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Judicial Quality and the Supreme Court Nominating Process

by

Andrew O'Geen

Under the Direction of Robert M. Howard

ABSTRACT

In recent months, presidential appointments to the Supreme Court have become an increasingly salient issue with both the public and the press. The relevance of the topic makes it an inviting subject for political science research. When looking at the question of judicial quality, the problem that researchers have faced in the past is one of quantifying quality. This work seeks to expand on previous survey research done on the quality of individual justices. By using quality scores (Comiskey 2004) as a dependent variable, it is possible to analyze influences on the President's nomination choice and their relative impacts on the quality of justices. By using a more rigorous approach, this study can more confidently make assertions about the nature of the nomination and confirmation process and the quality of Supreme Court justices.

INDEX WORDS: Supreme Court, nomination, confirmation, quality, judicial

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Andrew O'Geen

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TABLE OF CONTENTS

Page

LIST OF TABLES……...v

JUDICIAL QUALITY AND THE SUPREME COURT NOMINTATING PROCESS

Introduction……. 1

Supreme Court Appointments……. 3

Judicial Quality……...…….5

Ideology……..…….6

Presidential Popularity……..... 8

Data and Methods……... 9

Results and Analysis…… 12

Conclusion……..... 15

REFERENCES……. 17

LIST OF TABLES

Page

Table 1: Summary Statistics…….10

Table 2: The Effects of Political Circumstances at the Time of Nomination

On Judicial Quality……12

Table 3: Effects on Judicial Quality Controlling for Justices' Ideology……14

Introduction

Article II § 2 of the United States Constitution confers upon the president the power, with the "advice and consent of the Senate" to appoint justices to the Supreme Court. For each president, beginning with Washington, much thought and consideration went into the formation of the federal judiciary (Goldman 1997; Slotnick 1984) and any future president would be loath to miss the opportunity to influence the nature of the judiciary during his term(s) in office. Nowhere is this more evident than in the selection of a potential Supreme Court justice. While nominations for federal judgeships at the district and appellate levels are much more common, the nomination of a potential Supreme Court Justice holds special interest not just for scholars but for the public as well.

While Supreme Court nominations are both important and interesting, some scholars have argued that the process by which nominees are selected and confirmed is broken. The argument is that the increased involvement of the public, in the form of the media and various interest groups, has altered the process from its original state as political bargaining between the president and the senate(Carter 1994; Davis 2005). This involvement has created a spectacle of the nominations and caused presidents to adjust their nominees to account for public perception as well as the Senate's interpretation of public perception. The results are nominees without substantial track records on substantive and divisive issues. This lack of experience can also lead to a lack in qualifications for the position (Schultz 2003). Supreme Court nominees are increasingly silent on topics that hold the interest of many in the public and their performances in the hearings before the Senate Judiciary Committee are judged not on the content of their answers but more on their appearance and ability to answer questions without saying anything outrageous.

The question at the heart of this research is whether the circumstances surrounding a nomination, in particular the influences on the President, affect the quality of those who are eventually confirmed to the Supreme Court. Are there systemic factors within the process that influence the quality of nominees? Does the changing nature of the process affect the quality of those who have been confirmed recently? These are a few of the questions that this paper addresses using a numerical measure of judicial quality as the dependent variable.

This work differs substantially from other studies of judicial quality in several ways. First is the focus on the nomination process and the political environment in which a justice is nominated. Epstein and Segal (2005) look at this process, but with an eye toward the likelihood of confirmation rather that the quality of the justice's service on the Court. By focusing on the ultimate outcome (the quality of a given justices' service), it becomes possible for this work to make statements about the effectiveness of the process. Second, this paper moves the study of judicial quality on the Supreme Court from a descriptive phase into an explanatory phase. One may assume that a president would simply choose the most qualified candidate for a seat on the Supreme Court. Given the pool of available candidates, it does not seem feasible that a president could not find a person that would live up to the expectations that both the government and the public have for a Supreme Court Justice. However, as the variation in quality shows, this is not always the case. By looking at the circumstances surrounding a nomination and the effects that those circumstances have on the ultimate product, this work provides a step in the process of explaining the variation in quality on the Court.

The literature on judicial selection abounds with studies, both historical and theoretical, on the nature and evolution of the process (Abraham 1999; Davis 2005; Felice and Weisberg 1988-89; Gates and Cohen 1989; Scigliano 1971; Segal 1987; Silverstein 1994; Watson and

Stookey 1995; Yalof 1999). One salient feature of these and other studies to this work is the increasingly political look of the selection process. The influences of outside forces such as public scrutiny, the media, and powerful interest groups have shaped the process into something more resembling an election campaign than the collegial tone that was the hallmark of the process for so long (Davis 2005; Johnson and Roberts 2004). A direct result of the influences of these outside forces is pressure on the President and his advisors to satisfy those other than the Senate in the nomination of a Supreme Court Justice. The President must balance his own interests with those of the Senate, the public, the media, and any concerned interest groups (Goldman and Slotnick 1999; Yalof 1999).

Supreme Court Appointments

The salience of Supreme Court nominations makes them an attractive subject for political scientists and legal scholars. University law libraries are full of works devoted not only to the high court as a whole but to individual justices and their confirmation hearings, opinions and personal and professional lives. The nomination process in particular holds a great deal of significance. For many in the general public, the early stages of the nomination and confirmation process represent their first (and likely their most protracted) look at the nominee. In this forum, the public can witness the poise and intelligence of a candidate for the Court, as well as get a glimpse of the nominee's legal views and reasoning. Also, for the members of the Senate Judiciary committee, it is a chance to question the nominee on their legal philosophy and gain a greater understanding of their positions on important Constitutional issues.

Two major factors are the driving forces behind the salience of Supreme Court appointments. The first is the independence of the Court, which manifests itself most readily in the form of the life tenure of the justices. Also, justices are now serving much longer, on

average, than their predecessors. In the last thirty-five years, the average length of service for a given justice has steadily risen (from 1970, an increase on average from 14.9 years to 25.6 years). Second is the increasingly political nature of the nomination and confirmation process (Carter 1994; Comiskey 2004; Peretti 1999; Segal and Spaeth 2002; Silverstein 1994). With the election of Ronald Reagan came an increased emphasis on the political views and affiliations of judges. Reagan's long-view strategy of judicial appointment was meant to shape the federal bench for years to come. A direct result of Reagan's attempts to mold the judiciary in a conservative image was a backlash of the norm of concession in the Senate in the form of the failed confirmation of Robert Bork (Silverstein 1994). The combination of the change in tone of the process and the recent explosion of media availability have led the Senate to be much more willing and able to investigate the qualifications and personal ideologies of nominees and challenge the President (Comiskey 2004).

Another factor affecting nominations to the Court is the increased involvement of both the public and powerful interest groups. Studies have shown that both interest group activity and constituency concerns can be factors in the success or failure of a nominee (Caldeira and Wright 1998; Overby et al. 1992).

With increased public awareness of the Court and the confirmation process comes increased scrutiny on the practices of the institution. There are those who argue that the quality of Justices on the Court has declined over time and thus the overall quality of the Court has declined (Fein 1991; Schultz 2003; Silverstein 1994). The problem of measuring the quality of past Justices and of past Courts is a formidable one for researchers. Attempts to operationalize such a subjective notion as quality may be subject to the coding whims of the researcher. Therefore scholars have utilized surveys to understand the variation in quality among individual

Justices and the Court as a whole. Surveys, while admittedly subjective, avail the researcher to the expertise of the respondents and can provide a useful tool in the study of the Court. Previous research has utilized elite surveys to find workable measures of difficult variables (Segal, Timpone, and Howard 2000). These studies show that elite surveys, while admittedly not an ideal method, can provide reliable measures of variables that have previously been difficult to quantify.

Judicial Quality

Previous work on judicial quality lacks the in-depth statistical treatment that is the hallmark of most present research in public law. With the exception of recent work by Epstein and Segal (2005), studies including measures of judicial quality have utilized ordinal scales to operationalize their dependent variable. This work seeks to expand the function of previous survey research done on the quality of individual Justices. By using ordinal quality scores (Comiskey 2004) as a dependent variable, it becomes possible to analyze potential influencing factors and their relative impacts on the nomination and confirmation process and ultimately on the Court; and also to observe any bias that may exist in the scores themselves. This allows for not only a systematic review of quality on the Court but also suggestions for future research on judicial quality.

Several studies have been published that seek to rank past Justices in terms of their "greatness" (Asch 1971; Bradley 1993). These studies were the result of surveys presented to scholars and students of the Court in an attempt to classify those who have served on the Court in terms of their quality. The problem faced by scholars in applying this information to a substantive study of quality on the Court is that the format of the survey only asked respondents to list justices from greatest to least or to classify them in one of five categories of "greatness".

For scholars to perform any type of advanced statistical analysis of the quality of Justices and the Court, it would be necessary to quantify quality.

This task was undertaken by Michael Comiskey (2004). Comiskey conducted a survey of law professors and political science professors. The survey asked respondents to rank past and present Justices on a scale from 0-4 (4 being the highest quality) and to then provide a brief explanation of their ranking. Comiskey then took the mean of the responses to come up with a score for each justice on the Court from Holmes through Breyer. Using the results of his survey, Comiskey then proceeded to address the question of whether the quality of justices (and by default, the Court) has declined over time. He found that the average quality of justices has remained fairly stable over time. This is a result of the relatively even distribution of weaker and higher quality justices throughout the span of his research.

Comiskey's results prompted the principal research question in this work. If, as Comiskey's and other's research has shown, there is variation in the quality of Justices who serve on the Court, what factors may play into this variation? Are there forces at work that may influence the placement of a high or low quality justice? Finally, does the political conflict that exists in the form of ideological differences and the President's power vis-à-vis Congress influence the quality of the justice confirmed? Using the results of Comiskey's survey, it becomes possible to perform statistical analysis to determine the effects of political circumstances on the quality of the nominee. Specifically, what circumstances influence the President's nomination of a high or low quality Justice?

Ideology

As the public's view of the Court and the nomination process becomes increasingly political, the circumstances surrounding the nomination of a potential Justice become more

important to both political scientists and those directly involved in the process. Research has shown that judicial decision making can be predicted accurately by observing the political proclivities of a given justice (Segal and Spaeth 2002). Working from this conclusion it is easy to see the importance of political preferences when a vacancy on the Court is to be filled.

The degree to which ideology influences Supreme Court voting is a topic of debate among social scientists (Segal and Spaeth 2002; Vanberg 2001). However, the fact that ideology plays a role in determining justices voting behavior is taken as a given. While professional and legal credentials and qualifications are clearly necessary for the confirmation of most serious nominees to the Court, increasingly the nomination and confirmation of a potential Supreme Court Justice hinges on a question of personal and professional ideology[1]. If one is to consider the political ideology of Justices as important in decision making, it follows that their ideology will be a factor in the decision of a president to nominate them to the Court in the first place (Epstein and Segal 2005; Segal, Timpone, and Howard 2000).

Studies have also shown that the relative ideological position of Senators and Presidents are important in the outcome of roll call votes (Krehbiel 1998). Viewing the confirmation vote for a potential Justice in terms of the roll call vote helps to see the importance of the ideological positioning of both the president and the "pivotal" Senators. Using common-space ideological score developed by Poole and Rosenthal (1984), the ideological difference between the Senate and the President can be assessed at any given time. Common space scores represent a static ideological score for the entire tenure of a public official and are comparable across institutions[2].

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[1] The failed nomination of Robert Bork is an excellent example. Also, the more recent failed nomination of Harriett Myers provides insight into the importance of ideology in the selection process.

[2] There are no common-space scores available for presidents Truman and Roosevelt. For Truman, his score from his time in the Senate is used as the common-space scores represent static ideology over time (see Sala & Spriggs 2004). For Roosevelt, the score becomes trickier. In a conference version of the same paper, Sala & Spriggs devised a method for computing Roosevelt's ideology in the common space. To obtain a common-space score, the

With this information it is possible to understand the impact of ideological differences on the nomination process. Also, previous work on the nomination and confirmation of federal judges has shown that similarly measured ideological distance significantly impacts the duration of the confirmation process for both lower federal judges (Binder and Maltzman 2002) and Supreme Court justices (Shipan and Shannon 2003). Finally, common space scores for Supreme Court Justices, developed by Epstein, Martin, Segal, and Westerland (2005), provide an added level of analysis to the ideology question. These scores allow for testing of any bias in the dependent variable in terms of judicial ideology. The understood importance of ideology in both judicial decision making and the interaction between Congress and the President yields the first hypothesis to be tested:

H_1: A President will nominate a higher quality Justice when his ideology is more distant from the Senate median.

Presidential Popularity

Conventional wisdom holds that the nomination and confirmation process for Supreme Court Justices is marked by significant political maneuvering by both the President and members of the Senate (Goldman and Slotnick 1999; Johnson and Roberts 2004; Moraski and Shipan 1999; Segal 1987; Silverstein 1994; Yalof 1999). For political scientists, questions arise as to the importance of different factors in the nomination and confirmation process. Does the President make certain choices based on his popularity or the public perception of the judiciary? Do the Senators in the judiciary committee possess the political capital to block the confirmation vote or kill the nomination in committee?

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scores existing in the data are regressed on the measures of Presidential liberalism developed by Segal, Timpone, and Howard (2000). The resulting equation is then used to calculate the common-space score for Roosevelt.

Research has shown that presidential popularity can be directly linked to legislative success (Ostrom and Simon 1985). If legislative success is taken to imply any successful interaction between the President and Congress, the importance of presidential popularity on the nomination and confirmation processes becomes evident. Also, Presidents are more readily seeking the approval and support of the public for potential justices (Johnson and Roberts 2004). If a president is unable, because of a lower level of popularity, to rally the public around his nominee, he is more likely to nominate someone whose quality and qualifications can more easily withstand the political scrutiny of the process.

Finally, the President must overcome the final hurdle in the confirmation process. Under the Constitution, the Senate has the authority to provide advice and consent to the President with regard to his nominations. In the nomination of a potential justice the President must take into account not only his own political and personal goals, but those of the Senate as well (Epstein and Segal 2005). Politics, both partisan and institutional plays an enormous role in the interplay between the President and the Senate when it comes to Supreme Court nominations(Moraski and Shipan 1999; Segal 1987; Segal and Spaeth 2002).

Given the importance of the President's political position with respect to both the public and Congress, the second hypothesis tested is as follows:

H_2: A President with lower popularity will nominate a higher quality justice.

Data and Methods

The above two hypotheses will be tested using a standard OLS regression model. While at first glance the dependent variable, mean quality score, may seem bounded thus warranting a logit or probit regression model, this is not necessarily the case. In the presentation of his results, Comiskey reports mean averages at two decimal places. Thus, even though the survey limits the

results of the quality rankings to five possible answers, the mean averages allow for four hundred possibilities. For this reason, an OLS regression is the most appropriate method for conducting this particular analysis.

Data for the various independent variables was collected from a variety of sources. Data was collected for each justice beginning with Justice Reed in 1938 and includes each subsequent sitting justice through Justice Breyer[3]. While there have been two recent appointments to the Court, the data for the dependent variable does not include quality scores for Justices Roberts and Alito. The descriptive statistics for the relevant variables are reported in Table 1.

Table 1
Summary Statistics

Variable	Observations	Mean	Std. Dev.	Min	Max
Quality	32	2.48	.6469429	1.11	3.56
Ideological Distance	32	.47	.1881903	.122	.722
Presidential Popularity	32	61.46	11.12407	44.5	87
Length of Service	32	17.59	9.411247	2	37
Judicial Ideology	29	.000897	.3466267	-.751	.584

Two variations of the same model are presented in this paper. The first includes variables for the ideological distance between the President and the Senate median[4], the president's popularity rating at the time of the nomination[5], and the length in years of service on the Court. The control for length of service is necessary to control for the likelihood that longer serving justices will receive higher quality scores because of their increased exposure and familiarity to respondents.

[3] The selection of justices for the data set has several justifications. The first consideration is the scope of the project. Limiting the justices studied to those appointed by Roosevelt and later allows for a much more manageable data set. Second, data are not available for presidential popularity prior to the Roosevelt administration. Finally, Justice Black is excluded on the front end of the data because he was nominated and confirmed during the 74th Congress. The variable measuring ideological distance between the President and the Senate median utilizes common-space ideology scores and these are only available from the 75th Congress to the present.

[4] Ideological distance is measured in terms of the absolute value of the difference between the nominating president's first dimension common-space score and that of the Senate median. First dimension common space scores measure economic conservatism and range from -1 to 1.

[5] This variable is measured using the results of the most recent Gallup poll prior to the nomination.

A second model is then presented which includes a variable for the ideology of the justice. The control for judicial ideology is included in the form of common-space scores for the ideology of the nominated justice. The scores were developed by Epstein, Martin, Segal, and Westerland (2005) and reflect the first dimension ideology of the justices compatible with the first dimension common-space scores developed by Poole and Rosenthal (1984)[6] for presidents and those in Congress.

The control for ideology is necessary to offset bias that may exist in the observations for the dependent variable in two forms. First, the personal political beliefs of the respondents to the survey may have crept into the responses. Including the ideology of the justice in the model assures that the changes in the dependent variable are driven by the independent variables alone and not the personal biases of the respondents. Second is the issue of timing. In recent years, by all appreciable measures, the make-up of the Court has moved in a conservative direction. Those justices identified as liberal tend to be those who served on the court during or before the Burger Court. This being said, respondents to the survey had the benefit of hindsight in evaluating the most liberal of the Justice in the data while many of the more conservative justices have either recently left or are currently sitting on the bench[7].

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[6] Epstein, et. al.'s scores are developed using the same measure of economic conservatism as the Poole and Rosenthal scores and are thus directly comparable. Epstein, et. al.'s scores are broken down so that a separate score exists for each term that a given justice sat on the Court. In order to come up with a workable measure of ideology, it was necessary to average the scores across each justice's tenure to obtain one score for each justice.

[7] The attitude of specific presidents regarding judicial appointments would seem to be an important factor in their decision to nominate a high or low quality justice. To test for this, two approaches were utilized. First, a random effects model was estimated and found that the division of the data into presidential groups account for little or no variation in the dependent variable. Further, a dummy variable was collected coded 1 for Roosevelt, Nixon, and Reagan and 0 for all other presidents. This was designed to capture the distinction between these two groups with regard to their situational and attitudinal approaches to judicial selection noted by Goldman (1997). This method too did not yield substantive results.

Results and Analysis

The results of the regression analysis are expected to mesh with the theory on the impact of external political forces on the President during the nomination process. The expectation is that the variable measuring ideological distance between the Senate median and the President will have a positive coefficient. This is to say that as the distance between the Senate and the President increases, the quality of the justice will increase. Also, the variable for presidential popularity is expected to have a negative coefficient. Meaning that the lower the president's popularity, the higher the quality of the justice. The results of the first model are reported in Table 2.

As evidenced by the results of the first regression model, none of the predictors of judicial quality reached an acceptable level of statistical significance. In fact, the coefficient for ideological distance is in the wrong direction. The coefficient for presidential popularity is in the expected direction, indicating a negative relationship with judicial quality. However, the effect observed is minimal and not statistically significant.

Table 2
The Effects of Political Circumstances at the Time of Nomination on Judicial Quality

	Coefficient	Standard Error
Ideological Distance	-0.76	.54
Presidential Popularity	- .0034	.0093
Length of Service	.03***	.01
Constant	2.44***	.713
Adjusted R^2 = .25		

N = 32
** p < .05
*** p < .01

Finally, the coefficient for length of service is positive and statistically significant at the .01 level. This result indicates that for every year that a justice served on the bench, their quality score increased by .03.

The results of the first model prompt several questions. First, if ideological difference and Presidential popularity do not drive the variation in quality, what does? If the President's political position and the ideological distance between the President and the Senate do not account for variations in quality, there are two likely reasons. First, and most obvious, is that these factors have no relationship with the quality that a given Justice exhibits on the bench. If this is true, the current system of nomination and confirmation, with all its inherent flaws, is actually working rather well. This is in direct contradiction to those who argue that the system is broken and needs fixing (Davis 2005). According to the results of the first model presented above, political conflict in the form of ideological difference and intense media and public scrutiny during the nomination and confirmation process has not systematically decreased the quality of the Justice that is finally confirmed[8]. This result is consistent with Comiskey's (2004) finding that while there is variation in quality among individual justices, the overall quality on the Court has not experienced any substantial change over time.While this result is normatively appealing, the reliability of the data must be considered before making any statements about the consistency of judicial quality over time.

To further investigate the problem with the measure of quality a second model is presented that includes a variable to measures judicial ideology. The results of the second, more inclusive model are reported in Table 3. After controlling for the ideology of the justice, the

[8] One problem with that data is that the quality scores are after the fact assessments of job performance while the data collected concerns the time surrounding the nomination. Epstein & Segal (2005) have collected quality rankings based on the perceived qualifications of nominees before their service on the bench. Substituting these quality scores as the dependent variable in the model however does not substantively change the results.

results presented in Table 3 show that neither presidential popularity nor ideological distance are significant indicators of the quality of the justice that ends up on the bench. The coefficient for service on the Court is again positive and statistically significant. The results of the second model are also interesting in that the variable measuring judicial ideology has a negative coefficient[9] and is right on the edge of statistical significance at the .05 level. There are several possible explanations for this outcome. The first is that the quality rankings simply represent a liberal bias within the responses to Comiskey's survey. Another explanation is that liberal justices are simply higher quality justices than their conservative colleagues. Finally is the fact that the composition of the court has changed over the time included in the data.

Table 3
Effects on Judicial Quality Controlling for Justices' Ideology

	Coefficient	Standard Error
Ideological Distance	-.60	.64
Presidential Popularity	.00082	.0099
Length of Service	.032**	.012
Judicial Ideology	-.44	.35
Constant	2.13***	.77

Adjusted R^2 = .24

N = 29
** p < .05
*** p < .01

In the past 30 years the overall ideological make-up of the Court has moved to the right. For example, the three most liberal justices in the data set are Douglas, Brennan, and Marshall; while

[9] The measure of judicial ideology used follows the common-space model developed by Poole and Rosethal and measures economic conservatism. Thus a negative coefficient for this variable can be taken to mean that as ideology scores get lower (more liberal), quality increases.

the three most conservative are Renquist, Scalia, and Thomas. One could also argue that the most recent appointments of Justices Roberts and Alito provide further evidence of this trend. Given that the survey asked respondents to rank past justices, it would be likely that the liberal justices of the past would receive higher rankings. Respondents had the benefit of history's judgment when evaluating these justices, while the most conservative of the group were currently still serving on the bench.

The results of the two models presented above prompt several questions concerning the dependent variable. Most notably, the influence of both length of service and judicial ideology on the quality scores calls into question the reliability of the measure used by Comisky to asses the quality of the Court over time. This only serves to underscore the point made above that the quantification of quality poses a difficult obstacle for social science researchers. Unbiased and reliable measures are needed in order to make substantive statements about the value of the nomination and confirmation process.

Conclusion

This study seeks to fill a void that exists both in the literature on judicial selection and on the historic evaluation of the Court and its members. Previous studies of quality have taken a much more general approach in the assessment of Supreme Court Justices. This study seeks to expand on that work and provide a detailed statistical analysis of the circumstances surrounding an appointment to the Supreme Court. Using a numerical measure of judicial quality as the dependent variable allowed for an in-depth look at the impact of several independent variables. The results of both models suggest that neither presidential popularity at the time of the nomination, nor ideological differences between the President and Senate are factors in the quality of the justice that ends up on the bench. Further, preliminary statistical tests found no

support for the notion that presidential attitudes toward judicial selection play an important role in determining the quality of a justice.

However, the inclusion of controls for both length of service and judicial ideology yielded interesting results. These results call into question the reliability of the measure of judicial quality presented in Comiskey's recent work and suggest that a reliable and unbiased measure of judicial quality is still needed to make in depth assessments of both the Court and the nomination and confirmation process.

The Supreme Court holds a unique place in the triumvirate of American government. It is greatly shielded from public view and scrutiny and is presumably not subject to the ever-changing political landscape in Washington D.C. and around the country. For many people, the televised confirmation hearings and the news that accompany are one of very few glimpses they get of a person that holds one of the highest positions in American government. By focusing on the nomination and confirmation process of Supreme Court Justices, political scientists have a unique opportunity to produce work that is all at once interesting, important, and relevant to both scholars of the Court and those outside the field. However, in order to make detailed and substantive statements about judicial quality and the effectiveness of the nomination and confirmation process, a reliable measure of judicial quality is necessary. This work has shown that, with a reliable measure of quality, interesting statements about the effectiveness of the process are possible. What remains is the development of a workable and unbiased measure of judicial quality.

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