

Dissent in the Aftermath

The Efficacy of Interest Group Targeting Strategies of U.S. Courts of Appeals Nominees

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[M]ore than ever before, judicial selection is prone to manipulation by forces outside the Senate, especially mobilization and counter-mobilization by organized interests. (Caldeira and Wright 1998)

Contemporary views of the federal judicial appointment process (e.g., Bell 2002; Binder and Maltzman 2005; Scherer 2005; Epstein and Segal 2005; Steigerwalt 2010) tend to be uniformly grounded in themes of growing obstruction and gridlock. This burgeoning literature presents a newly contested environment wherein opposing interest groups now target, and successfully oppose, judicial nominees that once mechanistically moved through to confirmation. In the terminology of this new strain of research, these outside groups sound *fire alarms* (Scherer, Bartels and Steigerwalt 2008) that alert senators to the presence of nominees with outlier ideological characteristics. These groups thus provide valuable information that reelection-seeking senators are unable, or unwilling, to generate themselves. In essence, the screening of federal judicial nominees has been centralized and outsourced to a number of policy-oriented interest groups that do the background vetting of nominees to life tenured seats on policy-making courts.

Today, in fact, little doubt exists that these interest groups are increasingly important players in the process that determines whom will be sitting on the federal bench. However, much less is known about the efficacy of these groups in carrying out their policy-screening role. This particular project seeks to step into this gap and begin an exploration of group motivations and performance within nominee vetting. Here we ask a relatively simple question: *Do interest groups really oppose nominees who are ideological outliers?* We seek to answer this question by examining whether nominees opposed by interest groups are different than arguably similar but unopposed nominees.

To evaluate this research question we adopt two different theories of interest group motivations groups could adopt in their screening role: 1) *policy promotion*; and 2) *group maintenance*.

We then gain the empirical leverage necessary to evaluate these theories by taking advantage of the fact that interest groups are not always successful in their opposition. We look at matched pairs (Ho, Imai, King, and Stuart 2007) with one member of the pair being an opposed-successful nominee and the other being an unopposed-successful nominees to the U.S. Courts of Appeals (USCA) during the Clinton and W. Bush Administrations. Finally, we look at the most salient, visceral, and clear expression of ideological position-taking (Hettinger, Lindquist and Martinek 2004; 2007) on these courts – the act of penning a separate dissent.

Do opposing interest groups get it right? The answer according to this initial study is discernibly *no*. We conclude that there are no substantive differences between the dissenting behavior of targeted and untargeted nominees. Perhaps more interesting, the true relationship might actually be reversed. To the extent that we find marginally significant relationships, they point toward the position that opposed nominees are less likely to dissent than a matched pair nominee. This could suggest that the surrounding controversy and observed opposition during confirmation engenders some form of a legacy effect. While we are unable to push very far on that point, it does strike us as an interesting premise for future study.

INTEREST GROUP MOTIVATION – POLICY VERSUS GROUP MAINTENANCE

This project relies upon two contrasting perspectives of group motivation for the opposition of a USCA nominee: *policy promotion* and *group maintenance*. We begin with the premise that unequivocal policy victories are often rare for policy-oriented groups. While victories in small policy skirmishes may satisfy a core constituency, groups need a message with a broader appeal to motivate its base and recruit new members. USCA nominations can provide that opportunity. Groups can oppose a nominee in a manner similar to a popular election or a piece of legislation.

Shogan (1996:152) put it succinctly: “[P]residential appointments increasingly are viewed as just another political trophy and the confirmation process just another political battleground.” The nominee becomes the face of everything the group opposes and media attention and a public relations push can gain the interest group not only a concrete victory – the defeat/delay of a nominee – but also a justification for its continuing existence. Vacancies are certain to occur, and the opposition of a nominee provides a recurring basis to seek public support for the group’s policy position and/or to pay the group’s administrative expenses.

Opposing judicial nominees has costs, however. Presidents nominate numerous individuals to fill spots on the USCA (e.g., President Clinton made 87 nominations and President George W. Bush also nominated 87). Unlike the Supreme Court, where vacancies are few and far between and naturally generate interest from the media and the public, involvement at the appellate level requires a resource maximization calculation on the part of the group. Each group must determine how it can get the most out of its time and resources invested in an appointment contest. It simply is not effective to go all-in and oppose every nominee. Thus, these groups must save their powder and pick-and-choose their battles.

Even if a group has the financial resources to oppose every nominee there are other factors that would weigh against the strategy. Groups must select optimal nominees to oppose lest they fall into a dilemma akin to *Peter and the Wolf*. If groups labeled every nominee as controversial they lose credibility; eventually senators and the public would stop listening. Ultimately an undifferentiated shotgun approach to nominee opposition could jeopardize the interest group role within the confirmation process.

In addition, the groups would lose the ability to prosper from their role in the process – because members and potential recruits would see their actions as unproductive or unnecessary.

Members do not want their donations going to activities that seem wasteful or have no pay off. Therefore, groups limit their opposition to nominees they choose to label as *controversial* and must have a convincing argument for those targeted nominees.

Interest group scholars have found that to understand interest group actions, you must understand interest group incentive structures (Clark and Wilson 1961). There are two primary incentives that motivate group behavior: 1) promoting a particular ideological position; and 2) obtaining the resources necessary to sustain the group itself (Moe 1988; Bell 2002). In the world of opposition to judicial nominees, each of these motivations can lead to a distinct set of opposition strategies. Importantly for our purposes, opposition on policy grounds is substantively different than opposition based on group maintenance goals.

The Policy Motivation Framework.

Interest groups form to promote or oppose a particular policy position. For these issue-based groups, monitoring and responding to challenges to their policy “niche” is a primary goal (Gray and Lowery 1996). Groups seek to influence governmental policies or decision-making related to the group’s particular area of interest at all levels of policy-making – both formal and informal. Groups may seek to persuade legislators to sponsor or oppose a bill that impacts the group’s interests (Smith 1995) through informal electoral pressure or formal lobbying by testifying before congressional committees (Flemming, MacLeod, and Talbert 1998). They may assert their influence in administrative bodies that are adopting rules and regulations viewed as threatening the group’s ideological position (Yackee 2006). Groups may also turn to the courts – either by engaging in litigation or by filing *amicus curiae* briefs in pending litigation (O’Connor and Epstein 1983; Olson 1990). At the Supreme Court level, groups can also influence whether

the Court agrees to hear a case by filing *amicus* briefs at the *certiorari* stage (Caldeira and Wright 1988).

In the context of judicial appointments, groups attempt to insure that nominees with policy positions in opposition to the group are not confirmed (Schlozman and Tierney 1986:361-62; Watson and Stookey 1995:102-104). After all, hostile courts can turn back groups' hard-won policy victories. While they are no longer able to formally testify at hearings before the Senate Judiciary Committee, these groups seek to inform individual senators about nominees that present the greatest threat to their policy goals and anticipate that senators will act to further shared interests or face electoral consequences. Groups do this by first identifying a nominee to oppose and then utilizing informal methods such as providing information about a nominee for the senator to use and by encouraging members to communicate with senators in an effort to persuade them to oppose a particular nominee.

In this framework, then, the primary objective is not material gain for the organization, but to serve the vetting function – providing accurate information to assist senators and group members in assessing the policy positions of nominees. Policy-based opposition is an inherently limited approach – groups will look to oppose only those nominees that have expressed a clear ideological disparity. This is analogous to the Solberg and Waltenburg (2006) finding that interest groups are motivated by policy success (versus group maintenance) when filing *amicus* briefs. They participate in the fewest number of cases because the groups are looking to expend resources only in those cases where there is a legitimate chance of influencing policy.

The vetting function generally increases in importance as you move from members of the Senate Judiciary Committee to non-member senators. These non-judiciary committee senators will rely almost exclusively on interest group evaluations and the constituent-based responses

that these groups can trigger (Steigerwalt 2010). In sum, interest groups acting on a policy motive will seek to insure that any nominee opposed is truly an ideological outlier and will expend resources to identify valid outlier nominees.

Interest groups anticipate that nominees who are ideologically extremists will decide cases based on that ideology – a position that has strong support in the judicial decision-making literature (Carp and Rowland 1983; Songer and Davis 1990; Songer and Haire 1992; Segal and Spaeth 2002). If interest groups are opposing nominees because of inherent policy motivations, then an opposed judge’s decision-making behavior should be substantively different than an unopposed matched pair nominee’s behavior.

The Group Maintenance Framework.

The group maintenance framework posits that interest groups are primarily motivated by concerns about organizational maintenance when opposing nominees. As James Wilson (1973) famously said: “Whatever else organizations seek, they seek to survive.” Survival in this context is equated with group maintenance – maintaining the current enrollment base and recruiting new members. Even if organization leaders would prefer to solely pursue policy goals, the reality is that they must insure that the organization remains solvent (Moe 1980). Therefore, interest groups have to make decisions that, from a policy perspective might not be optimal, but that act to further the fundamental maintenance goal (Spill 2001).

Groups have bills to pay and do so largely through membership dues – the more members, the more resources a group has. Practically, this has two consequences for groups. First, they must offer members and potential members what the members demand. Groups can take a number of actions to provide those benefits (Olson 1971). Specifically here, groups can utilize the confirmation process “to show their members that they are proactive and effective advocates”

justifying the member's (or potential member's) interest in the organization and financial support (Bell 2002:71). The second consequence of the need to engage in maintenance conduct is that groups must be able to demonstrate success – and claim the credit for that success. If a group can show it has success in an area where members are interested, the group will be able remain relevant and appeal to members/potential members to fill the group's coffers to continue the fight for good policy.

A final factor that weighs in favor of a group maintenance explanation is the bandwagon effect. Because of the contemporary proliferation of interest groups, groups must be concerned about losing members or resources to competing interest groups. This means that groups must monitor the activities of other similarly-minded groups. When a competitor group makes the decision to go on record opposing a nominee, like-minded groups feel the pressure to join in the opposition lest the competition appear more active, obtain more publicity, claim more credit, and reap scarce resources.

If opposition to judicial nominees were a no-cost strategy, maintenance-minded interest groups would oppose all nominees. However, opposing every nominee would cause the groups to lose credibility with sympathetic senators. As Scherer (2005:131) suggests of liberal interest groups: "[the groups] firmly believe that Democratic senators on the Judiciary Committee will only vote against so many judicial nominees in deference to the president. How many 'no' votes each senator has is a huge question for these groups." This sentiment applies equally to conservative groups. Therefore, liberal and conservative groups alike must conduct a cost-benefit calculus before they oppose a current nominee.

If the organizational maintenance framework is correct, then groups' decisions to oppose nominees should be based upon an ever-varying mixture of policy and non-policy criteria associ-

ated with each individual nominee. In short, the groups should decide to oppose nominees whenever there are cues – based either on the political context or nominee characteristics – that there is a reasonable likelihood of success. Within this framework, the nominee’s ideological predilection is really just a means to an end or an opportunity to credit claim upon victory. Therefore, under a group maintenance framework we do not anticipate a substantive difference between the subsequent behavior of controversial and non-controversial nominees once they reach the bench.

A Focus on Dissenting Behavior

This project seeks to understand the differences that may, or may not, exist among opposed and unopposed judges’ decision-making calculi, which presents a challenge at the USCA level. All litigants with the money or wherewithal can appeal to the court. Therefore, unlike the justices of the Supreme Court, federal appellate court judges do not have the ability to select the cases they will decide. The result is a significant number of cases that deal with questions that are uncontroversial or where the legal answer is reasonably clear. These ordinary cases will not necessarily expose an ideological outlier judge.

The challenge, then, is to isolate those cases where a judge is expressing their own independent position. One can identify ideology directly and unequivocally when a judge dissents – where the judge is writing unhindered by the need to reach a majority or the need to adopt language that will mollify a colleague. Justice Scalia expressed the role of the dissent succinctly: “to be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one’s colleagues; to address precisely the points of law that one considers important and *no others...*” (Scalia 1994:42). It is this individual nature of the dissents that make them an ideal test of ideology.

Dissenting judges write separately primarily to express policy positions that differ from the panel majority (Hettinger, Lindquist and Martinek 2004; 2007). Judges incur costs in writing dissents, including the time it takes to write and edit the opinion as well as allocating staff resources to the effort. However, time and resources expended might actually be the least significant cost. Panels on the USCA gravitate toward consensus and the issuance of a dissent violates that norm (Fischman 2012). The cost of dissent will almost always outweigh the benefits given that the Supreme Court rarely cites the dissenting opinions of appellate courts and the Supreme Court takes so few cases (Epstein, Landes and Posner 2011). In situations where judges do dissent, they are willing to step out on their own and bear all the corresponding costs of expressing an ideological position that runs counter to the majority. Because dissenting judges are expressing a position that violates the norm of collegiality, the fact that they decide to write a dissent is significant. Dissents are by definition a statement of the judge's position unbound by external considerations.¹

Putting this in the context of the above frameworks, if interest groups pursuing policy maintenance goals label a prospective nominee as *controversial* then the subsequent dissenting behavior of the nominee-judge should exhibit systematic differences versus otherwise similar but unlabeled judges. If, on the other hand, a group's opposition is based on organizational maintenance, then the dissenting behavior of controversial labeled judges should not be systematically different than otherwise similar but unlabeled judges.

¹ Thus, Justice Scalia – a prolific dissenter – could say in his dissent in *Atkins v. Virginia* (2002): “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.” And in *Boumediene v. Bush* (2008): “The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.” These quotes are indicative of the freedom that dissenting judges have.

RESEARCH DESIGN

To empirically evaluate the policy motivation and group maintenance frameworks of interest group opposition to USCA nominees, we focused on the consecutive two-term Clinton and W. Bush Administrations, both of which experienced significant obstruction to their judicial nominees. This sampling strategy provides the benefit of capturing opposition to prospectively liberal and conservative nominees to the USCA and the final year of the W. Bush Administration 2008 provides an adequate lapsed period of at least 6 years to capture patterns of dissent.

To identify controversial nominees we replicated the procedure followed by Scherer, Bartels and Steigerwalt (2008). Using their guidelines, we identified 41 USCA nominees that faced opposition during the two administrations. Of these 41 controversial nominees, 22 ultimately were confirmed by the Senate, representing our potential sample of controversial but confirmed nominees to the USCA.

We then matched (Ho, Imai, King, and Stuart 2007) on a number of nominee-specific and political context variables found to be relevant to interest group involvement. These variables provide a baseline of similarities between the nominees. Variables matched on include gender (coded as 1 for female and 0 for male); race (1/0 for whether the nominee is African American, Asian, Latino/a); ABA rating (1/0 for rating of "not qualified" "qualified" or "well qualified" ratings); appointing president (0 for Clinton; 1 for Bush); circuit appointed to (a 1/0 variable that corresponds to each circuit between 1 and 11); the nomination year (1992 through 2008); the year in the presidential term of the nomination (coded as 1 through 8); the number of home state senators not of the party of the president (from 0 to 2); whether there was divided government at the time of the nominee's initial nomination (0 for unified government; 1 for divided) and the absolute ideological distance between the most distant home state senator and the president on

Poole and Roenthal's (1997) two available dimensions of the DW-NOMINATE legislator coordinate system.

Following the estimation of the nearest-neighbor match for each controversial nominee, we utilized Westlaw searches to identify any dissenting opinion associated with the sample of judges through the end of the 2014 calendar year. These searches resulted in 1,674 observed dissents associated with 44 different judges. For each of these cases we applied the standard case type, issue type, and direction coding established by the *U.S. Court of Appeals Database* (Songer, Sheehan and Haire 2000). After the coding stage, we were unable to utilize three pairs of controversial-matched pair nominees due to shorter sample periods associated with termination events such as death, resignation or taking senior status.

The resulting 19 pairs of judges for the analysis can be found in Table 1. For each pair, we calculated the minimum service period and created a uniform timeframe for comparing dissent activity. Each of the 19 pairs had at least 6 years of observation but some pairs provided as many as 18 years of comparative leverage.

[INSERT TABLE 1 ABOUT HERE]

Estimation Strategy and Dependent Variable Constructs

In aggregate, throughout the comparable matched pair observation periods we capture 1,318 dissents. We will present this broader sample visually in plots of dissent activity, but limit our modeling strategy to the uniform 6 year cross-sectional time series sample associated with our 38 judges ($n = 228$). This balanced 6 year sample associated with our 38 judges captures 761 dissenting opinions. To estimate parameter relationships we adopt a negative binomial regression strategy designed for panel data.² We model 4 different dependent variables: 1) aggregate dis-

² These panel data represent annual event counts of dissent that begin on January 1st of the calendar year after the judges' commission was received and end on December 31st.

sents in all cases; 2) dissents in criminal and civil liberties cases only;³ 3) ideologically consistent dissents;⁴ and 4) dissents from a prospective whistleblower situation (Cross and Tiller 1998).⁵

Independent Variable Constructs

Our primary independent variable is a simple dichotomous variable that identifies controversial nominees versus the matched uncontroversial pair. It will capture any systematic differences in the dissenting patterns between controversial and noncontroversial nominees. Parameter results and tests of significance will be used to evaluate the policy motivation (i.e., significantly different) and group maintenance (i.e., no difference) expectations.

Given that our data take the form of aggregated annual event counts, the adoption of alternative control variable is to some extent limited within this particular analysis. Since judge specific annual counts act as the unit of analysis, we are unable to control for specific case level characteristics such as issue types or collegial relationships amongst different panels. Data about the annual agenda constructs of the USCA circuits are not available, but neutral criteria of case assignment and rotation of judges among panels does help reduce potential bias in issue distribution and collegial effects.

Because we require independent variables with an annual unit of analysis we simply controlled for differences in the ideological construct that individual judges found themselves in with respect to their circuit and the U.S. Supreme Court. We utilize preference position data

³ These dissents are associated with GENISS types 1 criminal; 2 civil rights; 3 First Amendment; 4 due process; and 5 privacy.

⁴ Ideologically consistent dissents are those where the dissent has a clearly delineated directional component and that component is consistent with attitudinal expectations – Democratic appointees dissent in a liberal direction and Republican appointees dissent in a conservative direction.

⁵ Whistleblower dissents occur when the judge's dissent is from a prospective minority position – both of the other assigned judges on the panel where appointed by the opposite party (i.e., a Democratic appointee dissent versus two Republican appointees in the majority or a Republican appointee dissent versus two Democratic appointees in the majority).

available through Epstein, Martin, Segal, and Westerland's (2007) *Judicial Common Space*. In particular we control first for the circuit median for the year in which the case was decided. We then control for the absolute distance between that median and the individual judge's common space position. These two variables thus control for any variance in dissent related to the liberal or conservative leanings of the circuit and the judge's relative position within that circuit. Moving up a level, we then control for the annual median position of the U.S. Supreme Court as well as the absolute distance between the circuit median and that Supreme Court median. These two variables similarly control for the liberal or conservative balance of preferences upon the Court and the relative position of the circuit. With these control variables in place we will be testing for systematic differences in the dissenting activity of controversial nominees versus non-controversial nominees after accounting for the ideological context of the appellate hierarchy surrounding these sitting judges.

THE EVIDENCE OF POLICY MOTIVES VERSUS GROUP MAINTENANCE

Do opposing interest groups get it right when they target USCA nominees as ideological outliers? The answer according to the subsequent dissenting patterns of those nominees is – *no*. Looking at the aggregate pattern of dissent in comparable sample periods (see Figure 1), the opposite pattern clearly emerges wherein controversial labeled nominees yield *fewer* dissents. This pattern holds in the 6 year sample period when each of the 19 controversial and the 19 matched pair nominees is captured. It similarly holds for most of the remaining sample period in which the pairs of judges sequentially drop from the sample. The only period in which the controversial judges actually evince greater levels of dissent are in the far reaches of the sample period (e.g., 15 through 18 years of service) when the graph is capturing at most one or two individuals.

Thus, the initial evidence suggests that the controversial label applied by interest groups does not exhibit much validity.

[INSERT FIGURE 1 ABOUT HERE]

This pattern holds when we dig further into to the data and focus on those cases where we should anticipate heightened dissent. When looking only at dissents in relatively salient civil liberties and rights cases (i.e., criminal procedure, civil rights, First Amendment and privacy disputes) this incongruent pattern holds. For each of the first 6 years of service, controversial nominees on whole are less often writing separately than their otherwise similar matched pair. The pattern holds for the most part in the waning portion of the sample period, but there are sporadic instances when the opposed nominees are more active than nearest neighbor matches. On whole, however, the pattern remains clear and runs counter to expectations.

When considering only those dissents that are consistent with *apriori* ideological expectations (see Figure 3 that identifies Democratic appointees with liberal dissents and Republican appointees conservative dissents), we again find that the controversial nominees again are dissenting at a lower rate. In terms of aggregate counts, the 19 controversial nominees collectively are writing 25 to 35 dissents per year. On the other hand, the 19 non-controversial nominees are issuing 40 to 60 dissents, suggesting that the differences in magnitude are substantively large. When looking at dissents from a minority position (see Figure 4) the song remains the same. Concentrating on dissents that are structurally consistent with Cross and Tiller's (1998) whistleblower thesis, we again find the discordant relationship. Controversial nominees are less often taking positions that might alert the Supreme Court to the shirking of precedent. Nominees that did not face obstruction during the confirmation process are more often writing separately and potentially bringing attention to circuit conflicts and compliance problems.

[INSERT FIGURES 3 AND 4 ABOUT HERE]

From the initial evidence, then, it seems that policy motivation framework is flawed with respect to interest group participation within the federal judicial appointment process. We find no visual evidence that those USCA nominees identified as controversial more frequently evince heightened forms of ideological position taking. Simply put, they are not dissenting at rates that are greater than arguably similar nominees who did not face group obstruction. This raises some possibility that the obstruction and conflict may somehow actually inhibit dissent when the nominee takes the bench. The judicial decision-making literature often emphasizes the lack of constraint associated with life tenured seats, but here we are potentially finding that the confirmation process (and how it is conducted) may in fact matter. In this instance, we might hypothesize that the rocky road to confirmation engenders a type of legacy effect. Perhaps confirmation scrutiny creates a lingering constraint within the decision-making calculi of targeted nominees despite the relative paucity of sanctions for ideological policy-making at the USCA level.

Model Results of the Negative Binomial Regressions

The relationships depicted in Figures 1 through 4 obviously are not useful in terms of inference, but the model results do provide at least some support for the premise that appointment conflict may subsequently constrain dissent. When running the initial binomial regressions without the alternative control variables,⁶ we did find some evidence in this regard. Parameter estimates were uniformly negative for the dichotomous control identifying controversial nominees. The parameter estimate associated with aggregate dissents did not approach statistical significance (i.e., the standard error term was larger than the parameter estimate). The models testing civil liberties dissents and whistleblower dissents similarly were insignificant although the

⁶ We omit the table as the results and simply provide a textual summary given the weakness of the results.

standard error terms were smaller than the parameter estimate. The controversial parameter result associated with ideologically consistent dissents did show some borderline strength ($p < .10$ one-tailed test). Thus we have some extremely thin evidence that dissent may be suppressed for contested nominees.

That evidence, however, essentially disappears when we introduce alternative control variables for ideological context (see Table 2). In each model specification, the parameter result associated with controversial nominees is insignificant and exhibits no discernible relationship after controlling for the ideological position of the judge, the circuit and the Supreme Court. The parameter does turn positive in the last model specification associated with whistleblower dissents but that parameter result is the weakest of all the presented model specifications.

We do find some significant relationships within the alternative ideological controls. Throughout the four models, the median position of the Supreme Court is significantly associated with USCA judges' likelihood of dissent. Here, the relationship suggests that USCA judges issue fewer dissents as the Supreme Court leans more conservative. The result might suggest that conservative courts may be less active in responding to visible cues such as dissents within the *certiorari* stage and generally engaging in compliance activity. In the latter two specifications associated with ideologically consistent dissents and whistleblower dissents, we find positive relationships associated with the preferences of the USCA judges. Here, the parameter controls are significant for the absolute difference between the judge's ideal point and the circuit median, meaning ideologically dissimilar judges are more prone to issue dissents. This result is intuitive and would certainly match expectations.

[INSERT TABLE 2 ABOUT HERE]

With the modeling evidence in hand, we are forced to accept the null hypothesis that no systematic differences exist between those USCA nominees labeled as controversial and their nearest neighbor match nominee. This null result is not indicative of the absence of a relationship between those judges who experienced interest group opposition and those that did not. Nonetheless, it clearly would be more consistent with the group maintenance framework of interest group participation within the judicial appointment process.

CONCLUSIONS ON GROUP EFFICACY

The empirical evidence does not yield robust evidence of a systematic relationship between targeted nominees and their subsequent dissenting activity. In fact, to the extent that marginal evidence does exist, it points in the opposite direction – controversial nominees seem more likely to hold their pens. This suggests that the vetting of nominees conducted by interest groups is not particularly valid in terms of identifying ideological outlier nominees (at least in terms of their propensity to dissent).

The group maintenance framework would suggest that identifying true ideological outliers is not really all that critical to those interest groups participating within the appointment process. Instead, it emphasizes that these groups participate in order to seek out opportunities to score points and claim credit when targeted nominees succumb to obstruction and gridlock. The above results could suggest that these targeted nominees may be altered by the conflict they face within the appointment process. Ironically, then, interest group participation may be efficacious at influencing judges' behavior on the USCA despite their poor record of identifying ideological outliers. Groups certainly are effective at slowing down the appointment process and picking off potential nominees by labeling them as controversial and outside the ideological norm. Further research is necessary to better understand whether their participation and derived conflict is

merely inaccurate or whether it creates a legacy of constraint that may act to moderate decision-making outcomes.

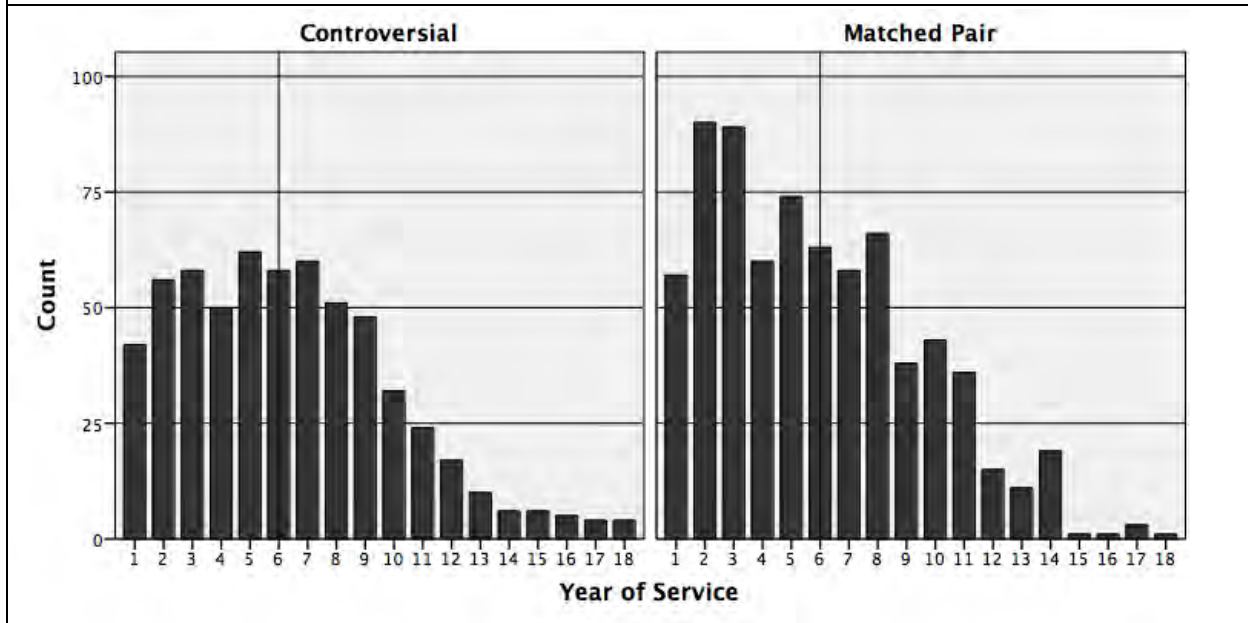
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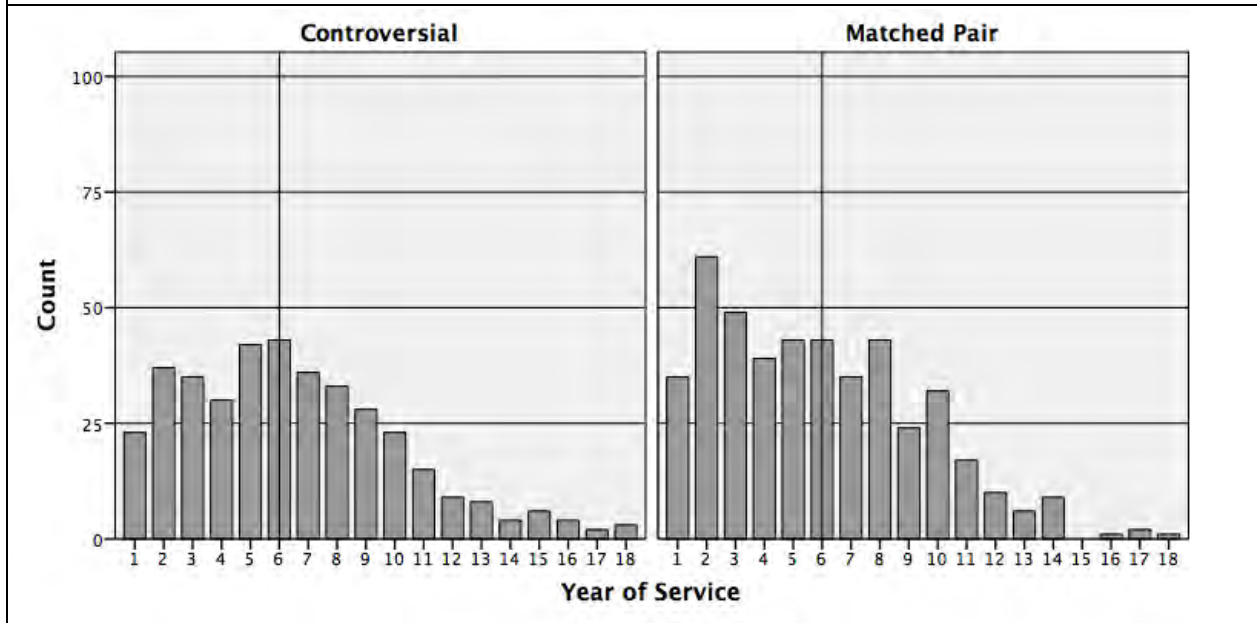
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Figure 1: Aggregated Dissent Activity for USCA Nominees – All Issue Types



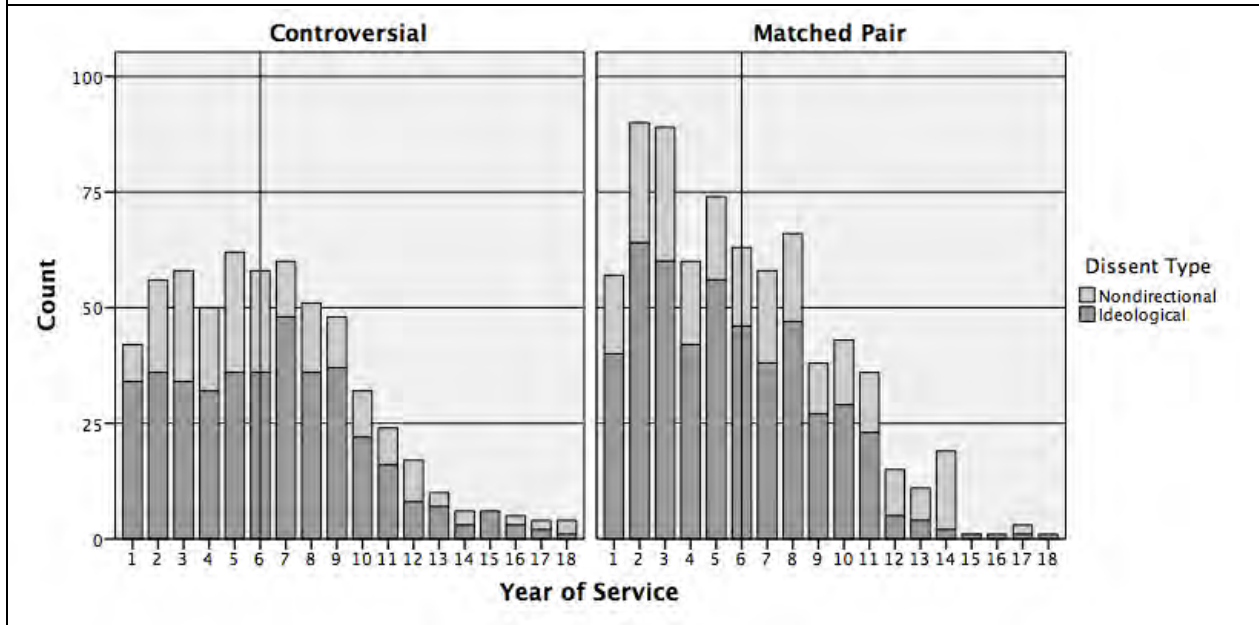
Note: Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pairs nominees that were never labeled as controversial. Each matched pair in the plot had at least 6 years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

Figure 2: Aggregated Dissent Activity for USCA Nominees – Civil Liberties Cases



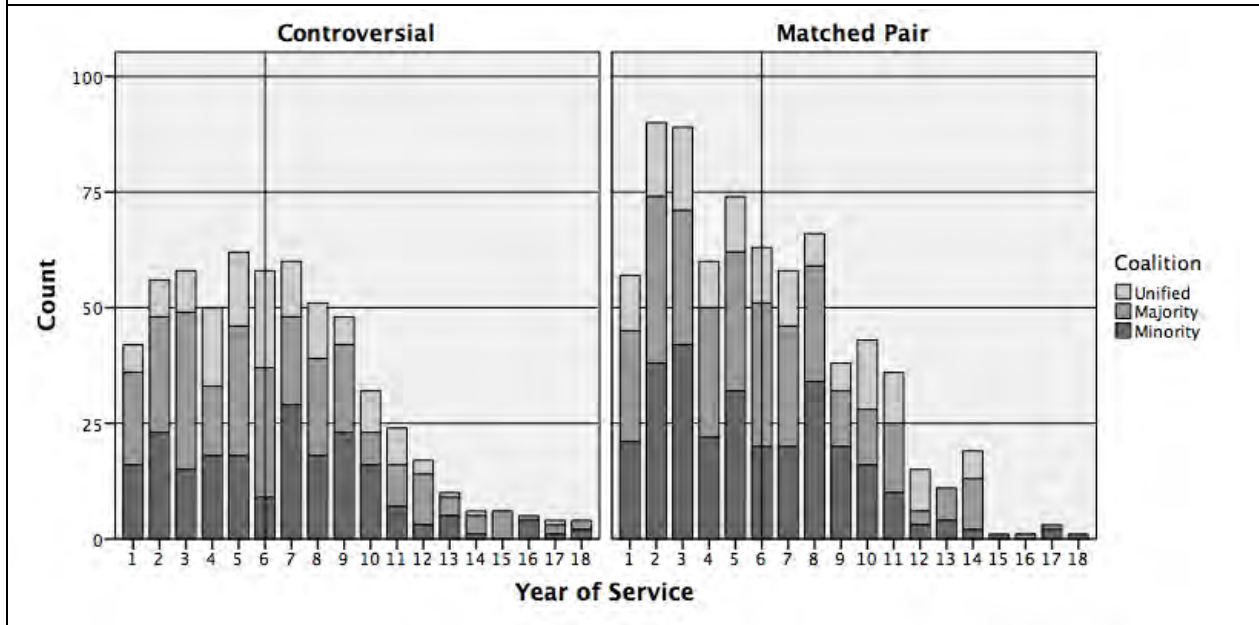
Note: Plot specific to cases with criminal and civil liberties issue types (i.e., Songer issue coding 1-5). Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pairs nominees that were never labeled as controversial. Each matched pair in the plot had at least 6 years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

Figure 3: Dissent Activity for USCA Nominees – Ideologically Consistent



Note: Plot specific to dissents that are ideologically consistent with the nominee's party affiliation (Democrat appointee - liberal; Republican appointee - conservative). Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pairs nominees that were never labeled as controversial. Each matched pair in the plot had at least 6 years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

Figure 4: Aggregated Dissent Activity for USCA Nominees – Whistleblower Panel



Note: Plot designates partisan panel construct. Unified represents all three judges of same party. Majority occurs when nominee and another judge are of same party. Minority occurs when the other two judges are of the opposing party. Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pairs nominees that were never labeled as controversial. Each matched pair in the plot had at least 6 years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

Table 1: Dissent Sample of Controversial and Matched Pair Nominees

<u>Controversial Nominee</u>				<u>Matched Pair Nominee</u>			
Judge	President	Commission	Circuit	Judge	President	Commission	Circuit
Daughtrey, Martha	Clinton	11/22/1993	6	Ikuta, Sandra	Bush	06/23/2006	9
Barkett, Rosemary	Clinton	04/15/1994	11	Stewart, Carl	Clinton	05/09/1994	5
Wood, Diane P.	Clinton	06/30/1995	7	Sykes, Diane	Bush	07/01/2004	7
McKeown, M. Margaret	Clinton	04/08/1998	9	Rawlinson, Johnnie B.	Clinton	07/26/2000	9
Fletcher, William A.	Clinton	10/09/1998	9	Smith, Milan	Bush	05/18/2006	9
Fisher, Raymond	Clinton	10/12/1999	9	King, Robert	Clinton	10/09/1998	4
Berzon, Marsha	Clinton	03/16/2000	9	Callahan, Consuelo M.	Bush	05/28/2003	9
Smith, Lavenski	Bush	07/19/2002	8	Riley, William J.	Bush	08/03/2001	8
Smith, D. Brooks	Bush	08/02/2002	3	Marcus, Stanley	Clinton	11/12/1997	11
McConnell, Michael W.	Bush	11/26/2002	10	Prado, Edward C.	Bush	05/05/2003	5
Bybee, Jay S.	Bush	03/21/2003	9	Bea, Carlos	Bush	10/01/2003	9
Sutton, Jeffrey S.	Bush	05/05/2003	6	Colloton, Steven M.	Bush	09/10/2003	8
Cook, Deborah	Bush	05/07/2003	6	Smith, Norman Randy	Bush	03/19/2007	9
Fisher, D. Michael	Bush	12/11/2003	3	McKee, Theodore	Clinton	06/09/1994	3
Owen, Priscilla	Bush	06/03/2005	5	Motz, Diana	Clinton	06/16/1994	4
McKeague, David	Bush	06/10/2005	6	Dennis, James	Clinton	10/02/1995	5
Pryor, Jr., William H.	Bush	06/10/2005	11	Gibbons, Julia	Bush	07/31/2002	6
Holmes, Jerome	Bush	08/09/2006	10	Benton, William D.	Bush	07/02/2004	8
Haynes, Catharina	Bush	04/18/2008	5	Hardiman, Thomas M.	Bush	04/02/2007	3

Table 2: Negative Binomial Regression Event Count Estimates of the Likelihood of a Dissent

Parameters	All Issues Types			Civil Liberties			Ideologically Consistent			Whistle Blower		
	β	(s.e.)	ρ	β	(s.e.)	ρ	β	(s.e.)	ρ	β	(s.e.)	ρ
Controversial ^a	-.08	.23	.71	-.08	.24	.74	-.15	.26	.55	.06	.34	.85
Circuit Median ^b	.18	.34	.60	.17	.37	.64	.04	.38	.93	-.53	.50	.29
Judge-Median _(abs) ^c	.28	.40	.70	.57	.43	.19	.88	.45	.05	2.01	.60	.001
USSC Median ^b	-1.24	.42	.003	-1.10	.46	.02	-1.19	.47	.01	-1.75	.66	.01
Circuit-USSC _(abs) ^c	-.54	.71	.45	-.54	.82	.51	-.30	.82	.71	-.34	1.22	.78
Constant Value	2.32	.52	.000	2.80	.97	.004	2.34	.80	.004	.60	.60	.31
<u>Function Parameters</u>												
ln(r)	2.45	.42		3.19	.86		2.75	.64		1.78	.43	
ln(s)	1.31	.34		1.06	.33		1.00	.34		.60	.40	
r	11.64	4.95		24.33	20.92		15.66	10.01		5.95	2.58	
s	3.73	1.27		2.91	.95		2.71	.91		1.81	.73	
<u>Model Fit</u>												
Log Likelihood		-483.09			-403.33			-409.21			-298.95	
X ² Test		12.20	.03		11.45	.04		15.60	.01		23.37	.000
N observations		228			228			228			228	

Note: Data represent a balanced cross-sectional event count of the 6 calendar years after confirmation event. 19 controversial nominees and 19 noncontroversial matched pair nominees (38 nominees * 6 years = 228 obs). ^a Identifies controversial nominees versus non-controversial nominees. ^b Median positions of circuit and Supreme Court with judicial common space scores. ^c Absoluted distance calculation between the judge and circuit median or the circuit median and Supreme Court median. Probabilities are two-tailed tests.