Interest Groups

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When most people hear the term "interest groups," they think of well-connected political elites seeking to obtain policy benefits at the expense of the public good. Indeed, a Gallup poll taken in the Spring of 2007 found that the vast majority of American adults believe that political leaders in Washington pay too much attention to the needs of interest groups. Hardly anyone, however, thinks of judges when they hear of "interest groups."

Yet, because the federal judiciary—especially the U.S. Supreme Court—is a powerful policy making institution, we should expect interest groups to train their sights on it. From upholding the constitutionality of race-based admissions in *Grutter v. Bollinger* (2003), to striking down same-sex sodomy laws in *Lawrence v. Texas* (2003), to intervening in the 2000 presidential election dispute in *Bush v. Gore* (2000), the Court has flexed its policy making muscles and defined political events. This power, coupled with interest groups' desires to influence policy, naturally draws us to the following question: Can interest groups influence the Supreme Court?

Our goal here is not to provide a definitive answer to this thorny empirical question, a complicated task beyond this brief essay. Instead, our goal is more limited. We describe how interest groups seek to influence the Supreme Court in three areas— the nomination and confirmation of justices; the agenda-setting process; and the Court's decisions on their merits.

1. The Nomination and Confirmation Process.

The Constitution of the United States creates a two-stage process for filling vacancies on the Supreme Court. In the first stage, the president nominates an individual for the post. In the second, the Senate responds to (i.e. confirms or rejects) that nomination. For better or worse, this process is

inherently political and is one in which interest groups attempt to wield influence—and occasionally succeed.

Each stage presents opportunities for interest groups to exert influence. While a host of factors influence the president's nomination decision (such as the partisan makeup of the Senate and the nominee's qualifications and ideology) interest groups can play an important role. Presidents require the aid of interest groups to ensure that their nominees obtain enough political support to make it through the process. Thus, presidents frequently will try to gauge how key interest groups will react to their nominees.

Failure to do so can bring about dramatic consequences. As Jan Crawford Greenburg points out in *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*, a primary reason President Bush's nomination of Harriet Meiers failed is that conservative interest groups were not on board with it. These groups believed that the vacancy created by Sandra Day O'Connor's retirement promised them the opportunity to push the Court to the right. Yet, when Bush nominated someone who appeared insufficiently conservative (and unqualified), they were outraged and let the president and the public know. The eventual response—Meiers withdrew her nomination (even before she had a Senate hearing) and the president nominated Samuel Alito, a candidate perceived as more qualified and, more importantly from the perspective of the president's base, more conservative.

Of course, President Bush is not alone in suffering the hard lessons of interest group politics. A principal reason for Robert Bork's failed Supreme Court nomination was the Reagan administration's tardy mobilization of conservative interest groups to counteract the unanswered and increasingly effective attacks lodged by liberal groups.

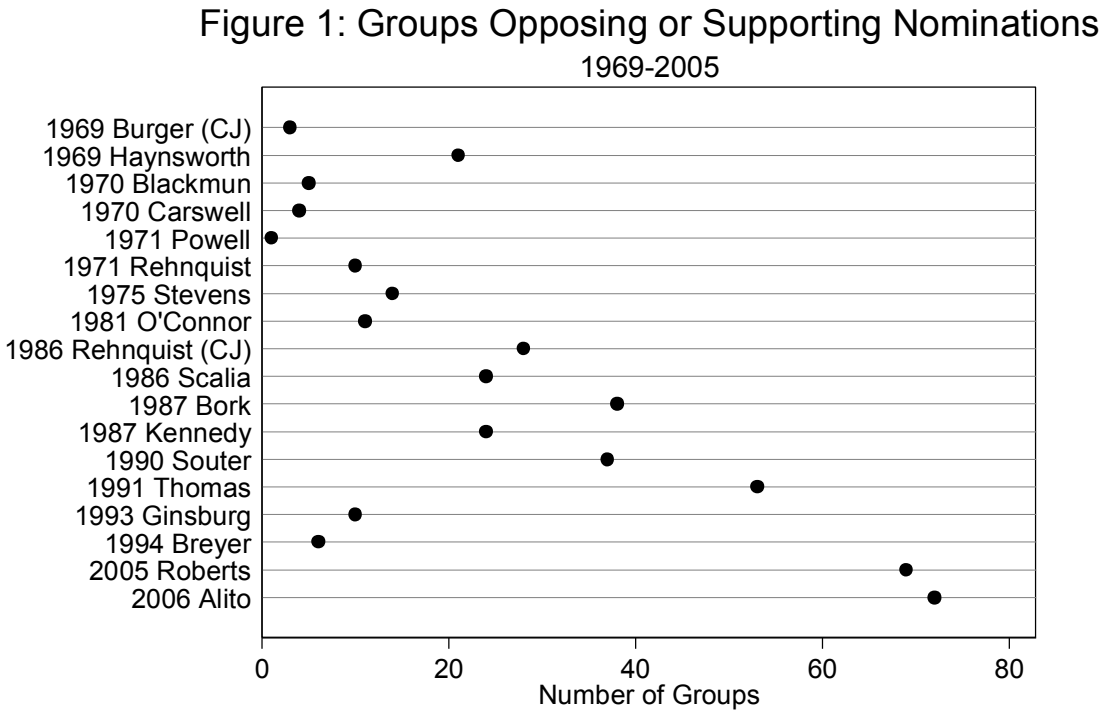
The president is not the only actor influenced by organized interests during the confirmation process. Senators are just as—if not more—susceptible to their influence. Members of Congress are

motivated primarily by a desire for reelection and, as Caldeira and Wright tell us in their article, "Organized Interests and Agenda Setting in the U.S. Supreme Court," interest groups can inform senators of how their constituents will react to their confirmation votes. Senators are loathe to endanger their reelection chances by voting the "wrong" way on a nomination. So, by providing them information about their constituents' desires, they can help senators avoid making crucial missteps that might cost them their jobs.

Groups also can inform senators of what *they* will do if the senator votes the wrong way. For example, in *Advice and Consent: The Politics of Judicial Appointments*, Epstein and Segal describe how a liberal group claimed it would have reacted if Senator Joe Biden (D-DE) had voted to confirm a conservative nominee: "We would have had every Delaware donor of Joe Biden on an airplane, and they would've been standing in his office…We could've gone that far and we would have…" (p. 101). By threatening to mobilize a senator's constituents, interest groups can provide additional, potentially electorally relevant information.

Interest groups can also provide policy-based information to politicians by informing them of how the nominee is likely to behave on the bench once confirmed. Groups like the American Bar Association conduct background reviews of nominees, searching for evidence that indicates how a nominee will behave in the future. The fruits of these searches help politicians determine a nominee's judicial philosophy and whether he or she will remain ideologically consistent over time.

And these groups mean business. As Figure 1 shows, they are quite active in the nomination and confirmation process, with their activity growing substantially over time. When President Nixon nominated Warren Burger to serve as Chief Justice in 1969, only three groups offered written or oral testimony for or against the conservative Burger. Just four decades later, almost 70 organized interests came out in support or opposition to John Roberts, President Bush's equally conservative nominee for Chief Justice.



Data source: Lee Epstein et al. *The Supreme Court Compendium* (Washington, D.C. Congressional Quarterly Press, 2007).

The lesson from all of this: During the nomination and confirmation process, presidents and senators must consider interest groups. These groups have potentially important information and mobilization power.

2. The Agenda Setting Stage.

Interest groups can also influence which cases the Court decides to hear. The Supreme Court's decision-making process consists of two general phases. In phase one—the *certiorari* phase—justices decide whether they will hear and decide a case on its merits (i.e grant a writ of *certiorari*). If at least four justices vote to hear the case, it proceeds to phase two—the merits phase—in which the Court renders judgment over the dispute. In this first phase, interest groups can play an important role.

Deciding which cases to hear is a formidable task for the Court. Each term, it receives thousands of *certiorari* petitions—these days, over 7,000. The Court faces a resource constraint, however. It does not have the capacity to hear every case appealed to it. Accordingly, justices must look for cases that best allow them to meet their goals.

This, of course, begs the question—what are the justices' goals? In "Mapping Out the Strategic Terrain: The Informational Role of *Amici Curiae*," Epstein and Knight argue that Supreme Court justices are motivated by a desire to make conservative or liberal policy. The presence of interest groups requesting the Court to hear (or not hear) a case sends strong signals about the case's policy implications. As more interest groups file briefs in support or opposition to *certiorari*, the case appears to be more salient and, thus, a more effective policy making vehicle. Thus, justices should be more likely to hear cases that attract interest group involvement.

The data support the theory. Caldeira and Wright (1988) show that when there is no lower court conflict and no Solicitor General (the U.S.'s attorney) participation in a case, there is only a one percent chance that the Supreme Court will hear it. If, however, two or three *amicus* briefs are filed in that same case, the probability that the Court will hear it jumps to thirty-five percent. Clearly, interest groups provide important signals to justices and, in so doing, influence which cases make it on to the Court's agenda.

3. The Merits Stage.

Once a case makes it on the Court's agenda, interest groups try to influence how it is decided. The most frequent tactic they use is to file briefs *amicus curiae*. From the Latin for "friend of the Court," these briefs are meant to provide information to the Court, information that justices should find useful when pursuing their goals. That is, justices lack knowledge about the practical ramifications of their votes and decisions, as well as information on how other relevant actors such

as Congress and the president will react to their rulings. *Amicus* briefs filed by interest groups can provide such information.

The evidence of whether the information in these briefs actually influences the Court, however, is mixed. Some scholars argue that interest groups' briefs are not influential. In their article, "Interest Group Success in the Courts: Amicus Participation in the Supreme Court," Songer and Sheehan used a rough matched pair analysis where they compared similar Supreme Court cases, save for the fact that one case had *amicus* support while the other did not. They found no significant relationship between *amicus* support and victory. Other scholars are equally skeptical of *amici* influence. In *The Supreme Court and the Attitudinal Model Revisited* (2002) Segal and Spaeth assert that justices make decisions based on their own political values vis-à-vis the facts raised in cases. Since justices have firmly rooted and well-defined preferences, arguments made by interest groups rarely, if ever, influence their votes.

On the other hand, some scholars have asserted that interest groups *do* influence the process. In a 2005 speech at the University of Maine, *New York Times* columnist Linda Greenhouse argued that the information from *amicus* briefs caused the conservative Rehnquist Court to uphold liberal policies like the Family and Medical Leave Act, affirmative action, and gay rights. In "The Influence of Amicus Curiae Briefs on the Supreme Court," Kearney and Merrill counted the number of times the party supported by *amici* won its case versus the number of total cases in which the *amici* participated, finding that *amicus* briefs tend to be associated more with winning parties. And in "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation," Paul Collins used statistical controls to find that the more *amicus* briefs that are filed for a party, the more likely that party is to win.

Additional data, while not answering whether *amicus* briefs influence justice's votes, clearly show that interest groups are highly active in the Supreme Court decision making process. In "*Amici*

Curiae During the Rehnquist Court Years," Owens and Epstein found that at least one *amicus curiae* brief accompanied nearly 90 percent of all cases decided between the Court's 1986 and 2003 terms. Indeed, they found that it is now the rare case in which at least one interest group does *not* file an *amicus* brief. For example, in the 2001 term, at least one *amicus curiae* brief accompanied nearly 95 percent of the cases. Clearly, interest groups are actively engaged in the decision making process.

The data also show that justices are increasingly likely to reference these briefs in their majority opinions. Owens and Epstein found that between the 1994 and 2003 terms, the Court's majority opinion referenced at least one *amicus* in nearly 40 percent of the 687 cases in which one or more amici participated. As the authors tell us, "[r]elative to earlier years, this is an astonishingly high figure" which suggests that the Court has made far more use of *amicus* briefs than their predecessors (p. 130). Again, while these data do not necessarily support an inference of influence, they are suggestive of an important connection between interest groups and the Court.

4. Discussion.

Our goal in this entry was to survey three areas in which interest groups influence or seek to influence the Supreme Court. We found, first, that interest groups are more active than ever in the nomination and confirmation process, where they try to influence presidents and senators by providing information and applying electoral pressure. In this manner, interest groups can influence whom the president nominates to the Supreme Court and how senators vote on those nominees. Organized interests can also influence which cases the Court decides to hear. As policy seekers, Supreme Court justices look for cases with the most far-reaching policy consequences. As the number of interest groups filing *amicus* briefs at this stage increases, the Court becomes more confident in the salience of the case and, thus, the desire to hear and decide it. Finally, interest groups now file *amicus* briefs in the vast majority of cases the Court agrees to decide on their merits

While the evidence is mixed regarding whether these briefs influence justices' votes, groups will continue to seek influence with the Supreme Court and, as a result, commentators will continue to debate their importance.

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Further Readings

Bush v. Gore, 531 U.S. 98 (2000).

Collins, Paul. 2004. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." *Law & Society Review* 38(4):807-832.

Epstein, Lee and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford University Press.

Epstein, Lee *et al.* 2007. *The Supreme Court Compendium*. Washington, D.C.: Congressional Quarterly Press.

Epstein, Lee and Jack Knight. 1999. Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae. In *Supreme Court Decision Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman. Chicago: University of Chicago Press.

"Government and Politics: Gallup Poll. Taken March 26-29, 2007. Available from: http://www.pollingreport.com/politics.htm

Greenburg, Jan Crawford. 2007. *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. New York: Penguin Press.

Greenhouse, Linda. 2005. What Got Into the Court? What Happens Next? *Maine Law Review* 57(1):1-12.

Grutter v. Bollinger, 539 U.S. 306 (2003).

Kearney, Joseph D. and Thomas W. Merrill. 2000. The Influence of Amicus Curiae Briefs on the Supreme Court. *Pennsylvania Law Review* 148(3):743-855.

Lawrence v. Texas, 539 U.S. 558 (2003).

Owens, Ryan J. and Lee Epstein. 2005. Amici Curiae During the Rehnquist Years. *Judicature* 89(3):127-132.

Segal, Jeffrey A. and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Songer, Donald R. and Reginald S. Sheehan. 1993. Interest Group Success in the Courts: Amicus Participation in the Supreme Court. *Political Research Quarterly*. 46:339-354.