Senators and Supreme Court Nominations:

Why Some Senators Deviate

Robyn Parkinson

**Introduction**

The process of nominating and confirming a Supreme Court nominee has been extensively studied with significant inquiry into the presidential factors that influence the nomination and confirmation process. There is also some small discussion on the factors individual senators may consider when voting on a candidate. Future literature could be improved by a more in depth consideration of a senator's preferences and how he might seek to maximize these preferences. This paper aims to show the role of the Senate in the confirmation process and then improve upon previous models that took factors of partisanship, ideological preference, and constituency preference into account to explain how individual senators vote.

The president has the first move in the confirmation process—nominating the candidate—and has significantly more political power than any singular senator, so his preferences and goals have been extensively analyzed in ways senators' have not. The president's goal in the nomination game has largely been considered maximizing his ideological preference. Both Moraski and Shipan (1999) and Johnson and Roberts (2004) assume that a president wishes to maximize his ideological preferences as much as possible, and then consider the factors that may limit his ability to successfully maximize preferences and what steps he may take to overcome constraints. The president is constrained primarily by the senate, although other factors also constrain him. His political capital can directly impact the ease with which a nominee will be confirmed and will allow the president to nominate a more ideologically extreme candidate (Segal, 1987).The senate is likewise constrained in their ability to maximize their preferences. The most obvious constraint is the president’s nomination power, which ensures most senators could not possibly maximize their ideological preference. The senate is also faced by institutional constraints; they are incentivized to fill a vacant seat because it is perceived as too important to leave empty and fear of the president making a unilateral recess appointment (Whittington, 2006). These perceptions afford the president even more power in the nomination process. While both branches constrain each other and are effected by outside constraints on the other branch, there are strategic actions the players can take to improve their chances of maximizing their preferences.

Presidential capital is one of the president’s most important assets in the nomination process. A politically strong president will face far less opposition than a weaker president. Reagan’s nominees to the bench at the beginning of his presidency, Rehnquist and Scalia, were far more conservative than Kennedy, who he nominated at the end of his time in office. Moraski and Shipan (1999) consider presidential approval and year in office among the factors that contribute to his capital and thus effect his ability to maximize his ideological preferences. In the face of an ideologically distant senate, the president can increase the likelihood of a candidate succeeding by "going public". Johnson and Roberts (2004) found that as the distance between a nominee and the pivotal senator—he considered the filibuster senator as the pivot—increased, the likelihood the president will talk in public about the nominee will increase. Presidents like Clinton who selected moderate candidates were not forced to go public while ones who selected more extreme candidates were forced to make public appearances to drum up support for their candidates. Reagan made 70 statements for Bork but only 12 for the far more moderate Kennedy (Johnson and Roberts, 2004). Presidents are dominant in the nomination game and will try to exert influence on senators to impact the outcome of the nomination vote. Because senators can be impacted by presidential capital, their ideological preferences must not be the only factors individual senators consider when confirming a candidate.

Senators are impacted not only by the executive but also by the nominee, both directly and indirectly. The interactions between the nominee and the senate may impact the outcome of a vote. Harlan Stone faced significant opposition from some senators, particularly Walsh, who questioned actions Stone took as Attorney General and adamantly opposed his confirmation. Stone’s testimony at the Senate Judiciary Committee resulted in his confirmation and moved Walsh from strong opposition to simply abstaining from voting (Grossman and Wasby, 1972). A nominee also has the ability to campaign to senators individually in order to increase their chance of securing a confirmation. Kagan visited almost every senator while campaigning for her seat. Interactions with the nominee have an impact on a senator’s vote, but the more general attributes of the candidate play a larger role.

The Senate will consider the ideology, qualifications, and ethics of a nominee, with a focus on their ideology. An ethically questionable candidate like Fortas or a less qualified nominee like Miers will certainly have a more difficult time securing a seat on the bench. The perceived ideology of the nominee will also influence a senator, but normally only “when other issues are raised” (Sulfridge, 1980). An ideologically extreme candidate, like Burger or Blackmun who were perceived as extremely conservative, were able to pass through the Senate with little to no opposition because they were perceived as highly qualified. Similarly, Fortas and Haynsworth both failed due to “financial impropriety”, but senators who opposed one tended to favor the other, as Haynsworth and Fortas were ideologically distant (Sulfridge, 1980). Senators will not act solely to maximize these preferences, but their ideology will play a role in certain circumstances.

Certain senators must chose against ideological preference in order to pursue some other goal. Ideological considerations cannot be every senator's primary concern, or unanimous votes would never occur. However, literature focusing on the nomination game will use a pivotal senator's ideology as the primary—or even only—factor determining how the senate will vote. Johnson and Roberts (2004) consider the filibuster pivot's ideology as measure of where the senate stands on a particular nominee. Another measure employed is the average ideology of the Senate as compared to the median on the current court (Moraski and Shipan, 1999). This suggests a senator will vote yes if the candidate is closer to their ideology than the median and otherwise vote no, which cannot explain unanimous or near unanimous votes. There have been 8 such unanimous votes in the history of the Court, and many more votes with only a few senators voting to reject a candidate. Ideology cannot be considered the main concern behind every vote, and yet it is often treated as though it is.

The driving factor pushing senators to vote a certain way for a candidate may be reelection rather than maximizing ideological preferences. Segal et al. (1992) found that "confirmation voting is decisively affected by the ideological distance between senators' constituents and nominees"(109). A one standard deviation increase in a candidate's distance from a senator's constituency was accompanied by a 32% decrease in a confirmation vote. Other factors, like qualifications and presidential capital, certainly influence the probability of a yes vote; sharing the same party as the president raises the probability of a senator confirming from 50% to 64% (Segal et al. 1992). The American public cares about Supreme Court nominations and will sanction senators for failing to appropriately vote. During Alito's nomination process, 75% of Americans thought that it was important for their senators to vote the correct way (Kastellec et al. 2010) If a constituency is upset at their senator, they will sanction him by pushing him out of office. Alan Dixon was an Illinois democrat who voted to confirm Clarence Thomas, and his constituency responded by voting for Carol Moseley Braun in the primaries. She focused on Dixon's failure to represent the will of the people by voting for Thomas. Voters do pay attention to Supreme Court vacancies, they form opinions on candidates, and they may sanction their senators for failing to adequately represent them. Certain nominees, like Sandra Day O’Connor and Clarence Thomas, have clear constituencies that may favor them for reasons other than ideology, thus pushing their representatives to vote a certain way. Overby et al. (1992) found that in Thomas’ confirmation vote, as the percentage of African Americans in a senator’s home state increased, the probability that he would vote to confirm Thomas also increased. This was especially true for senators seeking reelection, as the chance of being sanctioned by their constituents was greater. Senators consider the desires of their constituents and react to these preferences.

In addition to appeasing their constituents, partisan politics will affect how individual senators vote. If one party controls both the senate and the executive branch, nominees were confirmed 93 out of 104 times or 89%; when the executive and legislative branches are controlled by different parties, the rate of success drops to 59% or 20 out of 34 cases (Segal, 1987). Additionally, no votes by in-party senators are rare and almost always occur when the nominee is exceptionally unpopular in their home state (Kastellec et al. 2010). While only 18% of nominations occurred during times where the president and senate majority were different parties, a third of failed nominations happened in divided governments (Whittington, 2006). Confirmation votes are partisan—in general parties tend to vote together, however the way parties vote in Supreme Court nominations has different characteristics now than earlier in the nation’s history.

Historically, partisan rejections of nominees occurred only if the president was a lame duck, but recently the Senate has taken to using its constitutional power to advise and consent on nominations (Whittington 2006). This switch in attitudes about the role of the Senate in the confirmation process will certainly effect how senators vote and the effects of partisanship. In only two votes since Johnson's presidency has there been any significant split in one party's votes. There were 21 recorded votes, or 42 instances of potential party splits, in this time period. The vote for Roberts to replace Rehnquist in 2005 resulted in a 78-22 split. All the republicans voted to confirm, but there was an even 22-22 split between the democrats on whether to confirm or reject Robert's elevation to Chief Justice. The Republicans fairly evenly split for Carswell’s confirmation, with 27 voting to confirm and 14 voting to reject his nomination. These two instances are the only cases of a party not having a clear partisan stance on a nomination since 1967. No other case had a split of greater than 31% of one party voting differently than the majority, although there was some dissent amongst members of the party in 19 instances—a little under half. In 21 of the instances there was complete party agreement. Senators likely take into account their party's preference; there is almost always a definite preference and partisan control of both executive and legislative branches greatly increases the chance of a confirmation (Segal, 1987). Still, they will deviate from their party's preference.

Previous literature has thoroughly evaluated the president's role in the nomination process, putting a premium on ideological preference maximization, but often failed by treating the Senate as a single player also seeking to maximize ideological preferences. Senators are individual preference maximizers with a goal of increasing their chance of reelection above all else; ideological preferences are a secondary concern. Using only ideological measures to determine the Senate's preference would never predict a unanimous vote, and factoring in the strength of the president and their constituencies' preferences does not provide a complete explanation. There is evidence that Senators will consider partisan, ideological, and their constituencies' preferences in their votes (Overby et al. 1992, Sulfridge 1980). A president's political capital influences his ability to successfully get a Supreme Court nominee onto the bench; an individual senator's strength may affect their ability to preference maximize as well.

**Hypotheses**

Senators generally want their policy preferences to become the law of the land, even if this is not a primary goal in their confirmation votes. Segal et al. (1992) found senators were more likely to vote with their constituencies' preferences if this also lined up with their policy goals. Other studies used the ideology of a significant pivot or the average of the senate as a whole successfully, indicating ideology is a factor senators consider in Supreme Court confirmations. Senators also tend to vote with their parties in Supreme Court confirmation votes; when the executive branch and legislative branch are unified, the chance of a successful nomination is far higher than during times of divide (Whittington 2006). Partisan politics play a clear role in these votes so a senator will need a compelling reason to deviate from their party. Ideology could explain these deviations. If ideology is a factor, then a senator who chooses to deviate from his party will likely have notable ideological differences from his party.

**Hypothesis 1**: A more ideologically neutral senator will be more likely to deviate from their party toward the middle. That is to say, a republican senator voting against a republican president's nominee or a democratic senator voting for a republican president's nominee—if in the minority of his party—will be more ideologically neutral than the average senator in his party.

**Hypothesis 2**: A more ideologically radical senator will be more likely to deviate from their party, or supposing the majority of Republicans are voting to confirm a Democratic candidate, a Republican deviator would likely be more ideologically extreme than the average member of his party.

Given the frequency of unanimous Supreme Court confirmation votes—and the fact that they exist at all—it is evident that senators are not solely attempting to maximize their ideological preferences in these votes. Kastellec et al. (2010) identified constituency agreement as a primary factor influencing senator's votes because unhappy constituents could and would sanction their representatives by voting for a different candidate in the next election. Senators seek to maximize their chances of winning reelection, possibly above all else; “the literature suggests that the reelection incentive drives members of Congress to ‘position take’ in order to identify themselves with their constituents (Mayhew 1974)” (Jones 2003). In general, senators who have served longer will have a higher chance of reelection and may therefore worry less about losing their next election for disappointing their constituents. On average, 82.9% of senators running for reelection between 1960 and 1980 succeeded (Tuckel 1983). A more senior senator may feel more confident in his chances of getting reelected, thus allowing them to vote based on their ideological preference. A senator may also perceive that they will not be sanctioned for voting with the majority of their party given the partisan nature of these votes. Therefore a senator will be more likely to deviate as the length of his time in the senate or the number of times he is successfully elected increases.

**Hypothesis 3**: A senator who has served longer, either in number of years or number of terms, will be more likely to deviate from his party.

Senators care about their constituencies' opinions and will factor their desires into their votes (Kastellec et al. 2010). Supreme Court nominees are considered as an issue in presidential elections. Romney tried to rally far right conservative support by appointing Bork as his judicial advisor during his presidential campaign, gaining significant attention. Therefore, senators whose constituencies did not vote for the president may be less likely to approve of his nominee. Segal did not reach a conclusion on how senators evaluated their constituents' opinions on Supreme Court nominees, only that they did. Perhaps senators look more closely for their constituents’ desires through polling or other methods of determining public opinion—like the ethnic background of their constituents—or they may reach more general conclusions about the desires of their constituencies through their voting trends.

**Hypothesis 4**: A senator will be more likely to deviate for a nominee if their state's electoral votes went to the president in the most recent presidential election and more likely to deviate against a nominee if their state's electoral votes did not go to him.

**Data and Methods**

The nature of how the Senate perceives its role in confirmation votes has changed in the modern era, so only the votes occurring between the present and Johnson’s administration are considered. Since Johnson, the Senate has voted on 22 Supreme Court justices’ confirmations. However, Fortas’ nomination to replace Goldberg in 1965 was a voice vote, so it was omitted, leaving 21 votes. Each of these confirmation votes can be split into two parties from which a senator could possibly deviate, or 42 possible splits. For a senator to deviate from their party, there had to be a clear majority of senators voting one way. This paper considered only instances where at least 2/3 of a party who participated voted one way with at most 1/3 deviating from their party. There were 21 instances of complete party unanimity with no deviation, providing no information about why a senator might deviate, 19 instances of party splits with a clear majority of 2/3, and two instances of a party splitting with no clear majority—22 democrats voted to confirm John Roberts while 22 voted to reject him and Republicans split 27-14 on Carswell’s confirmation. From these 19 party splits, a total of 132 votes were cast by senators deviating from their parties. The analysis is limited to these votes.

The senators are split both by party and by deviation type—moderate deviation and radical deviation. Their ideology is given by their W-Nominate score for the year of the Supreme Court vote. The basis of comparison for republicans is the average of all republican senator’s W-Nominate scores from the 90th to the 110th Congress, the time-period covered by this study, and the basis of comparison for the democrats is the average of all democratic senator’s W-Nominate scores over the same period of time. The number of years in office and whether or not a senator is in their first term was also considered. This is compared both to the average number of years current senators have served and the percentage of senators in their first term, data collected in previous literature (Glassman and Wilhelm 2015, Manning and Peterson 2013). Lastly, the way a senator’s state voted in the previous presidential election is compared to the way they deviated—for or against the nominee and the president who nominated them.

**Results**

There appear to be distinct trends in senators who deviate from the party majority in Supreme Court confirmation votes. First is the examination of the relationship between ideology and deviation. It seemed probable that a senator would be more likely to deviate more moderately if he was more ideologically moderate than the rest of his party and more likely to deviate radically if he were more ideologically radical than the rest of his party. The results are pictured in the table below.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Avg. Ideology of all Senators** | **Avg. Ideology of Deviators** | **Avg. Ideology of Radical Deviators** | **Avg. Ideology of Moderate Deviators** | |
| Democrat | -0.31851 | -0.17993 | -0.43492 | -0.13797 | |
| Republican | 0.33965 | 0.22847 | 0.53508 | 0.09707 | |
| **Difference Between Party Average and Deviator Average** | | | | | |
| Democrat | 0 | 0.13858 | -0.11641 | | 0.18054 |
| Republican | 0 | -0.11118 | 0.19543 | | -0.24258 |

It does seem to be the case that senators are more likely to deviate from their parties the more their ideologies deviate from the norm. The average ideology of both republican and democratic deviators is significantly different than the party averages, although the difference is more pronounced in republicans. The difference between a moderate republican deviator and the average republican is the greatest. A moderate republican deviator is closer ideologically to a neutral or slightly left-leaning stance than the average of the Republican Party. Ideology appears to factor in to a senator’s decision to deviate; hypotheses 1 and 2 both have positive results. The more ideologically extreme a senator becomes, the more likely they are to deviate from their party when most senators vote to confirm a nominee from a president not in their party. The more ideologically neutral a senator, the more likely they are to deviate away from their party to either confirm a nominee from a president not in their party or reject a nominee from a president in their party.

Next, a senator’s length of service is considered in relationship to their deviation. The table below shows the difference between deviating senators and all senators in both average years in the senate and percentage of senators in their first term.

|  |  |  |
| --- | --- | --- |
|  | **Average years of Service** | **Percent in first term** |
| **All Senators** | 11.4[[1]](#footnote-1) | 29%[[2]](#footnote-2) |
| **Deviating Senators** | 14.36 | 21.97% |
| **Difference** | 2.96 | 7.03% |

There is a significant difference between the average for the entire Senate and the deviating senators with respect to their likelihood of deviation. The average deviating senator has been in the Senate almost three years longer than those who vote with the majority, and they are less likely to be in their first terms. When the deviating senators are again broken up by type of deviation—moderate or radical—there is an even more pronounced difference between the majority and deviators.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Deviation Type** | **Number of Senators** | **First Term Senators** | **Percent in first term** | **Average Years of Service** |
| **Radical** | 25 | 14 | 56% | 10.75 |
| **Moderate** | 107 | 18 | 16.8% | 15.28 |
| **Difference between deviators & all senators** | | |  |  |
| **Radical** | \* | \* | 26.8% | 0.65 |
| **Moderate** | \* | \* | -12.2% | 3.88 |

By breaking senators up into radical and moderate regimes, a much more substantive effect of the years of service in the Senate and the number of terms served can be seen. A radical senator is far more likely to be in his first term than the party average—more than half of these deviations occur when a senator is still in his first term. Furthermore, the average years of service is less, not more, than the average for all senators. The results for moderate senators, however, are more in line with what was expected. They have spent an average of 3.88 more years in the Senate and are far less likely to be in their first term than the average. There is also a distinct difference between Republican and Democratic deviators and the length of time spent in the Senate. 27.5% of Republican deviators were in their first term, while only 19.6% of Democratic deviators were in their first terms. Similarly, the average years of service for a Republican and Democratic deviator is 12.53 and 15.16 respectively. While this may seem to indicate that Republican deviators tend to have spent less time in the senate than their Democratic counterparts, this could be a result of the changing nature of the votes. A relatively small number of Republicans deviated prior to Reagan’s presidency. Only 3 Republicans deviated during Ford, Nixon, and Johnson’s presidency—in the Rehnquist confirmation—as compared to 50 democrats in the same time period.

These results partially uphold and partially disprove hypothesis 3. The average radical deviators’ years of service in the Senate directly contradicts hypothesis 3, which suggests senators who have served longer will be more confident in their ability to get reelected and will therefore feel more confident in deviating. On the contrary, more moderate deviators clearly support the original hypothesis. Perhaps more junior senators feel pressure to vote against a president of an opposing party in order to show their conservative or liberal values and continue to get reelected. Alan Dixon, whose deviation is mentioned in the introduction, was a first term senator sanctioned by his constituents for voting more moderately than the rest of his party. There is also significant proof that senators feel more confident voting more moderately the longer they have been in office. Senators in their first term are far less likely to deviate moderately than the average senator, as the fear of sanctioning is a concern.

Finally, the relationship between how a senator’s state voted in the previous presidential election and his deviation will be discussed. Hypothesis 4 suggested that a senator may be incentivized to deviate to match his constituent’s perceived approval of the president. Specifically, that a senator would be more likely to deviate for a president’s nominee if their state voted for the president and less likely to deviate for a president’s nominee if their state voted for a different candidate in the most recent election. The results are pictured below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Voted with Constituents** | | **Voted against Constituents** | **Percent Agreement** |
| **Total** | | 76 | 56 | 57.6% |
| **"Aye" votes** | | 25 | 26 | 49% |
| **"Nay" votes** | | 51 | 30 | 63.8% |

From these results, it can be seen that a senator’s deviation matched with the constituent’s preferences in 57.6% of the deviations. While there does seem to be some correlation, it is relatively weak. When the type of vote the senator cast is considered, in favor of or against the confirmation, the results are drastically different. A senator is slightly less likely to vote to confirm a candidate than it seems like their constituents would prefer, and is significantly more likely to vote to reject a candidate if this seems consistent with their constituent’s preferences. Hypothesis 4 has mixed results—senator’s deviations tend to match with the perceived preferences of their constituents only when voting to reject. This suggests that senators seeking to match their constituent’s preferences on Supreme Court votes may use the previous presidential vote to determine this preference occasionally.

**Conclusion**

All four hypotheses had some positive results—although the results for length of service in the Senate had to be reframed to include moderate and extreme regime type and were only partially upheld. This study suggests that senators will deviate for a number of reasons; they wish to have their ideological preferences maximized and, perhaps more importantly, they want to be reelected. It also suggests a way senators may gather information on their constituents and that the behavior of first term senators is radically different from their more senior colleagues. Future research can both benefit from and expand upon these findings and the method of analyzing deviating senators.

As the length of time a senator has served increases, it seems more likely that the senator will deviate moderately and less likely that the senator will deviate radically. Future research could benefit by considering the average number of years a senator has served in its analysis of Supreme Court confirmation votes. Models for predicting a confirmation or rejection could be improved by factoring in the likelihood of a senator voting more moderately or more radically, which correlates to length of time in service, in addition to variables like the president’s political capital and the ideological median of the senate and the filibuster pivot. A model considering either the average length of time a senator has been in office or the percentage of first term senators may be far better at predicting the outcome of a confirmation vote than those without such considerations.

This paper does not contain an exhaustive list of factors that could contribute to a senator’s decision to deviate from his party; expansion upon the results is certainly possible. Factors such as party cohesion, presidential capital, and the ideology of the nominee were not considered, but could all play a significant role in informing a senator’s decision to deviate. Additionally, there is room to expand upon how constituents’ preferences are gathered and considered in Supreme Court confirmation votes. There is evidence that senators may use presidential elections to discover their constituent’s desires, but they may use other methods to gather information. Perhaps senators from certain regions—those who are impacted more greatly by the Supreme Court or are geographically closer—are more likely to gather extensive information about their constituents’ preferences and adhere to them. Considering specifically senators who deviate from their political parties has provided insight into what factors effect a senator besides partisan politics, or what factors are more important than partisan politics.

Additionally, the method of analyzing deviators rather than looking at the entire senate has promising results. It allows for an analysis of votes that is more nuanced than a vote simply to confirm or reject a nominee. If a senator votes with his party, the pressure to conform along party lines could trump any other factors; this pressure is eliminated when only considering deviators. It also allows for the separation of votes into regimes of moderate and radical. The effects of seniority on a senator’s decision to confirm or deny would not have been evident from a model considering every senator’s vote rather than just the deviators. This type of analysis could be applied outside of Supreme Court confirmation votes, providing additional information on factors that affect how congressmen vote, especially in highly partisan issues.

One of the more interesting things that can be noted by looking at all the deviations in this study is that they made a difference in the vote only once. That is to say, in the 14 instances of party splits with clear majorities, there was only one case where the outcome of the vote would have changed if the entire party had voted with the majority. In Clarence Thomas’ nomination vote, if the 11 democrats who deviated by voting to confirm Thomas had instead voted with the majority of their party, he would have been rejected. This seems to suggest that senators may be less likely to deviate from their party if this deviation would have an impact on the outcome of the vote. The perceived repercussions, both from within the party and from constituents, may be less severe if a vote is symbolic rather than substantial.

The analysis of senator deviations in Supreme Court votes has provided significant insight into how and why senators may choose to confirm or deny a candidate. While senators are perfectly divided along party lines, with no deviators, the majority of the time, this is not always the case. These special cases provide a deeper insight into factors effecting the confirmation vote because they are absolutely separate from party influence.

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1. This is the average for the 112th Congress (Glassman and Wilhelm, 2015) [↑](#footnote-ref-1)
2. The percentage of senators in their first term is given by an average of the percentage of new senators in each congress from the beginning of the study, the 99th congress, to the 113th congress. This is 9.57% (Manning and Peterson, 2013). This number is multiplied by 3, as an average of 1/3 of the Senate is elected in each new Congress, to arrive at the average percentage of senators in their first term in the time period covered by this analysis. [↑](#footnote-ref-2)