votes on confirmation in this century which were held in open session of the Senate. Of these, 21 were either approved by voice vote (and presumably were unanimous or nearly so) or were approved by roll calls with fewer than 10 percent of the senators present and voting being recorded as against confirmation.

Prior studies have come to different conclusions about which factors best account for the confirmation votes of senators. Halper concluded that value considerations are usually the decisive influence. Senators, he says, tend to interpret "qualifications" in terms of predicted policy outcomes: how will a nominee vote as a justice? (1973: 104). Harris also maintained that most of the significant contests over nomination since 1900 have occurred over broad political issues (1953: 305), and Swindler suggests that rejection of Supreme Court nominees has been prompted primarily by hostility to the nominee's perceived constitutional philosophy (1970: 533). On the other hand, Scigliano argues that senators are often more concerned with representational factors such as geography and party loyalty (1971: 124).

The present study analyzes the confirmation votes of all senators in each of the 14 most controversial nominations in the twentieth century. A nomination was considered to be "controversial" if at least 10 percent of the senators participating voted against confirmation. A list of the 14 controversial nominees, the year of their nomination, and the confirmation vote is presented in Table 1. The remainder of the discussion is confined to these 14 cases.

Table 1. The Fourteen Controversial Twentieth-Century
Supreme Court Nominees

Nominee	Year Nominated	Confirmation Vote
Louis Brandeis	1916	47-22
Pierce Butler	1922	61-8
Charles Hughes	1930	52-26
John Parker	1930	39-41
Hugo Black	1937	63-16
Tom Clark	1949	73-8
Sherman Minton	1949	48-16
John Harlan	1955	71-11
Potter Stewart	1959	70-17
Thurgood Marshall	1967	69-11
Abe Fortas	1968	45-43[a]
Clement Haynsworth	1969	45-55
Harold Carswell	1970	45-51
William Rehnquist	1971	68-26

[a]cloture vote; nomination defeated by inability to end debate

It is hypothesized that when a nomination is viewed as controversial, a senator will vote to confirm a nominee whose perceived policy position is compatible with his own, and will oppose a nominee whose policy position on important issues is

quite different from his own. To test these expectations, the following hypothesis (Hypothesis 1) is investigated:

> For each controversial nomination, the policy positions of senators supporting the nominee will be different from the positions of those in opposition on the most salient issues with which the Court is expected to deal.

Since there is a presumption in favor of confirmation, it might be expected that even on generally controversial nominations, some senators who disapprove of the policy position of the nominee will vote for confirmation. For example, members of the President's party may feel obliged to mask their private opposition as a matter of party loyalty, while members of the opposition party may cast their votes on the basis of party considerations. But since it is hypothesized that when senators feel that their choice is not constrained, they will vote primarily in accord with their policy preferences, it should be rare for a senator who agrees with the policy position of the nominee to vote against confirmation. Votes against confirmation should be primarily due to the perception of policy *disagreement*, while support for confirmation may be due to either nonpolicy factors or to the perception of policy *agreement* with the nominee. These considerations lead to Hypothesis 2:

> On the most salient issue with which the Court is expected to deal, opponents of the nomination will be more homogeneous as a group in regard to issue position than will supporters of the nomination. Opponents will be concentrated near one of the extremes of the scale measuring issue position.

To test hypotheses 1 and 2, one or more policy areas for each Supreme Court nominee were hypothesized to be salient to the senators voting on confirmation. These issues changed over time as the subject of the cases dominating the Supreme Court's docket changed. It was assumed that the policy areas which were considered important by the president making the nomination[3] and the policy areas containing the greatest number or most controversial cases decided by the Supreme Court in the period immediately preceding the confirmation vote would be most salient to the senators. Two different policy area measures were used: the E scale (economic policy) and the C scale (civil liberties), both developed by Glendon Schubert (1965: 101-102, 127-128).

Cumulative scale scores were computed for each senator on roll calls from each of these policy areas. First, a subjective

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[3] Reliance was placed on the account of Scigliano (1971) for a determination of what these policy areas were.

selection[4] was made of all "nonunanimous"[5] roll calls in a particular Congress which seemed pertinent to the policy area in question. Cumulative scales were then constructed[6] with the aid of OSIRIS computer programs, and a scale was assigned to each senator. Scale scores were derived in such a way that "zero" always represented the most conservative position on the scale, and the most liberal position was represented by the largest integer.[7]

Each of the fourteen confirmation votes was then cross-tabulated with the scale scores of senators on each of the salient policy areas. The contingency tables using the policy area hypothesized to be most important to senators are shown in Table 2. Chi square was used to test whether the differences between those voting for and against confirmation could have occurred by chance.

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[4] All roll calls whose subject matter seemed to deal with the same questions of policy that are contained in Schubert's E scale and C scale were included. Also included were procedural motions made during consideration of bills whose subject matter dealt with E scale or C scale questions. If there was doubt in the author's mind about whether a particular bill did deal with policy which was similar to one of the scales, the doubt was resolved in favor of including the roll call vote in the initial group of roll calls selected for analysis. The number of roll calls in the original pool from which the scales were constructed ranged from a low of 19 for the 64th Congress to a high of 40 for the 92nd Congress.

[5] A roll call was considered "nonunanimous" if at least 10 percent of those voting "yea" and at least 10 percent voted "nay."

[6] The value $Q=0.7$ was specified for the "cluster" program. In addition, any scale with a coefficient of reproducibility less than 0.95 was eliminated. The number of roll calls included in each scale originally varied from a low of 7 for the 67th Congress to a high of 31 for the 92nd Congress. These scales were collapsed to form the scales shown in Table 2 by combining adjacent scale categories. Such a reduction in the number of scale positions was necessary to make the computation of chi square meaningful.

[7] Some may object that the measures of liberalism for judges and senators are not compatible because the meaning of liberalism may change over time and in different contexts. However, it should be noted that the same definition, taken from Schubert, of the difference between a "liberal" and a "conservative" vote in each policy area was used by the researcher for both the Senate and the Supreme Court and that this definition was consistently used in all time periods. It is not contended that each judge or senator included in analysis would have agreed with the researcher on the label given to his votes. However, the label given by the participant would not be relevant for analysis. The assignment of position is based on behavior and the fact that the votes scale suggests that they reflect some underlying value, regardless of whether different people would apply different labels to that value. A given scale score (e.g., a "2") for a senator does not necessarily represent the same policy position as the same numerical score for a judge might represent. Ordinal scales measure only relative positions, but relative positions will be the relevant considerations for senators involved in the selection process. Since it is clear that both senators and judges are subject to restraints on their behavior which come from the context in which they make decisions, a senator would presumably not limit his support to judicial nominees whose views were identical to his own even if the nominee's policy values were the same as those of the senator. Instead, a senator might well support those nominees whose values, compared to the values of other possible nominees, appear to be relatively close to his own.

Table 2.   Contingency Tables: Distribution of Issue Positions for Senators Voting For and Against Confirmation of Each Nominee[a]

Brandeis[b] (E scale), 64th Cong., Rep. = .99, Sc. = .91

	0[c]	1	2	3	4		N
For	22%	22%	11%	20%	24%	100%	45
Against	41%	41%	9%	5%	5%	100%	22

x^2=17.5, p < .01, gamma=−.591

Hughes (E scale), 71st Cong., Rep. = .96, Sc. = .57

	0	1	2	3		N
For	55%	20%	19%	6%	100%	53
Against	0	0	34%	66%	100%	29

x^2=47.6, p < .001, gamma=.953

Black (E scale), 75th Cong., Rep. = .95, Sc. = .59

	0	1	2	3		N
For	0	8%	42%	50%	100%	66
Against	67%	33%	0	0	100%	18

x^2=67.0, p < .001, gamma=−1.0

Minton (E scale), 81st Cong., Rep. = .96, Sc. = .64

	0	1	2	3		N
For	11%	12%	44%	33%	100%	57
Against	59%	35%	6%	0	100%	17

x^2=29.0, p < .001, gamma=−.884

Butler (E scale), 67th Cong., Rep. = .98, Sc. = .86

	0	1	2		N
For	37%	28%	35%	100%	51
Against	0	0	100%	100%	7

x^2=10.5, p < .01, gamma=1.0

Parker (E scale), 71st Cong., Rep. = .96, Sc. = .57

	0	1	2	3		N
For	64%	9%	16%	11%	100%	44
Against	4%	15%	30%	50%	100%	46

x^2=37.2, p < .001, gamma=.785

Clark[d] (E scale), 81st Cong.

	0	1		N
For	35%	65%	100%	74
Against	88%	12%	100%	8

x^2=8.91, p < .02, gamma=−.856

Table 2 continued

Table 2 continued

Harland[d] (C scale), 84th Cong.

	0	1					N
For	64%	36%				100%	53
Against	100%	0				100%	9

x^2=4.76, p < .05, gamma=−1.0

Stewart (C scale), 86th Cong., Rep. = .96, Sc. = .72

	0	1	2	3	4		N
For	14%	15%	25%	28%	18%	100%	79
Against	11%	78%	11%	0	0	100%	18

x^2=31.2, p < .001, gamma=−.66

Marshall (C scale), 90th Cong., Rep. = .99, Sc. = .94

	0	1	2	3		N
For	5%	12%	25%	58%	100%	73
Against	93%	7%	0	0	100%	15

x^2=59.1, p < .001, gamma=−.99

Fortas (C scale), 90th Cong., Rep. = .99, Sc. = .94

	0	1	2	3	4		N
For	0	2%	15%	62%	21%	100%	47
Against	43%	31%	8%	18%	0	100%	49

x^2=54.5, p < .001, gamma=−.904

Haynsworth (C scale), 91st Cong., Rep. = .97, Sc. = .75

	0	1	2	3	4		N
For	36%	26%	21%	14%	2%	100%	42
Against	0	4%	6%	27%	63%	100%	52

x^2=57.3, p < .001, gamma=.934

Carswell (C scale), 91st Cong., Rep. = .97, Sc. = .75

	0	1	2	3	4		N
For	32%	30%	20%	16%	2%	100%	44
Against	0	0	6%	25%	69%	100%	48

x^2=61.7, p < .001, gamma=.963

Rehnquist (C scale), 92nd Cong., Rep. = .97, Sc. = .74

	0	1	2	3	4		N
For	17%	23%	22%	29%	9%	100%	69
Against	4%	0	0	46%	50%	100%	24

x^2=30.6, p < .001, gamma=.826

[a]Figures in table are row percentages. Percentages were used to facilitate the testing of Hypothesis 2 and to make the table easier to read. Chi squares and gammas were computed from actual frequencies rather than from percentages. "Rep." stands for Guttman's Coefficient of Reproducibility and "Sc." stands for Menzel's Coefficient of Scalability.
[b]Vote totals in all tables include both votes cast on the floor and pairs recorded in the *Congressional Record*.
[c]Low scale scores represent conservative positions; high scale scores represent liberal positions.
[d]The scale originally used in the analysis of the Harlan and Clark

Table 2 continued

nominations has four positions. The values of Rep. and Sc. for Harlan for these scales were Rep. = .96; Sc. = .70. The values for the Clark nomination were Rep. = .96, Sc. = .64. In the original scales, a meaningful value of chi square could not be computed because of the small number of votes against confirmation. Therefore the two most conservative positions from the original scale were combined to produce the scale position labeled "0" in Table 2 above and the other two scale positions were combined to produce the position labeled "1" in Table 2.

II. POLICY POSITIONS AND OPPOSITION TO CONFIRMATION

The results of comparing the scale scores of senators favoring and opposing each nominee provide striking confirmation of the first hypothesis. In all 14 comparisons, the differences between those voting for and against confirmation were statistically significant. In all but two cases, the differences were significant at the .01 level. On each of the 14 nominations, the senators supporting confirmation had different issue positions than senators opposing confirmation on salient policy issues.[8]

The data in Table 2 emphasize the magnitude of the differences in issue position between supporters and opponents of nomination in many policy areas. The median score for those voting against confirmation is located at one of the extreme positions (i.e., most liberal or most conservative) in 11 of the 14 cases. That is, in over 75 percent of the confirmation votes, more than half the opponents are among the most liberal or most conservative group of senators in the salient policy area. In five of those cases the median score of those supporting the nomination is at the opposite extreme. Even stronger evidence of the tendency for opposition to a nomination to be concentrated at the extremes is that in 12 of the 14 cases the modal scale score for those voting against confirmation is at one of the extremes of the scale. In all but two cases, more opposition senators are found in one of the extreme scale categories than in any other category. In 9 of the 14 cases, the modal score for the supporters of the nomination is at the opposite extreme of the scale from the mode of the opponents.

The heavy concentration of opponents, and to a lesser extent the supporters, of most nominees at the extremes is consistent with the hypothesis that it is primarily dissatisfaction with the predicted policy behavior of the nominee which is the

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8 There were also statistically significant relationships between the E scale positions of senators and the confirmation votes for Stewart, Marshall, Fortas, Haynsworth, Carswell, and Rehnquist.

main motive force behind a vote against confirmation. Presumably, the greater a senator perceives the distance between his issue position and that of a nominee, the greater his dissatisfaction and the greater his propensity to vote against confirmation.

III. POLICY-BASED OPPOSITION AND PARTY LOYALTY

Before proceeding to Hypothesis 2, it is necessary to consider the possibility that the above results are spurious because of the effect of party. The majority of votes against confirmation in all but one case came from the opposition party to the president. Since numerous studies of congressional voting have shown significant party differences in roll call voting,[9] it is possible that the findings could be the result of purely partisan opposition. To test for this possibility, the relationship between issue position[10] and confirmation vote was examined separately for each party. On three of the nominations (Clark, Brandeis, and Butler) there were too few votes cast against confirmation to make analysis meaningful for either party. On seven of the nominations, there were only enough votes cast against confirmation in one of the parties to make analysis meaningful. In the remaining four nominations, there were sufficient votes to permit analysis of both parties. Thus there were 15 opportunities to test Hypothesis 1 with party held constant.

The results from the seven nominations in which it was only possible to analyze the votes from one party are presented in Table 3. In all seven cases, the distribution of the positions of supporters of confirmation was significantly different from the distribution of the positions of opponents with party held constant. It is therefore clear that in these nominations, the policy positions of senators had an effect on confirmation vote which was independent of party.

The results from the four nominations in which it was possible to analyze the votes from both parties are presented in

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[9] Democrats in Congress have consistently been found to be more liberal than Republicans on general measures of liberalism and on more specific measures of liberalism on economic policy. See Hinckley (1971: 168), Clausen (1973), and Stone (1965).

[10] In order to have enough votes in each cell to make the use of the chi square statistic meaningful, the policy position scales for senators were collapsed into a dichotomous variable. In each case, the author started with the conservative end of the scale and combined the extreme scale category with the adjacent scale categories until the number of senators (from both parties combined) in the new combined conservative position was as close as possible .to 50 percent of the number of senators in the total table. All other scale categories were combined to form the new liberal position.

Table 3.   The Relationship Between Issue Position and Confirmation Vote Controlled by Political Party Affiliation: Nominations in Which the Vote of Only One Party Is Analyzed

Black (E scale) - Democrats			Minton (E scale) - Republicans		
	CON	LIB		CON	LIB
For	2	61	For	9	7
Against	7	0	Against	15	1
	x^2=66.0, p < .001			x^2=6.58, p < .02	

Harlan (C scale) - Democrats			Stewart (C scale) - Democrats		
	CON	LIB		CON	LIB
For	12	19	For	5	41
Against	12	0	Against	14	2
	x^2=13.2, p < .01			x^2=34.3, p < .001	

Marshall (C scale) - Democrats			Fortas (C scale) - Democrats		
	CON	LIB		CON	LIB
For	18	25	For	14	22
Against	11	0	Against	18	0
	x^2=11.9, p < .01			x^2=18.6, p < .001	

Rehnquist (C scale) - Democrats		
	CON	LIB
For	23	8
Against	2	21
	x^2=23.6, p < .001	

Table 4.   The Relationship Between Issue Position and Confirmation Vote Controlled by Political Party Affiliation: Nominations in Which the Votes of Both Parties Are Analyzed

Hughes (E scale)

Party	Policy	Proportion For Confirmation	N
R	Con	1.00	37
R	Lib	.188	16
D	Con	.833	6
D	Lib	.348	23

Summary
Republicans, Policy × Confirmation: x^2=40.1, p < .001
Democrats,   Policy × Confirmation: x^2= 4.5, p < .05
interaction effects, party × policy: x^2= 2.5, p > .10

Parker (E scale)

Party	Policy	Proportion For Confirmation	N
R	Con	.811	37
R	Lib	.176	17
D	Con	.429	7
D	Lib	.276	29

Summary:

Republicans, Policy × Confirmation:	$x^2=20.2$,	$p < .001$
Democrats, Policy × Confirmation:	$x^2= 0.9$,	$p > .10$
interaction effects, party × policy:	$x^2= 4.26$,	$p < .05$

Haynsworth (C scale)

Party	Policy	Proportion For Confirmation	N
R	Con	.870	23
R	Lib	.263	19
D	Con	.882	17
D	Lib	.057	35

Summary:

Republicans, Policy × Confirmation:	$x^2=15.8$,	$p < .001$
Democrats, Policy × Confirmation:	$x^2=35.0$,	$p < .001$
interaction effects, party × policy:	$x^2= 2.09$,	$p > .10$

Carswell (C scale)

Party	Policy	Proportion For Confirmation	N
R	Con	.957	23
R	Lib	.333	18
D	Con	.875	16
D	Lib	.061	35

Summary:

Republicans, Policy × Confirmation:	$x^2=18.2$,	$p < .001$
Democrats, Policy × Confirmation:	$x^2=34.4$,	$p < .001$
interaction effects, party × policy:	$x^2= 1.60$,	$p > .10$

Table 4. The format of the table has been changed to facilitate employment of techniques for analyzing complex contingency tables (Kritzer, 1978). For the nominations of Hughes, Haynsworth, and Carswell, the policy views of senators in both parties were significantly related to their confirmation votes, and there were no statistically significant interaction effects between the effects of party and policy views. In the case of the Parker nomination, there was a statistically significant relationship between policy views and confirmation vote only for Republicans. For the Parker confirmation vote there was a statistically significant interaction between the effects of party and policy views.

Taken together, the results from Tables 3 and 4 generally support Hypothesis 1. Even when a control is introduced for political party, the confirmation votes of senators are significantly related to their policy positions.

IV.   POLICY-BASED OPPOSITION AND HIGH ETHICAL STANDARDS

The words used in debate in most confirmation proceedings in the Senate deal primarily with nonpolitical aspects of the nominee's "qualifications" to serve on the Supreme Court. Frequently debates center on allegations of ethical impropriety or conflicts of interest. Senators and the news media sometimes suggest that these ethical issues are the "real" reasons for support or opposition to the nominee.

If the ethical standards of senators do in fact have an important influence on their confirmation votes, it would be desirable to determine whether the relationship noted above between the policy values of senators and their confirmation votes is rendered spurious by the effect of senators' ethical standards. A test is provided for three recent nominations through the introduction of a control variable for senators' positions on ethical standards. The operationalization of this variable is given in Appendix A.

The results of the analysis of the relationship between the policy values of senators and their confirmation votes with a control for the ethical standards position of senators is presented in Table 5. The introduction of the control has little effect. For each of the three nominations, the relationship between the policy values of senators and their confirmation votes is statistically significant at the .01 level for senators with high ethical standards positions as well as for senators with low ethical standards.

In these three cases, the nominations of Fortas, Haynsworth, and Carswell, the ethical standards of the nominees were drawn into question in the debate over confirmation. However only in Haynsworth's case did ethics seem to have an important influence on the final vote (as opposed to merely the level of rhetoric during debate in the Senate). Five of the eleven conservative senators, who might have been expected to support Haynsworth on the basis of policy and ideology, actually voted against confirmation of his nomination. No significant interaction effects could be detected in the confirmation votes on Fortas and Carswell.[11] One explanation of the difference might lie in the increased salience of policy and ideology

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[11] A separate analysis indicated that for these two nominations, there was no statistically significant relationship between the ethics positions of senators and their confirmation votes when a control for civil liberties position was introduced.

Table 5.   The Relationship of Senators' Positions on Civil
Liberties Policy to Their Confirmation Votes Con-
trolled by Senators' Positions on Ethical
Standards for Three Recent
Nominees

Fortas Nomination

Ethics Position	Policy Position	Proportion For Confirmation	N
Low	Conservative	.04	25
Low	Liberal	.72	18
High	Conservative	.09	11
High	Liberal	.92	26

Summary:
Policy × Confirmation Vote for Low Ethics, x^2=21.91, p < .001
Policy × Confirmation Vote for High Ethics, x^2=24.11, p < .001
   interaction effects x^2= .836, p > .10

Haynsworth Nomination

Ethics Position	Policy Position	Proportion For Confirmation	N
Low	Conservative	.96	25
Low	Liberal	.11	18
High	Conservative	.55	11
High	Liberal	.14	28

Summary:
Policy × Confirmation Vote for Low Ethics, x^2=31.67, p < 001
Policy × Confirmation Vote for High Ethics, x^2= 6.79, p < .01
   interaction effects x^2= 5.74, p < .02

Carswell Nomination

Ethics Position	Policy Position	Proportion For Confirmation	N
Low	Conservative	1.00	25
Low	Liberal	.12	16
High	Conservative	.73	11
High	Liberal	.10	29

Summary:
Policy × Confirmation Vote for Low Ethics, x^2=32.89, p < .001
Policy × Confirmation Vote for High Ethics, x^2=15.19, p < .001
   interaction effects x^2= 2.26, p > .10

in these two cases. Both Fortas, a liberal, and Carswell, a con-
servative, excited much greater ideological and partisan opposi-
tion than did Haynsworth. Alleged ethical lapses were
frequently aired during the debate over Fortas' nomination to
be Chief Justice, but, coming as they did in the pre-Watergate
period, the allegations might be regarded as instrumental in
the sense that they were available to be used by those who did
not wish to publicly oppose Fortas on purely political grounds.
The intensity of ideological opposition to Fortas was probably
increased by the symbolic importance of the position of Chief
Justice and by the prospect that if Fortas were defeated the

position might be filled by an incoming conservative president.

Ethical considerations seemed to be least salient in the Carswell nomination. Allegations—and evidence—of racism on the part of the nominee, and well-documented assertions of incompetence, seemed to play a larger role in the Senate debate, to say nothing of the concerted liberal-labor effort to deny President Nixon a "southern strategy" appointment. In contrast, the ethical allegations against Haynsworth were clearly that. Haynsworth was no racist, although he was certainly no proponent of *Brown* v. *Board of Education* (1954) either. His record as an appellate judge was one of competence, if not brilliance. Yet he had sat in a case involving a company in which he had a (relatively minor) financial interest, contrary to the long-standing prohibition against that practice by the canons of judicial ethics.

V. THE COHESION OF OPPONENTS OF CONFIRMATION

Hypothesis 2 predicted that the opponents of each nomination would be more cohesive than supporters in regard to salient policy issues. The hypothesis reflects a presumption in favor of confirmation which may often lead senators to vote in favor of confirmation despite perceived policy differences with a nominee. However, it is expected that senators are unlikely to vote against confirmation unless they intensely oppose the nominee for policy reasons. Policy views significantly different from those of a nominee will more often produce a vote against confirmation than similar policy views will produce a vote for a nominee.

The data for testing this hypothesis may be found in Table 2. The extent to which supporters and opponents are found in one of the two extreme scale positions (either the liberal extreme or the conservative extreme) and the extent to which they could be found within two adjacent scale positions at either end of the scale was used to measure cohesion. The data support the hypothesis. In 25 of the 28 comparisons, the opponents of confirmation were more cohesive than were the supporters. Supporters of the nominees were more likely to be drawn from all or most policy positions represented on the scale, while the opponents tended to be concentrated at one of the extremes.

For eleven of the nominations, the opponents of the nominee were found to be more cohesive on both measures of cohesion used. For two nominees, Stewart and Parker, the

supporters appear to be more cohesive if only the percentage of senators in one of the most extreme scale categories is used as the measure of cohesion. In each of these two nominations, opponents appear more cohesive if two adjacent scale categories are used as the measure of cohesion. For the Fortas nomination, opponents appear to be more cohesive if only the extreme scale categories are used, but supporters of confirmation appear more cohesive if two scale categories are used as the measure of cohesion.

If the aggregate figures on each nomination are used, the same picture emerges. The mean for the percentage of senators concentrated within the most extreme scale category was 61 percent for opponents and 34 percent for supporters, an average difference in concentration of 27 percent. When the two most extreme scale categories were used, the figures were 94 percent for opponents and 69 percent for supporters of the nomination. In every case at least 78 percent of the opponents could be found within the two most extreme scale categories. It is thus clear, as predicted by Hypothesis 2, that a very large majority of the opponents to every nominee had a very similar position on each issue upon which it would be reasonable for policy-oriented senators to evaluate Supreme Court nominees. In each case the shared position consisted of the two most extreme positions of the scale. On the other hand, supporters of most nominees tended to be drawn from a wide variety of issue positions.

VI.   MODERATES AND JUDICIAL ETHICS

The Rohde and Spaeth analysis of the confirmation voting on Fortas, Haynsworth, Carswell, and Rehnquist generally supports the hypothesis advanced above on the importance of senators' policy values (1976: 105). However, they add some qualifications. They suggest that ideology is less important for the confirmation votes of moderate senators. Specifically, they assert: 1) that neither liberal nor conservative senators had enough votes to confirm or defeat any of the four nominees; the outcome of each vote was determined by moderates; 2) the perception by moderates of the policy views of the nominees are less likely to be a crucial influence on their confirmation vote; and 3) moderates are more likely to be influenced by other considerations such as ethical concerns (Rohde and Spaeth, 1976: 106).

The first of these assertions is obvious. However, by itself it does not have any direct relevance for an assessment of the

importance of policy values for senators' confirmation votes. Even if the vote of every senator were completely determined by policy considerations, it would still be true that the outcome of the vote was determined by moderates.

Although the second and third assertions seem plausible on their face, Rohde and Spaeth present no evidence to support them. The present study attempts to test these assertions by examining the relationship of the confirmation votes of moderate senators to their civil liberties policy positions and to their position on the ethics scale used above.

A reanalysis was performed on the data in Table 2. Moderates were defined as senators holding a policy view which was not in either the most liberal or the most conservative scale position. Other senators were labeled "extremists." The implication of the Rohde and Spaeth position is that there should be a stronger relationship between the policy values and the confirmation vote for extremists than for moderates. To test this position the statistics chi square and gamma were computed separately for moderates and extremists for this relationship in

Table 6.   Strength of Relationship Between Confirmation Vote and Senators' Civil Liberties Positions for Moderates and Extremists on Four Recent Controversial Nominations

Fortas	N	x^2	Significance Level	Gamma
Moderates	65	22.78	pL .001	−.792
Extremists	31	31.31	pL .001	−1.0

for difference between gammas, Z = 1.48; p > .10

Haynsworth	N	x^2	Significance Level	Gamma
Moderates	45	11.68	pL .01	.591
Extremists	49	44.76	pL .001	1.0

for difference between gammas, Z = 2.08; p < .05

Carswell	N	x^2	Significance Level	Gamma
Moderates	44	14.17	pL .001	.806
Extremists	48	43.17	pL .001	1.0

for difference between gammas, Z = 1.43; p > .10

Rehnquist	N	x^2	Significance Level	Gamma
Moderates	62	13.37	pL .01	1.0
Extremists	31	10.99	pL .001	.920

for difference between gammas, Z = 0.92; p > .10

the four nominations examined by Rohde and Spaeth. The results are displayed in Table 6. The data show that the relationship between the civil liberties positions of senators and their confirmation votes is statistically significant at the .01 level for both moderates and extremists in all four nominations.

If Rohde and Spaeth are correct, the gamma, which is a measure of strength of association, should be significantly larger for extremists than for moderates. Table 6 shows that this is true only in the case of Haynsworth. For the confirmation votes on Fortas, Carswell, and Rehnquist there are no statistically significant differences between the gammas. This suggests that in three of the four cases examined, policy values were no more important for the confirmation votes of senators with decidedly liberal or conservative positions than they were for moderate senators.

Table 7.   Relationship of Senator's Position on Ethical Standards Scale to Confirmation Vote on Three Recent Controversial Nominations: Controlled by Civil Liberties Policy Positions of Senators

	Extremists on Civil Liberties			Moderates on Civil Liberties		
A. Fortas Nomination						
		Ethics Position				Ethics Position	
Confirmation	Low	High		Confirmation	Low	High
For	3	5		For	11	16
Against	14	5		Against	14	9
$x^2=3.04$; $p < .05$; gamma$=-.647$				$x^2=2.0$; $p > .05$; gamma$=-.387$		
B. Haynsworth Nomination						
		Ethics Position				Ethics Position	
Confirmation	Low	High		Confirmation	Low	High
For	20	4		For	6	6
Against	6	22		Against	11	7
$x^2=19.8$; $p < .001$; gamma$=+.896$				$x^2=0.35$; $p > .10$; gamma$=-.222$		
C. Carswell Nomination						
		Ethics Position				Ethics Position	
Confirmation	Low	High		Confirmation	Low	High
For	21	4		For	7	7
Against	4	22		Against	9	6
$x^2=23.76$; $p < .001$; gamma$=+.933$				$x^2=0.27$; $p > .10$; gamma$=-.147$		

Summary: Difference Between Gammas for Extremists and Moderates

Fortas: $z = 3.90$; pL .001
Haynsworth: $z = 5.05$; pL .001
Carswell: $z = 5.44$; pL .001

In order to test the assertion that moderates are more likely to be influenced by nonpolicy factors than are other senators, the ethics scale described in Appendix A was used again. The strength of association between the ethical standards positions of senators and their confirmation votes was determined for both moderates and extremists in three recent nominations. The Rohde and Spaeth position leads to the expectation that the gammas for these relationships will be larger for moderate senators than for the extremists.

The data in Table 7 provide no support for the Rohde and Spaeth position. In each of the three nominations examined there was no significant relationship between the ethics positions of moderate senators and their confirmation votes. Moreover, in all three nominations, the strength of relationship, as measured by the statistic gamma, was significantly larger for the extremists than it was for the moderate senators.[12] This result is opposite to what could be expected from the Rohde and Spaeth position.

To test the Rohde and Spaeth position more completely, it would be desirable to extend the above analysis to all 14 controversial nominations. However, the available evidence provides little reason to conclude that policy views are any less important for moderate senators or that moderate senators are more influenced by factors such as ethical standards for judges.

VII. CONCLUSIONS

Two hypotheses were derived from the general thesis that Senate opposition to Supreme Court nominees is due primarily to a predicted dissatisfaction with the policy-relevant voting of the nominee after confirmation. Data from the confirmation votes on 14 controversial 20th-century nominations provided strong support for each of the hypotheses. The position of senators supporting confirmation was found to be significantly different from the position of senators opposing confirmation on

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[12] It might be noticed in Table 6 that the direction of the relationship between the ethics positions of the extremist senators and their confirmation votes is different for the Fortas nomination than for the Haynsworth and Carswell nominations. For extremist, but not for moderate, senators there was a relationship between their civil liberties position and their ethical standards position. The extreme liberal senators tended to support high ethical standards positions and the most conservative senators tended to support lower ethical standards positions. Consequently, among the senators with extreme policy views, those with high ethical standards tended to vote for the Fortas nomination but against confirmation of Haynsworth and Carswell.

the issues which were predicted to be salient. Opponents were generally more cohesive on issues than were supporters. In every case the opponents were concentrated near one of the extremes of the issue scale. Moreover, the relationship between issue position and confirmation vote was found to be independent of senators' party affiliation and their position on ethical standards.

The data reported here are not adequate to "prove" causation. We do not know for sure why any of the senators voted against confirmation. Nor do we have any direct evidence about the way they perceived the nominees. However, all the data examined are consistent with what would be predicted if the main thesis were demonstrably true. Therefore it seems reasonable to conclude that, until such time as contradictory evidence is reported, predicted policy dissatisfaction should be regarded as the major cause of most votes against confirmation.

Two alternatives are often advanced to explain Senate opposition to Supreme Court nominees: partisan considerations and concern over ethics. Neither seems tenable as a general explanation in light of the evidence. Partisan motives may play some part, especially in increasing support from the President's party, but it was shown that the relationship of policy views to confirmation votes was independent of party. Even some of the confirmation votes which have traditionally been explained almost entirely in partisan terms turn out to be consistent with the thesis advanced here. For instance, the defeat of Fortas has often been explained as the result of the Republican desire to allow a Republican rather than a Democratic president to fill the Court vacancy. However, an analysis of the data reported above showed that most Republicans with liberal positions on civil liberties crossed party lines to vote for confirmation, while most Democrats with conservative positions on the same issue deserted their party and their president to oppose confirmation.

Similar conclusions may be drawn about the effect of senatorial concern over ethics for their confirmation votes. No direct relationship could be found between senators' ethics position and their confirmation votes; and the relationship between policy position and confirmation votes was found to be independent of ethics position. It therefore seems most reasonable to conclude that for the majority of senators, justifications of their opposition to nominees on ethical grounds are in reality rationalizations for policy disagreement.

APPENDIX A

Senate Ethics Scale

Five roll calls were selected from the 1967 and 1968 volume of *Congressional Quarterly* Almanac to form the ethics scale. The five votes were as follows:

> a) 1967 CQ Senate Vote 110, Senate vote to censure Senator Dodd. A yes vote was considered a pro-ethics vote. There were 92 pro-ethics votes.
>
> b) 1968 CQ Senate Vote 49, An amendment to the Senate Standards of Conduct offered by Senator Dodd to permit personal use of campaign funds. A no vote was considered a pro-ethics vote. There were 65 pro-ethics votes.
>
> c) 1968 CQ Senate Vote 46, An amendment by Case to the Senate Standards of Conduct permitting use of campaign contributions only for election expenses. A yes vote was considered pro-ethics. There were 45 pro-ethics votes.
>
> d) 1968 CQ Senate Vote 45, An amendment by Case to the Senate Standards of Conduct requiring senators and top staffers to file annual financial disclosure reports. A yes vote was considered pro-ethics. There were 40 pro-ethics votes.
>
> e) 1968 CQ Senate vote 50, An amendment by Javits to Senate Standards of Conduct permitting use of campaign contributions for certain office expenses. A no vote was considered pro-ethics. There were 28 pro-ethics votes.

The coefficient of reproducibility for the scale,	R = .94
The coefficient of scalability for the scale,	S = .78

Any senator who was not recorded on at least four of the five votes was excluded from analysis. There were 82 senators who were recorded on at least four votes and who also voted on one of the four recent controversial confirmation votes.

Each senator was assigned a scale score from 0 (low ethical standards) to 5 (high ethical standards) based on their position in the scale. (A scale score of 5 indicates that the senator cast a pro-ethics vote on all five roll calls used in the scale.) This scale score was used as a measure of each senator's ethical standards position. For computations in which it was necessary to dichotomize this variable, scale scores 0, 1, and 2 were considered "low" and scale scores 3, 4, and 5 were considered "high."

In assigning scale scores where there were either nonscale responses or nonparticipations in the scale, the following conventions were employed: a) If there was a nonparticipation which would affect the scale score, the nonparticipation was treated as if it were an actual vote, the nature of which was determined by the majority of other votes cast. b) If there was a nonscale response that would affect the scale score, the more moderate scale score was assigned.

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