

**Sounding the Fire Alarm:  
The Role of Interest Groups in the Lower Federal Court Confirmation Process**

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## **Abstract**

Traditionally, lower federal court nominations were confirmed swiftly and unanimously by the Senate. However, increasingly, lower court confirmations have become lengthy and contentious proceedings. Traditional explanations for this shift have centered on the temporal political environment and the ideological extremism of the nominees. We propose an alternative theory to explain this phenomenon: interest group opposition. We posit that interest groups sound “fire alarms” – raising the salience of a lower court nomination – thereby forcing senators politically aligned with the groups to abandon the senators’ default positions (confirm swiftly) and instead give the opposed nominee thorough consideration and perhaps even block confirmation all together. Our theory is supported by exclusive interview testimony from key players in judicial confirmation politics. We also test our theory using data on all U.S. Courts of Appeals nominations, 1985-2004. We find interest group opposition far eclipses previous explanations about lower court confirmation outcomes and timing.

In this article, we offer a new theoretical perspective for understanding the lower federal court confirmation process. We posit that, because of critical differences in the political salience of lower court and Supreme Court nominations, interest group opposition is today the most influential force driving the lower court confirmation process. Moreover, we detail *how* interest groups influence the confirmation process: by raising the salience of nominations and then convincing senators to thoroughly vet these nominations. We then test this proposition using a split population duration model and extensive data on federal appellate nominations.

### **The Political Salience of Federal Court Nominations**

Historically, there has been one critical difference between the Supreme Court and lower court confirmation processes: political salience. Confirmation battles over Supreme Court nominations have regularly been waged between the president and senators in the opposing party over the last two centuries (Maltese 1995). This is not surprising because, since asserting its right to assess the constitutionality of legislative acts in *Marbury v. Madison* (1 Cr. 137 (1803)), the Supreme Court has been one of three key policy-making institutions in the United States (along with the Executive and Legislative branches). As a result, not only do the president and senators view Supreme Court vacancies as important political battles in which ideological agendas can be advanced, so too do the bases of the Democratic and Republican Parties (Caldeira 1988). In fact, interest groups began weighing in on Supreme Court nominations during the 19<sup>th</sup> century; they have weighed in on *every* Supreme Court nominee since the late 1960s (Maltese 1995). This has served to further raise the salience of Supreme Court nominations. Fortunately for the Senate, the rarity of Supreme Court vacancies (on average, two per term), makes it feasible for senators to devote significant resources to investigating and debating each and every Supreme Court nomination made by the president—thereby appeasing

their respective political bases.

Given the high salience of Supreme Court nominations and the extensive resources available to the Senate to challenge such infrequent nominations, Supreme Court confirmation proceedings can, and often do, turn into hotly contested battles. Not surprisingly, then, there is a rich body of empirical research which seeks to identify the forces that influence senators' roll-call votes on Supreme Court nominations (*e.g.*, Austen-Smith and Wright 1994; Caldeira and Wright 1998; Cameron, Cover and Segal 1990; Epstein et. al. 2006; Overby et. al. 1992; Ruckman 1993; Segal 1987; Segal, Cameron and Cover 1992). The variables found to influence a senator's vote on a Supreme Court nomination include constituency preferences, a nominee's ideology, the senator's party, media coverage, a nominee's qualifications, divided government, a nomination made late in the president's term and, most relevant here, interest group lobbying.

In stark contrast, lower court nominations, historically, have not been salient political issues; neither politicians nor their political bases viewed the lower federal courts as policy-making institutions. Lower federal courts were seen strictly as forums to adjudicate business and property-related claims of individual litigants rather than political causes (Epp 1998). Accordingly, presidents and senators treated lower court vacancies as patronage-rewarding, rather than policy-making, opportunities (Harris 1953), and interest groups paid no attention to these positions until the mid-1980s (Schwartz 1988). Thus, for most of our nation's history, the Senate norm was to give almost complete deference to the president on lower court nominations (*e.g.*, Goldman 1997; Krutz, Fleisher and Bond 1998).<sup>1</sup>

Given the hundreds of lower court nominations made by the president each term and their low political salience, until the mid-1990s, it was a rare event for the Senate even to hold a roll call vote for a lower court nomination; these nominations were instead confirmed by unanimous

consent or voice vote (Cohen 1998). This norm of presidential deference served the Senate well, as it would be virtually impossible for the Senate to function were it to spend as much time and as many resources on each and every lower court nomination as it so often does on nominations to the Supreme Court.

Although roll-call votes are today commonplace for lower court nominations, those votes are qualitatively different from those taken on Supreme Court nominations. At the Supreme Court level where salience is high, senators must stake out their positions in highly-transparent roll-call votes held on the floor of the Senate. Senators' default positions on these votes reflect a combination of their political party, personal preferences and constituent preferences (Caldeira and Wright 1998). This means a sizable number of senators vote "no" to almost all Supreme Court nominations (Epstein and Segal 2005). Due to their low political salience, however, senators are able to oppose lower court nominations through a variety of non-transparent pre-floor procedural tactics.<sup>2</sup> If a lower court nomination makes it to the floor for a vote, it is virtually assured of being confirmed and, more importantly, confirmed unanimously. Consider the distribution of outcomes for courts of appeals nominations made in the period 1985-2004. A total of 284 nominations were made to the circuit courts and 192 received floor votes; of these 192, not one was defeated on the floor; 170 nominations (88.5%) were confirmed unanimously or with only one "no" vote (on five occasions).

Given the infrequency of roll call votes on the Senate floor with significant opposition, scholars of the lower court confirmation process have focused on the pre-floor *process* rather than on floor *votes* (as is the common practice of Supreme Court confirmation studies). Accordingly, there is a corpus of research which has sought to identify the forces that influence confirmation durations; it presumes that the longer it takes to confirm a lower court nomination,

the more “troubled” the nomination (Bell 2002; Binder and Maltzman 2002; Martinek, Kemper and Van Winkle 2002).<sup>3</sup> These duration studies all assume that confirmation delay is influenced by three sets of factors: characteristics about the nominee (*e.g.*, race, gender and ideology), characteristics about the political environment (*e.g.*, divided government, presidential election year and presidential approval rating) or Senate workload (*e.g.*, number of nominations pending and month in the congressional session). Completely absent from this literature, however, is any serious consideration of the role interest groups play in today’s lower court confirmation process.<sup>4</sup> This is true notwithstanding the fact that interest groups, by their own admission, have been heavily involved in the lower court confirmation process since the mid-1980s (Aron 2002) and the fact that we know interest groups have an impact on Supreme Court confirmations (Caldeira and Wright 1998). We now consider whether interest groups influence the lower court confirmation process and, if so, how they affect the process.

### **How Interest Groups Influence the Lower Court Confirmation Process**

We interviewed the leaders of those national interest groups on the left and right of the ideological spectrum which routinely monitor lower court nominations. We also interviewed Senate staffers who have been actively involved in the lower court confirmation process as well as a former member of the Senate Judiciary Committee. Our interviews provide compelling evidence that interest groups play a central role in the lower court confirmation process.

According to interest group leaders, the Senate’s norm of deference to the president regarding lower court nominations began to erode in the mid-1980s; interest groups readily take credit for this evolution (*e.g.*, Aron 2002; Jipping 2002a).<sup>5</sup> Fearing Ronald Reagan would follow through on his campaign promise to appoint conservatives to the lower federal courts – who were chosen not because of traditional patronage concerns but because they shared Reagan’s conservative

political philosophy – issue activists on the left began to monitor systematically lower court nominations in Reagan’s second term in office (Schwartz 1988). During the George W. Bush (“Bush (43)”) administration, liberal activists researched the background and judicial philosophy of each and every person selected for both the district courts and courts of appeals (Aron 2002; Cavendish 2002; Gandy 2002).<sup>6</sup> Conservative groups also monitored Bill Clinton’s lower court nominations, but their strategy was to follow up on tips they received from grass roots members of their organization; these members typically knew the nominee and questioned the person’s suitability for the bench (Jipping 2002a; Senior Conservative Spokesman 2002).<sup>7</sup> Once tipped off that a nominee may be a liberal ideologue, conservative groups would then proceed to do extensive research on the nominee’s background and judicial philosophy. Interest group leaders also made clear, however, that when aligned with the president, they do not expend resources in support of a lower court nominee unless the person has first garnered opposition and thus is in danger of a contentious confirmation fight (Jipping 2002b; Senior Conservative Spokesman 2002).

The decision by interest groups to conduct extensive research on the backgrounds and ideologies of lower court nominees has transformed the role interest groups play in the judicial confirmation process. In short, when leading interest groups believe they have uncovered a problematic nomination – problematic in the sense that the nominee may vote against the groups’ policy positions in future federal court litigation – they share this information, first with sympathetic senators on the Judiciary Committee, and later, with sympathetic senators throughout the chamber (liberal groups share with Democratic senators and conservative groups share with Republican senators) (Cavendish 2002; Gandy 2002; Neas 2002; Jipping 2002a, 2002b; Senior Conservative Spokesman 2002).

At the same time, interest groups share their findings with the press and their grass roots members as they try to muster public opposition against an objectionable lower court nomination (Jipping 2002a, 2002b; Cavendish 2002). Having engaged in mobilization tactics against Supreme Court nominees for many decades – and having perfected those tactics during the Robert Bork and Clarence Thomas confirmation fights -- interest groups are now adept at raising the political salience of a lower court nomination among the political bases of the Republican and Democratic Parties (Caldeira, Hojnacki and Wright 2000).

Targeted senators, in turn, are likely to heed the warnings of interest groups affiliated with their party or interest groups which support policies also favored by the senators' constituents. As a result, these senators are likely to move away from the norm of deference and instead delay and possibly prevent confirmation. First, because of the sheer volume of lower court nominations, senators lack the time to undertake the extensive research efforts that interest groups offer on lower court nominations. As long as interest groups provide accurate information, senators view their research as an invaluable resource (Gittenstein 2002; Metzenbaum 2002; Robinson 2002).<sup>8</sup> “Interest groups help flag who will be controversial and they [the interest groups] substantively do the work we [on the Senate Judiciary Committee] do not have the time to do” (Senior Democratic aide to Senate Judiciary Committee 2002; see also Senior Republican Senate aide 2002; Caldeira, Hojnacki and Wright 2002, 54).<sup>9</sup> Moreover, because interest groups represent the views of key constituents in the two major parties – constituents who not only care about the make-up of the lower federal courts but who also are the most mobilized voters – senators are reluctant to ignore the views expressed by interest groups (McCubbins and Schwartz 1984). Indeed, interest groups are not shy about threatening a senator with electoral retribution should he or she ignore the interest groups' demands by voting

to confirm (Gandy 2002).<sup>10</sup> However, if interest groups do not express opposition to a nominee, the key players (both on the interest group side and the Senate side) all concede that the Senate (including senators who oppose the president) will confirm that nomination unanimously and swiftly (Cavendish 2002; Correia 2002; Jipping 2002b; Neas 2002; Robinson 2002).<sup>11</sup> In other words, old norms persist in the absence of interest group opposition.

### **The Fire Alarm Theory**

We believe that the relationship between interest groups and the Senate regarding lower court nominations is akin to the relationship between Congress and interest groups vis-à-vis administrative agencies (McCubbins and Schwartz 1984). As McCubbins and Schwartz explain, because of limited resources, Congress cannot monitor the workings of a vast federal bureaucracy, and so it relies on interest groups with stakes in bureaucratic decisions to inform Congress when there is a problem – to sound a “fire alarm.” Absent a problem brought to its attention, Congress presumes the agency is functioning properly. But, when interest groups bring a problem to Congress’ attention, congressmen affiliated with these groups (or whose constituents support the groups’ agenda) heed these warnings because of electoral concerns.

Although the relationship between interest groups and the Senate in the context of the lower court confirmation process is not an exact analogy to the Congress-interest group relationship described by McCubbins and Schwartz, we draw upon significant similarities.<sup>12</sup> Because of low public salience and limited resources, senators who oppose the president cannot engage in the type of thorough confirmation proceedings we typically see at the Supreme Court level. Senators must rely on interest groups with stakes in the outcomes of federal court litigation to inform them when the president makes a troublesome nomination.

Absent a problem brought to their attention, each senator’ default position – *even those in the*

*opposite party of the president* – is to presume the nomination acceptable to their political base and to confirm each nomination swiftly. But, when interest groups bring a problem to sympathetic senators’ attention -- sounding a “fire alarm” – the salience of the lower court nomination is now raised to a higher level. Sympathetic senators are now likely to slow down the process and give the nomination thorough consideration. Furthermore, fire alarms serve as a means for interest groups to persuade senators to abandon their default positions (to confirm) and instead block confirmation through pre-floor procedural tactics.<sup>13</sup>

Some basic descriptive statistics seem to bear out our fire alarm theory. In the 99<sup>th</sup> through 108<sup>th</sup> Congresses, there were 284 nominations to the courts of appeals; 67 of these nominations were opposed and 217 were unopposed. Of the 217 unchallenged nominations, 166 (76.5%) went to the floor and were confirmed; however, of the 67 courts of appeals nominations challenged by interest groups, only 26 (38.8%) were confirmed, a statistically significant difference (chi-squared = 33.21,  $p < .001$ ).<sup>14</sup> Not only were unopposed nominations much more likely to be confirmed, they were also more likely to be confirmed with little or no opposition on the floor. Of the 166 nominations confirmed without interest group objection, 162 (97.6%) were confirmed either unanimously or with only one vote in opposition (on five occasions). In contrast, of the 26 opposed nominees who were ultimately confirmed, only 8 (30.8%) were confirmed unanimously (none had a single “no” vote). This difference is also statistically significant (chi-squared = 98.93,  $p < .001$ ). At least facially, the data suggest that our theory is correct: interest groups are dictating when senators need to thoroughly vet a nomination.

### **Hypotheses, Data and Methods**

We now empirically test the “fire alarm” theory using data on U.S. Courts of Appeals nominations.<sup>15</sup> If our fire alarm theory is correct, nominations with interest group opposition are

less likely to be confirmed and, if confirmed, then confirmed less swiftly.

**Hypothesis 1:** Courts of appeals nominations facing interest group opposition are less likely to be confirmed than nominations facing no interest group opposition.

**Hypothesis 2:** Courts of appeals nominations facing interest group opposition will take longer to be confirmed than nominations facing no interest group opposition.

The units of analysis are all nominations to the U.S. Courts of Appeals in the 99<sup>th</sup> through the 108<sup>th</sup> Congresses (1985-2004). Nominations not acted upon by the end of the congressional session are returned to the president *sine die*, and the president may renominate that person in the next congressional session. Persons nominated in more than one congressional session are treated as separate nominations (see Martinek, Kemper and Van Winkle 2002).

There are a total of 284 nominations included in this study: Reagan, 59; George H. W. Bush (“Bush (41)”), 54; Clinton, 105 and Bush (43), 66.

### **The Split Population Duration Model**

Because we are interested in explaining both confirmation outcomes and timing, we test the “fire alarm” theory by employing a split population duration model, which allows us simultaneously to model the *likelihood of confirmation* and the *timing of confirmation* (Box-Steffensmeier and Jones 2004; Schmidt and Witte 1989). Standard duration models (*e.g.*, a Cox or Weibull model) used thus far in the Senate confirmation literature assume every lower court nomination will eventually experience the event, *i.e.*, a successful confirmation. But, this is an unrealistic assumption for the lower court confirmation process because, as we have discussed, the past two decades have witnessed an increasing number of nominations effectively quashed at the pre-floor stage of the process.<sup>16</sup> Unlike standard duration models, the split population duration model relaxes the assumption that all nominations will eventually be confirmed. The model essentially “splits” nominations into two groups – those that will eventually be confirmed

and those that will not. Thus, the split population model more accurately captures the reality of the lower court confirmation process as it has evolved in the past twenty years.<sup>17</sup>

The split population model estimates via maximum likelihood the effects of the variables on the probability that a nomination will be confirmed, together with the effects of the variables on the hazard rate (*i.e.*, the risk of experiencing confirmation). The model produces two sets of simultaneously estimated coefficients: one for the likelihood of confirmation (the incidence of confirmation) and another for the timing of confirmation. We specify the incidence of confirmation part of the model as a probit since it uses a dichotomous dependent variable. The hazard rate part of the model is specified as a log-logistic distribution. For more details on our model specification see Web Appendix A. Durations are measured as the number of days in session from nomination to confirmation. For censored observations (those not experiencing confirmation), durations are measured as the number of days in session from nomination to the end of the congressional session when the nomination is returned by the Senate to the president.

We specify one model, which is designed to test Hypotheses 1 and 2 – whether interest group opposition has significantly influenced confirmation timings and outcomes.

### **Independent Variables**

Below, we detail the measurement of our key independent variable – interest group opposition – and briefly summarize our other independent variables.

***Interest Group Opposition*** is the decision by at least two national interest groups<sup>18</sup> to take a public position opposing the confirmation of a court of appeals nomination. This type of activity – “going public” – is designed to alert senators and their constituents that a particular nomination warrants careful consideration. It is one of the principal tactics interest groups employ when they decide to oppose a judicial nomination (Caldeira, Hojnacki and Wright 2000). The

requirement that there be at least two national groups in opposition is intended to avoid situations in which a single renegade group voices opposition (although there was only one such instance in the data). Under these circumstances, senators may not feel sufficient constituent pressure to hold up the confirmation process as they do when multiple national interest groups (separately or in coalition) oppose a nomination.

We conceive of this variable as dichotomous (opposed or unopposed), rather than as ordinal or a count measurement, for two reasons. The first reason involves the nature of interest group activity surrounding lower court nominations. Due to the large number of nominations made to the lower courts in each presidential term, interest groups admit to working in coalitions to decide whether or not to challenge a lower court nomination (Caldeira, Hojnacki and Wright 2000, 59). For example, during the Bush (43) presidency, NARAL Pro-Choice America, People for the American Way, the Leadership Conference on Civil Rights and the Alliance for Justice – all key players in confirmation politics – have met weekly to plan judicial confirmation strategy (Cavendish 2002; Toner and Lewis 2003). Moreover, many interest groups align themselves with umbrella organizations regarding appointment politics.<sup>19</sup> And, many of the key players in appointment politics are themselves coalitions of groups -- such as the Leadership Conference on Civil Rights and ADA Watch on the left, and Coalitions for America on the right. Accordingly, by virtue of working through a variety of different types of coalitions, the views expressed by one interest group usually represent the views of many other affiliated interest groups as well.

The second reason supporting a dichotomous conception of interest group opposition stems from an important trend observed in the data when we assessed the number of umbrella groups, coalitions and single groups voicing opposition to each nomination. Specifically, in the overwhelming number of cases, nominees either garner no opposition whatsoever (76.4 percent

of nominations in our data) or substantial opposition (22.9 percent of nominations in our data). Of the 67 opposed nominations, 65 had at least one umbrella group in opposition, which necessarily means a multitude of groups (when you consider all those aligned with the umbrella organization) opposed these nominations. Thus, a binary conception better captures the reality of confirmation politics in which interest group opposition tends to be an all or nothing proposition. However, we attempted to create an alternative measure of interest group opposition – an ordinal measure – designed to capture the magnitude of opposition. We re-ran our model using this alternative measure; results were stable across both measures (dichotomous and ordinal) and the substantive findings similar. The results of this alternative model are set forth in Web Appendix C.

To identify whether or not interest groups publicly opposed a nomination, searches were conducted in the electronic databases Lexis/Nexis and Westlaw on each nomination made in the 99<sup>th</sup> through 108<sup>th</sup> Congresses. Because Judiciary Committee chairs have not permitted interest groups to testify at lower court confirmation hearings since 1995, we were unable to measure objections by looking at confirmation hearing testimony, as other scholars have done with Supreme Court nominations (*e.g.*, Segal, Cameron and Cover 1992) and lower court nominations in earlier periods (*e.g.*, Bell 2002; Flemming, McLeod and Talbert 1998). Instead, for each nominee, we searched for any newspaper article or op-ed piece in which an interest group activist is cited as opposing the confirmation of that nomination. This type of interest group activity is intentionally aimed at raising the salience of a lower court nomination, thus prompting senators into action (*e.g.*, Gandy 2002; Gittenstein 2002).<sup>20</sup> A list of nominations garnering interest group objections and a graphic depiction of the number of objections by congressional session are set forth in Web Appendices D and E, respectively.

Because interest group opposition tends to be directional (liberal interest groups oppose Republican nominations and conservative groups Democratic nominations), we operationalized opposition as a nominal variable with three categories: (1) opposition by conservative groups to Democratic nominations; (2) opposition by liberal groups to Republican nominations; and (3) no opposition. We then dummied out these categories and include the two opposed dummy variables in our model; unopposed nominations serve as our baseline group. By operationalizing opposition as directional, we are also able to compare how responsive the Senate is to fire alarms raised by conservative versus liberal interest groups.<sup>21</sup>

Besides interest group opposition, we control for a variety of other forces that scholars have traditionally focused on when studying the lower court confirmation process (Bell 2002; Binder & Maltzman 2002; Martinek, Kemper & Van Winkle 2002). These control variables broadly fall into one of three categories. The first group of variables includes characteristics about the nominee, including the nominee's *appointing president*, the *ideological distance between the nominee and the median senator*, whether the nominee is a *white male*, the nominee's *American Bar Association (ABA) rating*, whether the nomination is to an ideologically *balanced circuit* and whether the nominee has a *Judiciary Committee patron*. The second category of variables are characteristics about the political environment, tapping into the notion that senators are more willing to obstruct the president's nominations when the president's political position is relatively weak compared to the Senate majority. These include *divided government*, the *ideological distance between the president and the median senator of the opposing party*, the *president's approval rating* and the *latter part of the president's term*. The third category of variables seeks to capture how heavy the Senate's workload is at the time that a given nomination is made; the heavier the load, the less likely a given nomination will be

confirmed swiftly or confirmed at all. These include the *number of nominations pending*, the *number of months* into the congressional session and *renomination* of a previously lapsed nomination. Explanations and coding for these independent variables are set forth in Web Appendix G. Positive coefficients in the probit part of the model (likelihood of confirmation) indicate that an increase in the independent variable increases the likelihood of being confirmed (which is beneficial for the nominee); positive coefficients in the timing party of the model indicate that an increase in the independent variable increases the time it takes to be confirmed (which is detrimental to the nominee).

## Results

Before turning to our results, we address the possibility that interest group opposition may be endogenous to forces at work in the Senate confirmation process. This situation could arise if the decision by interest groups to oppose a nomination were driven in part by their calculation of whether senators aligned with the objecting groups are likely to join them in opposition to a nomination. Interest groups can only challenge so many lower court nominations and, so, they may be more likely to launch a challenge if senators with whom they are aligned are in a better position politically to join them in opposition.<sup>22</sup> In short, we must consider whether the potential endogeneity of interest group opposition is biasing the split population model results reported herein. For straightforward models with either continuous (OLS) or discrete outcomes (*e.g.*, a simple probit), one can conduct exogeneity tests to ascertain statistically whether simultaneity bias exists (Rivers and Vuong 1988; Wooldridge 2002, 472-78). Unfortunately, for more complex models like the split population duration model, there is no straightforward way to test for statistical endogeneity. However, we conducted a Rivers-Vuong exogeneity test on a probit model predicting the likelihood of confirmation, and the results reveal that interest group

opposition is *not* statistically endogenous (see Web Appendix H for additional details on the Rivers-Vuong test). While this test is not perfect for testing the potential endogeneity of opposition in the split population model, it does suggest that interest group opposition is not statistically endogenous in a simpler version of our model.

### **Interest Group Opposition Has the Greatest Impact on the Confirmation Process**

Results from our split population model testing our hypotheses – that interest group opposition significantly affects confirmation timing and outcome – are presented in Table 1. As an initial matter, the model shows overall good fit. First, the Wald statistic is statistically significant, indicating the overall significance of our model specification compared to a null model. Second, the split parameter,  $\delta$ , is estimated at 0.76. Using this statistic, we conducted a hypothesis test designed to indicate the appropriateness of the split population model. The null hypothesis states  $\delta = 1$ , which means the split population model is unnecessary and reduces to a standard duration model. Results from this test allow us to reject the null hypothesis, leading us to conclude the split population model is superior to a standard duration model.<sup>23</sup> Substantively, this result means one should not assume every nomination will eventually experience confirmation.<sup>24</sup> Third, the estimate of  $\gamma$ , 0.30, provides an indication of the shape of the hazard. Since  $\gamma < 1$ , the hazard function is indeed non-monotonic (see Cleves, Gould and Gutierrez 2004, 242), suggesting that, as expected, the hazard of experiencing a confirmation increases early on, and then decreases as time goes on (see Web Appendix A).

[INSERT TABLE 1 ABOUT HERE]

Turning to the results set forth in Table 1, there is very strong evidence for our core theoretical argument regarding the relationship between interest group opposition and lower court confirmation outcomes and timing. The coefficients for liberal interest group opposition

are statistically significant in both parts of the model, while conservative opposition is statistically significant in the duration part of the model.<sup>25</sup> These findings suggest that liberal interest groups are more successful than conservative groups at persuading sympathetic Democratic senators to block confirmation altogether, but both conservative and liberal groups significantly slow down the confirmation process when they sound a fire alarm. Moreover, as we show in our post-estimation analyses, interest group opposition also exhibits the greatest substantive impact of all variables in both parts of the model.

It is worth noting some other statistically significant findings. In the probit part of the model, we find nominations with a Judiciary Committee patron are more likely to be confirmed. In the duration part of the model, we find greater ideological distance between the Senate and the nominee and divided government significantly increases confirmation delay, while higher ABA ratings decrease the time it takes to be confirmed.

Figures 1A and 1B provide post-estimation analyses, showing the substantive effects of all statistically significant variables. Here, we want to compare the magnitude of the effect of interest group opposition (both liberal and conservative) to the magnitudes of the other statistically significant variables. Does interest group opposition eclipse the effects of the other variables? We set each independent variable at low and high values<sup>26</sup> and then, for each value, we calculate: (1) the expected (mean) probability of confirmation and (2) the predicted (median) duration in days from nomination to confirmation (Box-Steffensmeier and Jones 2004, 33).<sup>27</sup>

[INSERT FIGURES 1A AND 1B ABOUT HERE]

What Figures 1A and 1B highlight is that, when compared to the other explanatory variables, interest group opposition exerts the greatest impact on both confirmation timing and outcomes. In the probit part of the model (Figure 1A), unopposed nominations experience a 0.85 probability

of confirmation, nominees opposed by conservative groups a 0.78 probability of confirmation (a change of 0.07) and nominees opposed by liberal groups a 0.52 probability of confirmation.(a change of 0.33). Nominees with a patron on the Judiciary Committee have a 0.90 likelihood of confirmation compared to 0.71 for nominees with no patron; the change, however (0.19) is far less than that for liberal group opposition. In short, liberal opposition exerts the greatest substantive impact on confirmation outcomes.

Looking at confirmation delay (Figure 1B), interest group opposition – both liberal and conservative -- has the greatest substantive impact, though conservative opposition causes much more delay than liberal opposition. The predicted duration from nomination to confirmation for unopposed nominations is 52.11 days, while nominations opposed by liberal groups take 96.50 days to be confirmed (a change of 44.39 days) and nominations by conservative groups 181.53 days (a change of 129.42 days). While ideological distance, ABA ratings and divided government coefficients also have a statistically significant impact on confirmation durations, none of these variables cause as much delay as interest group opposition (70.81 days for an ideologically-distant nominee; 81.34 days for a nominee with a low ABA rating; 77.15 days for a nomination during divided government). Nor does the degree of change for these three variables measure up to the change going from an unopposed nomination to an opposed nomination (16.91 additional days for high ideological distance; 26.02 additional days for a low ABA rating; 37.90 additional days for divided government).

In sum, when comparing the substantive magnitudes of the independent variables in both the outcome and timing parts of the model, the results from Figures 1A and 1B lead us to conclude that liberal interest group opposition is the leading force driving confirmation outcomes and delay of Republican nominations, while conservative opposition is the leading force driving

confirmation delay of Democratic nominations. These results highlight how interest groups work behind the scenes to convince sympathetic senators to delay and optimally block problematic nominations. Interest group opposition thus serves as a “fire alarm” by raising the salience of a particular nomination; sympathetic senators then respond to the alarm by abandoning their default positions to confirm quickly and, instead, closely vetting the opposed nominees and, in the case of Republican nominations, perhaps even blocking confirmation.

### **The Senate Treats All Unopposed Nominees Alike Regardless of Their Ideology**

One important question remains is: how do we know senators would not have delayed or blocked certain ideologically extreme nominations even in the absence of interest group opposition? To address this issue, we return to the results of our model (Table 1), this time focusing only on the variable measuring ideological distance between nominees and the median senator and the variables for liberal and conservative interest group opposition. In Figures 2A and 2B, we present predicted probabilities of confirmation and durations for ideologically-distant versus ideologically-compatible nominees, both with and without interest group opposition.

[INSERT FIGURES 2A AND 2B ABOUT HERE]

As the results reported in Figures 2A and 2B highlight, in the absence of interest group opposition, ideologically-distant nominees have virtually the same chance of being confirmed as do nominees who lie close to the Senate median on the ideological spectrum (probability of 0.85 versus 0.84) (Figure 2A). In terms of confirmation durations, again we see little substantive difference between ideologically-distant nominees and ideologically-compatible nominees assuming no interest group opposition – 58.27 days versus 44.94 days from nomination to confirmation (Figure 2B). Thus, in the absence of interest group opposition, a nomination is almost assured of being confirmed quickly, even if the nominee is ideologically-distant from the

Senate.

Figures 2A and 2B also show how the Senate treats ideologically-distant versus ideologically-compatible nominees assuming interest group opposition. Strikingly, regardless of how ideologically compatible or distant the nominee is from the Senate median, once a fire alarm has been sounded, the Senate treats these nominations alike. While an ideologically-distant nominee with conservative opposition has a 0.78 chance of being confirmed, an ideologically-compatible nominee with conservative opposition has a 0.79 chance of being confirmed. Ideologically-distant nominees opposed by liberal groups have a 0.52 likelihood of confirmation, while those who are ideologically-compatible have a 0.53 likelihood of confirmation. With respect to confirmation delay, even though ideologically-compatible with the Senate, it will still take a Democratic nominee with conservative opposition 156.57 days to be confirmed with conservative opposition – almost four times the number of days for that same nominee to be confirmed absent opposition (44.94 days) – and a Republican nominee with liberal opposition 83.23 days to be confirmed – almost twice the number of days it would take that nominee to be confirmed absent opposition. Moreover, there is clear evidence that even ideologically-compatible nominees are more likely to encounter a difficult road to confirmation simply because they have garnered interest group opposition. In short, while interest groups assess nominee ideology in determining whom to oppose (*e.g.*, Aron 2002; Gandy 2002; Jipping 2002a, 2002b) – and opposition clearly drives confirmation outcomes and timing in the Senate -- there is little evidence that the Senate independently considers a lower court nominee's ideology in the absence of interest group opposition. These results further confirm that senators rely upon interest groups to identify problematic nominations, and only after a fire alarm has been sounded will sympathetic senators abandon their default positions of confirming swiftly, and instead

thoroughly vet the nomination.

## **Conclusion**

In sum, interest groups have become critical players in lower court confirmation politics. But their influence is markedly different than it is at the Supreme Court level. For Supreme Court nominations, political salience is always high with or without interest group opposition. But, for lower court nominations, political salience is low unless interest groups weigh in on the process.

We show herein that unless interest groups sound a “fire alarm,” a lower court nomination is all but certain to be rubber-stamped by the Senate. Critically, this is true even for senators in the opposite party of the president. In stark contrast, once opposition to a nomination is voiced by interest groups, the political salience of this confirmation proceeding is now raised to a new level. Senators aligned with the opposing groups are now forced to give careful consideration to this nomination or else face the wrath of interest groups come election time. Thus, opposed nominations will likely face a contentious and lengthy confirmation process. In many instances, particularly for Republican nominations opposed by liberal interest groups, it may mean the nomination is blocked completely and therefore will never make it to the floor for a vote.

Given the number of lower court nominations made in each presidential term, this relationship between the Senate and interest groups serves each institution well. The Senate can conserve resources by focusing only on a limited number of lower court nominations, while interest groups can help shape the ideological make-up of the federal bench. No prior study of the lower court confirmation process has considered how central a role interest groups play in this process. As this study illuminates, assessing interest group opposition is the key to understanding lower court confirmation politics.

## Endnotes

<sup>1</sup> The only exception to this rule of deference was when a home state senator exercised senatorial courtesy to block confirmation of a lower court nomination from his or her home state. Until the mid-1980s, such exercises of senatorial courtesy (or “blue-slipping”) were rare and typically did not turn on policy-related issues. Rather, senators often invoked senatorial courtesy based on personal hostility towards the nominee or a dispute that a judicial seat properly belonged to another home state (Scherer 2005).

<sup>2</sup> These tactics include refusing to schedule a confirmation hearing, denying the nominee a Judiciary Committee vote, putting a “hold” on a nominee, vetoing a nominee through senatorial courtesy or refusing to schedule a floor vote.

<sup>3</sup> One study of the Supreme Court also looked at confirmation timing (Shipan and Shannon 2003).

<sup>4</sup> Only Bell’s (2002) model controls for interest group “participation.” Participation is defined as written or oral testimony before the Senate Judiciary Committee, and Bell makes no distinction between testimony for or against the nomination. Since 1995, interest groups have been foreclosed from testifying in person or in writing at lower court confirmation hearings (Gandy 2002). Accordingly, this measure is meaningless where, as here, we use post-1995 data. Moreover, that Bell found interest groups to have *no influence* over confirmation timing during divided government – precisely the time when opposing groups should have the most influence because the party with which they are affiliated controls the Senate – suggests that her interest group measure is flawed.

<sup>5</sup> Nan Aron is the president of the Alliance for Justice, an organization that monitors judicial selection on behalf of other liberal interest groups. Thomas Jipping is the former director of the Judicial Selection Monitoring Project, an organization that monitors judicial selection on behalf of other conservative interest groups.

<sup>6</sup> Elizabeth Cavendish is the former legal director of NARAL Pro-Choice America, an interest group that advocates for women's reproductive rights. Kim Gandy is the president of the National Organization for Women, an interest group that advocates for women's civil rights.

<sup>7</sup>The Senior Conservative Spokesman, who asked not to be named, is an official at a conservative interest group that actively participates in judicial appointment politics.

<sup>8</sup> Mark Gittenstein is the former Chief of Staff to Senator Joseph Biden (D-DE) while he was chairman of the Senate Judiciary Committee; Howard Metzenbaum is a former Democratic senator from Ohio who sat on the Judiciary Committee; and Jeffrey Robinson is a former aide to Senator Arlen Specter (R-PA), a member of the Judiciary Committee.

<sup>9</sup> These two individuals asked not to be identified by name.

<sup>10</sup>Specifically, Gandy recounted threatening John Edwards (D-NC) that NOW would oppose him in the 2004 presidential primaries because he refused to vote against D. Brooks Smith (Third Circuit nominee) in a Judiciary Committee vote (Gandy 2002; see also Scherer, 25-26).

<sup>11</sup> Eddie Correia served as Senator Metzenbaum's chief counsel.

<sup>12</sup> Specifically, in the agency oversight context, interest groups bring problems to Congress after they occur (an *ex post ante* influence). In the case of judicial nominations, interest groups bring problems to the Senate after the president has made the nomination, but before the Senate has acted. Some political scientists have questioned the "fire alarm" theory as it relates to agency oversight because studies usually examine specific cases and are thus not applicable to the entire

bureaucracy (*e.g.*, Huber and Shipan 2000). Such an objection, however, is not applicable where, as here, we seek to understand the relationship between the Senate and interest groups only in the specific context of the judicial confirmation process.

<sup>13</sup> Contrast “fire alarm” oversight of presidential nominations with that for Supreme Court nominations. At the Supreme Court level, the Senate engages in “police patrol” oversight; senators, therefore, weigh the pros and cons of each nomination. A senator’s default position is not to confirm, but rather, is a combination of his or her party affiliation, personal preferences and constituent preferences (Caldeira and Wright 1998). Thus, interest groups need not focus on raising political salience; their efforts at the Supreme Court level are singularly focused on persuading a senator to cast a roll-call vote different from his or her default position. Moreover, because of the higher salience of Supreme Court nominations, senators must defeat objectionable nominations through roll-call votes, rather than blocking them through pre-floor procedural tactics.

<sup>14</sup> One of the principal reasons unopposed nominations are denied confirmation is they are made late in a president’s term; senators are loath to confirm a nomination with a presidential election in the balance (see Table 1).

<sup>15</sup> Although interest groups research district court nominations as well, “fire alarms” are rarely sounded with respect to district court nominations. This is due to groups’ limited resources and the greater power of the courts of appeals in the federal hierarchy (Cavendish 2002; Aron 2002). In theory, however, the “fire alarm” theory is equally applicable to district court nominations; those which garner interest group opposition will take longer to confirm and are more likely not to be confirmed than those unopposed. Since the overwhelming majority of interest group

objections are to appellate nominations, we test the “fire alarm” theory on these nominations only.

<sup>16</sup> For our purposes, getting a roll call vote is tantamount to being confirmed, for no court of appeals nomination was defeated in a roll call vote on the floor of the Senate between 1985-2004.

<sup>17</sup> We considered an alternative way of modeling this process using a competing risks framework, with the two risks being confirmation and, what might be called, “death by obstruction.” Thus, one would seek to ascertain the factors that explain when either of these events occurs. However, because of our fundamental emphasis on the factors that influence both whether *and* when nominations are confirmed, we use the split population model because it offers a unified framework for empirically assessing our theoretical contentions.

<sup>18</sup> National interest groups are defined as those which represent a national, rather than local, constituency.

<sup>19</sup> An umbrella organization is one that monitors judicial selection on behalf of other organizations and speaks for them on these issues. For further details on umbrella organizations see Web Appendix B.

<sup>20</sup> We then checked this list against the archived press releases of the two leading umbrella groups involved in confirmation politics – Alliance for Justice and Judicial Selection Monitoring Project -- in which these groups stated their objections to a nominee; we found no additional objections not already identified through the newspaper searches. Unfortunately, only press releases issued after 2001 were available on these web sites. We contacted the Alliance for Justice and the Judicial Selection Monitoring Project and were informed that they do not retain

press releases prior to 2002. Accordingly, for periods prior to 2002, our list of objections may be under-inclusive but, given the reliability of the post-2002 list, this is unlikely.

<sup>21</sup> We ran alternative models to consider whether interest group influence on the lower court confirmation process may be conditioned on Senate preferences (meaning groups do not change senators' positions on nominations but rather, only lobby like-minded senators already inclined to agree with the interest groups' positions). This conditional theory of interest group influence was first raised by Caldeira and Wright in their study of interest group influence on Supreme Court roll-call votes (1998); Caldeira and Wright ultimately rejected the conditional theory of influence. Because of critical differences between the lower court and Supreme Court confirmation processes, we argue in the text of the paper that interest group influence at the lower court levels is not *either* conditional *or* unconditional; rather, it is both (see pages 2-9). Because these alternative models assume an either/or framework that simply does not apply to a study of the lower court confirmation process, we ultimately concluded they were not appropriate to test our fire alarm theory. However, we set forth these alternative models in Appendix F.

<sup>22</sup> If this were true, then some of the same forces driving interest group objections would also be driving Senate opposition. That means there would be a relationship between some of the variables on the right hand side of the equations in our model. For example, divided government may make interest groups more likely to oppose a nomination because sympathetic senators control the Senate and would be better situated to fight the nomination. But, in our model, we believe divided government and interest group opposition (both on the right hand side of the equations in our model) independently drive the outcomes and timing of judicial confirmations.

<sup>23</sup> To perform this hypothesis test, we used a post-estimation parameter simulation procedure (King et. al. 2000), and simulated 1,000 estimates of each model parameter. This procedure simulates a sampling distribution of the estimated split, where the mean of the 1,000 estimates is the estimated split (0.76) and the standard deviation (0.04) represents the estimated standard error. Our test statistic is calculated as:  $|t| = (0.76 - 1) / 0.04 = 6.00$  ( $p < 0.001$ ). We reject the null hypothesis that  $\delta=1$ , therefore providing strong support in favor of the split population model.

<sup>24</sup>The split population duration model can be sensitive to sample size and model specification. However, we compared results from separate probit and duration models with those from our split population model, and while some differences emerged (as expected), the absence of overly drastic differences gives us confidence that our split population results are not artifacts of sample size or model specification.

<sup>25</sup>Throughout the paper, we use the  $\alpha = .05$  level to conclude statistical significance (one-tailed test).

<sup>26</sup>For opposition by liberal interest groups, the liberal opposition dummy is set to 1 and the conservative opposition dummy is set to 0 (and vice versa for conservative opposition). For unopposed nominations, both opposition dummies are set to 0. Dichotomous variables (patron and divided government) are each set at their only two values (0 and 1). ABA rating is set at its minimum (4) and maximum (8) values. Nominee-Senate median distance is set at its 5<sup>th</sup> and 95<sup>th</sup> percentiles.

<sup>27</sup> For our post-estimation procedure, we employ average predictive comparisons (Gelman and Hill 2007, 101-105), which mirrors the intuition behind calculating the estimated split ( $\delta$ ) discussed in Web Appendix A. To estimate the probability of confirmation for, e.g., a

nomination opposed by liberal interest groups, we set the liberal opposition dummy to 1, the conservative opposition dummy to 0, and let the remaining variables maintain their original values. This entails calculating a predicted probability for each observation and then calculating the mean of the probability estimates across observations. The same procedure is applied to calculating predicted (median) durations. The method of average predictive comparisons is different from a Clarify-like procedure where one sets the variable of interest to a particular value and then holds the remaining variables constant at their mean values. In sum, our procedure calculates the average probability of confirmation and the average median duration from nomination to confirmation across observations when setting the statistically significant variables at their high and low values.

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**Table 1: Split Population Duration Model,  
U.S. Courts of Appeals Nominations, 1985-2004 (Model 1)**

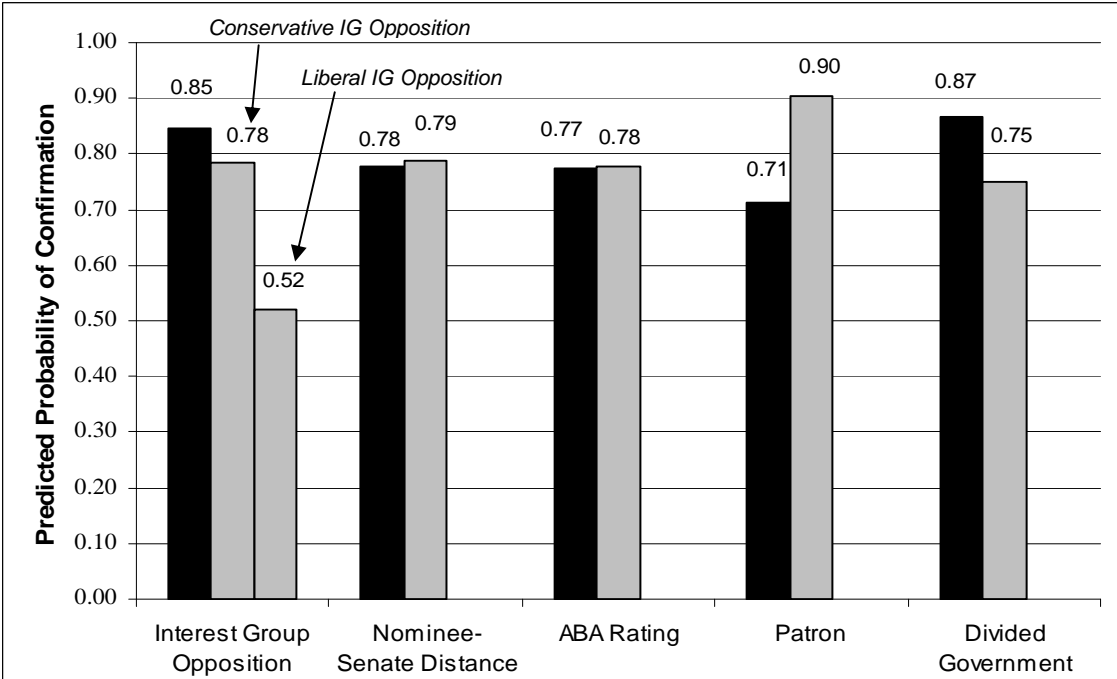
	Likelihood of Confirmation			Timing of Confirmation		
	Coeff.	(Robust SE)	p	Coeff.	(Robust SE)	p
<b>Opposition by Conservative Interest Groups</b>	-0.342	(0.734)	0.321	1.248	(0.280)	0.000
<b>Opposition by Liberal Interest Groups</b>	-1.406	(0.451)	0.001	0.616	(0.213)	0.002
<b>Nominee Characteristics</b>						
Nominee-Senate Median Distance	-0.048	(1.070)	0.482	0.476	(0.275)	0.042
White Male Nominee	0.508	(0.333)	0.064	0.079	(0.120)	0.256
ABA Rating	0.007	(0.105)	0.475	-0.096	(0.033)	0.002
Balanced Circuit	-0.223	(0.303)	0.232	0.030	(0.090)	0.368
Judiciary Committee Patron	1.052	(0.422)	0.007	-0.176	(0.125)	0.080
<b>Political Environment</b>						
Divided Government	-0.697	(0.942)	0.230	0.676	(0.129)	0.000
President-Opposing Median Senator Distance	-7.433	(15.131)	0.312	-0.101	(4.910)	0.492
Presidential Approval	0.013	(0.027)	0.321	-0.015	(0.013)	0.122
Latter Part of President's Term	-1.350	(0.919)	0.071	-0.115	(0.263)	0.331
<b>Senate Workload</b>						
Number of Nominations Pending	-0.022	(0.055)	0.347	0.008	(0.014)	0.278
Month in Congressional Term	-0.022	(0.066)	0.370	-0.006	(0.018)	0.365
Renomination	0.014	(0.521)	0.490	-0.402	(0.276)	0.073
<b>Appointing President Dummies</b>						
Clinton	-0.698	(1.338)	0.602	-0.477	(0.288)	0.097
Bush (41)	0.289	(1.187)	0.807	-1.220	(0.291)	0.000
Reagan	0.823	(1.308)	0.529	-1.010	(0.469)	0.031
Constant	7.881	(12.294)	0.521	5.548	(3.554)	0.118

N=284; Log-likelihood=-985.27; Wald Chi-Squared (df=17)=209.74, p<0.001;  $\gamma$ =0.30  
Actual split=0.68; Estimated split=0.76 (s.e.=0.04)

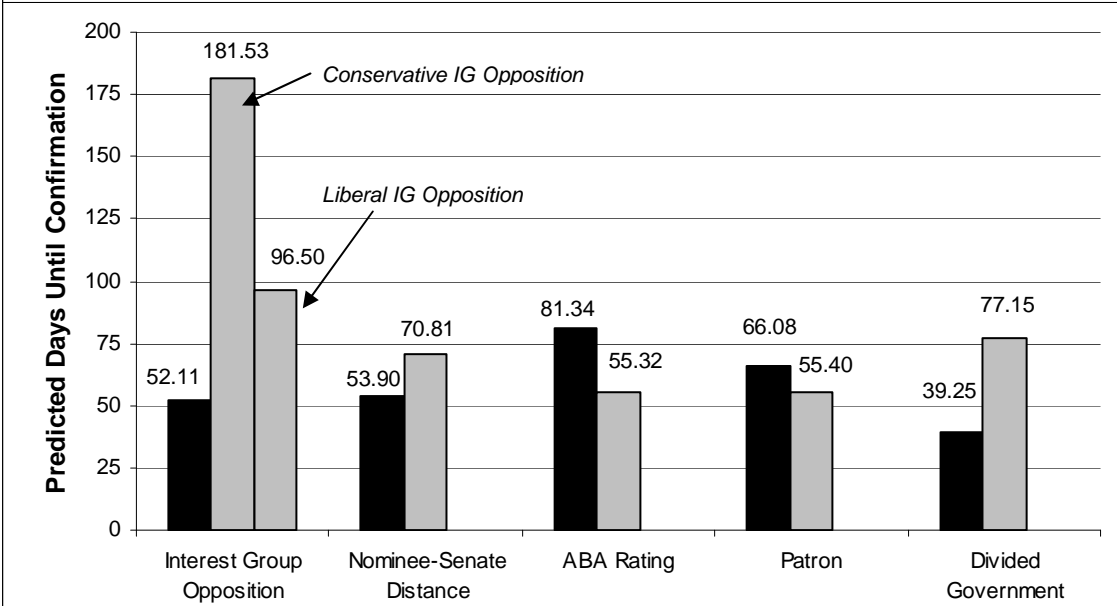
Note: Two-tailed p-values are reported for the Appointing President dummies and constant; one-tailed p-values are reported for the remaining coefficients.

**Figure 1: Predicted Probabilities and Durations (Model 1)**

■ Low Value of Independent Variable    □ High Value of Independent Variable



**Figure 1A**



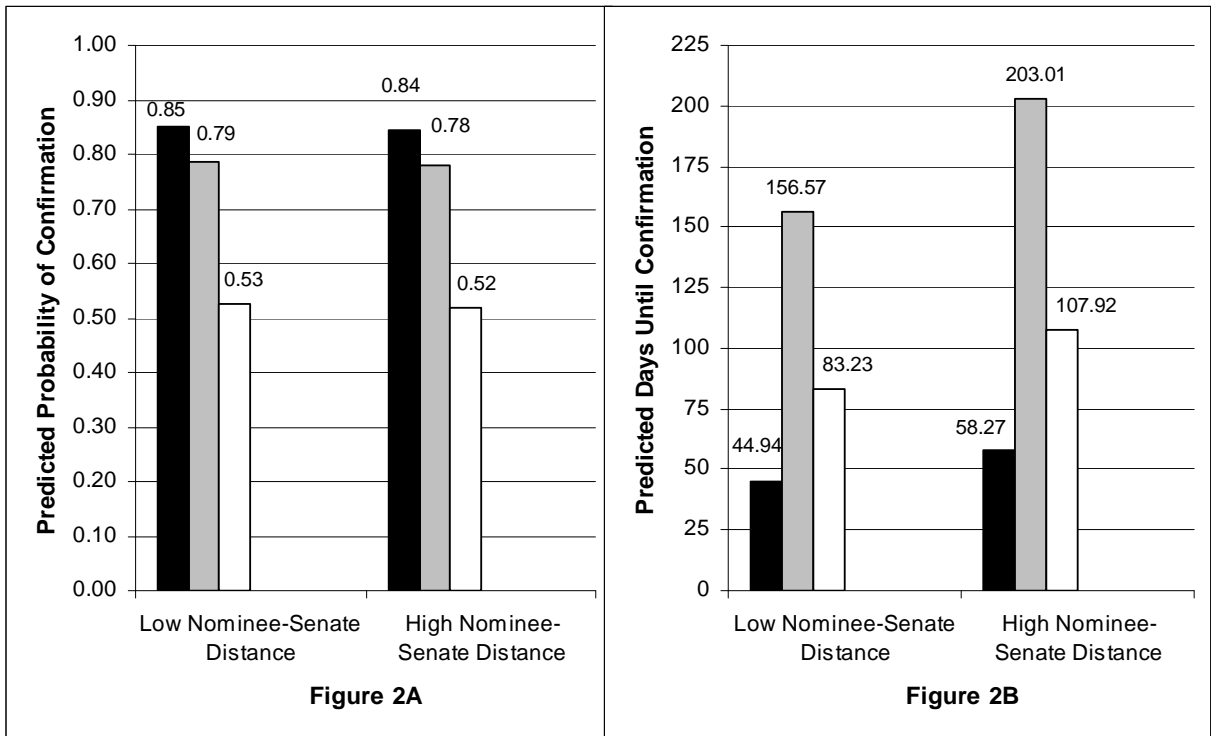
**Figure 1B**

Note: Dichotomous variables (white male nominee, patron, and divided government) are each set at 0 (for “low”) and 1 (for “high”). ABA rating is set at its minimum (4) and maximum (8)

values. Nominee-Senate median distance is set at its 5<sup>th</sup> and 95<sup>th</sup> percentiles. Three scenarios are estimated for interest group opposition: unopposed (black), opposition by conservative groups (the gray bar on the left), and opposition by liberal groups (gray bar on the right).

**Figure 2: How the Senate Treats Ideologically Distant and Congruent Nominees  
With and Without Interest Group Opposition**

Without Interest Group Opposition  
  Conservative Interest Group Opposition  
 Liberal Interest Group Opposition



Note: Low and high values of nominee-Senate ideological distance are the 5<sup>th</sup> and 95<sup>th</sup> percentiles.