

2010

# Predicting public approval of Supreme Court nominees: examining factors influencing mass public opinion of stealth nominees in the post-Bork era

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**Predicting public approval of Supreme Court nominees: examining factors influencing  
mass public opinion of stealth nominees in the post-Bork era**

by

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A thesis submitted to the graduate faculty  
in partial fulfillment of the requirements for the degree of

MASTER OF ARTS

Major: Political Science

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2010

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## ABSTRACT

Conventional wisdom asserts that the American public is ignorant of the Supreme Court and thus, the opinions of average citizens are irrelevant, both in the confirmation debates regarding nominees to the Supreme Court and as a tool of political mobilization. In light of the Seventeenth Amendment's direct election of the Senate and the Senate's advice and consent role, mass public opinion is relevant regardless of the sophistication of their input. Moreover, mobilization of mass public approval or disapproval of nominees is a factor influencing the strategies of partisan politics in general.

It is clear that the public is aware of Supreme Court nominees and they evaluate the nominees on two different bases. First, the public evaluates nominees based on an ideological model to the extent of the information the public possesses about the ideology of nominees. Second, the public assesses nominees on the basis of judicial qualification and suitability for the position of Supreme Court justice, what Gibson and Caldeira refer to as "Judiciousness." This two part evaluation mirrors part of Abrahams' model of executive decision making for Supreme Court nominations.

Given that stealth nominees, herein defined as nominees with limited judicial records, by their nature provide little insight into their ideological beliefs, they do not provoke significant disapproval among the mass public on that basis. Provided they meet some minimum standard of judiciousness, approval of stealth nominees is not negatively affected by the lack of knowledge about the nominee's ideology. Thus, in the cases examined herein presidents were able through the nomination of stealth candidates to avoid public disapproval their nominees to the Court.

## CHAPTER 1. INTRODUCTION

In the past five years the membership of the Supreme Court of the United States has changed dramatically with just less than half of its current members joining the Court in that time. We have gained a new Chief Justice of the Court and three additional Associate Justices. Moreover, many analysts predict that due to the death of Justice Ruth Bader Ginsburg, President Obama will likely have at least one more opportunity to nominate a Justice during his presidency. Thus, in seven years' time we will have seen a majority of the Justices on the Court join that body.

In the most recent addition to the Court, President Obama nominated and the Senate confirmed Elena Kagan. The nomination of Justice Kagan, a former law professor and Dean of the Harvard Law School broke from the recent pattern of nominating sitting federal judges. Her nomination came in the immediate wake of the nomination and confirmation of Sonia Sotomayor early in Obama's presidency. Justice Sotomayor, in contrast to Justice Kagan, however, had spent almost two decades on the federal bench before her nomination. In nominating these two jurists, President Obama does not appear to be following any specific strategy with regard to whether he nominates experienced jurists or nominees with limited or no experience on the federal bench.

President George W. Bush, during his second term in office, also nominated and secured the confirmation of two new members of the Court, John Roberts and Samuel Alito. These two Bush nominees were both elevated to the Supreme Court from positions on the US Court of Appeals. While Justice Alito had been on the Third Circuit Court of Appeals for sixteen years, Chief Justice Roberts had spent just two years as a member of the federal bench before joining the Supreme Court as its Chief Justice.

The nominations and the subsequent political battles over confirmation for each of these recent nominees were the subject of extensive national media coverage. The process in each instance and the individuals themselves were topics of national discussion and public scrutiny. In these cases, as in each modern Supreme Court nomination, one key element to the discussions and debates has been mass public opinion on the nominee. Not only have the discussions focused on the ideology of the nominee, but also questions about whether the public is satisfied that the nominee is qualified for the position and that the public knows enough about the views of the nominee.

Pointing to the successful and less controversial nomination of John Roberts, some argue that when presented with the opportunity to nominate a candidate to the Supreme Court, a president should be advised to nominate someone about whom little is known, a so-called “stealth nominee.” While the term stealth nominee is not used consistently in either the media or scholarly literature, for purposes of this examination, it will be used to mean a nominee with a limited judicial record as a member of the federal bench. Some have also used the term to include a nominee who employs evasive tactics with the goal of intentionally concealing his or her ideology and opinions during the confirmation process; however, tactics used to conceal ideology in the confirmation process are beyond the scope of this inquiry and thus that is not part of the definition of stealth nominee used herein.

Roberts was nominated by President George W. Bush after having spent only two years on the Court of Appeals for the DC Circuit. That followed a decade in spent in private legal practice. His nomination is clearly “stealth”, as defined herein, and he was confirmed to the position of Chief Justice by a vote of 78 to 22. This nomination of a jurist with limited experience as a federal judge, and thus about whom little is known, is in contrast to

nominations of federal judges with a long tenure on the bench, and thus, a well-established record of jurisprudence such as Samuel Alito and Sonia Sotomayor. It is reasoned, by proponents of the stealth strategy, that it would be hard for the public, or the Senate, to disapprove of a candidate about whom they know very little.

This concept of strategically nominating “stealth nominees” then raises further questions regarding public approval of nominees. It raises the initial question of whether public approval is even a relevant factor to consider in the nomination of justices. It raises questions about whether the public knows enough to evaluate Supreme Court nominees. Additionally, it raises the issue of upon what basis the public evaluates nominees to the Supreme Court and whether the public believes we should know certain information about a nominee’s views before approving of that nominee.

While much scholarship has been written on the public ignorance of the Supreme Court, controversial nominations, and the strategic considerations regarding Senate confirmation of nominees, there is less scholarly work in the area of public evaluation of nominees, particularly in the context of stealth nominations. Most commentators generally view the successful nomination and confirmation of David Souter as an Associate Justice to the Supreme Court as the birth of the “stealth nominee” strategy. Upon further reflection, however, the failed nomination of Douglas Ginsburg also fits the model. Additionally, the nomination and confirmation of John Roberts as Chief Justice is a recent application of the “stealth nominee” strategy. By examining these examples of stealth nominations, I seek to evaluate a model of public approval in light of concerns regarding ideology, judicial qualification and adequate disclosure.

Each of the data sets used in this research have been acquired through the Inter-University Consortium for Political and Social Research (ICPSR) at the University of Michigan. These data were originally collected by the American Broadcasting Company New Division (ABC News) and ABC News, in conjunction with the Washington Post and through its subsidiary Chilton Research Services, which have conducted several polls with regard to Supreme Court nominations.

Reliance on the available data regarding historical public opinion constrains certain lines of inquiry based on the nature of the data collected and the form of the questions used. While each separate data set necessitates analyzing them independently, generalizations will be made based on analogous lines of inquiry in the multiple surveys to develop the models of public approval. Additionally, while the timing and frequency of data collection varies slightly between the three polls relied upon, each fits within the proposed model of mass public approval. As has been noted by other researchers, the unexpected nature of Supreme Court vacancies and the unspecified process of generating potential nominees, often leads to inconsistent and less than comprehensive data collection. It is only in rare cases that multiple polls or panel data have been collected regarding a nominee. That type of data is available for the Clarence Thomas nomination, since his nomination, more than any other has been studied and analyzed. It is not surprising that the data was gathered and is available in the case of the Thomas nomination, since it was the subject of such media and academic scrutiny. To a lesser extent, such data is also available for the Samuel Alito nomination. Again, the nature of the data collection does not impact the model of public approval discussed herein.

## **CHAPTER 2. PREVIOUS LITERATURE**

The Supreme Court is the branch of our national government charged with adjudicating many of the most controversial issues in American politics. Increasingly, over the second half of the twentieth century, it has been at the center of a firestorm of public debate and protest. It has confronted issues of race, gender, sexuality and reproductive health. Serving in such a prominent role, it could be argued that the Court would be prominent in the political concerns of the public. On the contrary, most research tells us that the public is woefully ignorant of the Supreme Court (Gibson and Caldeira 2007 (criticizing traditional methodology, while recognizing the axiomatic nature of the point), Gimpel and Ringel 1995, Caldeira 1991).

### **2.1 Relevance of Public Opinion of Nominees**

While the conventional wisdom about public opinion and Supreme Court nominees stresses the ignorance of the masses, a more fundamental question is whether public opinion is even relevant. Under the United States Constitution, the general public does not have any role in the selection of the Court's membership, the evaluation of the Court's functioning or holding individual justices accountable to the will of the people. While some jurisdictions within the United States have popularly elected judiciaries or judges subject to retention elections, that is not the model of our federal court system. Our federal court system stresses the independence of the judges, with life time terms and isolation from democratic accountability once confirmed to the bench. Thus, one could ask if it matters whether the masses pay attention to or have opinions about potential nominees to the Court.

Despite the lack of a constitutional role in the process, the argument is made that public opinions regarding nominees are important, in that the public holds the Senate

accountable for its confirmation or rejection of nominees through the election process (Kastellec, Lax and Phillips 2010, Gimpel and Ringel 1995). While Gimpel and Ringel argued that public opinion may impact how senators vote due to evaluation of constituents' views, Kastellec, Lax and Phillips actually developed a model based on state-specific public opinion data which showed that public support significantly increased the likelihood of senators voting to confirm a nominee (Kastellec, Lax and Phillips 2010, Gimpel and Ringel 1995). Following this line of reasoning public opinion has been relevant to the process ever since the Progressive Era reform of the Seventeenth Amendment made the Senate popularly elected. Moreover, in the heightened partisanship of late 20<sup>th</sup> and early 21<sup>st</sup> century American politics, the mobilization of voters over issues of judicial ideology and court activism increase the relevance of public opinion as well.

Regardless of whether Kastellec, Lax and Phillips are correct in their model of a direct relationship between mass public opinion and Senate voting, it has been shown that senators are aware of and concerned with constituent opinions when they vote on Supreme Court nominees (Overby et al., 1992). It is through this public awareness, and the pressure it appears to place on senators, that Presidents utilize the option of "going public" and expending political capital to increase the chance of confirmation (Johnson and Roberts 2004). The clearly increasing role of interest groups and political advertising in the confirmation process would also support that the political process of mobilizing of public opinion has an impact (Johnson and Roberts 2004; Segal, Cameron and Cover 1992).

This politicization of the process and the public role changed with the Robert Bork Supreme Court confirmation hearings, as well as the later Clarence Thomas hearings. These two confirmation hearings have altered the public's awareness of and its role in the Supreme

Court nomination and confirmation process. These two nominations, more than any others, are cited as the seminal conflicts in the battle for ideological control of the Supreme Court at the end of the 20<sup>th</sup> century (Gimpel and Wolpert 1996). Not only were they marked by fierce debate in elite circles, they involved, grass roots lobbying, advertising and intense media scrutiny (Nemacheck 2007; Frankovic and Gelb 1992; Mansbridge and Tate 1992). In fact, these nominations were seen by scholars as so different from the historical norms or previous confirmations, that they began to resemble political campaigns more than traditional confirmation hearings (Gimpel and Wolpert 1996, 164; citing Overby et al. 1992).

## **2.2 Public Ignorance of Nominees**

The conventional wisdom's assertion of public inattention to the Supreme Court and its proceedings, also applied to the nomination of potential justices at least until the Reagan administration (Frankovic and Gelb 1992). Historically, the nomination and confirmation process had been seen as one that was removed from public attention or involvement (Frankovic and Gelb 1992). Article II of the Constitution, provides that the President shall have the power "by and with the Advice and Consent of the Senate" to appoint judges to the Supreme Court. (Article II, Section 2, US Constitution). Prior to the Reagan administration's nominees, polling of the public about nominations, when it had been done, was done to see public opinion of newly confirmed justices or of senate action to reject a proposed nominee (Frankovic and Gelb 1992, 481 (citing polls on the confirmations of Hugo Black and Felix Frankfurter and the rejections of Clement Haynesworth and Harold Carswell).

Public awareness of the nominees and the role of public opinion changed in 1987 with Ronald Reagan's nomination of Robert Bork to the Supreme Court. With Bork's outspoken political positions, his repeated criticism of the majority opinion in *Roe v. Wade*

and his role in the “Saturday Night Massacre” firing of Watergate Special Prosecutor Archibald Cox, he became a major topic of media coverage, and a lightning rod for criticism from liberal Democrats in the Senate and liberal interest groups attempting to derail his confirmation to the Court (Davis 2005). His failed nomination led to the coining of the verb “Borking”, which is understood to mean sinking a Supreme Court nomination based on political/ideological considerations. It may also be asserted that his failed nomination served as a catalyst in the creation of the “stealth nominee” strategy.

While the post-Bork era has seen considerable scholarship on Supreme Court nominees, the scholarship has frequently been focused on the politics within the Senate confirmation process (Cameron, Cover and Segal 1990; Gimpel and Wolpert 1995; Shipan and Shannon 2003; Johnson and Roberts 2004; Epstein et. al 2006; Nemacheck 2007). Robert Bork’s highly publicized and controversial nomination, or more accurately those nominations which have followed it, can provide us insights not only into the Senate and its role in confirmation, but also public awareness of Supreme Court nominees, public opinions regarding nominees and models of their evaluation and approval of nominees during the confirmation process.

Due to the general inattention of the public to the activities and personnel of the Supreme Court, one question that is often posed is whether the disputes over nominations, even those of visible and controversial nominees, trickle down to the masses (Gimpel and Ringel 1995). Despite the arguments that the Court and its membership should be of significant importance to average Americans, many scholars argue that this not the case. They assert that generally American citizens know very little about the Court and its functions (Gimpel and Wolpert 1996). In response to phone surveys, most American’s

cannot identify the members of the Supreme Court (Gibson and Caldeira 2007). Not knowing even the membership of the Court, scholars assert that the public lacks an understanding of the ideology and judicial philosophies of the various justices that make up that body. Moreover, the overwhelming majority of the Court's decisions, let alone the jurisprudential principles upon which they are decided, escape public attention or scrutiny (Gimpel and Wolpert 1996).

A small, but growing school of revisionist scholars counter that the methodology of the surveys used in assessing the public's knowledge of Supreme Court membership is simplistic and fails to accurately reflect the public's knowledge (Gibson and Caldeira 2007; Gibson and Caldeira 2009; Hoekstra 2003). They assert that rather than accurately assessing what the public knows about the Court, surveys assess what scholars wish the general public knew. Moreover, the coding of free-response open-ended answers as incorrect in some surveys, such as the ANES was questionable (Gibson and Caldeira 2009). In one example cited, responding that William Rehnquist was a Supreme Court Justice was incorrect if the respondent did not identify him as the Chief Justice.

In contrast to the traditional line of inquiry, Gibson and Caldeira demonstrated that nearly 80 percent of survey respondents were aware that one Justice was an African-American. In response to a follow up question in which they were given multiple choice options of name more than 80 percent of those asserting there was an African-American justice were able to pick out Clarence Thomas as that individual. Similarly, more than 80 percent of respondents were able to answer correctly that there was at least one woman on the Court. Additionally, respondents were successful, although not as much as in the previous example, in picking out Sandra Day O'Connor's name from a list of female federal

judges. Thus, with different question types, the public scored significantly higher than most scholars on public awareness of the Court would have one believe.

Gibson and Caldeira also assert that the public's knowledge of the appointment process and awareness of the concept of judicial review demonstrate a better understanding of the Court than many commentators are willing to recognize. Gibson and Cladeira provide data that 44.4 percent of respondents were able to correctly answer that justices are appointed, serve a term of life with good behavior and that they have the ultimate say on constitutional interpretation (Gibson and Caldeira 2009). They assert that this demonstrates a reasonably sophisticated knowledge of the Court and how it functions. These results do not demonstrate a great degree of sophistication, and additionally they confirm that the majority of respondents failed to correctly answer all three of those basic questions about the US Supreme Court. Moreover, the minority of respondents who were able to answer those inquiries correctly merely demonstrated a basic knowledge of a political institution at the level expected of those seeking to be naturalized as citizens.

### **2.3 Models of Public Approval**

As mentioned above, the nature of the Supreme Court nomination and confirmation process has changed in the post-Bork era. The nomination process has become a salient aspect of political debate in American society (Nemacheck 2007; Gimpel and Wolpert 1996). This public awareness, combined with the campaigning efforts on behalf of nominees, has arguably expanded the role of the general public in the debate (Gimpel and Wolpert 1996; Gibson and Caldeira 2007). Thus now, more than ever before in the nomination process, it is important to explore public opinions about Supreme Court nominees and about factors upon which their approval of confirmation turns.

Even in low salience nominations, where there is initially no major public controversy, public opinion is still important because, “[l]atent or unfocused opinions can quickly be transformed into intense and very real opinions with enormous political repercussions (Gimpel and Wolpert 1996).” Senators who are concerned about public scrutiny of nominee confirmations must then anticipate not only public attitude, but also the likelihood of it being inflamed and made an issue relevant to their own reelection to the Senate.

Senate confirmation hearings of Supreme Court nominees, and public debate over them, have often focused on the two key inquiries of judicial qualifications (i.e., experience on the bench) and political ideology (Cameron, Cover and Segal 1990; Epstein et. al 2006). These are also the first two factors articulated by Abraham in his four factor model of what presidents and their advisors consider in evaluating potential nominees (Abraham 1999). While Abraham’s model also includes balancing representation on the Court and personal friendship as additional factors that drive presidential decision making, those lines of inquiry have not been the subject of much research in the area of mass public opinion (Abraham 1999; Nemacheck 2007). Some scholars have created models for Senate confirmation voting which take into account not only ideology of the nominee, but also the nature of the vacancy based on the remaining makeup of the Court, public opinion models are less apt to include the court balancing as a factor (Cameron, Cover and Segal 1990; Epstein et. al 2006).

Gibson and Caldeira have recently put forth two models of public preference in the confirmation process, which they call the Policy Agreement Model and the Model of Judiciousness (Gibson and Caldeira 2009). Their Policy Agreement Model is driven by assessment, correct or incorrect, by the public about the ideology of a nominee and how

closely it mirrors that of the survey respondent. In their Model of Judiciousness, Gibson and Caldeira sought to identify characteristics viewed as important to being a judge (e.g., fairness, respect for existing precedent, and the willingness to protect people without power) and determine the degree to which the public believed the nominee would embody those attributes. While their model goes beyond mere experience, a long judicial career would tend to provide evidence or expectations that a candidate would possess such judicious attitudes and behavior.

In their research and modeling, Gibson and Caldeira intentionally focused on the Samuel Alito nomination because of the fact that it was divisive and controversial. Much like the scholarship on the Bork and Thomas nominations, they viewed the issue of Alito's outspoken conservative views as a vehicle to explore mass public opinion on nominee ideology and judiciousness in shaping public opinion. Thus, they stressed the debate of whether Alito's conservative ideology was perceived by the public as being outside the mainstream. Additionally, they sought to determine whether the public believed Alito's judicial experience would provide him the ability to act in judiciously as a member of the Supreme Court.

In modeling public opinion of controversial Supreme Court nominees, Gibson and Caldeira assessed the degree to which ideological distance between the nominee and the public determined public approval. They found that not only ideological distance but also partisanship were moderately strong variables in determining public opinion on whether he should be confirmed. Thus, Democrats tended to disapprove of Alito's confirmation, but so long as the majority did not perceive Alito's views as extreme, they would generally support his confirmation.

The Gibson and Caldeira model, however, added the factor of judiciousness and demonstrated that its relationship to approval eclipsed ideological distance and partisanship in the ability to predict approval. They demonstrated that while a combined model of ideology and partisanship could only explain 21 percent of the variance in preference, the expectation of judiciousness increased that to a model which predicted 39 percent of variance.

Since Gibson and Caldeira have intentionally developed their model of public approval in the context of the divisive and partisan Alito nomination, it remains unclear how mass public opinion on ideology would affect approval in stealth nominations, where ideology of the nominee is difficult to determine given the limited judicial record as a member of the federal bench. Moreover, since stealth nominations remain largely unstudied, it is uncertain whether public approval can be secured by meeting some minimum standard of judiciousness, even when the public lacks substantial knowledge of the nominee's ideology. Thus, in this examination I seek to develop a models predicting mass public approval of stealth candidates nominated by Republican presidents in the post-Bork context. Due to the nature of stealth nominations, and based on the limited research that exists on stealth nominees, I hypothesize that partisanship is less significant than in controversial nominations and that approval is more directly influenced by vague assessments of the qualification of the nominee.

### CHAPTER 3. RESEARCH DESIGN

Given that little scholarly research has focused on models of public approval in stealth nominations, this inquiry will seek to analyze available survey data regarding such stealth Supreme Court nominees in the Post-Bork era. Rather than examine post-Bork nominations generally, the study will focus on three different examples of stealth Supreme Court nominations. It will begin with the nomination of Douglas Ginsburg in 1987. It will examine the David Souter nomination in 1990. It concludes with John Roberts' nomination to the Supreme Court in 2005.

Douglas Ginsburg's nomination by Ronald Reagan in October of 1987 was the first nomination to the Supreme Court in the Post-Bork era. While his nomination was never formalized and he withdrew before going through the confirmation process, his nomination serves as a starting point in the post-Bork. Largely ignored by scholars and not generally considered a stealth nomination, it is arguably the proto-stealth nomination. He was nominated at a point in his career when he had less than one year of experience as a member of the federal judiciary, making it difficult to assess his ideology and judicial philosophy from the limited judicial record. His nomination is also of interest in that it was a stealth nomination which failed due to an excess of information being discovered that derailed his nomination.

The second data set analyzed herein was collected following the nomination of David Souter to the Supreme Court in 1990. Souter's nomination to fill the vacancy of William J. Brennan, Jr. by President George H.W. Bush is generally credited with being the original implementation of the "stealth nominee" strategy. As the quintessential "stealth nominee",

public opinion on Souter is valuable to developing a working understanding of the factors that shape public approval in this context.

The final data set examined in this paper is one collected following the nomination of John Roberts to the Court in 2005. His nomination by President George W. Bush is considered a recent application of the “stealth nominee” strategy. As the clearest example of a recent use of the “stealth nominee” strategy, it provides critical insights to public perceptions of such nominees today and models for public approval.

The inquiry into each data set begins with statistical descriptives from the individual surveys. Taking cues from existing literature, this examination explores the perception of general public ignorance and apathy with regard to the Supreme Court and its make-up. Specific concepts noted include awareness of the public regarding nominees, public approval of the nominees, as well as questions regarding how much should be known about the political and judicial views of nominees.

Following the discussion of descriptive aspects of the survey data, this study examines the relationships between variables within the individual data sets. In each of the cases, the inquiry focuses on the critical relationships between nominee approval and variables regarding experience/qualification of candidates and ideological beliefs/political views and judicial philosophy.

Finally, through the use of regression analysis this inquiry attempts to establish in each case the relationship between the dependent variable of nominee approval and the independent variables of nominee qualifications, knowledge of nominee’s political views and judicial philosophy on certain issues, as well as the party identification of the survey respondents. Through such regression analysis the study asserts a simplistic model of

nominee evaluation and approval, which does not envision a public that is both capable of understanding complex jurisprudential issues and then assessing the beliefs of potential nominees and the degree to which those views agree with their own. The model proposed herein asserts that partisanship is not relevant in determining approval in stealth nominations and that approval is driven primarily by assessments of qualification.

Through review of media coverage on the Roberts nominations, it appears that Roberts' successful confirmation should have reenergized the "stealth nominee" model, however, it did not and the subsequent Alito and Sotomayor nominations were both of long-tenured judges. This may have been in response to a public that expresses a desire for qualified jurists, however, it may also be a response to the public's desire to know the political views and judicial philosophy of nominees before they are confirmed. That is particularly the case in the area of reproductive rights and the precedents set by the decision in *Roe v. Wade* and its progeny.

In the model put forth in this research, it is hypothesized that specific information related to the nominee, to the extent that it is known, is also predictive of public approval. Regardless of whether that assessment is a fact is personal in nature, such as illegal drug use, or whether it is related to ideology, such as beliefs about abortion. Thus, the less the public knows about a nominee, the less likely they are to disapprove. Therefore, in the highly partisan post-Bork era, a president who is seeking to avoid having his nominee fail to meet public approval might be advised to nominate a "stealth nominee" to avoid controversy and the risk of another Bork-style confirmation hearing. Moreover, it is hypothesized that that while partisanship is a predictive factor of approval in controversial nominations of

experienced federal judges, as Gibson and Caldeira found in their model, it plays a smaller role, or no role, in approval in the stealth context.

Finally, the model put forth herein hypothesizes that while specific negative factors impact approval of the nominee, the public generally accepts and approves of qualified candidates absent some other specific negative factor regarding the nominees. With acceptance of a candidate as “qualified”, the public accepts their appointment regardless of the degree of their actual knowledge of the candidate’s ideology or even when they disagree with the justice.

### **3.1 VARIABLES**

Based on Kastellec, Lax and Phillips’ model of senate confirmation voting, as well as Gimpel and Ringel’s conclusion that public opinion on the approval of nominees is meaningful in the Senate confirmation process, the key dependent variable that will be measured is approval of nominees by the mass public. It will be measured in each of three separate public opinion polls regarding the nominations of Douglas Ginsburg, David Souter and John Roberts to the Supreme Court.

Based on the survey data available and the hypotheses that are being tested, the key independent variables for this inquiry include opinions about the qualification of a particular nominee for the Supreme Court, opinions about the nominee’s ideology, opinions about whether more should be known about the views of nominees, and the party identification of the survey respondents. While previous research has already established links between the evaluation or approval of the President and approval of the nominee, each of the surveys upon which this research is based does not include this data. In cases of high presidential approval ratings, the President may serve as a cue for the public in forming their opinions

regarding a nominee. In each of the nominations studied in this paper, the nominating president was Republican. Thus, party identification could still allow the president to serve as a cue for opinion formation. I do not assert, however, nor provide data to support the degree of approval that the individual nominating presidents enjoyed at the time of selecting and announcing the nominees or the role presidential approval might have in approval of the Supreme Court nominee.

While in certain controversial, high-profile nominations race and gender have been factors that influenced opinion formation, those nominations involved the nomination of minority candidates such as the Clarence Thomas nomination (Mansbridge and Tate 1992). Since the nominations involved in this inquiry do not involve women or blacks, this was not a focus the inquiry. It is for that reason that the research stressed the other identified independent variables of ideology and party identification.

### **3.2 MEASUREMENT**

The variables in this research have been measured through a series of public opinion research polls where respondents were questioned in phone interviews pursuant to a script. Each of the polling scripts varied slightly based on the inquiries being conducted by the polling organization, but there was commonality between these three public opinion polls which spanned the period from 1987 to 2005. The items in the opinion polls include among others the following: 1) Do you approve of the candidate's nomination to the Supreme Court? 2) Would you say that the nominee's qualifications should lead to their confirmation as a Supreme Court justice? 3) Do you think the nominee should state his opinion on abortion? and 4) Do you think of yourself as a Republican, a Democrat, an Independent or what? Depending on the survey question being analyzed, the type and level of measurement

varies. The data generated in the three surveys is generally, nominal and ordinal data, with very little interval or ratio scale data.

### **3.3 DATA**

The surveys to be utilized were developed and implemented by ABC News, Chilton Research Services (the historical research arm of ABC News) and Taylor Nelson Sofres Intersearch. Each of the surveys were developed and implemented for ABC News and/or the Washington Post newspaper. The households in the survey were selected by random-digit dialing. The respondent within the household was chosen by the adult living in the house and present who last had a birthday. Thus, the data is not original data collected for the purpose of this inquiry, yet it was collected pursuant to common professional standards of polling research.

While opinion data was sporadically collected with regard to the confirmation of Supreme Court justices historically, it was only in the past couple of decades that such data is widely available. In response to President Reagan's controversial nomination of Robert Bork to the Supreme Court, news organizations like ABC News and the Washington Post began collecting significant amounts of data on Supreme Court nominees. Traditionally, each poll was idiosyncratic to the specific issues of the nominee (e.g. Ginsburg: drug use, conflict of interest and wife's professional acts; Bork: Watergate, racism, and sexism; Thomas: race, affirmative action, and sexual harassment), but the Bork nomination and the post-Bork era also set the stage for the war over the ideological direction of the court. Thus, survey research regarding subsequent nominees, in addition to certain idiosyncratic questions, pursues a more general analysis of issues such as approval, qualification and ideological questions about nominees.

In completing their research, Gimpel and Wolpert relied on opinion surveys regarding Rehnquist, Bork, Souter and Thomas nominations. They pointed out that the data for other nominations including "Ginsburg, Breyer, O'Connor, Scalia and Kennedy were either unavailable or did not contain sufficient information for analysis (Gimpel and Wolpert, 165)." In an effort to eliminate some of the inconsistency of early surveys, and to limit the scope of the inquiry, the data sets used in this research are confined to relatively recent nominees to the Court. While earlier survey data is available through the Inter-University Consortium for Political and Social Research (ICPSR) at the University of Michigan, in analyzing "stealth nominees" it make sense to limit the inquiry to post-Bork nominees and in particular Ginsburg, Souter and Roberts.

While there is significant consistency among the three surveys, it is important to acknowledge that the three surveys were developed independently over nearly two decades. Therefore, there is also variation in the questioning that was utilized. Because of this problem of survey sections which are too idiosyncratic to the specific issues of a particular nomination, I attempt to limit my inquiry to those areas of questioning which are the most consistent across the three nominations.

Additionally concerns exist regarding the fact that the timing of the surveys, and thus the collection of data, was not consistent to the same point in the nomination process. In particular, the Ginsburg survey data was before his nomination to the Court was made official, while the Roberts data was collected after he had been officially nominated to the position as an Associate Justice, but before his nomination was withdrawn and he was nominated to the position of Chief Justice. Thus, the collection of data and particularly the timing of when during the nomination process the data was collected is problematic. Since

one minor aspect of this research is the public's desire to know more about the views of nominees, it would have been ideal if the surveys had been conducted at approximately the same time during the nomination process. Unfortunately such consistency is not possible based on the data which is available, however, it does not appear to have any measureable effect on the ability to create a basic predictive model of mass public approval.

## CHAPTER 4. DATA ANALYSIS

The initial analysis for each of the nominations involves descriptive statistics of what the public opinion is on various inquiries asked in the survey. The examination includes whether variations occurred between the three polls and to what degree they varied. One issue that it raises is whether it might be appropriate in future polling to develop consistent questions regarding ideology of nominees and whether we might attempt to separate political views of nominees from the judicial philosophy of nominees. In their recent scholarship on the Alito nomination Gibson and Caldeira were able to maintain consistent lines of inquiry in multiple polls, which might serve as a guide for future survey research in this area. Due to the generally accepted ignorance of the public by most scholars, it is unlikely that they would push for questions that distinguish between ideology and judicial philosophy. It is assumed that most respondents would not have evaluated nominees at that level of distinction, or appreciate a variation of that nature when questioned as part of a telephone interview. Thus, it might not be a meaningful distinction.

Following the descriptive analysis of each individual data set, correlations are examined between variables within the individual data sets. In particular, the correlations stressed include: approval and variables regarding qualification of candidates and nominee ideology. To the extent possible from the data, the inquiry analyzes whether the public has concerns about their knowledge of the nominees' beliefs.

Finally, through linear regression I attempt to examine a model which predicts of the relationship between the dependent variable of public approval of the nominee and various independent variables, including nominee ideology and qualification.

#### 4.1 DOUGLAS GINSBURG

In the fall of 1987, Douglas Ginsburg spent less than two weeks as a nominee for the United States Supreme Court. Due to the brevity of his nomination and the survey data available, this nomination is often overlooked or ignored by researchers. Most researchers have concentrated on the nominations and confirmation hearings for Robert Bork or Clarence Thomas instead. The Ginsburg nomination, however, is interesting for several reasons. First, it was the first nomination in the so called “post-Bork era”. Second, due to its brevity, it gives us insight into how quickly opinions are formed and what factors might shape those early opinions. Third, it further clarified the public’s beliefs about what are appropriate considerations, including personal lifestyle, qualifications, and ideology, in the selection of a Supreme Court Justice.

The data utilized in this paper were made available by the Inter-university Consortium for Political and Social Research. The data utilized are known as the *ABC NEWS GINSBURG POLL, NOVEMBER 1987*. They were originally collected by Chilton Research Services, a subsidiary of ABC News.<sup>1</sup> The poll was taken in the days following President Reagan’s announcement of his intent to nominate District of Columbia Circuit Court Judge Douglas Ginsburg to fill the vacancy on the United States Supreme Court created by the retirement of Supreme Court Justice Lewis Powell. The sample was drawn by the Random Digit Dialing Method from the contiguous forty-eight United States. The researchers then interviewed the person at home who was over 18 and had most recently had

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<sup>1</sup> Neither the collector of the original data nor the Consortium bear any responsibility for the analyses or interpretations presented here.

their birthday. This sampling method, though subject to certain criticisms, is a “theoretical well based” model (Rucinski 1993, 582).

While not typically discussed as a stealth nominee, Ginsburg was nominated to the Supreme Court with very little judicial experience. He had been a professor at Harvard Law School for nearly a decade and had spent three years in the Reagan administration before President Reagan appointed him the Court of Appeals for the District of Columbia Circuit in 1986. It was less than one year later that President Reagan nominated Douglas Ginsburg for a position of Associate Justice on the Supreme Court.

In examining Ginsburg’s brief nomination, the first statistic of note is the fact that polling data show a full 71.4 percent of the respondents expressed an opinion about Ginsburg’s nomination. This is much higher than the 36.2 percent of respondents expressing an opinion about the Rehnquist nomination in 1986 or the 27.5 percent of respondents who had an opinion about Bork early in his nomination process (Gimpel and Wolpert 1996). While opinion expression about Clarence Thomas peaked at 95.4 percent in October of 1991, in the days following his nomination 78.8 percent of the public had an opinion about him (Gimpel and Wolpert 1996). From this it is clear that nominations to the Supreme Court have become much more salient than in the pre-Bork era. One exception to this trend in the post-Bork era of greater scrutiny was the confirmation of David Souter in 1990, which is discussed later. According to data from an NBC News Poll relied upon by Gimpel and Wolpert, only 19.3 percent of respondents had an opinion about Souter (Gimpel and Wolpert 1996, 169).

In further support of the proposition that Supreme Court nominations are salient issues for the general public in the post-Bork era, fully 78.6 percent of those questioned

responded that they had heard or read about the nomination of Ginsburg to the Supreme Court and knew something about it. In clarifying this response, however, only 29.7 percent of those who responded that they had heard or read something about the nomination characterized what they knew about Ginsburg as “a lot” or even “some.” This left just more than 70 percent of respondents who characterized their knowledge of Douglas Ginsburg as “not much”, “almost nothing” or “no opinion”. Thus, while a general awareness of nominees exists, the *ABC News Ginsburg Poll, November 1987* supports the idea that, in-depth evaluation of nominees and their ideology is largely restricted to elite discussions and the chattering classes.

Of those who responded that they had any knowledge at all of Ginsburg, only 50.2 percent of them were willing to state opinions on whether Ginsburg was qualified to be on the Supreme Court. Similarly only 51.2 percent of those with any knowledge were willing to express an opinion as to whether Ginsburg was experienced enough to sit on the highest Court. This supports the argument that in-depth substantive evaluation of nominees does not take place among the general public. One factor that might make these numbers lower than some of the other survey data in the post-Bork era is the brevity of Ginsburg’s nomination and the lack of Senate hearings or debates about it.

While the public was knowingly ignorant of Ginsburg’s qualifications and experience, there were several factors related to his nomination of which they were widely aware. The most noticeable factor, and the factor for which Ginsburg’s confirmation is best known, was his acknowledgement that he had used marijuana. Of the sample that had any knowledge of Ginsburg, 91.4 percent were aware of Ginsburg’s drug use. Not nearly as striking, but also of note was the fact that 58.9 percent were aware of a potential violation by

Ginsburg of conflict of interest rules during the time he worked at the Department of Justice. While not as large a percentage as those aware of his drug use, this is a substantial number of respondents aware of a relatively obscure aspect of his nomination.

Each of these pieces of data supports that use of the stealth strategy by Presidents will help to avoid controversy given the opportunity to nominate a candidate for the Court. While the public is generally aware of nominees, their scrutiny is generally superficial absent some specific piece of provocative data such as drug use or conflict of interest. The more private of a career and life the nominee has lived, the less likely they are to elicit disapproval. While 78.6 percent of the respondents had knowledge of Ginsburg and 71.1 percent of respondents had an opinion about his nomination, the poll showed that Ginsburg had the approval of 61.4 percent of the respondents who had an opinion on his nomination. This was notably lower than other Supreme Court nominees have enjoyed. In their research Gimpel and Wolpert found that approval ratings for their sample, which included Rehnquist, Bork, Souter, and Thomas, ranged from 72.3 percent to 40.5 percent. Of their sample, however, only one of the four justices had an approval rating below that of Ginsburg, which was Robert Bork's 40.5 percent (Gimpel and Wolpert 1996, 171).

Obviously key to the data in the Ginsburg nomination was public opinion regarding marijuana use and suitability for the United States Supreme Court. Based on the data from the survey sample, 71.9% of the sample said that prior drug use should not bar appointment to the United States Supreme Court. It is also clear, however, that opinion on whether drug use was a relevant consideration for approval was strongly correlated with approval of his nomination. In Table 1 that follows, we observe a statistically significant  $-.472$  correlation between approval of Ginsburg and those who believe marijuana use should bar appointment

to the Court. Additionally, strong positive correlations exist between public approval and those who believe that Ginsburg was qualified enough and experienced enough for the Court.

**Table 1: Correlation of Ginsburg Approval with Factors Potentially Related to Opinion Formation**

	Approval of Ginsburg Nomination
Marijuana use should bar Supreme Court appointment	-.472 **
Ginsburg is qualified	.708 **
Ginsburg has adequate experience	.518 **
Party Identification	.022
Ginsburg's ideology is liberal versus conservative	.171

*Note:* For this correlation all samples have observed values without missing data so the N=83.

\*\* Correlation is significant at the 0.01 level (2-tailed)

\* Correlation is significant at the 0.05 level (2-tailed)

As is seen in Table 1, however, party identification is unrelated to the respondents' approval of Ginsburg's nomination. This is very interesting in light of how politicized Supreme Court nominations have become. As a society and according to the research, the general sense is that public opinion about potential justices is heavily influenced by party identification. In their examination of attitudes toward controversial Supreme Court nominees, Gimpel and Wolpert found that party identification was not related to activating opinions about a nominee, but that it was a significant factor in determining approval (Gimpel and Wolpert 1996). They showed that the effect of partisanship on approval varied based on other factors about the nominee (Gimpel and Wolpert 1996). Similarly, Gibson and Caldeira found party identification predictive of nominee approval in the Alito nomination as well (Gibson and Caldeira 2010). In the case of Douglas Ginsburg's nomination, party identification might have been counterbalanced by the fact that he had admitted using marijuana. This is particularly true since that was one of the most widely known characteristics about the

nominee. His drug use (which he repudiated during his nomination as wrong) might have turned off social conservatives in the Republican Party and led Democrats to believe that Ginsburg would be a moderate on social issues. Moreover, the fact that Ginsburg's nomination was so short-lived, likely prevented some of the partisan posturing that normally takes place during the confirmation hearings on controversial nominees. Such partisan political campaigning might have had an effect on the relationship between approval and party identification.

As shown in the data, there was a significant negative association between an opinion that drug use alone should be enough to keep a nominee off the Supreme Court and Ginsburg's approval. This relationship appears very similar to the negative association between the opinion that someone who has used drugs should not be allowed to serve on the Supreme Court and Ginsburg's approval. This relationship might also be a basis for why party identification did not have a stronger relationship with Ginsburg approval.

In attempting to develop a predictive model for public approval in the context of stealth nominations I note that there was not even a correlation between the respondent's assessment of Ginsburg's ideology and their approval. In the model set forth herein and described in the results of Table 2, I sought to predict approval of Ginsburg based on the respondents' answers about Ginsburg's ideology, his experience, the respondent's party identification and their perceived depth of knowledge of Ginsburg. As we can see in Table 2, the R-square indicates that such a model would predict .347 of the variance in the dependent variable of nominee approval by the general public.

**Table 2: Ideology, Experience, Party ID and Depth of Knowledge Model as Predictive of Ginsburg Approval**

Dependent Variable	Ginsburg Approval
Independent Variables	
Ginsburg Liberal	
b	0.019
(SE)	(0.152)
Ginsburg experienced	
b	0.543**
(SE)	(0.228)
Party ID	
b	0.137
(SE)	(0.137)
Depth of knowledge about Ginsburg	
b	0.063
(SE)	(0.144)
R <sup>2</sup>	0.347

*Note:* Throughout the tables, standard errors are presented in parentheses, and standardized coefficients (B) are given together with regression coefficients. The levels of statistical significance are denoted as follows, unless indicated otherwise. N=83.

\* p < .05, \*\* p < .01

As can be seen in the above regression results, public assessment of Ginsburg's ideology, party identification, and the public's self-perceived depth of knowledge about Ginsburg were not predictive of approval. Not a single one of those factors was statistically significant in predicting approval. Based on the available data, the key fact of this model in determining approval was the public's assessment of whether Ginsburg was adequately qualified to sit on the United States Supreme Court. In fact, despite a general ignorance of Ginsburg, as indicated earlier in this section, and very superficial knowledge of him, lack of knowledge was not statistically significant in influencing approval. Thus, while Ginsburg's nomination was never formalized and he withdrew from consideration for the Supreme Court, it is worth noting that he had general approval among the people and it was driven by perceptions of his experience in the legal profession, despite almost no federal judicial record. Thus, this use of the stealth nomination appears to have been initially successful in securing public approval

and might well have put Ginsburg on the Court, except for the report on National Public Radio by Nina Totenberg which publicized Ginsburg's prior marijuana use.

One final note on the Ginsburg nomination is that we have no indication of Senate attitudes or potential votes since his nomination was quickly withdrawn following the media coverage of his past marijuana use. Thus, unlike the other nominees considered herein, we do not have the results of a confirmation vote to compare Senate approval to public approval of the nominee.

#### **4.2 DAVID SOUTER**

As was mentioned before, David Souter's nomination by President George H.W. Bush is generally considered the quintessential example of a "stealth nomination." While some in the media have recently used the term to describe the evasive answers given by nominees to the Supreme Court during the Senate Judiciary Committee hearings or tactics employed to conceal information about the nominee, in the context of this paper and in the scholarship generally it means the nomination of candidate with a limited federal judicial record. As the original "stealth nominee" discussed in the literature and the essence of the strategy, I believe that it is imperative to examine the strategy in light of the opinions we can measure about his nomination and what factors are predictive of public approval.

David Souter's nomination to United States Supreme Court was made by President George H.W. Bush only three months after he had been unanimously confirmed by the Senate for a position on the United States Court of Appeals for the First Circuit. His rapid ascension through the federal judiciary came following a legal career split primarily between the New Hampshire Attorney General's Office and the trial and appellate courts of New Hampshire. Even though Souter had spent seven years on the state Supreme Court in New

Hampshire, his opinions from that body gave little insight into how he would rule on cases regarding federal law and the balance of powers under the United States Constitution.

The data utilized in this section of the paper were also made available by the Inter-university Consortium for Political and Social Research. The data utilized are known as the *ABC News/Washington Post Souter Nomination Poll, July 1990*. They were originally collected by Chilton Research Services, a subsidiary of ABC News.<sup>2</sup> The poll was taken following President George H.W. Bush's nomination of David Souter to the United States Supreme Court. The methodology of the survey was similar to that of the ABC News Ginsburg Poll.

In contrast to the Douglas Ginsburg nomination discussed in the previous section, David Souter's nomination was only slightly less known among the public. Fully 63.6 percent of respondents in the ABC News poll said that they had heard or read about Souter, after his nomination by the President. This relatively high percentage in comparison to Ginsburg is even more significant in light of the fact that unlike Ginsburg's drug use, there were no scandalous allegations about the nomination of a quiet state court judge from New Hampshire. Unfortunately, due to changes in the survey utilized by ABC News and Chilton Research, we do not have data on the degree of knowledge that respondents believed they had in the case of the Souter nomination. Thus, on this one point we are limited in comparisons between the two data sets.

Whereas illicit drug use and conflicts of interest were idiosyncratic considerations to the Ginsburg nomination, the Souter nomination falls into the battle over the Court with

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<sup>2</sup> Neither the collector of the original data nor the Consortium bear any responsibility for the analyses or interpretations presented here.

regard to the jurisprudence of abortion and reproductive rights. Since that was the case, the Court's decision in *Roe v. Wade* and views on abortion were central inquiries in this data set. In response to whether they approved of the Court's ruling in *Roe v. Wade*, the majority in the sample expressed a favorable opinion 59.7 percent.

While the public was slightly less aware of the Souter nomination than that of Douglas Ginsburg, they held a significantly higher opinion with regard to whether the Senate should confirm Souter to the Court, with 76 percent of respondents saying that Souter should be confirmed. Such a public approval of 76 percent is even higher than the range discussed by Gimpel and Wolpert in their research on the Rehnquist, Bork, Souter, and Thomas nominations, which ranged from 72.3 percent to 40.5 percent (Gimpel and Wolpert 1996, 171). Gimpel and Wolpert's highest measured approval rating of 72.3 percent was also for Souter, but in their research they relied on different survey data, the CBS News/New York Times poll from August of 1990.

During the Ginsburg nomination, the ABC News survey found that 65 percent of respondents believed that Senate consideration and approval of the nominee should include the nominee's political views in addition to qualifications and experience. Just three years later, however, during the case of David Souter's nomination, that position dropped to 49.7 percent. At that level, for the survey sample size of 739 respondents, 50 percent is within the confidence interval for an alpha of .05 and an alpha of .01. Thus we can no longer say with a certainty whether the public believes that politics should or should not be considered by the Senate.

While we cannot say with certainty whether the public believed that the Senate should have considered Souter's political views in evaluating his nomination, it is certain the

public believed that they should have questioned him about those views. In the case of Souter's position on abortion, 65.9 percent of respondents believed that the Senate Judiciary Committee should question Souter about that. Moreover, 54.4 percent of the public believed that despite George H.W. Bush's assertions that he never asked Souter about his political or legal views, he would have. In contrast to the fact that most in the public believed that the President and the Senate Judiciary Committee should have questioned Souter about his political views on abortion and his legal views on *Roe v. Wade*, the majority of respondents 55.1 percent asserted that they did not believe that the Senate should consider Souter's abortion views in their evaluation of the nominee. Thus, it would appear that they do not believe a so-called litmus test on abortion should drive confirmation. Thus, while respondents clearly assert that we should know a nominee's ideology and views on political and legal issues, they simultaneously appear to assert that it should not be considered, at least in the case of abortion, in confirmation voting.

Once again, however, it should be noted that while people willing to express an opinion on approval favored confirmation roughly three to one, a greater number of those surveyed responded either "No Opinion" or "Refused to Answer". Those responses made up 48.1 percent of the total 778 surveyed. This is particularly important in that such a sense of ignorance or ambivalence is part of the tactics of the stealth strategy.

With the voting public remaining generally ignorant or ambivalent about Souter's nomination, the Senate had less concern for voter accountability. Factoring in that of those who were not ignorant or ambivalent the approval rating was 76 percent, it is not surprising that the confirmation vote in the full Senate was 90 to 9. While he did not receive unanimous confirmation from the Senate like his colleagues Antonin Scalia or Anthony Kennedy, it was

a much more unified Senate than in the recent string of confirmation votes, including the confirmation of John Roberts as Chief Justice in 2005.

In examining the relationship between variables from the Souter survey, it starts to establish a pattern consistent with the Ginsburg results. The following table, Table 3, shows the correlation between variables of ideology, experience/qualification, party identification and whether more should be asked of the nominee by the Senate Judiciary Committee.

**Table 3: Correlation of Souter Approval with Factors Potentially Related to Opinion Formation**

	Approval of Souter Nomination
Souter is qualified	0.315**
Approve of appointing a conservative to the Court	0.245**
Part y Identification	0.056
Should the Senate question Souter on his views regarding abortion?	-0.138**

*Note:* For this correlation all samples have observed values without missing data so the N=744

\*\* Correlation is significant at the 0.01 level (2-tailed)

\* Correlation is significant at the 0.05 level (2-tailed)

Thus, as can be seen in the correlations, party identification, is once again not significantly correlated with approval in the case of stealth nominees. This is more surprising in the case of Souter because many assumed that the lack of correlation between party identification and approval of Ginsburg was driven by the fact that marijuana use was seen as more offensive or inappropriate to conservative elements of the Republican Party. In the case of Souter there was no such factor to highlight with regard to why party identification was not more correlated with approval. Approval of Souter's alleged conservative ideology was positively correlated with approval of his nomination, but not as substantially as whether the respondents believed he was qualified to sit on the Court. Thus, while the media and

politicians were arguing about an ideological battle for the Court, public approval was actually more closely correlated with the desire to have a bench populated with qualified jurists. Finally, the correlations in Table 3 show that a negative correlation existed between approval of Souter and the desire to have the Senate question him regarding his views on abortion. Thus, it appears that a certain segment of the population did not support approval absent specific knowledge of Souter's views on abortion.

In attempting to establish a predictive model of public approval based on the data available, I did a linear regression of the data from the ABC News/Washington Post Souter Nomination Poll which were most similar to those examined in the model from Section 4.1 on Douglas Ginsburg. The results of that regression are provided in Table 4 that follows. In the case of the Souter nomination, this predictive model is less powerful in its ability to predict public approval generally, with an R-square of .127 in comparison to the similar model from the Ginsburg nomination, which had an R-square of .347. In the following Table 4, however, we observe that certain elements of that model are substantial predictors of approval at levels that are statistically significant.

**Table 4: Ideology, Qualification, Party ID and Depth of Knowledge Model as Predictive of Souter Approval**

Dependent Variable	Souter Approval
Independent Variables	
Approve of a conservative	
b	0.160**
(SE)	(0.048)
Souter Qualified	
b	0.265**
(SE)	(0.032)
Party ID	
b	0.051
(SE)	(0.093)
Should Senate question Souter about abortion	
b	-0.085
(SE)	(0.229)
R <sup>2</sup>	0.127

*Note:* Throughout the tables, standard errors are presented in parentheses, and standardized coefficients (B) are given together with regression coefficients. The levels of statistical significance are denoted as follows, unless indicated otherwise. N=744.

\* p < .05, \*\* p < .01

Within this model, believing that Souter is qualified remains the strongest factor in determining public approval with a t-score of 7.542, and a standardized beta of .265 with a p-value < .001. This mirrors the analysis from the Ginsburg nomination in which the survey results support the concept that mass public approval of Supreme Court nominees is driven primarily by a desire for qualified as jurists to handle the cases that come before them judiciously. Of additional note, however, is the fact that ideological control of the court, as discussed extensively in the media and elite debates of that time is actually a strong predictive factor of general public support as well. With a t-score of 4.574, a standardized beta of .169 and a p-value < .001, it is only slightly less predictive of approving Souter's nomination than the desire for a qualified jurist.

### 4.3 JOHN ROBERTS

In July of 2005, Associate Justice Sandra Day O'Connor announced her intent to retire from the Supreme Court upon the confirmation of her successor. In response to that opening on the Court, President George W. Bush nominated John Roberts to fill her position. While Robert's nomination was pending, however, then Chief Justice William Rehnquist died, leaving an additional vacancy. President Bush quickly withdrew John Roberts' nomination to fill Justice O'Connor's seat on the bench and nominated him to fill the role of Chief Justice.

When nominated by President Bush, John Roberts was a 50 year old judge who had recently been appointed to the United States Court of Appeals for the D.C. Circuit. Having at that point only spent two years as a federal judge, Roberts did not have a long record of judicial opinions. In fact, he authored only 49 opinions in his position on the D.C. Circuit Court. Prior to his judicial appointment to the Court of Appeals, Roberts had spent the preceding decade as an appellate litigator in private practice. The remainder of Robert's professional resume consisted of various positions within the Justice Departments of several Republican administrations.

With very little in the way of way of written opinions, many anticipated that the Roberts confirmation hearings would focus on attempting to discern his judicial philosophy and how he might rule on certain hot button issues such abortion. In fact, his testimony before the Senate Judiciary Committee began with a series of questions about his position on *Roe v. Wade* and the role of *stare decisis*. Beyond merely presenting as a "stealth nominee" in the sense of a limited judicial record, Roberts engaged in a concerted effort during his hearing testimony to further obscure and conceal his ideology and beliefs. He was

intentionally vague and non-committal during his testimony before the Senate Judiciary Committee. He repeatedly expressed that it would not be appropriate to discuss how he might have ruled on past cases or how he would rule in a hypothetical case if he were confirmed to the Court. Thus, he sought to avoid providing any concrete evidence to potential critics on whether he was willing to overturn the landmark decisions of the Court such as *Roe v. Wade*.

While demonstrating a commanding knowledge of Supreme Court precedent that is not surprising given his extensive experience of arguing cases before the Court as both a Deputy Solicitor General and a private practice member of the Supreme Court Bar, his testimony regarding the role of the Court in shaping policy was intentionally ambiguous. He refused to articulate a specifically defined judicial philosophy by which he would decide cases that came before him should he be confirmed. Moreover, he repeatedly asserted the position that he could not answer how he would rule on certain principles such as federalism and the separation of powers in the context of the war powers, absent specific facts of a given case. In doing so, nominee Roberts went beyond the definition of “stealth nominee” as used herein and sought to intentionally conceal information relevant to his confirmation. In doing so, however, he was able to maintain uncertainty about his judicial philosophy.

In July of 2005, following Roberts’ nomination to replace Justice O’Connor on the Court, ABC News and the Washington Post gathered public opinion data about the Roberts’ nomination. That data is stored by and was made available through the Inter-university Consortium for Political and Social Research. The data utilized in this section are known as the *ABC News/Washington Post Supreme Court Poll, July 2005*. They were originally

collected by Taylor Nelson Sofres Intersearch, for ABC News and the Washington Post.<sup>3</sup> The poll was taken following President George W. Bush's nomination of John Roberts to the position of Associate Justice of the United States Supreme Court. The methodology of the survey was similar to that used by Chilton Research and ABC News in each of the previous sections. As in that previous survey research, the data was collected via a random digit dialing sampling method. Respondents were then picked through the strategy of questioning the adult home at the time who last had a birthday.

In light of the previous research on the general ignorance of the public regarding the Court, it is interesting to note that the majority of respondents, in fact 59.3 percent, questioned regarding their awareness of the Roberts' nomination, said that they had been following the news regarding the nomination either "very closely" or "somewhat closely". This would seem to follow the general proposition that in the post-Bork era, nominations to the Supreme Court are salient aspects of our political system.

When questioned about their approval of the Roberts' nomination in the summer of 2005, specifically whether the Senate should vote to confirm him, the public strongly supported the proposition that the Senate should confirm Roberts' nomination to the Court. In fact, 72.8 percent of respondents believed that he should be confirmed. Additionally, though not to the same degree, 57.6 percent of respondents supported the proposition that senators should vote to confirm Roberts if he is considered qualified for the position, regardless of whether his judicial philosophy and legal views are contrary to their own. This is an even stronger assertion of depoliticizing the Supreme Court than was present in either

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<sup>3</sup> Neither the collector of the original data nor the Consortium bear any responsibility for the analyses or interpretations presented here.

the Ginsburg or the Souter survey data. Thus, despite the post-Bork politicization of the confirmation process, the public opinion data in the Roberts' nomination supported a contrary conclusion, with the public calling for confirmation even if the views of the nominee were contrary to those of the democratically elected Senate.

Since, well over half of respondents believed that senators should vote for a nominee with whom they disagreed, then it would appear that knowing the particulars of a nominee's judicial philosophy or ideology should not be of great importance in shaping the public opinion. In fact, however, when asked about the degree of candidness they expected during the confirmation process, 61.7 percent of respondents believed that Roberts should answer how he would have ruled on various cases that had come before the Supreme Court. An even greater percent, 64.8 percent believed that during confirmation hearings he should publicly state his position on abortion. Moreover, those positions are strongly correlated with approval of the nominee, as can be seen in the following Table 5, where the desire to know how he would have ruled on cases had a statistically significant correlation of  $-.289$  and knowing his view on abortion had a similarly significant correlation of  $-.298$ .

**Table 5: Correlation of Roberts Approval with Factors Potentially Related to Opinion Formation**

	Approval of Roberts Nomination
Roberts should be appointed if qualified	.593**
Roberts ideology	-.540**
Party Identification	-.203**
Roberts should answer how he would rule on cases	-.289**
Roberts should publicly state his position on abortion	-.298**

*Note:* For this correlation all samples have observed values without missing data so the N=393

\*\* Correlation is significant at the 0.01 level (2-tailed)

\* Correlation is significant at the 0.05 level (2-tailed)

As is clear from the above correlations, all of which are statistically significant, there are strong relationships between each of these variables examined and public approval. First, it is important to clarify that in the case of the Roberts survey, the question on qualification was very different than in the other two surveys examined herein. Where as in the Ginsburg and Souter surveys, the question was specifically are they qualified, in this survey the researchers asked whether a senator should vote to confirm Roberts based on “background and qualifications” even if the senator disagreed with Roberts’ philosophy and views. The finding that there is a strong positive correlation of .593 between approval of Roberts’ confirmation and the belief that confirmation should be based on whether John Roberts is qualified regardless of his political beliefs and judicial philosophy is not surprising. Second, although slightly not as strong, there is a negative correlation of -.540 between approval and those who believe Roberts is more conservative of a justice than they would have preferred. In the correlations set out in Table 5, we see for the first time out of these data sets a statistically significant correlation of -.203 between party identification and nominee approval. This would seem to indicate that the politicization of the nomination process, at least in the Roberts confirmation, is starting to have a relationship to approval even in stealth nominations, and not just in the highly contested nominations of long-tenured federal judges.

While public approval of Roberts at 72.8 percent was not substantially different than public approval of Souter at 76 percent, the Senate confirmation vote for Roberts dropped to 78 to 22 (Souter secured 90 votes in favor of confirmation to only 9 against). Roberts’ confirmation occurred as part of the recent string of nominations that came at a time in which confirmation votes were much closer. In comparison, Samuel Alito was confirmed by a vote of 58 to 42. Sonia Sotomayor was confirmed 68 to 31 and the most recent addition of Elena

Kagan was confirmed 63 to 37. Thus, a slightly closer vote on Roberts' confirmation would fit with the general pattern of more closely contested Senate voting on Supreme Court nominees.

**Table 6: Ideology, Qualification, Party ID and Depth of Knowledge Model as Predictive of Roberts Approval**

Dependent Variable	Roberts Approval
Independent Variables	
More conservative than you would like	
b	-0.332**
(SE)	(0.023)
Senate Should confirm if they believe Roberts is qualified	
b	0.359**
(SE)	(0.042)
Party ID	
b	-0.059
(SE)	(0.020)
Roberts should answer how he would vote on cases	
b	-0.055
(SE)	(0.040)
Roberts should state his position on abortion	
b	-0.090
(SE)	(0.040)
R <sup>2</sup>	0.438

*Note:* Throughout the tables, standard errors are presented in parentheses, and standardized coefficients (B) are given together with regression coefficients. The levels of statistical significance are denoted as follows, unless indicated otherwise. N=393.

\* p < .05, \*\* p < .01

In the case of the Roberts nomination the predictive model based on ideology, qualification, partisanship and adequacy of information has an R-square of .438, which is by far the strongest predictive value of this model in any of the three stealth nominations examined herein. As we examine the predictive value of individual factors within the model, we continue to see that party identification is not a statistically significant predictor of nominee approval by the public. Again the two most significant independent variables in predicting nominee approval were ideology and qualification. The analysis showed a t-score of -7.448,

and a standardized beta of  $-.332$  with a  $p$ -value  $< .001$ , for people who believe that Roberts was more ideologically conservative than they would have liked. This indicates, not surprisingly, that those finding Roberts more conservative than they would have liked, are substantially less likely to approve of him. Additionally, we see a strong predictive value in the  $t$ -score of  $7.925$  and a standardized beta of  $.359$  with a  $p$ -value  $< .001$ , for those who believe a senator should vote to confirm Roberts, if the senator believes Robert is qualified regardless of whether he shares Roberts's judicial views. Thus, the predictive model set forth herein, driven by ideology and qualification regardless of partisanship is strongly predictive of public approval in the context of the Roberts nomination.

## CHAPTER 5. CONCLUSION

An examination of the literature on public approval of Supreme Court nominees, highlights the limited scrutiny that “stealth nominations”, that is nominations of candidates with little or no experience on the federal bench, have received. In contrast, numerous scholars have explored models of opinion formation and approval in the context controversial nominations such as Clarence Thomas or Samuel Alito. Recognizing this omission in the field, this study sought to examine a model which evaluated factors which shape public approval in the context of stealth nominations.

In examining a predictive model of public approval, this paper limited the scope of its inquiry to the post-Bork era and to stealth nominees by Republican presidents. These limitations were driven in part by the available data, but also the realities of recent court nominations. While not seeking to advocate the use of a stealth strategy, I sought to evaluate factors determining approval and thus explore the efficacy of pursuing a stealth nomination given the opportunity to appoint a Supreme Court nominee.

From the data analysis set out in Chapter 4 we see that the mass public is aware of nominations and does scrutinize nominees. These are not issues concentrated exclusively among political elites or the chattering classes. While the mass public does evaluate nominees, that evaluation is generally simplistic and the depth of knowledge regarding nominees is superficial.

While those opinions may lack sophistication, they are politically relevant as demonstrated by Kastellec, Lax and Phillips in their model of Senate confirmation voting. Moreover, with the innovations in political polarization and party mobilization implemented by Karl Rove, the ability to manipulate public opinion regarding the Court and its

membership is now not only a concern for individual senators in their vote, but it has relevance in the general political landscape and strategies of the parties, particularly on the right.

Identifying the relevance and significance of mass public opinion on Supreme Court nominees, including particularly “stealth nominees”, this paper sought to quantify the significance of independent variables in determining public approval of stealth nominees. Contrary to the literature on non-stealth nominees, such as Thomas and Alito, the data for stealth nominees establishes that party identification is not predictive of nominee approval in these specific cases. This is noteworthy in light of the fact that partisanship was not a significant factor for approval in any of the nominations examined despite the media arguments regarding politicization of the Court. It should be noted, however, that each of the three nominees noted herein were nominated by Republican presidents and therefore it would be prudent and worthwhile to compare this data to a stealth nominee by a Democratic president such as the recent Kagan nomination by President Obama.

In examining the model of public approval herein, it is clear in each of these cases that the most significant independent variable in determining public approval was qualification of the nominee. Qualification and/or experience, whichever was measured, is the strongest predictive factor in all three cases. Due to limitations in the survey data, however, it is difficult to assess what makes a nominee qualified or experienced enough in the eyes of the public. It is clear from the data, however, that an extensive resume of federal court experience is not necessary. This can be seen from the fact that the public generally approved of each of these stealth nominees, who were deemed adequately qualified despite very limited federal judicial resumes.

The predictive model, while discounting the significance of party identification, does indicate that ideology is predictive of public approval at least in the cases of Souter and Roberts. As noted in the analysis of the Ginsburg data, the complicating factor his marijuana use and the perceived ideological implications of that may have complicated that factor's predictive value. In the case of the other two, however, ideology is clearly a significant predictive factor. In Gibson and Caldiera's work on the Alito nomination, however, they demonstrated that so long as the nominee is not perceived as an ideological extremist, the public will generally approve of the nominee. Thus, while ideology is predictive in the context of stealth nominees, with their limited federal judicial records it would be more difficult to portray them as ideological extremists absent some other specific evidence.

In each of the stealth examples, despite significant desires by the public to know more about the political and legal views of the nominees, particularly on the issue of abortion, and negative correlations between those desires and approval, public approval of the nominees remained nearly three to one in favor of confirmation. The desire to know more about the ideology was not predictive of approval by the public and in each case the nominations examined herein went on to be confirmed in the Senate vote. Thus, the model predicts demonstrates that the desire to know more about a nominee, in and of itself, is not enough to undermine public approval.

Thus, since ideology and ideological extremism is a key factor for determining public approval that may be obscured through use of the stealth strategy, it would be efficacious for a president, who is seeking to avoid a contentious confirmation battle and the threat of public disapproval to derail a nomination, to use the stealth strategy to secure confirmation of a nominee. Additionally, since a lack of sufficient candor and disclosure by stealth nominees

does not appear to undermine public support, that too would indicate the efficacy of the strategy.

While the successful courting of public approval and Senate confirmation of nominees about whom the public knows little may encourage presidents to engage in the use of stealth nominees, it is not without its dangers. While presidential administrations engage in rigorous vetting programs for potential nominees, the stealth nature of one candidate over another may also lead to nominating a jurist about whom the administration knows less. They should heed the warning of Eisenhower's experience, in which he later claimed that one of his greatest mistakes as president was the decision to name Earl Warren to the Court. Many would argue that President George H.W. Bush experienced a similar result with Justice Souter.

Due to the limited scope of this inquiry, further research would be advisable in to determine if there is a threshold of experience or adequate evidence of judiciousness that is necessary for public approval. This may be difficult due to the complications of collecting public opinion data on Supreme Court nominees, yet it could provide insight into public disapproval of the Harriet Miers nomination, despite her limited judicial record. Examination of that case might also entail further examination of the interplay between public approval, ideology and the role of elites in influencing presidential decision making under the Abrahams model.

Moreover, further research could examine the qualitative effect stealth nominations have on the Supreme Court. Through a systematic analysis of the data provided in the Spaeth Database, compiled by Professor Harold Spaeth at Michigan State University as updated and currently maintained, researchers may evaluate whether these stealth nominees

have led to inferior decisions by the Court and less consistent legal analysis and rationale in applying the principles of American Jurisprudence. An additionally line of inquiry into the effects the stealth strategy could examine ABA scores of Supreme Court nominees. cursory review of the ABA rankings of justices discussed in this study fails to indicate a negative effect of stealth nominations. Every justice confirmed to the Court since Justice Souter, the quintessential stealth candidate was rated “well qualified”, with the one except of Justice Clarence Thomas who received a rating of “qualified”. Thus, based on the ratings of the American Bar Association’s Standing Committee on the Federal Judiciary, even the stealth nominees rise to the highest of their three levels (not qualified, qualified, well qualified).

Finally, in further analyzing the use of this stealth nominee strategy, it would be beneficial to directly compare the nomination of stealth nominees to a non-stealth nominee in a similar timeframe, such as comparing the Roberts nomination data discussed herein to the Alito nomination data examined by Gibson and Caldeira. Thus, while this examination adds one small piece of understanding to the model of public approval of Supreme Court nominees, much work is left to flush out our understanding of public opinion formation in this context.

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## ACKNOWLEDGEMENTS

I would like to take this opportunity to thank a few of the many people that have helped me through the process of writing my thesis. First, I thank my committee members for their time, patience and understanding. To Dr. Mack Shelley and Dr. Dirk Deam who served as co-chairs of my Program of Studies Committee, I appreciate the willingness each showed in taking over those roles rather late in the process. I greatly value the guidance they provided and the insights they have given me. For Dr. Kimberly Conger I am extremely grateful, as she was instrumental in the completion of my studies and in particular this thesis. I owe to her a special debt of gratitude for her continued willingness to work with me and remain vested in my success despite moving on to a position at Colorado State University.

In addition to the members of my committee, I would like to thank the James Madison Memorial Foundation and the members of its academic and administrative staff. The financial assistance of the Foundation and the support of its staff were extremely important in the continuation of my studies and their ultimate completion. I also thank the other Madison Fellows, and my colleagues at Valley High School, who have inspired me to pursue graduate study as a way to enhance my knowledge and skills as a teacher.

Finally, I would like to thank my family. Without the love and support that they have given me through this process, I am confident that I would never have completed this endeavor.