

CONSCIENTIOUSNESS AND SUPREME COURT  
CONFIRMATION HEARINGS IN THE SENATE JUDICIARY  
COMMITTEE

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ABSTRACT

*This article examines how one personality trait of U.S. Supreme Court nominees influences the confirmation process in the Senate Judiciary Committee. Specifically, the article asks, are conscientious nominees more forthcoming when they answer Committee Members' questions? And, second, are Committee Members, in turn, more or less likely to vote favorably for conscientious nominees? The paper builds a theory of how the conscientiousness trait shapes how nominees to the High Court interact with the Senate Judiciary Committee. To test our theory and answer the questions, we use confirmation hearing data starting from 1955 and extending through 2018, which includes both the Gorsuch and Kavanaugh hearings. We find that personality shapes interactions in the Senate judiciary committee in important and meaningful ways. Importantly, we find evidence that suggests a nominee's conscientiousness helps to explain why some Senators would be willing to vote for him or her even when that nominee might be less qualified.*

KEYWORDS

*Senate Judiciary Committee, personality, conscientiousness, Confirmation Hearings, Nominee qualifications*

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## I. INTRODUCTION

Immediately after a new Supreme Court nominee is announced, there is a mad scramble to find out more information about the new nominee and how that person might influence the law, the interpretation of the Constitution, and the institution itself. Therefore, it was no surprise that immediately after Judge Amy Coney Barrett's nomination to fill the vacancy left by the death of Justice Ruth Bader Ginsburg, the political and legal world roared to life, immediately filling this vacuum. While the lion's share of attention typically focuses on the ideology of the nominee—and how liberal or conservative the nominee is and how it changes the balance of the Court—commentators and pundits slowly build a sketch of the nominee that tells us about the nominee's traits and characteristics and how the nominee might approach or decide a case that goes beyond their ideology. Specifically, the nominee's personality slowly comes into focus even though its impact receives far less attention than ideology.

Observers routinely depict nominees in terms of their perceived personalities. Consider a few examples. When discussing Judge Amy Coney Barrett's recent nomination, the news media rehashed a 2017 letter that 34 former law clerks wrote for her appointment to the U.S. Circuit Court of Appeals for the Seventh Circuit: "Professor Barrett is a woman of remarkable intellect and character...Based on our observations, we came to respect Professor Barrett's *conscientious* work ethic, her respect for the law, and her remarkable legal abilities".<sup>1</sup> In another interview, Harvard Law Professor Noah Feldman, who clerked at the Supreme Court alongside now-Justice Barrett several decades prior, described her as "highly qualified" and said, "I know her to be a brilliant and *conscientious* lawyer..."<sup>2</sup>

Importantly, the discussion of personality traits is not just a new phenomenon, as media have often touched on nominee's personalities. For example, after President Trump nominated then-Judge Neil Gorsuch to the U.S. Supreme Court, the *Wall Street Journal* ran a story with the headline: "Neil Gorsuch's Personality Could Shift Supreme Court's Dynamic."<sup>3</sup> Following Brett Kavanaugh's nomination, another news outlet hired a handwriting analyst to examine what Kavanaugh's handwriting revealed about his personality.<sup>4</sup> Numerous books (and some articles) have examined, at least anecdotally, how Justices' personalities may have aided or thwarted their legal goals.<sup>5</sup> As these examples suggest, Supreme Court observers and the public have been interested in Justices' personalities for many years.

The same, however, cannot be said about researchers. Scholars have amassed thousands of pages of research on the High Court, ranging from the nomination

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<sup>1</sup> Richard Wolf & Maureen Groppe, *Amy Coney Barrett: Talented judge, popular professor brings solid conservative credentials*, USA TODAY Sept. 26, 2020 (emphasis added).

<sup>2</sup> Harry Litman, *A lopsided Supreme Court harms the country and its own legitimacy*, L.A. TIMES Oct. 2, 2020, (emphasis added).

<sup>3</sup> See Brent Kendall & Jess Bravin, WALL ST. J. Feb. 6, 2017.

<sup>4</sup> Alice Scarsi, *Brett Kavanaugh's handwriting reveals he's paranoid and irritable—expert says*, EXPRESS Oct. 1, 2018.

<sup>5</sup> JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2007); PHILLIP J. COOPER, *BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT* (1995); Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002).

and confirmation process to agenda setting, oral argument, conferences, voting, and opinion writing. But few studies have examined how Justices' personalities influence their behavior and the broader legal and political context.<sup>6</sup> We seek to change that. We argue that while a judge's ideology is undoubtedly important to examine, it is hardly the only characteristic that we should pay attention to during the Senate Judiciary Committee hearings. Indeed, as we show below, the nominee's personality can, under certain circumstances, prove vitally important for how nominees respond to Senators' questioning, as well as how Senators might vote on those nominees in Committee. Given how a nominee's personality can shape almost every aspect of their behavior on the Supreme Court,<sup>7</sup> we think it is only natural that it will play an important role in the Senate Judiciary Committee.

In this paper, we examine how a Supreme Court nominee's personality influences the confirmation process in the Senate Judiciary Committee, continuing the line of scholarship from our recent book on personality and Supreme Court decision making.<sup>8</sup> Here, we investigate whether one particular personality trait—conscientiousness—affects how nominees to the High Court interact with the Senate Judiciary Committee. Specifically, we ask two questions. First, are conscientious nominees more forthcoming when they answer Committee Members' questions? And, second, are Committee Members, in turn, more or less likely to vote favorably for conscientious nominees? Specifically, we consider how a nominee's conscientiousness helps to explain why some Senators would be willing to vote for him or her even when that nominee might be less qualified.

These research questions are important because the stakes for confirmation hearings have never seemed higher. We know that nominee forthcomingness is important for understanding how much we learn about the nominee, yet we also know that this candor is shaped by different forces.<sup>9</sup> We argue that a nominee's conscientiousness is especially important for shaping how nominees respond to questioning. In addition, we know that one of the most important aspects that Senators care about when voting are the perceived qualifications of the nominee and whether they were nominated by a co-partisan. But, those strong forces might be conditioned on a nominee's personality.

Importantly, understanding how the Senate Judiciary Committee evaluates Supreme Court nominees in this polarized era is vital because partisan cues can only reveal so much. With both parties seemingly ready to retaliate in response to any perceived past slight (e.g., elimination of the filibuster, court packing, etc.), this partisan feud clearly has no end in sight. Thus, it stands to reason that we examine other factors such as personality that might play an influential role in the confirmation process. What is more, confirmation hearings are a unique setting in the sense that the nominee has a clear goal—to be confirmed—and is clearly motivated by that above all else. Thus, while Senators may be mining and sifting

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<sup>6</sup> For two exceptions, see RYAN C. BLACK ET AL., *THE CONSCIENTIOUS JUSTICE: HOW SUPREME COURT JUSTICES' PERSONALITIES INFLUENCE THE LAW, THE HIGH COURT, AND THE CONSTITUTION* (2020) and MATTHEW E.K. HALL, *WHAT JUSTICES WANT: GOALS AND PERSONALITY ON THE US SUPREME COURT* (2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See DION FARGANIS & JUSTIN WEDEKING, *SUPREME COURT CONFIRMATION HEARINGS IN THE US SENATE: RECONSIDERING THE CHARADE* (2014).

through the nominees' responses for ideological or partisan breadcrumbs as to how the nominee might decide some future case, we think it is vital to consider the role that personality, and conscientiousness in particular, plays in shaping the confirmation-hearing setting.

We begin with a brief discussion of the nomination and confirmation process. We then describe personality—what it means and why it matters. We theorize how and why a Supreme Court nominee's personality might influence his or her behavior and the behavior of Senators during the confirmation process. We then discuss our measures and methods, present our empirical results, and conclude with a brief assessment of the importance of personality amid the growing partisan polarization on the Senate Judiciary Committee.

## II. THE NOMINATION AND CONFIRMATION PROCESS

Article II of the United States Constitution declares that: “[The President] shall... nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, *judges of the Supreme Court*, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law...”<sup>10</sup> The text says little about the nomination and confirmation process, what factors the president must consider when selecting a Justice, what qualifications the nominee should have, or what factors Senators must consider when voting. But, over time, presidents and Senators' behaviors have provided structure.

Before the president even selects a nominee, he or she narrows the consideration to a handful of possible nominees—a “shortlist”—whose backgrounds undergo a preliminary vetting by the executive branch.<sup>11</sup> Next, the president selects a nominee and then often holds an elaborate announcement ceremony, seeking to capitalize on media attention and frame the narrative about the nominee. At that point, the president sends the formal nomination to the Senate, as the Constitution requires.

### A. THE SENATE JUDICIARY COMMITTEE

Once the president announces his selection, he sends the formal nomination to the Senate. Since 1868, all Supreme Court nominations have been redirected, by Senate Rule, immediately by the full chamber to the Senate Judiciary Committee. Under limited conditions, the rules allow a vote on the Senate floor without a Committee hearing, such as when the nominee was a member of Congress or had been confirmed for another federal position. It is likely that even under those conditions today, the nomination will still go to the Committee for investigation and hearing.<sup>12</sup> As we discuss below, the Committee investigates and interrogates nominees, and then makes recommendations to the full Senate. This process has gained increasing

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<sup>10</sup> U.S. CONST. art. 2, § 2 (emphasis added).

<sup>11</sup> See CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH (2008).

<sup>12</sup> See DENIS STEVEN RUTKUS & MAUREEN BEARDEN, SUPREME COURT NOMINATIONS, 1789-2009: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 6 (2009).

visibility in recent years and is currently known for being contentious. It fulfills these tasks in three stages: (1) Committee investigations; (2) Committee hearings; and (3) Committee recommendations.

### B. COMMITTEE INVESTIGATIONS

The Committee begins by investigating the nominee. Part of this investigation falls on the nominee and part of it falls on the committee itself. The information sought by the Committee is extensive. Nominees are required to fill out numerous background forms and financial disclosure reports. Senators seek information about the nominee's finances, everything he or she has ever published, every speech ever delivered, groups or organizations to which he or she belongs, and every person with whom the nominee talked about the nomination. The committee asks nominees to list every case they have litigated as attorneys and cases in which they presided as judges. The questionnaire also seeks other miscellaneous information, such as the nominee's favorite judge or Justice, among other related material. What is more, not only do the nominees themselves contribute information to the investigative work, but Committee staff also conduct investigations.

During this time, nominees also meet with individual Senators in their offices. (Nominees meet with all Senators during this time, not just those on the Judiciary Committee.) These meetings enable Senators to ask face-to-face questions that foreshadow those they will ask publicly during the hearings. Importantly, little is empirically known about these meetings since they take place behind closed doors. So, it is impossible to say how much Senators learn about nominees during these meetings. We only know the small sound bites that Senators occasionally share with the media that typically echo either support or concern, depending on whether the nominee is a co-partisan.

If the investigation finds any significant concerns, the process can grind to a halt, as was the case with the Senate's investigation of Harriet Miers when Senators and groups from both sides of the political spectrum expressed concerns.<sup>13</sup> Typically, however, no major concerns are uncovered. And, presuming the Committee Chair is allowing the nomination to move forward, he or she will then schedule hearings, working with the Ranking Member (the minority party member with the most seniority).<sup>14</sup>

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<sup>13</sup> Richard L. Vining Jr, *Grassroots mobilization in the digital age: Interest group response to supreme court nominees*, 64 POL. RES. Q. 790 (2011).

<sup>14</sup> On rare occasion, the Chair does not hold a hearing, instead blocking the nominee in order to prevent a nomination from moving forward. Specifically, in February 2016 when Justice Antonin Scalia died, about an hour later that same day, Senate Republicans issued a statement that the Republican-controlled Senate would not consider any nominee by President Obama, who would later nominate Merrick Garland. Thus, the Senate Judiciary Committee refused to move forward on Merrick Garland's nomination, hoping that Donald Trump would win election and nominate someone more jurisprudentially conservative than Garland- a gamble that ultimately paid off.

### C. COMMITTEE HEARINGS

After the Judiciary Committee has collected data and conducted its initial investigations, it usually holds hearings—typically a little over a month after the nomination. Since 1955 (John Marshall Harlan II’s nomination), every nominee has appeared before the Judiciary Committee to provide testimony. And since Sandra Day O’Connor’s nomination in 1981, all of these hearings have been televised.<sup>15</sup>

The hearings begin with the Chair of the Committee providing opening remarks and discussing how the hearing will proceed. Senators from the nominee’s home state often introduce the nominee to the Committee. Senators will then provide their prepared remarks. Senators speak in order of seniority, with the Chair speaking first, the Ranking Member speaking second, going back and forth between majority and minority party. The nominees then offer their prepared opening remarks. In modern hearings, all of this takes place on day 1.

Typically on days 2 and 3, the nominee is on the hot seat. He or she sits before the committee answering Senators’ questions. The Chair imposes a time limit on all Senators and there are typically two rounds of questioning (e.g., a 30-minute initial round with a 20-minute session the following day). Committee members often ask about the nominee’s judicial philosophy, legal qualifications, biographical information, and anything else they believe merits scrutiny. In the modern era, Senators from the party of the president will generally ask the nominee easy questions that will not generate controversy. For example, a question might be: “tell us what you think is the Supreme Court’s best decision?” or “when does precedent apply or not apply in a case?” On the other hand, when an opposition-party Senator gets a turn to ask questions, the demeanor often takes a negative turn. Opposition-party Senators usually will look for any negative thing they can find out about a nominee to sink his or her confirmation. If they cast a vote as an appellate judge that opposition Senators dislike, they will highlight it and try to rake the nominee over the coals. They may research past writings by the nominee to find evidence of bias or a lack of empathy. They look decades into the nominee’s past to find evidence of wrongdoing—anything to block the nomination.

For their part, nominees seek to answer as much as possible *without* answering in a way that might give Senators a tangible reason not to cast a favorable vote. Research on the forthcomingness of nominees has shown that nominees (from Harlan in 1955 through Kagan in 2010) typically answer the vast majority of questions asked to nominees, with approximately 70-75% of questions being answered in a fully forthcoming manner.<sup>16</sup> A lack of nominee candor tends to occur in response to questions focused on the nominees’ views, or when asked about hot-button topics like civil rights and liberties issues.

Day 4 of the hearings typically include a debate-commentary session by individual members of the Committee, alternating each party, and the nominee is not present during this portion.

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<sup>15</sup> FARGANIS & WEDEKING, *supra* note 9.

<sup>16</sup> *Id.*



#### D. COMMITTEE RECOMMENDATIONS

Upon the conclusion of the hearing (usually within a week), the Judiciary Committee will vote on how to report the nomination to the full Senate. The committee can: (1) award the nominee a positive recommendation; (2) award the nominee a negative recommendation, or (3) forward the nomination with no recommendation.

There have been seven instances since the Civil War in which the Committee offered a negative recommendation. The Senate nevertheless confirmed two (29%) of those nominees—Stanley Matthews in 1881 and Lucius Lamar in 1888. The Committee has sent one nomination to the full Senate without any recommendation—Clarence Thomas—who was later confirmed in 1991 by a 52-48 vote. In large part, however, most nominees get reported to the full Senate with a favorable recommendation.

In the analysis below, we examine individual Senators' votes on the recommendation to send the nominee to the floor with a favorable recommendation.<sup>17</sup> This Committee vote has taken on a significant meaning in recent decades. Since the 1980s—the era when the hearings started to be televised with Sandra Day O'Connor—most early Supreme Court confirmation hearings, *compared to hearings today*, generated relatively little negative attention, but with the obvious exception of Robert Bork.<sup>18</sup> In fact, even Justice Antonin Scalia received little scrutiny along the way to a 98-0 floor vote.<sup>19</sup> The Senate Judiciary Committee in recent decades has often been a microcosm of the Senate at large, as the Committee vote has signaled the likely outcome in the full Senate; though, some scholars have noted that the contentiousness of confirmation hearings slowly started to increase over time.<sup>20</sup>

What factors lead Senators to vote to support a nominee? Scholars have identified three broad factors: the nominee's legal qualifications, the ideological distance between the Senator and the nominee, and various political considerations. We discuss each in turn.

*Legal Qualifications.* We mentioned above that presidents nominate people to be Justices, in large part, because they believe those nominees can fulfill the important obligations of being Justices. It turns out that Senators also care about legal qualifications. In *Advise and Consent*, Epstein and Segal examine Senators' votes over a number of Supreme Court nominees throughout the mid- to late-20th century. Their analyses suggest that if all 100 Senators were to vote on a hypothetical nominee, "a highly qualified nominee would receive about forty-five more votes (on average) than one universally deemed unqualified."<sup>21</sup>

<sup>17</sup> For example, we note that Justice Thomas' nomination was sent to the full Senate floor with no recommendation, but this was actually the result of the second motion on his nomination. The first Committee vote on his nomination was over a motion to send it to the floor with a "favorable" recommendation, but that vote (7 ayes against 7 nays) failed to achieve a majority. <https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes>.

<sup>18</sup> Frank Guliuzza III et al., *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria*, 56 J. POL. 773 (1994).

<sup>19</sup> See Alexander Denison & Justin Wedeking, *Justice Scalia's Confirmation Hearing Legacy*, in *THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA* (David A. Schulz & Howard Schweber eds., 2018).

<sup>20</sup> Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

<sup>21</sup> LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 103 (2005).



The fact that a highly qualified nominee gains votes right out of the gates is important for presidents to know. And it explains, we believe, why presidents have been so much more likely in recent years to nominate sitting circuit court judges to the Supreme Court: announcing that you have nominated “Judge Barrett” or “Judge Gorsuch” immediately evokes images of credibility because these people have already received a favorable Senate vote and served time on the bench. In contrast, knowing that someone’s legal qualifications have suffered a severe loss of credibility, such as Robert Bork for his role in the “Saturday Night Massacre” during the Nixon Administration, can have a detrimental effect on the president’s goal.<sup>22</sup>

*Ideological Considerations.* Perhaps not surprisingly, policy considerations also motivate Senators’ votes. Just as presidents nominate people they believe will vote “the right way” once on the Court, Senators vote to confirm or reject with those same considerations in mind. Senators are considerably more likely to vote to confirm nominees who are ideologically proximate to them. Ideologically distant nominees obtain roughly 57% of their votes (think, Neil Gorsuch and Senator Mazie Hirono of Hawaii) while those who are ideologically close to Senators (e.g., Samuel Alito and Senator Ted Cruz of Texas) obtain roughly 97% of their votes

*Political Considerations.* Senators of the president’s party are much more likely to vote for the president’s nominee than Senators of the other party. As Epstein and Segal note: “through the history of the Republic, the Senate has confirmed just 59 percent of Supreme Court nominees under divided government...compared with 90 percent when the president’s party controlled the Senate.”<sup>23</sup> Alternatively, Senators of the opposition party are significantly less likely to vote for the nominee.

After the Judiciary Committee makes its recommendation, the full Senate chamber then typically votes on the nominee; though, historically, Senators have at time invoked the filibuster. The full Senate deliberations and vote have also been contentious in recent decades; the last unanimous confirmation vote occurred in 1986 with Antonin Scalia.<sup>24</sup> Other scholars have noted that Senate discussion and debate has focused on high profile issues,<sup>25</sup> the fact that Senate voting dynamics have changed,<sup>26</sup> that Senators listen to their constituents,<sup>27</sup> and that some nominees are treated differently based on race or gender.<sup>28</sup>

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<sup>22</sup> See Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

<sup>23</sup> EPSTEIN & SEGAL, *supra* note 21, at 107.

<sup>24</sup> Denison & Wedeking, *supra* note 19.

<sup>25</sup> See PAUL M. COLLINS & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE (2013).

<sup>26</sup> See Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296 (2006).

<sup>27</sup> See L. Marvin Overby & Robert D. Brown, *Reelection Constituencies and the Politics of Supreme Court Confirmation Votes*, 25 AM. POL. Q. 168 (1997); see also L. Marvin Overby et al., *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 997 (1992); see also Jonathan P. Kastellec et al., *Public Opinion and Senate Confirmation of Supreme Court Nominees*, 72 J. POL. 767 (2010).

<sup>28</sup> See Christina L. Boyd et al., *The Role of Nominee Gender and Race at US Supreme Court Confirmation Hearings*, 52 L. & SOC. REV. 871 (2018).

### III. PERSONALITY AND SENATE CONFIRMATION OF U.S. SUPREME COURT NOMINEES

What is personality? Saying that someone has a “strong” personality or “flaky” personality is commonplace, but it’s not altogether clear what those labels mean. That is because personality is a complicated and difficult concept to measure and define—even for academics. Nevertheless, scholars have discovered elements of personality that can be measured objectively and systematically.

Scholars today often focus on *traits* as a critical element of personality.<sup>29</sup> As one scholar writes: “traits represent basic categories of individual differences in functioning” and “are useful as the basic units of personality.”<sup>30</sup> Traits can explain our past behavior and help us predict future behavior.<sup>31</sup> More specifically, scholars have identified five—the “Big Five”—predominant personality traits: conscientiousness, agreeableness, neuroticism, openness, and extraversion. We briefly discuss each, though our emphasis here is on conscientiousness.

*Conscientiousness* captures whether a person is loyal, hardworking, and rule-following.<sup>32</sup> It correlates with the propensity to be self-controlled, responsible to others, orderly, and to follow rules. Descriptions of highly conscientious people suggest they are deliberate, self-disciplined, well-organized, competent, dutiful, orderly, responsible, goal directed, and thorough.

Perhaps not surprisingly, conscientious people tend to perform well at their jobs and are academically successful. “Workers high in conscientiousness are predisposed to be organized, exacting, disciplined, diligent, dependable, methodical, and purposeful. Thus, they are more likely than low-conscientiousness workers to thoroughly and correctly perform work tasks, to take initiative in solving problems, to remain committed to work performance, to comply with policies, and to stay focused on work tasks.”<sup>33</sup> Conscientious people tend to work well on teams because they are dependable, thorough, and persistent.<sup>34</sup>

*Agreeableness* refers to a person’s tendency to be warm, compassionate, and cooperative with others.<sup>35</sup> Agreeable people are hospitable and friendly and make you feel welcome. An agreeable person dislikes confrontation, is unassuming and

<sup>29</sup> There are, of course, other aspects of personality, such as motives. Those aspects are considerably more difficult to define and measure than traits, and enjoy less scholarly consensus, despite their theoretical importance.

<sup>30</sup> See JEFFERY J. MONDAK, *PERSONALITY AND THE FOUNDATIONS OF POLITICAL BEHAVIOR* 7 (2010) (quoting L. Pervin (2003)).

<sup>31</sup> See ROBERT R. MCCRAE & PAUL T. COSTA, *PERSONALITY IN ADULTHOOD: A FIVE-FACTOR THEORY PERSPECTIVE* (2003).

<sup>32</sup> MONDAK, *supra* note 30.

<sup>33</sup> L.A. Witt et al., *The Interactive Effects of Conscientiousness and Agreeableness on Job Performance*, 87 J. APP. PSY. 164 (2002).

<sup>34</sup> See Leatta M. Hough, *The ‘Big Five’ Personality Variables--Construct Confusion: Description Versus Prediction*, 5 HUM. PERF. 139 (1992); and Michael K Mount et al., *Five-factor Model of Personality and Performance in Jobs Involving Interpersonal Interactions*, 11 HUM. PERF. 145 (1998); and Michael K. Mount & Murray R. Barrick, *Five Reasons Why the “Big Five” Article Has Been Frequently Cited: The Big Five Personality Dimensions and Job Performance: A Meta-Analysis*, 51 PERS. PSY. 849 (1998).

<sup>35</sup> DAVID G. WINTER, *PERSONALITY: ANALYSIS AND INTERPRETATION OF LIVES* (1996).

humble, and tends to be altruistic in the sense that he or she finds helping others to be rewarding.<sup>36</sup> When interpersonal conflicts occur, agreeable people try to solve them amicably.<sup>37</sup> Whereas agreeable people are good-natured and affable, less agreeable people are irritable, headstrong, and jealous.<sup>38</sup>

*Neuroticism* is a concept that reflects emotional instability—the extent to which a person’s emotions fluctuate with the environment. Neurotic people are anxious and sensitive to what others think of them. They worry about whether they say or do the right things. They are vulnerable to stress, have a fiery temper, and dwell on things about which they are unhappy. On the other hand, emotionally stable people are more likely to exercise and hold close relationships. They are poised, calm, and composed.<sup>39</sup>

*Openness to Experience* is a trait that focuses on the extent to which a person is comfortable with exposure to different activities and ideas. A person who is open seeks out creative experiences, is intrigued by new ideas, and will challenge authority and traditional values.<sup>40</sup> One study claims that openness to experience “encompasses a willingness to seek new paths, and a corresponding weak attachment to familiar ways.”<sup>41</sup> People who are high in openness generally “do not impose rigid restrictions on their own thoughts or behaviors, or those of others.”<sup>42</sup>

*Extraversion* focuses on whether a person is outgoing and thrives on meeting new people. Extraverted people are adventurous, outgoing, talkative, and ready to engage the outside world.<sup>43</sup> Introverts are the opposite; they find social networking and public events to be mentally taxing. They are perceptive, quiet, and introspective.

These “Big Five” traits have told us a substantial amount about people in general as well as in certain situations. But this concept was neglected by legal scholars for far too long. Only a handful of studies have examined the role of personalities on the Supreme Court. A study from the 1980s was one of the first modern analyses to investigate the role of personality on the Court. The author examined how Justices’ motives (as opposed to their traits) influenced their decisions to write majority and separate opinions.<sup>44</sup> But the topic received little attention until the late 2000s, when scholars began to analyze things like cognitive dissonance theory and motivated reasoning.<sup>45</sup> In 2012, two of us analyzed how cognitive rigidity can constrain ideological drift on the High Court.<sup>46</sup> But none of these studies focused on Justices’ traits.

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<sup>36</sup> MONDAK, *supra* note 30.

<sup>37</sup> *Id.*

<sup>38</sup> WINTER, *supra* note 35.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See MONDAK, *supra* note 30, at 51.

<sup>42</sup> *Id.*

<sup>43</sup> WINTER, *supra* note 35.

<sup>44</sup> See Jilda M. Aliotta, Social Backgrounds, *Social Motives and Participation on the US Supreme Court*, 10 POL. BEHAV. 267 (1988).

<sup>45</sup> See Paul M. Collins Jr, *Cognitive Dissonance on the US Supreme Court*, 64 POL. RES. Q. 362 (2011); EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING (2009); and Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making*, 68 J. POL. 308 (2006).

<sup>46</sup> See Ryan J. Owens & Justin Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 J. POL. 487 (2012).

Two recent books focused exclusively on Justices' personalities and how they influence their individual behavior. In one book, Matthew Hall sought to examine how all five traits interact with Justices' ideological goals to influence their decisions.<sup>47</sup> Additionally, we recently published a book that examines how Justices' conscientiousness influences their behavior.<sup>48</sup> The results were exhaustive and compelling. Conscientiousness influences nearly every aspect of judicial behavior. Justices who are conscientious are much more likely than less conscientious Justices to vote to grant review to clear up legal conflict. They are more likely to be influenced by strong legal arguments, and more likely to follow the legal recommendations of the U.S. Solicitor General's office. The Chief Justice is considerably more likely to assign legally important opinions to conscientious Justices than to less conscientious Justices. A conscientious Court is significantly less likely to overrule or criticize a precedent than a less conscientious Court. And conscientious Justices are more likely to recuse than their less conscientious colleagues.

Omitted from these studies, however, is any examination of how a nominee's personality—and specifically their conscientiousness—can influence how they interact with Senators during confirmation hearings, or how Senators will vote on them.

#### IV. HOW MIGHT CONSCIENTIOUSNESS INFLUENCE A NOMINEE'S RESPONSIVENESS AND A SENATOR'S VOTE?

Because conscientiousness reflects not only a desire to do a task well, but also the tendency to be dutiful, hardworking, efficient, and careful, we expect it will influence how nominees respond to senators' questions and how Senators vote on nominees.

##### *A. NOMINEE RESPONSIVENESS*

Consider, first, how forthcoming a nominee is in her answers before the Committee. This aspect of the Judiciary Committee's hearings has been one of the most criticized, especially in recent years. While Farganis & Wedeking describe the overall level of responsiveness for each of the nominees through Elena Kagan, they also identify the factors that explain the variation in nominee responsiveness.<sup>49</sup> Specifically, Farganis & Wedeking find that nominees are less forthcoming with their answers when they are asked about their views on the law and questions about civil rights and liberties. Nominees are also less forthcoming when they are ideologically distant from the Senator asking questions, and when they are grilled with numerous questions.<sup>50</sup> Farganis & Wedeking also found that nominee forthcomingsness began to decrease, on average, shortly after the hearings were televised in 1981.<sup>51</sup>

Conversely, nominees are more forthcoming when they are asked factual questions (as opposed to their personal views), and during times of divided

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<sup>47</sup> HALL, *supra* note 6.

<sup>48</sup> BLACK ET AL., *supra* note 6.

<sup>49</sup> FARGANIS & WEDEKING, *supra* note 9.

<sup>50</sup> *Id.* at 67.

<sup>51</sup> *See id.*

government, presumably because they must placate opposition Senators to obtain confirmation. Surprisingly, a nominee's perceived qualifications or their co-partisan status did not have any bearing on their proclivity to provide forthcoming answers. While this finding may at first seem odd, upon deeper consideration it is helpful to make note of the growing importance of partisanship and polarization that started to play a much bigger role in the process after the start of televising the proceedings.<sup>52</sup>

We also think it raises another possibility, namely, that partisanship may have an impact on forthcomingness through its interaction with conscientiousness. In other words, we argue that partisanship moderates the relationship between a nominee's conscientiousness and their forthcomingness. To illustrate, let us start by considering the effect of conscientiousness. Initially, it might seem natural to suggest that more conscientious nominees would be more forthcoming with their answers. This would be straightforward, intuitive, and generally consistent with what is universally known about conscientiousness—that the nominee would try to be dutiful and provide thorough answers. However, we know from all of psychology that the power of the situation is incredibly important.<sup>53</sup> And as we remarked above, these hearings before the Senate Judiciary Committee are incredibly high stakes and the equivalent of a pressure cooker. One small verbal slip by the nominee could derail their chance at the Supreme Court.

These high stakes suggests that the situation has the power to shape and channel how partisanship and a nominee's conscientiousness may impact their candor. For example, we know that senators of the opposing party are much more likely to be hostile and are generally going to look for ways to "trip-up" the nominee. This is especially the case with the recent era of confirmation hearings that have been hyper-partisan. At the same time, senator co-partisans are generally there to promote and highlight the strengths of the nominee. They can use the time to ask questions to let the nominee "score points" by displaying aspects of their intelligence and also grandstand about issues and have a conversation about the Constitution.<sup>54</sup> It is in these different situations—whether the question is being asked by a friendly or opposition Senator—that we think makes a crucial difference for whether conscientiousness matters for a nominee's forthcomingness.

Specifically, when faced with friendly questions from same-party Senators, we expect conscientiousness to increase responsiveness. In contrast, when faced with questions by opposing Senators that are fraught with landmines, we expect that conscientiousness to have either no effect or a negative effect.

We think this is important because we think this gets at the predominant way that people perceive these confirmation hearings. In fact, it is very common for observers of the Judiciary Committee hearings to come away with two different perceptions. Supporters of the President and his/her co-partisans in the Senate generally perceive the nominee to be forthcoming and dutiful. In contrast, supporters of opposing-party

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<sup>52</sup> See Justin Wedeking & Dion Farganis, *The Candor Factor: Does Nominee Evasiveness Affect Judiciary Committee Support for Supreme Court Nominees?*, 39 HOFSTRA L. REV. 329 (2010).

<sup>53</sup> LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (2011).

<sup>54</sup> See Jessica A. Schoenherr et al., *The Purpose of Senatorial Grandstanding during Supreme Court Confirmation Hearings*, 8 J. L. & C'TS 333 (2020); see also COLLINS & RINGHAND, *supra* note 25.

Senators typically perceive a nominee that is less forthcoming and does not display any hint of the trait of conscientiousness.<sup>55</sup> As we argue elsewhere,<sup>56</sup> possessing and displaying the trait of conscientiousness is typically seen as a normatively good thing with respect to judging. After all, there are aspects of the Judicial Code of Conduct that comport well with conscientiousness. So, when the public observes the same process but sees two realities, whether they are on one side or the other, we think it is important to highlight how conscientiousness, along with its interaction with partisanship, plays an important role in shaping nominees' behavior.

### B. CONSCIENTIOUSNESS AND THE COMMITTEE VOTE

We also argue that conscientiousness will influence how Judiciary Committee members vote on nominees. Existing work reveals that Committee members are more likely to vote out a positive report on the nominee when the nominee is more qualified and enjoys interest group support, and (at least in the era of televised hearings) when the Senator is of the same party as the nominating president.<sup>57</sup> Members are less likely to vote positively when nominees have been asked numerous questions, when they are ideologically distant, and when they are from opposite parties.

In this section, we think conscientiousness will shape voting in two ways. First, one of our contributions is to show how conscientiousness is, again, likely to have a conditional effect because of the highly partisan stakes at play. Second, we argue that conscientiousness is such a valuable trait that it may even save nominees who are perceived to be less qualified.

Regarding partisanship, we argue that a key starting point is that Senators from the same party will not behave the same as Senators from the opposing party. Consider, first, Senators from the same party as the president. Even though they are already likely to vote for the nominee, all else equal, conscientiousness can still be an important factor. Specifically, same-party senators know that having a highly conscientious nominee on the bench will go a long way towards solidifying their party's vision of the law. And that a low conscientious nominee would not be as dutiful in carrying out the party's constitutional agenda. Thus, we expect that, nominees with more conscientiousness will enhance same-party Senators' probability to vote favorably on the nominee.

In contrast, with opposing-party Senators, we think conscientiousness will either play no role or a negative influence on the committee vote. It has long been a puzzle as to why nominees tend to get voted onto the Court with far more support (from the opposing party) than what would normally be predicted given the institutional arrangements.<sup>58</sup> At first glance, it might seem that a nominee's personality is one

<sup>55</sup> See Philip G. Chen & Amanda C. Bryan, *Judging the "Vapid and Hollow Charade": Citizen Evaluations and the Candor of US Supreme Court Nominees*, 40 POL. BEHAV. 495 (2018).

<sup>56</sup> BLACK ET AL., *supra* note 6.

<sup>57</sup> Wedeking & Farganis, *supra* note 52; FARGANIS & WEDEKING, *supra* note 9.

<sup>58</sup> See Timothy R. Johnson & Jason M. Roberts, *Presidential Capital and the Supreme Court Confirmation Process*, 66 J. POL. 663 (2004); See Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999).



factor that can enhance the nominee's chances of getting confirmed. Specifically, even when a Senator of the opposite party may not like some of the ideological policy positions of the nominee, it is conceivable that there are certain traits like conscientiousness that Senator's might desire for judges.<sup>59</sup> However, we also know that opposite party Senators are going to be highly cognizant of the fact that a highly conscientiousness nominee would be better skilled at enacting a partisan agenda. Combined that with the fact that, in general, opposite party Senators are typically going to be opposed to the nominee on policy grounds. Thus, we expect that opposing-party Senators are either no different or less likely to vote for high-conscientiousness nominees compared to low-conscientious nominees.

We also argue that conscientiousness will enhance the effects of qualifications. Recall that members are, overall, more likely to report positively on highly qualified nominees and less likely to report favorably on unqualified nominees. What does this mean for conscientiousness? Conscientiousness likely plays little role for nominees already seen as qualified. Since their professional reputations have already plateaued at or near their ceiling, there is little one's personality can do to improve their odds of a positive recommendation. On the other hand, conscientiousness might be valuable for nominees perceived to be less qualified. Conscientiousness can improve their odds of a favorable recommendation by making them appear dutiful, hardworking, and attendant, *despite their rating*. That is, conscientiousness can make up for lost ground among nominees rated as less qualified. Taken together, we expect that conscientiousness will improve the odds of a favorable recommendation for nominees perceived to be unqualified and will have no effect on nominees rated as highly qualified.

## V. MEASURES AND METHODS

To test these expectations, we use the confirmation hearings data that has been updated to include the confirmation hearings of Gorsuch and Kavanaugh.<sup>60</sup> Unfortunately, the confirmation hearing transcripts for Amy Coney Barrett were not yet available. Our data include all confirmed nominees starting in 1955 with John Marshall Harlan II through Brett Kavanaugh in 2018.<sup>61</sup> Since 1955, the Senate Judiciary Committee has continually held hearings for nominees. Prior to this time period, hearings were sporadic and idiosyncratic. Our unit of analysis is the nominee-senator dyad.

Our dependent variables are well-established in the literature. For nominee responsiveness, our dependent variable is the percentage of answers that were coded as "fully forthcoming" for each Senator. Figure 1 displays a descriptive figure for then-nominee Brett Kavanaugh's forthcomingness, with Senators sorted by party (Republicans are on the left and Democrats are on the right). This figure illustrates the "two realities" that we described earlier. Republicans all evidenced

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<sup>59</sup> BLACK ET AL., *supra* note 6.

<sup>60</sup> Schoenherr et al., *supra* note 54; FARGANIS & WEDEKING, *supra* note 9.

<sup>61</sup> Unfortunately, we do not have measures of conscientiousness for the nominees that did not get confirmed. However, we do not think this is fatal to our analysis. To explore this, at the end of our analysis we present a set of separate results based on simulations that allow us to address this point.



relatively high levels of responsiveness while Democratic Senators all experienced low levels of responsiveness.

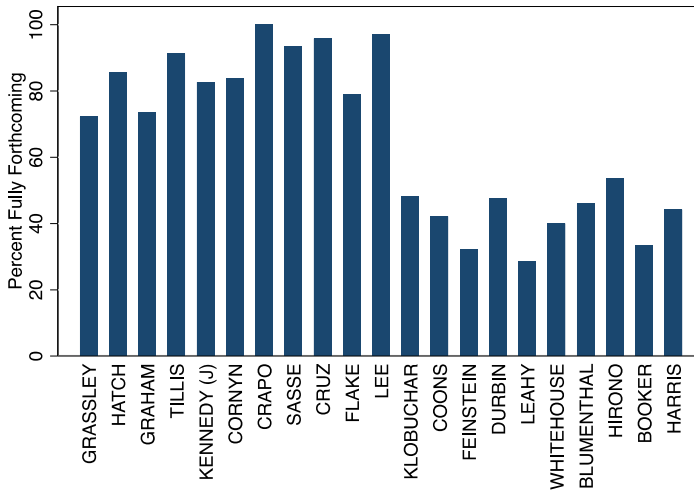


Figure 1: Kavanaugh's Forthcomingness to the Senate Judiciary Committee, by Senator.

Because the forthcomingness dependent variable is a proportion that is bounded on the end by 0 and 100 percent, we convert this measure to a proportion that ranges between 0 and 1 and we estimate a fractional logit model,<sup>62</sup> though we note that we get substantively similar results if we estimate it with ordinary least squares.

For our dependent variable reflecting the Judiciary Committee's vote, we use the vote on the first motion, which is to send the nominee to the full Senate floor with a favorable recommendation (1=yes, 0=no). Because the vote is dichotomous, we use a logistic regression.<sup>63</sup>

For our main explanatory variable—conscientiousness—and the other four personality traits, we use the measures developed and validated in our prior research.<sup>64</sup> These measures were developed by mining a wide variety of texts that were taken from the nominee's legal career prior to their nomination to the Supreme Court. This ensures that the text isn't being mined for some trait that is endogenous to the behavior we are seeking to explain. These texts include speeches, writings, and lower court opinions. Ultimately, the documents are estimated using IBM's Watson Personality Insights to generate measures of the Big-Five personality

<sup>62</sup> See Leslie E. Papke & Jeffrey M. Wooldridge, *Econometric Methods for Fractional Response Variables with an Application to 401 (k) Plan Participation Rates*, 11 J. APP. ECONOMETRICS 619 (1996).

<sup>63</sup> See J. SCOTT LONG & JEREMY FREESE, 7 REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA (2006).

<sup>64</sup> BLACK ET AL., *supra* note 6

traits.<sup>65</sup> The method described in Black et al. details how the procedure accounts and adjusts for the different source of documentation (i.e., a speech might reveal more about a person's personality than a lower court opinion). Figure 2 displays the conscientiousness for the nominees only in our analysis here. One contribution to highlight in Figure 2 is the addition of conscientiousness estimates for Justices Gorsuch and Kavanaugh.

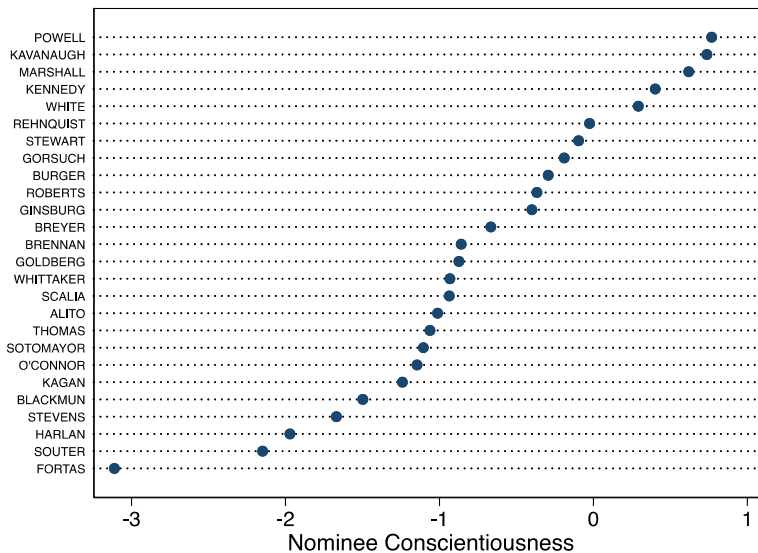


Figure 2: The Conscientiousness of United States Supreme Court Justices, 1955-2018.

For each model, we include several covariates that were adopted in the specifications of Farganis and Wedeking (2014), whose justifications are explained there. For nominee forthcomingness, we include: percentage of questions on a nominee's views, percentage of questions on civil liberties, the ideological distance between the Senator and nominee, a binary variable of whether the nominee affiliates with a different party than the Senator, a time trend variable and a squared measure, the number of questions asked to the nominee, whether there was divided government, and the nominee's perceived qualifications. Importantly, we also include the interaction between conscientiousness and political party.

For the model explaining Senator voting behavior, we include predictors accounting for: the nominee's responsiveness, the number of questions, the ideological distance between the Senator and party, a binary variable of whether the nominee is of a different party than the Senator, divided government, the nominee's perceived qualifications, and the level of interest group support. Importantly,

<sup>65</sup> See IBM, THE SCIENCE BEHIND THE SERVICE (IBM Watson Personality Insight Documentation) <https://cloud.ibm.com/docs/personality-insights?topic=personality-insights-science>.

we also include the interactions between conscientiousness and party, as well as conscientiousness and perceived qualifications.<sup>66</sup>

## VI. RESULTS

Table 1 displays the results of the forthcomingness model. Importantly, we observe the same general pattern as found in previous research. To test our expectation, however, we need to see if conscientiousness exhibits a conditional impact on nominee forthcomingness. Figures 3 and 4 illustrate these conditional effects.

*Table 1: The Conditional Impact of Supreme Court Nominee Conscientiousness and Senator Party Affiliation on Forthcomingness to Hearing Questions.*

Predictor	Nominee Forthcomingness
Percentage Questions on Views	-.007* (.003)
Percentage Questions on Civil Liberties	-.008* (.003)
Ideological Distance: Senator-Nominee	-.489* (.287)
Time Trend	.085* (.037)
Time Trend Squared	-.002* (.001)
Number of Questions	-.002+ (.002)
Divided Government	.688* (.189)
Qualifications	.660* (.271)
Nominee different party than senator	-.563* (.193)
Conscientiousness	.255* (.109)
Conscientiousness X Nominee different party	-.315* (.135)
Openness to Experience	-.117* (.070)
Extraversion	.009 (.072)
Agreeableness	-.241* (.129)
Neuroticism	-.040 (.105)
Constant	.850* (.430)

\* $p < 0.05$  one-tailed, + $p < 0.10$  one-tailed;  $N=339$ ; Log-pseudolikelihood = -187.339. The dependent variable is the proportion of fully forthcoming answers a nominee gave to a Senator.

Figure 3 reports the predicted level of nominee forthcomingness (with 95% confidence intervals) across the range of nominee conscientiousness, for each category of Senator party affiliation (same- vs. opposite-party Senator). The analyses support our expectations. For questions posed by same-party Senators,

<sup>66</sup> With the vote model specification, we deviate slightly from the Farganis and Wedeking 2014 specification by not including all of their interaction terms because of the issue of separation in logit models, or commonly referred to as perfect prediction. Using a slightly different model is not a concern because we are testing different arguments.

greater conscientiousness increases a nominee's forthcomingness. A shift in nominee conscientiousness from the 10<sup>th</sup> to 90<sup>th</sup> percentile leads to an expected increase of approximately 11 percentage points in nominee forthcomingness—an increase of more than one-half of a standard deviation. What is more, as is evident in Figure 4, nominee conscientiousness exhibits a statistically significant, positive impact on forthcomingness when answering questions from same-party Senators. Yet, there is no statistically meaningful relationship when nominees respond to questions from opposite-party Senators.

Figure 5 reports the average marginal effect of Senator party affiliation (with 95% confidence intervals) across the range of nominee conscientiousness. Importantly, the data suggest there is no statistically significant difference in forthcomingness between same- vs. opposite-party Senators at low levels of nominee conscientiousness. However, among highly conscientious nominees, there is a meaningful difference. That is, conscientious nominees are much less likely to provide forthcoming answers to opposite-party senators compared to questions posed by fellow partisans. Specifically, this effect is statistically significant among nominees scoring greater than -0.87 on the conscientiousness scale—representing greater than 55% of nominee-Senator dyads. In short, the data suggest that nominee conscientiousness is a substantively important factor that shapes the partisan dynamics between Supreme Court nominees and U.S. Senators during committee hearings.

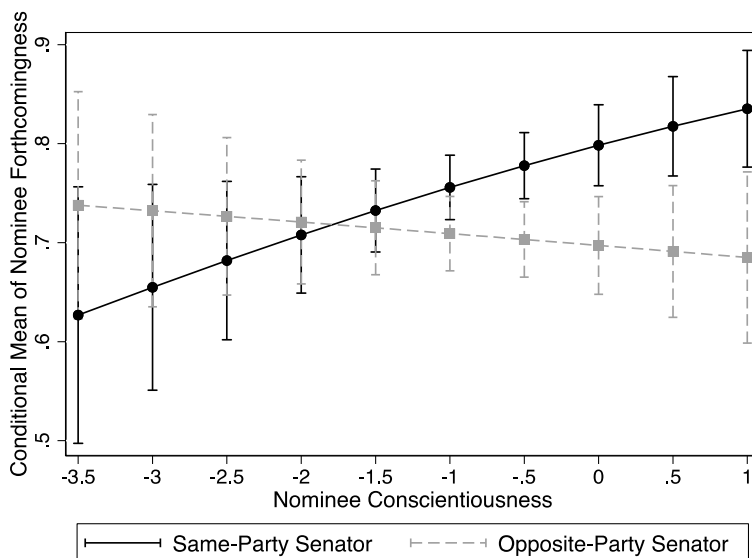


Figure 3: Predicted Level of Forthcomingness Conditional on Nominee Conscientiousness and Senator Party Affiliation.

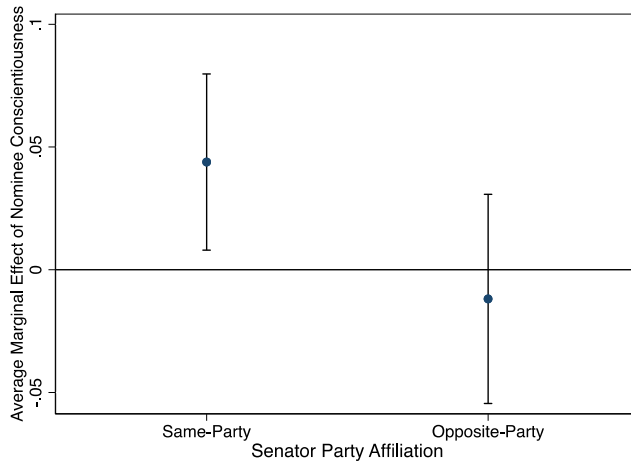


Figure 4: Average Marginal Effect of Nominee Conscientiousness, Conditional on Senator Party Affiliation, on Nominee Forthcomingness.

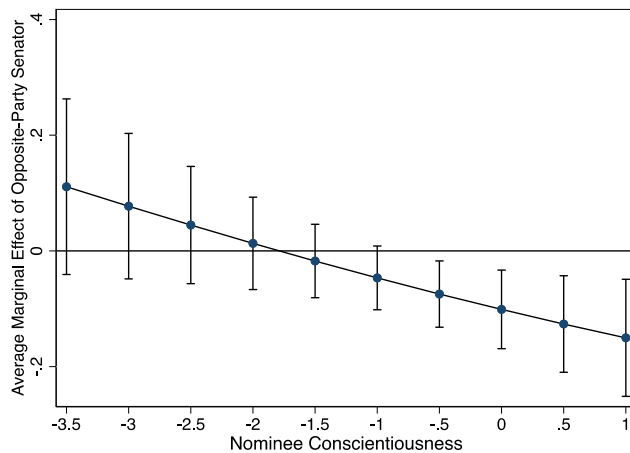


Figure 5: Average Marginal Effect of Opposite-Party Senator, Conditional on Nominee Conscientiousness, on Nominee Forthcomingness.

Next, we move to our model of votes in the Judiciary Committee. Recall that we test two empirical expectations: how nominee conscientiousness interacts with (1) Senator party affiliation and (2) nominee qualifications to affect Judiciary Committee Senators' voting support for nominees. Table 2 presents these logistic regression results. Importantly, the empirical results offer substantial support consistent with both expectations.

*CONSCIENTIOUSNESS AND SUPREME COURT CONFIRMATION HEARINGS IN THE SENATE  
JUDICIARY COMMITTEE*

*Table 2: The Conditional Impact of Nominee Conscientiousness with Senator Party Affiliation and Nominee Qualifications on Senators' Votes in Committee.*

Predictor	Senator Vote
Nominee Responsiveness	.043* (.009)
Number of questions	-.036* (.008)
Ideological Distance: Senator-Nominee	-4.047* (1.382)
Divided Government	1.025* (.482)
Television Era	2.138* (.891)
Interest group support	.085* (.027)
Conscientiousness	3.921* (1.541)
Nominee Different Party	-5.604+ (3.599)
Conscientiousness X Nominee Different Party	-1.835 (1.626)
Qualifications	4.398* (1.7049)
Conscientiousness X Qualifications	-3.113* (1.163)
Openness to Experience	-.016 (.285)
Extraversion	.115 (.287)
Agreeableness	.279 (.278)
Neuroticism	.762* (.286)
Constant	1.348 (3.712)

*\*p < 0.05 one-tailed, +p < 0.10 one-tailed; N = 445; Log pseudolikelihood = -71.710. The dependent variable represents the Senator vote in committee (1=favorable, 0= not).*

We first focus on the interactive relationship between nominee conscientiousness and Senator party affiliation. Figure 6 reports the predicted probability (with 95% confidence intervals) that a Senator in the Judiciary Committee supports a nominee across the range of nominee conscientiousness, for each category of Senator party affiliation (same- vs. opposite-party Senator). Among same-party Senators, greater conscientiousness increases the likelihood that the nominee will receive a favorable vote. Specifically, a shift in nominee conscientiousness from the 10<sup>th</sup> to 90<sup>th</sup> percentile leads to an expected increase of 10 percentage points in the probability of a favorable vote—from highly likely to receive a favorable vote to a virtual certainty. What is more, as is evident in Figure 7, while nominee conscientiousness exhibits a statistically significant, positive impact on the probability of favorable votes from same-party Senators, there is no meaningful relationship among opposite-party Senators.

Figure 8 reports the average marginal effect of Senator party affiliation (with 95% confidence intervals) across the range of nominee conscientiousness. Importantly, the analyses suggest there is no statistically significant difference in the voting behavior of same- vs. opposite-party Judiciary Committee Senators when considering the least-conscientious nominees in the data. In other words, the least-conscientious nominees do not receive the political benefit of a shared

party affiliation with Judiciary Committee Senators. However, as nominee conscientiousness increases, so too does the difference in voting behavior between opposite- vs. same-party Senators. That is, highly conscientious nominees are much less likely to receive favorable votes from opposite-party Senators compared to fellow partisans. Specifically, this difference is statistically significant among nominees scoring greater than -2.35 on the conscientiousness scale—representing approximately 94% of nominee-Senator dyads. In short, our results suggest that nominee conscientiousness is an important moderator that can magnify the partisan-motivated voting behavior of co-partisans in the Senate Judiciary Committee.

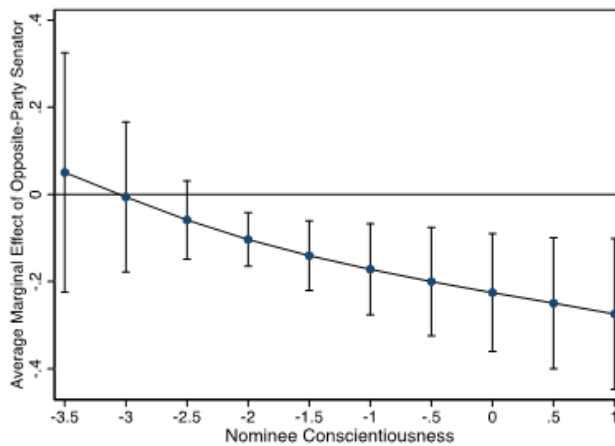


Figure 6: Predicted Probability of a Favorable Vote Conditional on Nominee Conscientiousness and Senator Party Affiliation.

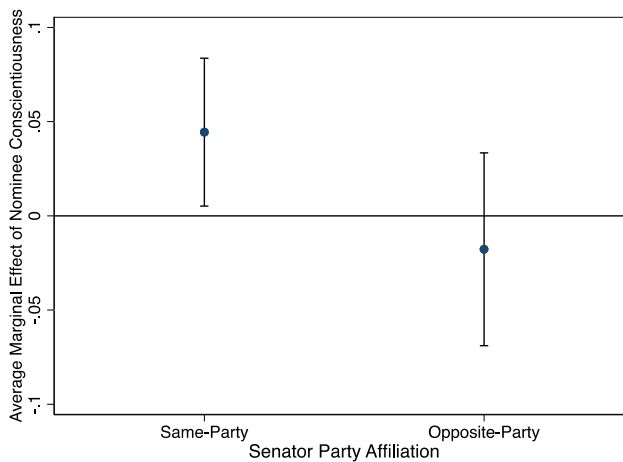


Figure 7: Average Marginal Effect of Nominee Conscientiousness, Conditional on Senator Party Affiliation, on Senator Support in Committee.



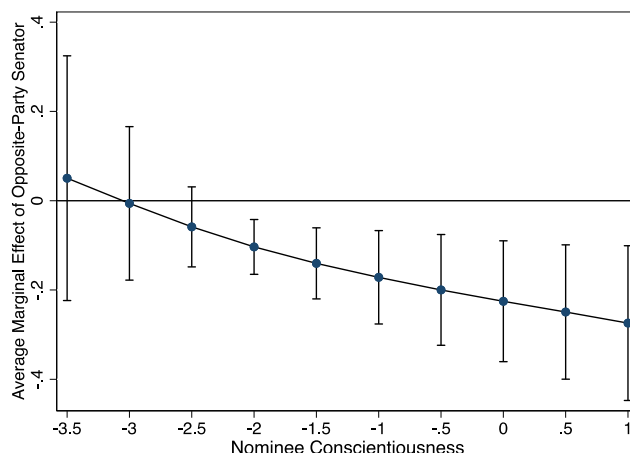


Figure 8: Average Marginal Effect of Senator Party Affiliation, Conditional on Nominee Conscientiousness, on Senator Support in Committee.

Next, we turn our attention to the interaction between nominee conscientiousness and qualifications. Figure 9 reports the predicted probability (with 95% confidence intervals) that a Senator in the Judiciary Committee supports a nominee across the range of nominee conscientiousness, conditional on nominee qualifications. When viewing the most qualified nominees in the data, having greater conscientiousness exhibits little impact on the probability that Judiciary Committee Senators will offer their support. In fact, as Figure 10 shows, the average marginal effect of nominee conscientiousness is statistically insignificant among nominees scoring above 0.63 and below 0.95 on the qualifications scale—representing approximately 40% of the observations in the data.<sup>67</sup>

Importantly, the data show that nominee conscientiousness is a critical factor that can lead Judiciary Committee Senators to offer their support for those nominees scoring at the bottom quartile of qualifications. That is, a highly-conscientious nominee can mitigate the negative effects of low legal qualifications. As Figure 9 illustrates, when focusing on the least-qualified nominee in the data, a shift from the 10<sup>th</sup> to 90<sup>th</sup> percentile in nominee conscientiousness leads to an expected increase of 57 percentage points—from 0.147 to 0.718—in the probability of a favorable vote—a near-fourfold increase. On the flip side of the interactive effect, Figure 11 reports the average marginal effect of nominee qualifications (with 95% confidence intervals) across the range of nominee conscientiousness. The data show that greater legal qualifications exhibit no discernible effect on the propensity of Judiciary

<sup>67</sup> The model also suggests that greater conscientiousness has a modest, negative effect on Senator support among nominees with the highest legal qualifications (i.e., scoring 0.95 or higher). This result is seemingly driven by eight total (out of 189—i.e., less than 5%) Senator votes that did not support two of these nominees—John Roberts and Potter Stewart. And, among those nominees with such high qualifications, Roberts and Stewart were two of the most conscientious nominees.

Committee Senators to cast favorable votes for highly conscientious nominees—representing roughly one-quarter of the observations in the data. In short, the data indicate that nominee conscientiousness can act as a powerful mitigating factor to offset the negative effects of low legal qualifications when appearing before the Senate Judiciary Committee.

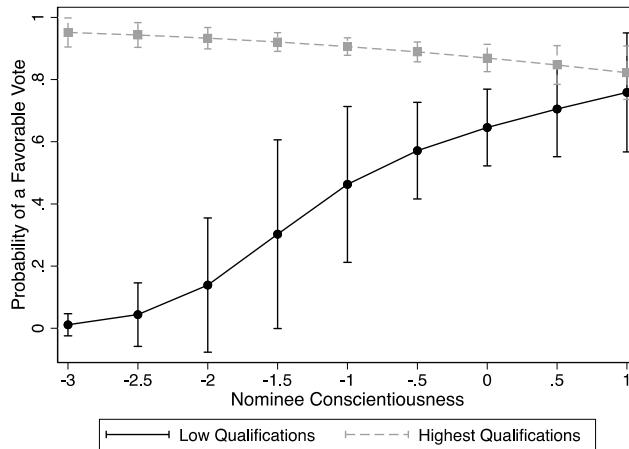


Figure 9: Predicted Probability of a Favorable Senator Vote Conditional on Nominee Conscientiousness and Qualifications

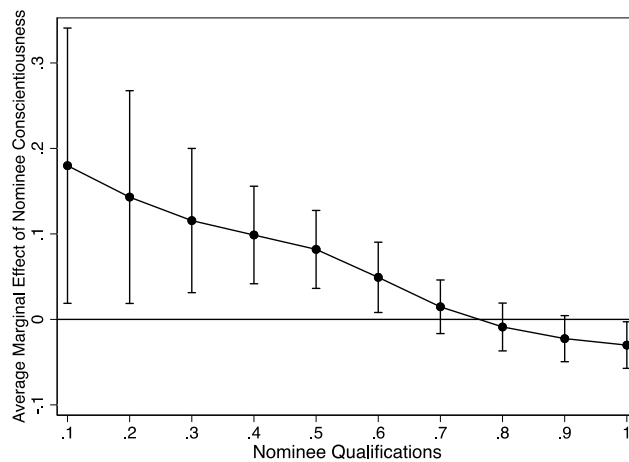


Figure 10: Average Marginal Effect of Nominee Conscientiousness, Conditional on Nominee Qualifications, on Senator Support in Committee

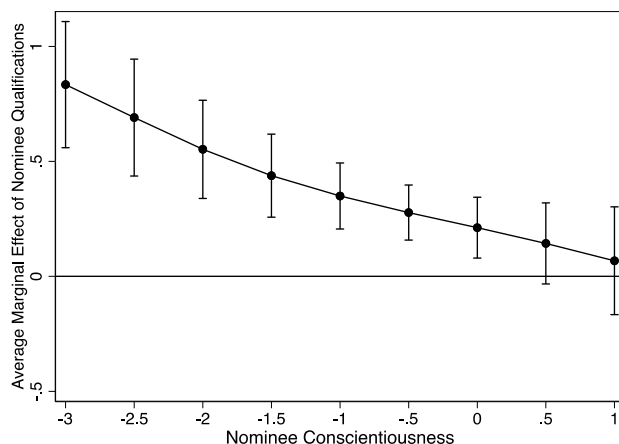


Figure 11: Average Marginal Effect of Nominee Qualifications, Conditional on Nominee Conscientiousness, on Senator Support in Committee.

## VII. ROBUSTNESS CONSIDERATIONS

Since 1955, there have been four nominees who participated in Senate Judiciary Committee hearings but were not subsequently confirmed: Abe Fortas (promotion to Chief Justice), Clement Haynsworth, G. Harold Carswell, and Robert Bork.<sup>68</sup> With the exception of Abe Fortas, for whom we have trait estimates since he had already been confirmed as an associate Justice, we exclude these individuals from the analyses reported above. One very real concern, then, is that this decision introduces selection bias into our estimation sample and, in so doing, contaminates our results. That is, it is not difficult to image a world where aspects of one's personality influence whether a nomination fails or succeeds. Indeed, that is part and parcel to the theory we propose, test, and for which we find ample support.

To empirically examine the extent to which our results are sensitive to these omitted nominees, we take a data-driven approach. In particular, we re-estimate each of our models but replace the missing personality values with a range of possible values of conscientiousness for each of the three missing nominees. Suppose, for example, we said conscientious could be one of three values: low, medium, or high. We would start by using low values for Haynsworth, Carswell, and Bork and then re-estimating both of our models using those imputed values. We'd then switch Haynsworth from low to medium while keeping Carswell and Bork at low and then do another round of estimation. Round three would have Carswell only at medium and the others at low. Round four would be Bork's time to shine as the sole medium with Haynsworth and Carswell at low. With three nominees and three possible conscientiousness values there are a total of 27 unique permutations (if you have

<sup>68</sup> Three additional individuals were nominated but never appeared before the Senate Judiciary Committee (year of nomination appears in parentheses): Douglas H. Ginsburg (1987), Harriet Miers (2005), and Merrick Garland (2016).

ample time you can game this out yourself). These 27 unique permutations yield 27 sets of model parameter estimates with which we then perform the same post-estimation to examine the interactions we report above.

Of course, the trait of conscientiousness varies well beyond the triplex of values we used for this simple illustration of our general approach. Instead, we start by using the sample minimum and maximum values of conscientiousness, which correspond to -3.1 and 0.77, respectively. In addition to the minimum and maximum we also include eight equally spaced points between those outer values for a total of 10 possible conscientiousness values.<sup>69</sup> And, since we examine each unique configuration of those 10 values for nominees, this equates to a total of 1000 models that we ultimately estimate (i.e.,  $10^3$ ).

Figure 12 provides a visual summary of the results from this exercise. The basic setup to this figure is identical to Figure 5 above, which portrays the marginal effect of a senator being from a different party on a nominee's forthcomingness (y-axis), conditional on the nominee's conscientiousness (x-axis). The key difference between Figure 12 and Figure 5, however, is the plethora of points within the plot. As the key indicates, we use x's and o's (oh how they haunt us!) to denote significant and insignificant effects, respectively. Whereas the input for Figure 5 was a single model, recall that we estimated 1000 models to investigate the impact of our failed nominees. Thus, for each value of conscientious along the x-axis the plotted symbols are a 10% random sample from the model results. We take this step because displaying 1000 closely related data points on a single plot would be like asking a toddler to paint your home office: it's going to be a mess. A similar motivation leads us to add some jittering along the x-axis to further decongest the figure.

Ultimately, however, the key quantity of interest is tucked away safe and sound along the labels on the x-axis. The top values, which range from -3.50 to 1.00 denote the level of nominee conscientiousness. The parentheticals beneath each of those values provide the percent of the 1000 models for which the marginal effect of a senator being from a different party is statistically significant ( $p < 0.05$ , two-tailed test). The value of 0%, which appears below -3.50 (among others) indicates that in none of the 1000 models examined did the substitution of conscientiousness for the three missing nominees result in the marginal effect becoming statistically significant. At the other end of the spectrum, the 100% value below 1.00 (among others) indicates that all of the 1000 ancillary models yielded a marginal effect that was statistically significant. Importantly, the results we obtain in this robustness check are strongly aligned with those we report above. That is, the figure above suggests that a Senator being of a different party has no significant impact on nominee forthcomingness when nominee conscientiousness runs between -3.5 and -1.0. However, when a nominee is at -0.50 or higher, there is a significant difference. This is substantively identical to what we report in Figure 5 above. Indeed, the only tiny exception to this statement comes in the form of 3% of the robustness models where we recovered a statistically significant effect when nominee conscientiousness was -1.00. Even this is consistent since, with a

<sup>69</sup> As noted above, we also control for a nominee's agreeableness, neuroticism, openness, and extraversion. Since these are only controls and are never interacted with any of our theoretical variables of interest, we simply set them at the sample means for the 28 nominees in our data for whom we have scores.

two-tailed p-value of 0.10, we would be unlikely to accept the null hypothesis that the effect of Senator party has no effect on forthcomingness when a nominee's conscientiousness is -1.00. Thus, so far as our forthcomingness model is concerned, we conclude the omission of failed nominees has no meaningful impact on our results.

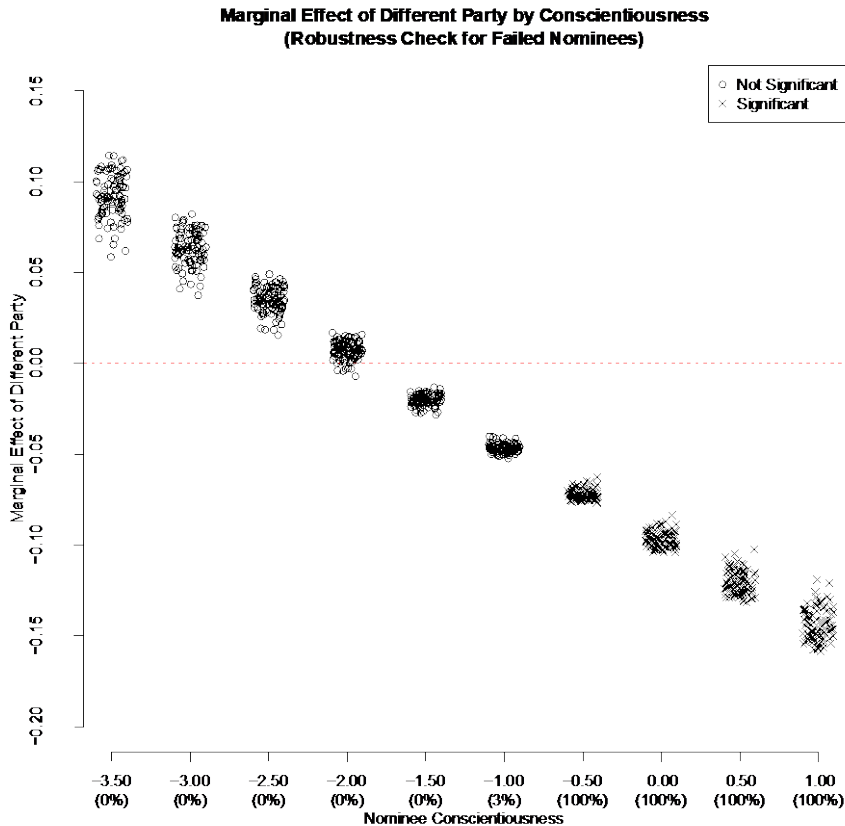


Figure 12: Average Marginal Effect of Senator Party Affiliation, Conditional on Nominee Conscientiousness, on Nominee Forthcomingness – Simulation for Failed Nominees.

Next, we apply an identical approach to stress testing our second analysis, which evaluates the individual votes of committee members on moving forward with a nomination. As discussed above, we find that conscientiousness conditions the impact of two other factors: the effect of a Senator being from a different party as well as a nominee's level of qualifications. Figure 13 presents the results of our robustness assessment for the different party result and, in particular, Figure 8, which shows the marginal effect of going from a Senator of the president's party to a Senator from the opposing party. Figure 13 adds a black solid line that presents the median marginal effect estimate over the 1000 models estimated (we add this given that there's a bit more variation in the cloud of points). The basic relationship we report earlier continues to hold here. For lower levels of nominee conscientiousness,

we find no statistically significant effect for Senator-President partisan agreement. As nominee conscientiousness increases, however, we show that disagreement between the voting senator and nominating president is associated with a decreased likelihood of a favorable committee member vote.

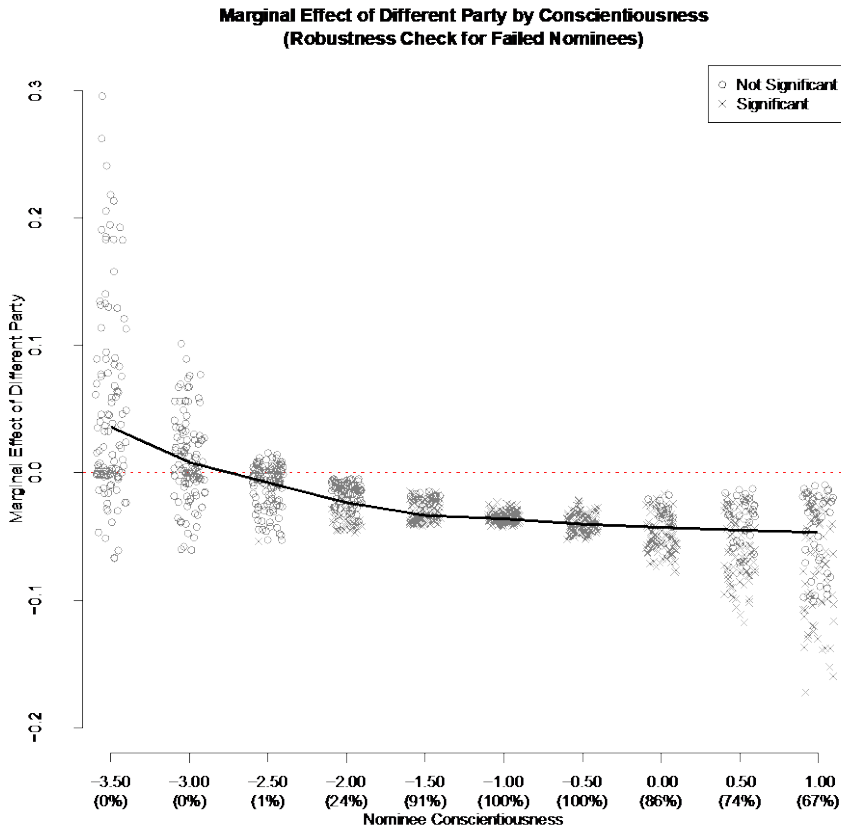


Figure 13: Average Marginal Effect of Senator Party Affiliation, Conditional on Nominee Conscientiousness, on Senator Support in Committee – Simulation for Failed Nominees.

We do observe a couple of differences between what we obtain in our robustness check relative to what we see in Figure 8. For starters, in our robustness models we find that the threshold for when partisanship matters is a bit higher. The effect in Figure 8 is significant from -2.0 onward. As we show in Figure 13, however, only 24% of our robustness models find a significant effect for that level of nominee conscientiousness. Additionally, for the highest levels of nominee conscientiousness we also observe that the effect of partisanship is smaller than we report in Figure 8 and becomes insignificant in a modest minority of the 1000 models we estimated.

Lastly, we consider the robustness of the nominee conscientiousness and nominee qualifications interaction. Figure 14 illustrates the marginal effect of

going from 0 to 1 on the nominee qualification scale, which is substantively to say an individual is utterly unqualified versus has the highest level of qualifications. This is the same quantity of interest presented in Figure 11 above, which showed that the effect of qualifications was decreasing in nominee conscientiousness. By way of refresher, qualifications mattered the most when a nominee was of low conscientiousness and mattered least when the nominee had a high conscientious value. Figure 14 largely corroborates this effect. The effect of qualifications is significant for a majority of our robustness models for low to above average levels of conscientiousness – just like we report in Figure 11. When a nominee has a conscientious value of 0.5 or higher, however, the estimated effect of conscientiousness is both slight in magnitude and highly uncertain statistically.

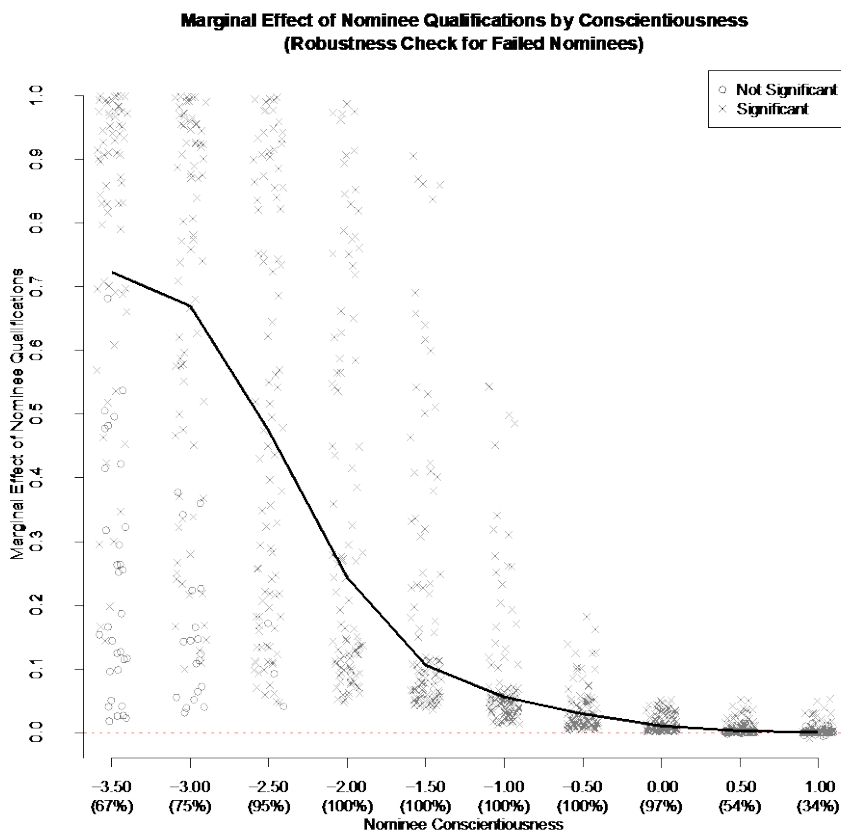


Figure 14: Average Marginal Effect of Nominee Qualifications, Conditional on Nominee Conscientiousness, on Senator Support in Committee – Simulation for Failed Nominees.

Limitations in measures necessitated the omission of three nominees questioned and voted upon by the Senate Judiciary Committee but who ultimately failed to secure a seat on the Supreme Court. As it seems probable that they are not truly missing at random, we have endeavored to examine how sensitive our underlying



results are to what could have been their measured conscientiousness scores. On the whole, the foregoing provides strong evidence that our conclusions about the interactive effect of conscientiousness on both a nominee's forthcomingness and his probability of securing favorable committee votes are robust to literally 1000 alternative configurations of conscientiousness held by Haynsworth, Carswell, and Bork.

## VIII. CONCLUSION

In this Article, we have seen the important effect of conscientiousness and how it shaped both how nominees and senators interacted on the Senate Judiciary Committee as well as how Senators voted in Committee. Importantly, while most popular accounts of these hearings will regularly comment on the importance of personality, we have made the contribution to the literature to show how personality matters for these hearings. We find that personality shapes interactions in the Senate Judiciary Committee in important and meaningful ways.

But is personality the most important factor in these hearings? Undoubtedly it is not, but that does not diminish its importance. What seems to be of growing importance is party polarization. As for the Senate Judiciary Committee, it seems like the growing polarization in the Senate is likely to further change the dynamics. We have seen with the most recent confirmation hearings of Amy Coney Barrett that party politics has a stranglehold on guiding senator behavior. In our analyses, we found that conscientiousness magnified partisan effects. It is unclear going forward how hearings before the Senate Judiciary Committee will evolve given the importance of party and conscientiousness and their interconnectedness. Only time will tell.