# The Politics of Scandals:

# The Case of Supreme Court Nominations, 1877-1994

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**Abstract**

We examine the role of scandals in the politics of Supreme Court nominations, 1877-1994. We argue that when a nominee's opponents control the process, they often delay it in the hope of uncovering a scandal. If they succeed in finding a scandal, they further delay the process in order to exploit the scandal and damage the nominee's prospects of confirmation. Evidence from a Markov model of the confirmation process, estimated on weekly data on the emergence of scandals, supports this view. We then examine the impact of scandals on roll call voting. Scandals reduce support for a nominee among the President's co-partisans, though modestly. But they galvanize opposition among the President's partisan opponents, especially in tandem with divided party government. We then estimate the expected aggregate support for nominees, in the presence and absence of scandals, given the size of the president's majority in the Senate. Scandal-wracked nominations face a substantial chance of failure, but only in periods of divided government. These findings suggest some lessons about the strategic, partisan manipulation of scandals during periods of ideological tension in American government.

"The Judiciary Committee . . . began a rousing search into all the dark abodes of scandal and tattle, to hunt for something against the character of the President's nominee."

New York Times, July 21, 1888, on the nomination of Melville Fuller to Chief Justice

## Introduction

Political scandals are a staple of the tabloids. Can they also be the subject of political science? We believe the answer is "yes."[1] We argue that in the American system of government the emergence of political scandals is a stochastic process that partisans manipulate for advantage, with important political consequences. The politics of scandals thus offers an opportunity for systematic empirical analyses grounded in a rational choice perspective, like such other initially unlikely topics as elections, war, and crime.

Supreme Court nominations provide an attractive laboratory for studying the politics of scandals. Because much of the confirmation procedure is established in the Constitution and varies relatively little from episode to episode, and because Supreme Court nominations occur regularly and are well documented, data are systematic, reliable, comparable, and abundant. Because the political stakes are high, relevant actors, such as the President, members of the Judiciary Committee, Senate leaders, other members of the Senate, and the nominee him- or herself, have an incentive to engage in strategic calculation and action. As recent experience shows, scandals can dramatically affect the nomination process, but there is considerable variation across nominations. Finally, findings from this area have broader implications for the operation of the American system of separated powers, including the role of divided party government (Fiorina 1996). Thus, a study of scandals and Supreme Court nominations may

reveal larger patterns about the strategic, partisan manipulation of scandals during periods of ideological tension in American government.

We study the period 1877-1994, from the re-emergence of comparatively normal partisan politics after Reconstruction to the time of the most recent nomination. This period encompasses the two great eras of divided government in American history (1877-1896 and 1955-present), as well as two periods of largely single-party hegemony (1897-1930 and 1933-1952). The period saw 80 nominations to the Supreme Court, of which 24 were controversial, 10 unsuccessful, and, by our measure, 23 with an element of scandal.[2]

Our argument is fairly straightforward. The political *grounds* for Senate opposition Supreme Court nominees have varied over time. Among these are ideological opposition to a nominee and institutional conflict between the President and Congress. The relative importance of the various sources of opposition has varied systematically through history, reflecting the changing contours of American politics. Yet despite the shifting grounds of opposition, the political *tactics* of opponents have been remarkably consistent, reflecting the continuity of the institutional foundations of nomination politics (e.g., the constitutional specification of key parts of the process and the existence and operation of the Judiciary Committee). A key tactic of senatorial opponents has been *delay*, boosting the chances for the emergence of a scandal. Then, opponents have exploited the scandal to degrade support among the President's co-partisans and to mobilize and legitimize opposition among members of the other party. We use a host of quantitative evidence to flesh out this story. We attempt to be sensitive to history -- that is,

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[1]See for instance Kathleen McGraw, "Managing Blame: An Experimental Test of the Effects of Political Accounts," *American Political Science Review* 85:1133-57 (1991).
[2]We discuss the criteria for scandal below. The criteria for "controversial" are 1) the nomination resulted in a roll call with 10% or more nay votes from all cast, or 2) the nomination was withdrawn under a cloud (D. Ginsburg,

changing relationships over time -- but nonetheless try to specify causal mechanisms and show how they work.

The paper has the following organization. In the next section, we informally sketch a simple search model of the confirmation process, focusing on delays and scandals. We indicate how to implement the theory in an empirical model and offer some expectations about patterns in the data, given the model.   Next, we discuss our data, which are novel, in more detail. Then, we use multivariate methods to examine the process of uncovering and investigating scandals. The section that follows explores the consequences of scandals for roll call voting, concluding with a model of the success or failure of nominations.

## Causal Mechanisms and the Nomination Process

At a minimum, a "theory" of Supreme Court nominations should accomplish the following:

1. Detail the basic logic of the President's choice of nominee, that is, the general type of nominee chosen by presidents under different conditions.

2. Detail the logic of support and opposition in the Senate, that is, the reasons *why* Senators would support or oppose a given type of nominee and *how* they would go about doing so.

3. Show how the intersecting logics of presidential choice and senatorial response determine the outcome of the process.

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Fortas 2, Thornberry) or 3) opponents deliberately delayed the nomination until the end of a Congress in order to kill it (Matthews 1).

Political scientists have made some progress toward such a theory.[3] However, key parts of the nomination process remain unexplored. We focus on one mechanism, the strategic use of delay, employed by opponents of a nominee.[4] Then, we investigate the consequences of delay in subsequent portions of the process. Incorporating scandals and strategic delay into a complete theory of Supreme Court nominations is a task we defer to the future.

*Scandals and Delay*

Empirical studies show that individual roll call voting on Supreme Court nominations in the post-W.W.II period depends on the interaction of ideological distance between the nominee and the senator, and the perceived "quality" of the nominee (Cameron, Cover & Segal 1990; Segal, Cameron & Cover 1992, Nokken and Sala 1996). High quality nominees rarely engender contentious votes. But nominees perceived as poor quality often do so. In the case of contentious votes, individual vote choice displays marked ideological polarization -- liberal senators vote against conservative nominees, and conservative senators vote against liberal nominees.

It is not clear why senators are so sensitive to the "quality" of nominee, nor why they are so often willing to vote for high quality but ideologically distasteful nominees (at least in the post-W.W.II period). The pattern may be due to the relative ease of explaining votes for high quality nominees to an electorate that rarely thinks of the Court in ideological terms (Cameron, Cover & Segal 1990). But perhaps senators genuinely care about "quality," so that negative

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[3]The best developed approach employs a simple spatial model to predict the policy consequences of adding a nominee to an existing body (e.g., the Supreme Court or the board of an independent regulatory agency), and then employs backward induction to derive an optimal support/opposition strategy for the median voter in the Senate, and an optimal nomination strategy for the President. See Cameron, Cover and Segal 1990a (Supreme Court), Lemieux and Stewart 1990 (Supreme Court), Snyder and Weingast 1996 (a significant extension to regulatory agencies), Chang 1997 (an application to the Federal Reserve), and Moraski and Shipan 1999 (Supreme Court).
[4] The principal quantitative study of delay during nominations is surely McCarty and Razaghian (1999), which studies nominees from 1885-1995. However, they do not investigate scandals and restrict their analysis to non-judicial appointments. We compare our findings with theirs in the Conclusion.

partisan and ideological assessments are over-weighed for "high quality" nominees but reinforced for "low quality" ones.

Regardless of the foundation of senators' voting behavior, their sensitivity to "quality" creates strategic opportunities for a nominee's opponents and dangers for his or her supporters. If opponents can uncover evidence that damages a nominee's reputation, they may be able to trigger a flood of nay votes from senators ideologically distant from the nominee or otherwise hostile to him or her. Conversely, if supporters can prevent the emergence of damaging information, the chances of defeating a nominee are quite low.

A vital element in smearing or protecting a candidate is *time*. The point was well-made in a memo to President Richard Nixon written by staffer Egil "Bud" Krogh. In the memo, Krogh explained why the Administration should nominate the more conservative nominee first when attempting to fill the two vacancies left by the departures of Harlan and Black. According to Krogh, such a strategy would help by "denying them [senatorial opponents] the time necessary to make a public case against a man. The longer these procedure drag out, the more difficult it is for us to get our man through" (Yalof 1997:281) (emphasis in the original).

As partial evidence that while the grounds for opposition have varied, the tactics have not, consider next the take by *Harpers Weekly* on the nomination of Melville Fuller to Chief Justice, four score and three years before the Harlan and Black departures:

> The president nominated for the most important office in his gift a gentleman not generally know to the country. The immediate and unanimous testimony from the State and city in which he lived, however, was in the highest degree favorable. But party spirit on the eve of a Presidential election sought every means to discredit him. His whole personal, professional, and political career was searched with electric lights. Months were devoted to the scrutiny but even party spirit could find nothing substantial enough on which to base a rejection of the nomination, and it was grudingly reported to the Senate without a recommendation (quoted in Ely 1995, p. 23).

*Toward A Model of Search and Delay*

In light of this discussion, consider the problem faced by a supportive and obstructive Chair of the Judiciary Committee, respectively.[5] We assume that some nominees are "low quality" while others are "high quality." High quality nominees are not likely to be associated with genuine scandals while the former may be. Unfortunately quality is not an attribute that can be known with certainty though investigation is apt to bring better information. Thus, Presidents may inadvertently nominate a low quality individual. We suggest that the Chair of the Judiciary Committee cares about the quality of the nominee. In addition, though, the Chair faces an ideological or partisan gain from the success of the nomination (if the Chair is a supporter) or its failure (if the Chair is an opponent). Both supporters and opponents begin the process with beliefs about the likely quality of the nominee, which they revise in the light of information that emerges during the process. *Ceterus paribus*, additional information about the quality of a nominee is valuable, though at a declining rate. In addition, both supporters and opponents face costs from delaying a nomination. These include the opportunity costs of resources devoted to the nomination, both before and during hearings, as well as pressures from interest groups, the President, and constituents, to end the process and come to a decision. At each step, then, the Chair must evaluate the marginal benefits of delay and the marginal costs. The Chair will continue the process until the marginal costs of additional delay outweigh the marginal benefits.

We have informally sketched a simple search model of the pre-vote process. The properties of such models are well-known (see Ross 1983). Typically, optimal search rules take the form of a cut-off value, e.g., buy the first object with price less than *x*. In this case, we

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[5]Other members of the Committee may also be able to delay confirmation, though the Chair clearly has disproportionate influence.

conjecture that the optimal cut-off rule would take the form: delay until the Chair is sufficiently convinced the nominee is either high quality or a low quality, then bring the nomination to a vote. However, *the ideological or partisan component of the Chair's payoff will affect the cut-off values he or she employs.* Supportive chairs will not be willing to engage in lengthy searches since the marginal benefits of favorable information about quality will be relatively modest while the possible partisan losses due to unfavorable information quite large. Conversely, obstructive chairs will be willing to engage in longer searches since little will be lost from favorable information while unfavorable information may bring a sizable partisan gain. Although a formal model of the process would be valuable, we believe these conjectures are sufficient to motivate the empirical analysis that follows.

### *Empirical Implementation and Expectations about Data*

Our argument suggests that opponents who control the confirmation process delay it in order to increase the likelihood of a scandal. We will show that scandals are more likely to emerge under divided government and, using a simple duration model, show that hearings last longer under divided government. But these findings are not conclusive, for the causality may run from scandals to delay rather than delay to scandals. That is, scandals may simply engender delay, as conscientious senators respond to allegations about a nominee. To disentangle these effects, we need an approach that examines the decision to continue or terminate searching before scandals emerge, and the decision to prolong or terminate the process after scandals emerge. The approach must relate the key decisions to covariates plausibly connected to the theoretical argument. Finally, we would like the approach to afford estimates of the probability that scandals emerge.

A straightforward way to accomplish these tasks employs a Markov model of the

confirmation process to structure event history data from confirmations (Allison 1984, Howard

1960). We treat the confirmation process as moving through discrete time periods (e.g., weeks).

In each time period, the confirmation process must be in one of three states, the Search,

Investigate, and End states (see Figure 1). The process begins in the Search state. In this state,

nature first determines whether a scandal emerges or not.[6] If no scandal emerges, Congress must

decide whether to continue searching for a scandal or terminate the process by bringing the

nominee to the floor of the Senate for a decision. If Congress decides to continue searching, then

next period the process remains in the Search state and again Nature determines whether a

scandal emerges. If a scandal emerges in the Search state, then the process moves to the

"Investigate" state. In this state, Congress must decide whether to prolong the investigation of

the scandal next period, or end the process.[7] The third state, the "End" or terminal state is an

absorbing state, denoting the termination of the confirmation process.

<div align="center">Figure 1 About Here</div>

The informal search model outlined above structures our expectations about the transition

probabilities in this Markov process. In particular:

1. *The Emergence of Scandals*

1 A. Because scandals should emerge quickly for low quality nominees, the per-period

probability of a scandal emerging in the Search state should decline over time in the Search state.

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[6] The probability that a scandal emerges may be affected by covariates, e.g., divided government, a plausible proxy
for intensity of search.

[7] In an alternative formulation, Congress might dismiss a scandal and return to the Search state. Although multiple
scandals sometimes emerge during confirmations, and some scandals plainly are bogus, we treat the Investigate
state as triggered by any scandal. Data limitations preclude measuring whether Congress "dismisses" a scandal.

1 B. We have no strong expectation about the effects of opponent control on the *per-period* probability of scandal emerging in the Search state. That is, the fact that a Judiciary Committee controlled by the opposition party searches longer than one controlled by the President's party does not necessarily mean that the opponents search more effectively in any given period. The emergence of scandals may depend on factors beyond the incremental control of opponents to the nomination. On the other hand, the majority's ability to call witnesses and compel testimony may in some instances be decisive in uncovering scandal.

2. *The Search for Scandals*

2 A. The probability of continuing in the Search state should increase when opponents to the nomination control the process.

2 B. 1) The per-period probability of ending the search process should increase with duration in the Search state. 2) The increase should occur whether opponents control the process or not. These hypotheses reflect the rational response of senators to the declining per-period probability of a scandal emerging (Hypothesis 1A),

3. *The Investigation of Scandals*

3 A. The probability of continuing in the Investigation state should increase when opponents to the nomination control the process.

3 B. Because of the declining marginal returns from exploiting a scandal, the per-period probability of ending the process should rise with duration in the Investigate state.[8]

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[8] Two other possibilities deserve mention. First, some nominees may be so identified with partisan positions that they provoke unusual opposition. Second, at the end of a President's term, Congress may delay the process in the hope of killing the nomination and thus securing a more attractive nominee from the next president. The analysis in McCarty and Razaghian 1998 suggests this possibility, as do the historic experiences in the first nomination of Stanley Matthews and the second nomination of Abe Fortas.

## Data and Measurement

*Duration*

We determined the duration of the confirmation process for each nomination from its start and stop dates -- i.e., from the time of the nomination to the time of final Congressional decision -- subtracting days when Congress was not in session.[9] The date of the emergence of scandals (if any occurred) determined the allocation of confirmation-days across the states. We calculated duration in each state in days, then reconfigured the durations into weeks using a universal calendar. Portions of weeks were rounded to entire weeks.

To gather data on scandals, we read each story on each nomination published in *The New York Times*, 1877-1994, identifying the stories through the annual indexes to the newspaper. We coded a story as indicating a scandal if it reported ethical or financial lapses, illegalities, misconduct, or allegations of unprofessional or unethical conduct as an attorney or judge. We did *not* code a story as indicating a scandal if the story simply reported opposition to the nominee or the existence of political controversy, e.g., because the nominee had defended trusts or railroads (for example, Charles Evan Hughes in 1930) or communists and anarchists (for instance, Felix Frankfurter). Thus, the measure is not a measure of controversy but specifically one of scandals. To avoid imposing debatable retrospective judgments on the seriousness of the scandals, we coded as scandal even allegations that subsequent investigation demonstrated had little merit, e.g., the allegations raised against Earl Warren by a known fugitive from justice. We treat the date of emergence of the scandal as the date it was reported in the *New York Times*.

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[9]We took the dates for presidential nominations and final disposition from Epstein et al. 1997, Table 4-13. We obtained the dates for Senate sessions and recesses from *Congressional Directory 104th Congress* pp. 504-516.

Right censoring can be an issue in duration data. In the data, four observations on terminations are, in a sense, right-censored:[10] the first nomination of Stanley Matthews, which expired with the end of the 46th Congress; the nomination of Abe Fortas for Chief Justice, which was withdrawn following the failure of a cloture vote; that of Homer Thornberry for Associate Justice, which became moot after the failure of the Fortas nomination; and that of Douglas Ginsburg for Associate Justice, which was quickly repudiated by President Reagan after the emergence of a scandal.[11] In no case does the exclusion of the arguably "censored" observations materially affect the analyses reported below.

*Opposition Control of the Process*

Coding opposition control of the confirmation process requires an understanding of institutional and historical context. Although it might be possible in principle to code whether key figures in the Senate opposed specific nominees, we principally rely on divided government as a proxy for potential opposition. We also examine a more nuanced historical approach, employing the era of the nomination.

The use of divided government as a proxy for opposition control requires little justification (Fiorina 1996, Mayhew 1991). Throughout the entire period, control of the Senate by the party opposing the President was likely to be a good indicator of opposition control.

Yet opposition control of the process was not restricted to periods of divided party government. In two periods, opposition to the President frequently came from his own co-

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[10] They are right censored in the sense that Congress never took final action on them. They are not right censored in the sense that right censoring often means that the action has not happened *yet*. In our cases, such action will never happen.

[11] We assigned termination dates to these nominations in the most natural way, i.e., with the end of the 46th Congress, the cloture vote, the cloture vote (since the failure of Fortas made moot Thornberry's nomination), and the time of the Reagan repudiation, respectively.

partisans. First, prior to the realigning election of 1896, reformed-minded presidents like Hayes,

Garfield, and Cleveland often faced bitter opposition within their own party over civil service

reform and patronage of all kinds. Historians Samuel Eliot Morison and Henry Steele Commager

supply some perspective in their discussion of the battle between President Hayes and New York

Senator Roscoe Conkling:

> What was involved in this unseemly squabble [over patronage between Hayes and
> Conkling's "stalwarts'] was not merely a falling-out between two factions in the
> Republican party, or 'Senatorial courtesy' but a larger issue of the American form
> of government. During the Johnson Administration Congress had inaugurated a
> quasi-parliamentary form of government, and Grant had offered no effective
> resistance to the continuation of this parliamentary system. Congress, since the
> Civil War, had so largely eaten into the presidential prerogative that the chief
> executive was by way of becoming a mere figure-head, like the President of the
> French Republic. Under Hayes a senatorial cabal, led by Conkling, Platt,
> Cameron, Ferry, Chandler, Boutwell, and Edmunds, proposed to continue their
> domination of government. Against this plan the President [Hayes] set himself
> with adamantine stubbornness, and in the end, with the support of the Democrats,
> he was successful. (1962:316)

In the case of Supreme Court nominations, inter-institutional conflict between President and

Congress continued beyond the Hayes Administration. As late as 1894, the rejection of

Cleveland's nominees William Hornblower and Wheeler Peckham during a period of unified

Democratic government reflected the same dynamic.

A second period of intra-party disputes began after the Supreme Court's landmark 1954

decision, *Brown vs. Board of Education*. In the wake of the decision, southern Democrats began

to respond quite harshly to the nomination of liberal Democrats. Then, in the later part of the

post-1954 era, opponents of the Court's abortion decisions often submitted nominees to intense

scrutiny, if there were any grounds for believing them sympathetic to reproductive rights. In

contrast to both these eras, the period 1897-1954 rarely saw opposition from within a President's

own party, with the notable exception of the Brandeis nomination. Accordingly, we use a

dummy variable for contentious periods of unified party government (i.e., pre-1897 and post-1954) as a potential proxy for possible opposition control during unified party government. Although hardly perfect, these proxies allow some sensitivity to historical context.

### *Other Variables*

We determined whether a roll call vote was taken using *The Supreme Court Compendium* (Epstein et al. 1997). We derived the number of yeas and nays by party from Poole and Rosenthal's *Voteview* program, except for the nominations of Pitney and McReynolds, where it was necessary to obtain the information directly from *The Journal of the Executive Proceedings of the United States Senate*.

To examine responses to unusually partisan nominees, we follow Baum (1999) and create a dummy variable that takes the value "1" if a nominee held elective office prior to the nomination, and "0" otherwise. This variable was coded from Tables 4-8 and 4-9 in Epstein et al. 1997. Data on the percentage of seats in the Senate held by the president's party were taken from Appendix B in Graff 1997. To examine special effects in the last year of a president's term, we created an appropriate dummy variable. In none of the analysis conducted below did this variable ever approach statistical significance; hence we do not discuss it further.

## Scandals and Delay

### *Overview of the Search Data*

The data consist of 366 weeks of observations generated by 80 nominations. Sixty-seven percent of the observations come from the Search state and 33% come from the Investigation state. Sixty-four percent of the observations, representing 74% of the nominees, come from periods of

unified party government. Of the 366 weeks of observation, 21% date from 1896 or earlier; 32% from 1896-1954; and 47% from post-1954.

Some 23 of the 80 nominations involved a scandal, including 14 or 24% of the unified party nominations and 9 or 43% of the divided party nominations. Thus, divided government nominations are clearly more likely to result in scandal. The question remains, what role does delay play in this phenomenon?

Of the 80 nominations, 72 or 90% began in the Search state while 8 or 10% began in the Investigate state (in other words, a scandal emerged immediately, or in the interval between the President's announcement and the date at which Congress entered session). Of the 55 unified government nominees who began the process without a scandal, a scandal emerged for 10 or 18%. Of the 17 divided government nominees who began the process without a scandal, a scandal emerged for 5 or 29%.

The median duration for nominations is 16 days. For nominations without scandal, a move from unified to divided government increased median durations two-and-one-half times, from 11 to 28 days. For nominations with a scandal, the move from unified to divided government increased median duration from 37 to 59 days, about 60%. For unified government nominations the move from no scandal to scandal increased median durations three-and-one-half times, from 11 days to 38. During divided government, that move more than doubled median durations, from 27 to 59 days.

Though suggestive, the data do not control for censoring (though censoring affects only a handful of observations) and provide only sketchy information about the duration process itself. Figure 2 addresses both problems by providing Kaplan-Meier survival curves for unified vs. divided government nominations, and scandal vs. no scandal nominations. The Kaplan-Meier

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survival curves explicitly account for censoring but, as non-parametric estimates of the empirical

survival curves, stay very close to the actual data. As shown, at any survival time less than 80

days, a greater percentage of the unified government nominations terminated than did the

divided government nominations. In the range of about 20-40 days, the survival rate under

unified government was about half that under divided party government. The survival curve for

nominations with scandals lies everywhere above that of nominations without scandals, A

similar pattern is manifested in the survival curves of nominations with and without scandals:

nominations with scandals have longer durations than those without. Log-rank tests provide a

formal statistical test of the differences on display in the figures. With respect to divided

government, a log-rank tests results in a Chi-square of 7.1 on 1 degree of freedom, with

associated $p$ value of 0.008. Thus, the apparent difference between unified and divided

government is highly statistically significant. With respect to scandal, a log-rank tests results in a

Chi-square statistic of 9.2 on 1 degree of freedom, with associated $p$ value of 0.002.

Figure 2 about here

The Cox regression reported in Table 1 allows simultaneous consideration of the effects

of divided government and scandal. As shown, the separate effects are highly statistically

significant, as is the overall regression. The exponentiated values of the coefficients suggest that

the hazard for a nomination with a scandal was about 40% that of nomination without one, and

the hazard for nomination under divided government was about half (49%) that of a nomination

under unified government.

Table 1 About Here

Although suggestive, these broad patterns do not address the causal mechanisms at work.

A step in that direction is offered in Table 2, which shows the average transition probabilities

between states in the Markov model of Figure 1. As shown, the per-week probability that a scandal emerged in the Search state was 6% (recall that 10% of the nominations began with scandals already having emerged). The probability that Congress continued to search in the next week was about 71%. Given a scandal (that is, being in the Investigate), the probability that Congress continued to investigate the scandal in the next week was about 81%. How did these transition probabilities depend on relevant covariates like divided government and the duration in the state? We now turn to this question.

Table 2 About Here

*The Emergence of Scandals*

Table 3 presents several logit models estimating the per-week probability that a scandal emerges in the Search state. The first model uses the duration in the state, plus two proxies for opposition control of the nomination process, divided government and unified government in contentious periods (i.e., before 1897 and after 1954). There is little evidence that opposition control of the nomination process affects the per-week probability of scandal. Models 2 and 3 present straightforward variations on the first model, all confirming this result. However, all these models suggest that scandal probabilities may decline with duration in the Search state. Model 4 examines this possibility more closely, employing only the duration in the Search state as an explanatory variable. Examination of the Cook's distances for this model reveals two moderately influential observations, weeks 6 for the Warren and Thomas nominations.[12] In those weeks in those nominations, scandals did emerge despite the lengthy duration of the process. Model 5 repeats Model 4, dropping those two observations. This procedure has only modest effects on the

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[12] The Cook's distances are appropriately modified for binary data; see Collett 1991.

predictions of the model, but it shows more clearly that duration in the Search state is negatively related to the per-week probability of a scandal.

<div align="center">Table 3 About Here</div>

Though inferences must be somewhat tentative, Models 1-5 offer some support for Hypothesis IA: the per-week probability of scandal emergence declines with duration in the Search state. They offer very little support for the notion that opposition control leads to more effective searches. Thus, the greater over-all probability that scandals emerge during divided party appears solely a function of the longer searches undertaken during divided party government.[13]

Figure 3 indicates the estimated probability that a scandal emerges, using Model 4. Also shown are point-wise 95% confidence intervals for the estimated probabilities.[14] (The confidence intervals are much tighter in Model 5, of course.) The estimated probability that a scandal emerges begins at about 10% at the beginning of the search. By week 3, the scandal emergence probability falls to about 5%, and it continues to decline more slowly thereafter, to about 2% after 8 weeks or so.

<div align="center">Figure 3 About Here</div>

*Searching for Scandals*

Table 4 presents several logit models concerning the termination of the search for scandals. The models estimate the per-week probability of terminating a search, given that no scandal has yet emerged. That is, the models estimate the probability of exiting the Search state to the End state,

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[13] Separate analyses, not shown, do not suggest effects due to greater partisan involvement of nominees.
[14] The authors' S-Plus code for generating the fitted values and confidence intervals is available upon request. Statistical details can be found in Hastie and Pregibon 1993 (Section 6.3.6).

given no exit to Investigate. The models have the same specification as those in the previous table, to facilitate comparison.

Table 4 About Here

Model 1 appears to fit the data well. Examination of the Cook's distances from the model reveals no influential outliers. The model indicates that the probability of stopping the search for scandals increases with duration in the Investigate state. Both of the proxies for opposition control of the process are negative and statistically significant. Thus, the model provides support for Hypotheses 2A and 2B(1). To test Hypothesis 2B(2) (that is, increasing probability of termination with increasing duration, both in unified and divided party government), we re-estimated Model 1 with an interaction term between duration and divided party control (not shown). This would allow the effect of duration to differ in the two circumstances. However, the interaction term was not statistically significant and an analysis of deviance using a Chi-square test found no statistical difference in the fits of the two models (McCullagh and Nelder 1989). This provides support for Hypothesis 2B(2).[15]

Figure 4 indicates the estimated per-week probability of terminating the Search state, absent a scandal, with 95% confidence intervals, using Model 1. Estimates are given for in-sample values on durations. During divided government, the initial per-week probability of terminating a search is slightly over 10%. As the duration in the Search state increases, the per-week probability of exiting (absent a scandal) increases. But even after 12 weeks it remains under 30%. The picture is quite different during non-contentious unified government. There, the initial probability of exiting is almost 40% and rises rather steeply with duration. The longest

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[15] Separate analyses, not shown, do not suggest effects due to greater partisan involvement of nominees.

such duration in our data was 5 weeks. During contentious periods of unified government, the

probability of exiting resembles that under divided party government, rising from an initial

probability of 15% to 37% after 12 weeks.

<div align="center">Figure 4 About Here</div>

***Investigating Scandals***

 Table 5 presents four logit models estimating the per-week probability that Congress exits from

the Investigate state, that is, ends the confirmation process given that a scandal has emerged.

Again, the models mirror those presented in Table 3.

<div align="center">Table 5 About Here</div>

Examination of the Cook's distances in these models revealed the presence of a single

highly influential outlier, the Brandeis nomination. This unified government nomination

persisted for a remarkable 19 weeks, 18 in the Investigate state, as pro-business elements in both

parties struggled to derail the confirmation of the Progressive Era reformer. This is the lengthiest

confirmation of the 80 we study, and the one with the most prolonged duration in the

Investigation state. (The next lengthiest duration in the Investigate state was the 11 weeks of the

divided government nomination, Haynsworth).  Inclusion of the Brandeis nomination

substantially alters all coefficients in all the models and renders most of the variables statistically

insignificant. Accordingly, we estimated the models in Table 4 dropping the Brandeis

nomination. It is these coefficients that are shown in the table.

Model 1 appears to fit the data well. The model indicates that the probability of

terminating the process increases with duration in the Investigate state. Both of the proxies for

opposition control of the process are negative and statistically significant. Thus, the model

provides support for Hypotheses 3A and 3B.[16]

<div align="center">Figure 5 About Here</div>

Figure 5 indicates the predicted per-week probability that an investigation of a scandal

ends, using Model 1. Also shown are 95% confidence intervals for the estimated probabilities.

During divided party government, the predicted probability is initially 6%, and rises moderately

with duration in the Investigate state, reaching 50% in week 10. The probabilities during unified

party government depend heavily on the historical era. During the period 1897-1954, the initial

probability is 24%, and rises steeply with duration in the Investigate state. The termination

probability reaches 50% in week 5. Before 1897 and after 1954, the probabilities during unified

party government strongly resemble those under divided party government.

*Summary*

The preceding analysis can be summarized succinctly. The per-week probability that a scandal

emerges depends on how long Congress searches, not on who controls the confirmation process.

When the President's opponents control the process, they search for a scandal much longer than

when the President's supporters control it. Then, when opponents find a scandal, they prolong

the investigation much more than would the President's supporters, presumably to exploit the

scandal.  The post-1954 era has seen a convergence between divided party and unified party

government, in the search and investigation behavior of Congress during Supreme Court

nominations.

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[16] Separate analyses, not shown, do not suggest effects due to greater partisan involvement of nominees.

The Consequences of Scandals

What effect do scandals have on a nomination? We examine the effect of scandals on the probability of a roll call vote (a proxy for serious opposition); on support from the President's co-partisans and partisan opponents, conditional on a roll call vote; and on overall support for a nominee.

### *Probability of a Roll Call Vote*

After about 1970, roll call votes became the norm for all nominations to the Supreme Court, reflecting changes in the Senate that vastly increased the number of roll call votes across the board. Prior to that time, however, roll call votes on Supreme Court nominations were relatively rare. Roll call votes did occur with only a handful of nay votes, however (for instance, the roll call vote on Horace Gray in 1881 was 51-5, and that on James McReynolds in 1914 was 44-6). Thus, the presence of a roll call vote prior to 1970 can be seen as proxy for even modest levels of serious opposition to a nominee.

Table 6 presents two logistic regressions predicting roll call votes before 1970 as a function of scandal and either divided government or the percentage of seats held by the president's co-partisans. In both models "scandal" is positive and statistically significant. Converting the indicated coefficients from the logit scale to the probability scale allows an interpretation of the results. According to Model 1, the change from no-scandal to scandal increased the probability of a roll call vote from 24% to 74% under unified party and from 64% to 94% under divided party government. In Model 2, the measure of seats held by the president's party has been normalized to one-half, so that the variable measures percentage points greater than or less than 50%. The intercept thus indicates the probability of a roll call vote absent a scandal when the president's party holds 50% of the seats in the Senate. Conversion into the

probability scale shows this probability to be 49%. Calculation indicates that the model predicts that when the president's party held 45% of the seats in the Senate, the switch from no-scandal to scandal raised the probability of a roll call vote from 61% to 91%. When the president's party held 55% of the seats, the same switch implied an increase from 36% to 85%. In short, the presence of scandal dramatically increased the probability of a roll call.

Table 6 About Here

### Partisan Support and Opposition

Is scandal the key factor in the switch between consensual and conflictual votes on Supreme Court nominees? The models in Table 7 address this question. The dependent variables are the percentage yea votes cast by the president's co-partisans, those cast by his partisan opponents, and the overall percentage of yea votes (we discuss the latter in the following section). Following Cameron, Cover, and Segal 1990, we treat voice votes as unanimous yea votes, a procedure justified by the preceding analysis. The models are logit models.[17] In all specifications, the intercept corresponds to the case of less partisan nominees without scandal. The coefficient on "scandal" thus provides a direct test of the incremental effect of scandals. In the models examining the effect of the percentage of seats held by the president's party, the intercept corresponds to the case of less partisan, scandal-free nominees when 50% of the seats are held by the president's party (i.e., the seat variable is normalized so that it measures the percentage points greater or lesser than one-half). Examination of standardized deviance

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[17] OLS estimates of proportions data suffer from heteroskedasticity and may yield predictions greater than one or less than zero. Although a two stage estimation procedure can correct for the heteroskedasticy, logit, probit, or complementary log-log models avoid both problems. See Greene 1993:653-655 and Collett 1999:51-62.

residuals and Cook's distances indicates prominent outliers and influential observations. Accordingly, the estimates shown in the table are robust logit regressions.[18]

<center>Table 6 About Here</center>

Models 1 and 2 examine support in the president's party. These models reveal a simple pattern: almost all of the president's co-partisans support the nominee, under almost all circumstances. However, scandals degrade support somewhat. Conversion from the logit to the probability scale indicates support of about 98% absent a scandal, falling to about 86% in the presence of scandal (using Model 2). The presence of divided party government does not further mobilize support within the president's party, nor does a scandal-free but more partisan nominee alter support statistically significantly.

Models 3 and 4 examine support in the opposition party, and reveal very different patterns. During unified party government, the baseline of support for a scandal-free, non-partisan nominee, is just as high as in the president's party (Model 3 implies the support is about 97%). In this situation, opposition senators seem not to have defensible grounds for opposing a nominee. Divided party government degrades support in the opposition party, though the effect is fairly small given a scandal-free or less-partisan nominee (Model 3 implies about 91% support in these cases). But the presence of scandal galvanizes opposition among the president's opponents. Calculations based on Model 3 imply a drop in support to 61% during unified party government. More dramatically, during divided party government, when mobilization may well defeat a nomination, support plummets to about 35% in the presence of a scandal. Finally, the nomination of a scandal-free but highly partisan candidate seems also to allow mobilization of opposition, but the effect is much smaller than that triggered by a scandal.

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[18] The method is Huber M-estimators; see Hastie and Pregibon 1993 and Western 1995 for details.

Model 4 replaces the divided government dummy with a continuous measure of seats held by the president's party but continues to show patterns similar to Model 3.

*The President's Party Strength and the Fate of Nominees*

Models 5 and 6 in Table 6 examine the "bottom line," yea votes as a percentage of all votes cast. Arithmetically, total percent yeas reflect support in the president's party, support in the opposition party, the percentage of seats held by the president's party, and the percentage of seats held by the opposition. From the previous analysis, we know that support in the two parties is a function of scandal, while support in the opposition party also reflects the size of the president's majority in the Senate and the partisan character of scandal-free nominees. The last two columns in Table 6 are thus reduced form models of the relationship between total support for a nominee and scandal, partisan character of the nominee, and seats held by the president. The models' overall fits suggest they provide a parsimonious summary of the data, and may be useful for predicting the success or failure of nominees under different circumstances. Accordingly, Figure 6 shows the fit from Model 6, 95% confidence intervals for the predicted levels of support, and the actual values for all observations. Prominent outliers are identified by name.[19]

The left-most panel of Figure 6 shows that declining strength of the president's party in the Senate has only modest effects on expected percentage of yea votes, given a less-partisan and scandal-free nominee. The middle panel shows the consequences of nominating a more partisan nominee, if he or she remains free from the taint of scandal. Such nominees can trigger some opposition, especially when the president's party holds relatively few seats. The model suggests, however, that such nominees are almost never in serious danger of rejection, and indeed none

has been rejected during the last 120 years. The right-most panel reveals the consequences of scandals. In this case, the percentage of yea votes declines steeply, reflecting the mobilization of partisan opposition uncovered by Models 3 and 4. The model suggest that if the president's party holds fewer than about 45% of the seats in the Senate, a scandal-wracked nomination faces a distinct possibility of failure. With one exception (the Hornblower nomination, in the left-most panel), all rejected nominees over the last 120 years are found in the right-most panel. With one other exception (the L.Q.C. Lamar nomination, in the middle panel), all nominations that even came close to rejection (yea percentage < 65%) are also found in the right-most panel.

Although this simple model summarizes much of the data, several outliers or groups of outliers bear mentioning. The first cluster contains scandal-free nominees who received much less support than the model predicts. These nominees differ in many respects. For example, they were nominated under both unified and divided party government, they were nominated in different years of the presidents term (not just the last), they belonged to different eras, and they came from different professional backgrounds.[20] However, they do share one characteristic: each of these nominees was extraordinarily embroiled, off the bench, in major partisan controversies of the era. For example, in the left-most panel, the Hornblower nomination stands out. William Hornblower's actions as an progressive reformer on a New York electoral commission infuriated key members of the Senate, including some in President Grover Cleveland's own Democratic Party. They worked relentlessly to defeat the nomination (Hornblower's career never involved electoral office so we code him, perhaps inappropriately, as "less-partisan"). In the middle panel, Lucius Q. C. Lamar was not merely the first Confederate to be nominated to the Supreme Court;

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[19] We count as outliers those observations with standardized deviance residuals greater than 0.5.

he was also the author of the Mississippi ordinance of secession and a high-ranking officer in the Confederate army. Not surprisingly, Republicans voted almost solidly against him, while Democrats voted unanimously in support. Similarly, Charles Evans Hughes, who began his career as a moderate reformer, had become a symbol of conservatism by the time of his nomination as Chief Justice in 1930. He was opposed not only by Democrats but also by Republican progressives. In short, for this group of nominees, their extraordinary participation in hotly contested issues of the day seemed to trigger unusual partisan opposition even in the absence of a scandal.

A second cluster of outliers contains scandal-plagued nominees who fared much better than the model predicts. Two stand out: Anthony Kennedy and Earl Warren. The explanation for their superior performance is straightforward. Although accused of inappropriate behavior, they were cleared by the subsequent investigations. Their roll call votes resemble those of scandal-free nominees.[21]

The third group of outliers contains scandal-wracked nominees who performed much worse than the model predicts. Among this group are Wheeler Peckham, John Parker, Hugo Black and, to a lesser extent, Stanley Matthews (the second nomination) and Robert Bork. The common feature in this group appears similar to that identified in the first cluster: unusually active involvement in partisan issues. But in this case, the combination of extreme hostility engendered by their partisan activities *and* the emergence of a scandal put all but the Black nomination in genuine jeopardy. Black escaped this danger despite massive opposition from

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[20] We examined each of these possibilities via dummy variables, to see if they correlated with heightened opposition. Though some took the correct sign none achieved statistical significance.
[21] Warren was accused of corruption and criminal wrongdoing, while Kennedy was charged with belonging to private clubs that excluded women and minorities. We code all such accusations as "scandal," even when the charges proved fallacious or insubstantial, to avoid biasing the analysis in favor of finding scandal effects.

Republicans (only 23% voted yea), because the Democrats controlled 82% of the seats in the Senate in 1937.

## Conclusion

Our study of political scandals and confirmation politics suggests that political scandals are not simply a neutral indicator of misconduct among those entrusted with public position. Political scandals are themselves a tool of politics. In periods of contentious politics, such as eras of divided government, political actors deliberately manipulate political processes in order to seek out scandals. Then they exploit the scandals to further their political goals. At least such has been the pattern in Supreme Court nominations, for the last 120 years.

The pattern evident in Supreme Court nominations differs somewhat from that uncovered in McCarty and Razaghian's analysis of non-judicial appointments over the same period (1998). They also find that delay is crucial in the politics of other executive appointments. But the mechanism is the "holds" placed on nominations by hostile senators, and the fact that such nominations expire at the end of a congress. They find that delaying an executive appointment is by far the most common way to derail such a nominee. They also argue that leaving an office vacant allows greater opportunities for an opposition Congress to influence agency policy. In contrast, Congress has not used delay per se to derail the confirmation of nominees to the Supreme Court, the first Matthews and the second Fortas nominations being prominent exceptions.[22] The high political salience of Supreme Court appointments may well preclude this tactic, except in unusual circumstances. If this is correct, then somewhat ironically it is the very

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[22] Lower court nominations, though, may be much more subject to this process.

visibility of Supreme Court nominations that triggers the mud-slinging tactics analyzed in this paper.

From a historical perspective, the most notable aspect of the recent experience is not the partisan use of scandals but instead the convergence of the politics of unified party government with that of divided party government. The result is a politics of confirmations in which scandals are likely to continue to play a prominent, if unsavory, role for the foreseeable future.

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| Variable | B | S.E. | Sig. | Exp(B) |
|---|---|---|---|---|
| SCANDAL | -.8761 | .2955 | .0030 | .4164 |
| DIVIDED | -.7204 | .2732 | .0084 | .4866 |
| -2 Log Likelihood | 507.550 | | | |

**Table 1. Cox Regression: Effects of Divided Government and Scandals on Duration**

|  | State in Next Week | | |
|---|---|---|---|
| State in Current Week |  | Search | Investigate | End |
|  | Search | .71 | .06 | .23 |
|  | Investigate | --- | .81 | .19 |

Probabilities are per-week rates

**Table 2. Empirical Transition Probabilities in the Markov Model**

|  | Model 1 | Model 2 | Model 3 | Model 4 | Model 5 |
|---|---|---|---|---|---|
| Intercept | -1.89 (.48) | -1.88 (.48) | -2.14 (.46) | -2.08 (.44) | -1.61 (.54) |
| Time in State | -.21 (.15) | -.21 (.15) | -.24 (.15) | -.23 (.15) | -.55 (.26) |
| Divided Gov't | -.09 (.63) | .69 (.76) | .26 (.57) | --- | --- |
| Contentious Unified | -.83 (.72) | --- | --- | --- | --- |
| Pre-1897 | --- | -.96 (.89) | --- | --- | --- |
| Post-1954 | --- | -.72 (.79) | --- | --- | --- |
| Residual Deviance | 107.9 | 107.8 | 109.3 | 109.5 | 93.2 |
| Degrees of Freedom | 241 | 240 | 242 | 243 | 241 |

Logistic regressions. Standard errors in parenthesis. In Models 1-4 Null Deviance is 112.9 on 244 d.f., in Model 5 101.4 on 242 d.f.

**Table 3. Probability that a Scandal Emerges in the Search State**

|  | Model 1 | Model 2 | Model 3 | Model 4 |
|---|---|---|---|---|
| Intercept | -.62<br>(.27) | -.62<br>(.27) | -1.05<br>(.24) | -1.20<br>(.23) |
| Time in State | .10<br>(.05) | .11<br>(.05) | .04<br>(.05) | .02<br>(.04) |
| Divided Gov't | -1.53<br>(.44) | -.10<br>(.45) | -.80<br>(.37) | --- |
| Contentious Unified | -1.19<br>(.39) | --- | --- | --- |
| Pre-1897 | --- | -.86<br>(.44) | --- | --- |
| Post-1954 | --- | -1.53<br>(.47) | --- | --- |
| Residual Deviance | 242.6 | 240.3 | 252.1 | 257.3 |
| Degrees of Freedom | 226 | 225 | 227 | 228 |

Logistic regressions. Standard errors in parenthesis.
Null Deviance is 257.6 on 229 d.f..

**Table 4. Probability of Ending the Search for Scandals**

|  | Model 1 | Model 2 | Model 3 | Model 4 |
|---|---|---|---|---|
| Intercept | -1.43 (.52) | -1.43 (.52) | -1.89 (.49) | -2.08 (.47) |
| Time in State | .29 (.11) | .29 (.11) | .24 (.10) | -.19 (.09) |
| Divided Gov't | -1.56 (.67) | -.32 (.67) | -.79 (.53) | --- |
| Contentious Unified | -1.31 (.71) | --- | --- | --- |
| Pre-1897 | --- | -1.48 (.81) | --- | --- |
| Post-1954 | --- | -1.16 (.78) | --- | --- |
| Residual Deviance | 96.6 | 96.4 | 100.8 | 102.6 |
| Degrees of Freedom | 99 | 98 | 100 | 101 |

Logistic regressions. Standard errors in parenthesis.
Null Deviance is 106.8 on 102 d.f..

**Table 5. Probability of Ending the Investigation Given a Scandal**

|  | Model 1 | Model 2 |
|---|---|---|
| Intercept | -1.15 (.36) | -.06 (.41) |
| Scandal | 2.18 (.75) | 2.33 (.83) |
| Divided Gov't | 1.72 (.79) | --- |
| President's Pct. Seats (pts. > .5) | --- | -10.60 (3.82) |
| Residual Deviance | 69.3 | 64.6 |
| Degrees of Freedom | 59 | 59 |

Logistic regression. Standard errors in parenthesis.
Null deviance is 83.6 on 61 d.f.

**Table 6. Probability of a Roll Call Vote Prior to 1970**

|  | Percent Yeas In President's Party | | Percent Yeas In Opposing Party | | Total Percent Yeas | |
|---|---|---|---|---|---|---|
|  | (1) | (2) | (3) | (4) | (5) | (6) |
| Intercept | 3.89 | 3.73 | 3.43 | 2.75 | 3.75 | 3.12 |
|  | (.64) | (.41) | (.61) | (.54) | (.54) | (.47) |
| Scandal | -2.17 | -1.90 | -2.97 | -2.82 | -2.35 | -2.31 |
|  | (.69) | (.51) | (.64) | (.61) | (.56) | (.53) |
| Scandal-free but partisan | -.44 | --- | -1.54 | -1.36 | -1.27 | -1.27 |
|  | (.84) |  | (.69) | (.66) | (.63) | (.59) |
| Divided Gov't | .32 | --- | -1.10 | --- | -.98 | --- |
|  | (.57) |  | (.48) |  | (.41) |  |
| President's Pct Seats (pts. > .5) | --- | --- | --- | 4.54 | --- | 6.97 |
|  |  |  |  | (2.30) |  | (2.15) |
| Residual deviance | 11.1 | 11.3 | 26.4 | 26.9 | 14.6 | 13.3 |
| Degrees of Freedom | 72 | 74 | 72 | 72 | 73 | 73 |

Robust logistic regressions. Standard errors in parenthesis. Null deviance: 14.6 on 75 d.f for models 1 and 2; 42.2 on 75 d.f. for models 3 and 4; 22.3 on 76 d.f. for models 4 and 5. There are 55 no-scandal observations (56 for total yea analysis) and 21 scandal observations.

**Table 7. Roll Call Support, 1877-1994**

As an appeal court, The Supreme Court cannot consider a case unless a relevant order has been made in a lower court. The Supreme Court: is the final court of appeal for all United Kingdom civil cases, and criminal cases from England, Wales and Northern Ireland. hears appeals on arguable points of law of general public importance. concentrates on cases of the greatest public and constitutional importance. maintains and develops the role of the highest court in the United Kingdom as a leader in the common law world. The Supreme Court hears appeals from the following courts in each jurisdiction: The Supreme Court of Judicature Act (Ireland) 1877 was an Act of the Parliament of the United Kingdom that brought about a major reorganisation of the superior courts in Ireland. It created a Supreme Court of Judicature, comprising the High Court of Justice in Ireland and the Court of Appeal in Ireland. It mirrored in Ireland the changes which the Supreme Court of Judicature Act 1873 had made in the courts of England and Wales.