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JUDICIAL SECRECY AND INSTITUTIONAL LEGITIMACY: MAX WEBER REVISITED

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The Supreme Court of the United States and its attentive public—the members of the bar, the press, and the law faculties and journal writing students—are currently engaged in a reappraisal of the norms of Court behavior. The contemporary reappraisal is in part a continuation of the controversies surrounding the Fortas, Haynesworth and Carswell nominations. By late 1972 and early 1973, considerable attention had been focused upon judicial disqualification issues. Some of these have centered upon the matter of judicial secrecy, both internal and relating to off-the-bench behavior. For example, the participation of Justice Lewis Powell in an antitrust suit against Falstaff Brewing Corporation was criticized or discussed in the press in the Washington, D.C., metropolitan area. Powell disqualified himself *after* press criticism and the disclosure that he owned 880 shares (worth $55,000) in a competitor, Anheuser-Busch, which might profit if Falstaff lost the suit.[1] The issue of full disclosure of outside sources of judicial income is, of course, merely one of a number of issues involving institutional norms and secrecy which have precipitated public controversy.[2]

It is the purpose of this article to consider the issues relating to the institutional norms—especially ethical norms requiring public disclosure of off-the-bench relationships—which may support the power and influence of the Supreme Court in its constitutional role as definitive interpretor of the boundaries of federalism and separation of powers. Of special relevance to this inquiry is the assessment

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1. Matthews, *Justices Must Decide Own Ethics: Supreme Court Justices Face Disqualification Dilemma,* Washington Post, Nov. 26, 1972, § K, at 1, col. 5.

2. J. SCHMIDHAUSER & L. BERG, THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION, 1945-1968, at 100-33 (1972).

and analysis of institutional stability. The contributions of major European and American theorists and researchers concerning the linkage between institutional norms and the stability of both specific political institutions and total political systems are relevant to this analysis.

The argument that the legitimization of the collective decision-making process cannot be performed unless the judiciary itself possesses an "image of legitimacy" was presented with irrefutable buttressing evidence by Gerald Jordan. The occasion was his excellent comparative study of the Dutch and American judicial systems in crisis in the World War II and Civil War eras, respectively. The image of legitimacy, argued Jordan, "is directly dependent upon persistent and cohesive political support of sufficient intensity and continuity to insure that the Court's decisions are accepted as final, as the collective decisions of society."[3] Jordan did not discuss the theoretical bases for his assumptions, nor did he relate these assumptions to a detailed analysis of the institutional norms, such as avoidance of conflict of interest, which may create or maintain a favorable or supportive "image." However, Walter Murphy, in his *Elements of Judicial Strategy,* argued cogently for recognition of the linkage between institutional prestige and judicial power. In Murphy's analysis:

> Prestige is an important source of judicial power. When combined with professional reputation it can also become an important instrument of judicial power. Prestige refers to the Court's hold on popular esteem. Reputation refers to the judgment of other government officials about the skill and determination with which the Justices use their power in their own advantage or that of the policies they are supporting. Since public officials are likely to have been brought up to respect the judiciary as an institution, they are also likely to share to some extent the widespread belief that they *ought* to obey Supreme Court decisions. When the Justices can reinforce this feeling of obligations with professional respect for their abilities and determination, they have fashioned a very potent weapon to secure obedience and cooperation from the very people who have the physical power to ignore or even defy them.[4]

Two of Murphy's assumptions—that prestige and professional reputation are significant sources of judicial power and that public

3. Address by Gerald Jordan, Annual Meeting of the American Political Science Association, Sept. 9, 1960.

4. W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 19 (1954).

officials are likely to have a sense of respect for the Court derived from their early political socialization—shall be investigated, the first from the perspective of broad institutional theoretical considerations, the second with respect to empirical evidence. Two of the great European theorists, Max Weber and Emile Durkheim, contributed significantly to the analysis of the characteristics of social and political institutions which insure the stability or continuity of entire political systems. Weber's studies of the institutionalization of authority have been characterized as constituting "the most highly developed and broadly applicable conceptual scheme in any comparable field which is available, not only in the specifically sociological literature, but in that of social science as a whole."[5] Whether or not one accepts Talcott Parsons' estimate of Weber's conceptual contributions, Weber's identification of the three modern bases of legitimacy—legality, formally correct rules, and accepted procedure[6]—does provide an appropriate starting point for analysis of the relationship of the norms of the Supreme Court and its systems maintenance role in the American political system.

Weber's general analysis of the institutionalization of authority has influenced many American scholars, political scientists as well as sociologists. In describing a conceptual framework for the investigation of the institutionalization of the United States House of Representatives, Nelson Polsby identified the three major characteristics of institutionalized organizations: (1) the establishment and maintenance of boundaries which differentiate a particular institution from others; (2) the specialization of functions within the institution; and (3) the evolution of standardized institutional procedures and ethical norms. Of the third of these characteristics, Polsby wrote: "Precedents and rules are followed; merit systems replace favoritism and nepotism; and impersonal codes supplant personal preferences as prescriptions for behavior."[7]

Allan Kornberg, investigating the institutional significance of standards of ethical conduct, described the functions served by "the rules of the game" in the Canadian House of Commons as follows: "(1) to expedite the flow of legislative business, (2) to channel and

5. M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 77 (T. Parsons transl. 1947).

6. *Id.* at 131.

7. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144, 145 (1968).

mitigate conflict, (3) to defend members against external criticism."[8] The latter, argued Kornberg, tended "to promote legislative solidarity regardless of party, and establish norms designed to discourage behavior which might bring the system and its members under attack from outsiders."[9]

American scholars have indeed described the institutional norms which are generally considered basic to the reputation for fairness that is considered fundamental to a properly functioning legal system. But most judicial commentators fail to relate these institutional attributes to a broader systems-persistence theoretical framework, and most treat lightly the serious problems of self-disqualification and financial conflict of interest. Karl Llewellyn, the noted legal realist, described these norms as comprising an interrelated "craft tradition":

> [I]n the craft-tradition of the appellate courts, we find a number of attributes . . . which are seldom phrased. . . . [These are] effort at "impartiality"; effort to keep the mind open till both sides have been heard; effort to dissociate the "true essence" of the controversy from accidents of person, personality and the like; avoidance of a case in which a judge is or may be thought personally "interested." . . . Some portion of this is institutionalized. "Independence of the judiciary" . . . and nonreduceability of salaries, seek both to make such "judicial" conduct possible and to further it. Rules of law against bribery, practices set against "influence," loose but useful practices of self-disqualification, even looser but still recognizable practices about judicial manners, the disciplinary pressure of phrasing an explanation of a decision in a published opinion, the policing power of possible open dissent by any member of the court who may see or feel outrage—these form a gap-filled hedge to mark and to half-police the tradition.[10]

Llewellyn, like most modern American legal scholars, recognized the looseness of the safeguards, but did not feel impelled to discuss either the necessity for stronger safeguards or the relationship between institutional reputation and institutional norms.

Prevalent in the writings of many contemporary Supreme Court commentators is the tendency to treat issues relating to institutional norms as matters which are largely internalized within the judiciary

8. Kornberg, *The Rules of the Game in the Canadian House of Commons,* 26 J. POL. 358, 359 (1964).

9. *Id.* at 361.

10. Llewellyn, *The American Common Law Tradition and American Democracy,* 1 J. LEGAL & POL. SOCIOLOGY 14, 32 (1942).

or through interaction between the Court and the American Bar Association. The contemporary discussion of norms of judicial behavior was stimulated by the controversy over Justice Abe Fortas' off-the-bench relationship with the Wolfson Foundation and the ensuing debate in the Senate. As a result, on June 10, 1969, Chief Justice Earl Warren announced that the Judicial Conference of the United States had limited outside income to those items approved by the judicial council for each circuit and made a matter of public record. In addition each judge was required to file a statement of assets and income. The approval requirement was suspended on October 31, 1969, pending completion of the ABA Special Study Committee's work. In December, 1969, the new Chief Justice, Warren Burger, appointed an Interim Advisory Committee to deal with the issue. The close relationship of the federal judiciary and the ABA is underscored by the history of the canons. The original Canons of Judicial Ethics of the American Bar Association were adopted in 1924. Although they were modified slightly in 1933, 1937, 1950, and 1952, they were fundamentally unchanged for decades. A reappraisal was made by a Special ABA Committee appointed by ABA President Bernard Segal in August 1969.[11]

Judge Irving Kaufman, a member of the special Committee on Standards of Judicial Conduct, recognized that American judges, under the old canons, were viewed as "a body of self-regulating individuals."[12] He chose to contrast the American tradition with that of the German system, thus emphasizing the influence of the mode of selection of judges as one aspect of American judicial independence. In Kaufman's words "[r]ather than selecting them through written or oral examinations and advancement under a rigid civil service system, we have generally followed the practice of choosing members of the bar, hopefully of some stature, and elevating them to the bench."[13]

Judge Kaufman urged that the principle of self-regulation of judicial disqualification issues be continued. Kaufman's frame of reference was centered primarily upon considerations deemed im-

11. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics,* 35 LAW & CONTEMP. PROB. 3, 7 (1970).

12. *Id.* at 4.

13. *Id.* Judge Kaufman noted that the California Supreme Court in City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 47 (1970), had "held that a California statute requiring public office holders (including judges) to file annual statements of investments, was an overbroad invasion of the right of privacy, and therefore unconstitutional." Kaufman, *supra* note 11, at 7 n.28.

portant by judges themselves or by leaders of the organized bar. Indeed the tendency to treat the institutional norms of the Supreme Court from a frame of reference similar to Judge Kaufman's is rather typical of legal professional and scholarly commentary. While there is no scarcity of articles documenting the nature of the problem,[14] there is little evidence that the problem has been thoroughly assessed from the perspective of the Supreme Court's legitimacy and its system maintenance role. It is the major thesis of this article that modification and strengthening of the institutional norms—especially ending secrecy in the private financial relations of the federal justices and judges—must be considered from this virtually ignored perspective.

Perhaps the most compelling evidence to support this recommendation may be found by reexamining the validity of the hypothesis which is most frequently invoked when questions relating to public or political attitudes toward the Court are discussed. As Walter Murphy had put it, "since public officials are likely to have been brought up to respect the judiciary as an institution, they are also likely to share the widespread belief, that they *ought* to obey Supreme Court decisions."[15] The essentials of the hypothesis, which comprises the conventional wisdom regarding the basis of public and professional "reverence" for the Court, are (1) the assumption that knowledge of the nature and purposes of the Supreme Court is acquired through a process of pre-adult political socialization, and (2) that there is a "widespread" belief that Supreme Court decisions ought to be obeyed. Murphy's emphasis upon "widespread" public support finds its corollary in the belief or assumption that legal professionals are especially supportive. Thus Glendon Schubert stated: "Many congressmen are lawyers; and the argument that proponents of the amendatory bill are showing disrespect for the highest court in the land is an effective one."[16]

If these interrelated hypotheses are correct, ending secrecy in off-the-bench financial transactions and strengthening other institu-

14. *Law and Contemporary Problems* published several excellent articles which provided specific data illustrating the need to make changes regarding conflict of interest among justices and judges. These include Frank, *Disqualification of Judges in Support of the Bayh Bill,* 35 LAW & CONTEMP. PROB. 9 (1970); McKay, *The Judiciary and Non-Judicial Activities, id.* at 43; and White, *To Have or Not To Have—Conflicts of Interests and Financial Planning for Judges, id.* at 202.

15. W. MURPHY, *supra* note 4.

16. G. SCHUBERT, CONSTITUTIONAL POLITICS 257-58 (1964).

tional norms of the Supreme Court presumably would be unnecessary (from the frame of reference of institutional legitimacy and systems-maintenance). Conversely, if these hypotheses are invalid, there would be a strong basis for the adoption of what Weber referred to as "formally correct rules" and "accepted procedures"[17] regarding these institutional norms.

In historic perspective, the verdict of conventional historians stresses the ascendancy of the judiciaries in relation to the legislatures. James Willard Hurst summed up this interpretation as follows:

> The years from 1750 to 1820 offered legislators a chance to become the principal lawmakers for the nation as a whole and also for the states . . . as we go on . . . the story of the legislature becomes largely negative in the telling.[18]

Hurst pointed out that the legislature began, in the post-colonial period, with "an impressive trinity of advantages."[19] These were (1) its legitimacy in public opinion, (2) its broad grant of constitutional authority, and (3) its power as "the grand inquest of the nation and states to inquire into matters of public concern."[20] Yet by the 1870's, the courts emerged as major influences. As Hurst put it, "between 1820 and 1890 the judges were already taking the initiative in lawmaking."[21] He also stressed that "through the injunction and the receivership, judges anticipated the later role of executive and administrative agencies."[22] As this comment indicated, Hurst concluded that initiative finally passed to the executive and administrative branches.[23]

The verdict of conventional historians concerning the relative positions of the political institutions of the nineteenth century could not, of course, be validated on the basis of public opinion surveys. In the 1960's and 1970's, however, empirical data interpreted by often ingenious utilization of the language of measurement provided the basis for contemporary testing of the hypotheses stated by Walter Murphy and Glendon Schubert in the 1950's and early 1960's. Joseph Tanenhaus and Walter Murphy completed a comprehensive mapping

17. M. WEBER, *supra* note 5, at 131.
18. J. HURST, THE GROWTH OF AMERICAN LAW 23 (1950).
19. *Id.*
20. *Id.* at 23-24.
21. *Id.* at 85.
22. *Id.*
23. *Id.* at 23-24, 85.

investigation of public opinion and the Supreme Court in the latter part of the 1960's.[24] Their findings concerning the visibility of and public perceptions of the role of the Supreme Court would, at a preliminary level, implicitly contradict the hypothesis based on the alleged consequences of early political socialization. Over one third (34.7 percent) of a 1966 national sample did not know what the major role of the Supreme Court was.[25] Another quarter of the sample (25.6 percent) did not identify its major constitutional responsibilities.[26] Data from the same 1966 sample indicate that the largest group responding to a like/dislike question was negatively disposed toward the Supreme Court—nearly 32 percent (31.7) were negatively disposed toward the Supreme Court, outnumbering those positively disposed by over 3 to 1 (9.5 percent).[27] Nearly 54 percent (53.8) indicated that they didn't know or would not respond to specific support questions.[28] The Murphy-Tanenhaus data on diffuse support (defined as "the degree to which the Supreme Court is thought to carry out its overall responsibilities in an impartial and competent fashion") did indicate stronger Court support—37 percent positive to 21.7 percent negative with 41.3 undetermined or uncommitted.[29] While the authors interpreted this as indicating that "the Court still retains a substantial reservoir of diffuse support," it is not clear that the Court would be in a strong position in the event that a major institutional conflict with Congress or the President were to occur. Not only is the level of diffuse support below 40 percent; under certain circumstances, diffuse support for the Supreme Court is likely to diminish when knowledge of specific Supreme Court actions increases. Utilizing data from the 1966 national sample, Murphy and Tanenhaus found that for black respondents a unit change (increase) in Court knowledge is associated with a +.45 change in diffuse support for the Supreme Court. Conversely, a unit change (increase) in Court knowledge for Southern whites is associated with a —.38 change in diffuse support.[30] These findings do not answer every question related to the issue

24. Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, in FRONTIERS OF JUDICIAL RESEARCH 276 (J. Grossman & J. Tanenhaus eds. 1969).
25. *Id.*
26. *Id.*
27. *Id.* at 287, 290.
28. *Id.* at 287.
29. *Id.* at 290.
30. W. MURPHY & J. TANENHAUS, THE STUDY OF PUBLIC LAW 203 (1972).

whether early political socialization of Americans contributes significantly to an alleged sense of public obligation to obey or uphold the Supreme Court, but it casts considerable doubt upon the broad assumption and indicates that the issues surrounding this assumption are rather complex.

This tentative conclusion is buttressed by the investigations of Edward Muller concerning the correlates and consequences of beliefs in the legitimacy of regime structures. Utilizing a sample of students enrolled in introductory political science courses and a special group which had been arrested in an anti-war demonstration (all in 1968), Muller found that in contrast to Congress, the Supreme Court is perceived as "a somewhat remote, perhaps not even especially relevant, institution."[31] Of far greater consequences for the purposes of this analysis. Muller found that "Congress legitimacy appears to be the only variable capable of independently producing change in legitimacy sentiments directed toward the Supreme Court as an institution."[32] If, as Muller's exploratory data suggests, the public perceptions of Supreme Court legitimacy are derivative, in part, from Congress legitimacy, do congressional attitudes as demonstrated by roll call behavior (or other manifestations) assume greater importance in contemporary assessments of the relative influence of these institutions? An affirmative answer is not only indicated; it is manifest that a concomitant question concerning the nature of congressional responses is in order.

Data reported by the authors in three earlier studies are relevant to this question. Many historians as well as political scientists have accepted the assumption that the Supreme Court as an institution is revered by the American public as well as by a majority of members of Congress. The "Court packing" controversy of the 1930's is frequently cited to support this contention. An initial investigation of 147 Court-oriented roll calls in the House and the Senate in the 79th through 90th Congresses (1945–1968) was conducted to determine the extent to which congressmen supported the Supreme Court. If congressmen in general revere the Court, and lawyer-congressmen in particular possess, through professional socialization, an unusual sense of respect for the Supreme Court, it may be assumed that the variables which

31. Muller, *Correlates and Consequences of Beliefs in the Legitimacy of Regime Structures*, 14 MIDWEST J. POL. SCI. 392 (1970).
32. *Id.* at 406-07.

ordinarily influence congressional voting behavior would be considerably less efficacious when judicially-oriented legislation was being voted upon than under other roll call circumstances. Do lawyer-legislators deviate from their "normal" voting behavior patterns to consistently defend the Court? Do congressmen abandon their partisan voting tendencies when Court-oriented legislation is acted upon? Do congressmen who ordinarily oppose or support the Conservative Coalition continue to do so when legislation relating to the Supreme Court is before the House or Senate?

In this investigation (omitting temporarily the special treatment of lawyer-legislators), an examination was first made of the ten roll calls in the House of Representatives and the twenty-one roll calls in the Senate which were distinctly attacks on the Court as an institution. Secondly, recognizing that a discernible distinction can be made between congressional attitudes toward the Supreme Court regarding ordinary legislative reversals of statutory interpretations and extraordinary actions which, in substance, would weaken the Court as an institution, the reversals of statutory interpretations were treated separately. The data summarized in Tables 1, 2, 3, and 4 indicate that while there were differences in Supreme Court support levels between the House and the Senate, the divisions reflected the typical voting patterns of the era. Thus the partisan divisions between Democrats and Republicans were modified considerably by Conservative

TABLE 1

AVERAGE PERCENTAGE OF DEMOCRATIC, REPUBLICAN AND NORTHERN DEMOCRATIC REPRESENTATIVES SUPPORTING THE COURT ON ROLL CALLS DIRECTLY ATTACKING THE COURT OR SEEKING TO CURB THE COURT

	Party		
	Democratic	Republican	Northern Democratic
Average Percentage (ten roll calls)	55.4%	19.2%	82.3%

Coalition voting patterns. This is substantiated in Tables 5 and 6 which summarize Rice Index of Cohesion scores in House and Senate statutory reversal cases.[33] The Conservative Coalition divisions and partisan conflicts were indeed very similar to the roll call divisions on civil rights and social welfare issues during the post World War II era.[34]

TABLE 2

THE AVERAGE PERCENTAGE OF DEMOCRATIC, REPUBLICAN, AND NORTHERN DEMOCRATIC SENATORS SUPPORTING THE SUPREME COURT ON ROLL CALLS ON LEGISLATION TO CURB OR DIRECTLY ATTACK THE COURT

	Party		
	Democratic	Republican	Northern Democratic
Average Percentage (21 roll calls)	60.0%	37.3%	83.0%

TABLE 3

AVERAGE PERCENTAGE OF DEMOCRATIC, REPUBLICAN AND NORTHERN DEMOCRATIC REPRESENTATIVES SUPPORTING THE SUPREME COURT ON ROLL CALLS TO MODIFY OR REVERSE SUPREME COURT DECISIONS

	Party		
	Democratic	Republican	Northern Democratic
Average Percentage (35 roll calls)	48.1%	13.0%	65.3%

33. J. SCHMIDHAUSER & L. BERG, *supra* note 2, at 134-84.

34. Compare voting patterns analyzed in D. MAYHEW, PARTY LOYALTY AMONG CONGRESSMEN: THE DIFFERENCE BETWEEN DEMOCRATS AND REPUBLICANS 1947-1962 (1966).

Max Weber and another influential European social theorist, Emile Durkheim, each emphasized, albeit from different analytical perspectives, the significant role of law as a profession and in politics. Durkheim, in particular, undertook a comprehensive analysis of the relationship of professions, their internal characteristics, and their interrelationship to the institutions of government. He hypothesized that professions which have "a public character," notably "the army, education, the Law . . ." are closely associated with certain agencies of government and possess a high degree of cohesiveness with respect to their professional goals, goals which are often related in some manner to public purposes.[35] Presumably certain professional norms could influence the behavior of legal professionals with respect to legal or political institutions. Indeed, in the modern American context, it might be argued that despite the impact of, in David Truman's characterization, "the centrifugal effects of specialized practice and wide income differentials,"[36] the American legal profession purportedly identifies a limited number of norms as fundamental to their profession. With respect to governmental institutions, virtually every group

TABLE 4

AVERAGE PERCENTAGE OF DEMOCRATIC, REPUBLICAN AND NORTHERN DEMOCRATIC SENATORS SUPPORTING THE SUPREME COURT ON ROLL CALLS ATTEMPTING TO MODIFY OR REVERSE SUPREME COURT DECISIONS

	Party		
	Democratic	Republican	Northern Democratic
Average Percentage (71 roll calls)	55.4%	24.2%	72.3%

35. E. DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 8-9 (1958).

36. D. TRUMAN, THE GOVERNMENTAL PROCESS 96 (1967). See especially the excellent study of the "Missouri" plan of judicial reform in R. WATSON & R. DOWNING, THE POLITICS OF BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 19-48, 75-110 (1969).

within the legal profession asserts (or at least gives lip service to) the profession's obligation to maintain the integrity of the courts. Indeed, this norm is reinforced not only by the canons of professional ethics, but also by the tradition which describes an attorney as an officer of the court and by frequent invocation by the courts themselves.

The editors of *American Jurisprudence* indicated that the role of an attorney as an officer of the court is fairly explicit—while the lawyer is not a "public officer" in an official sense, he "must maintain a

TABLE 5

RICE INDEX OF COHESION FOR DEMOCRATIC, REPUBLICAN AND NORTHERN DEMOCRATIC REPRESENTATIVES ON ROLL CALLS TO REVERSE OR MODIFY SUPREME COURT DECISIONS

	Party		
	Democratic	Republican	Northern Democratic
Rice Index (35 roll calls)	23.1	70.0	42.2

TABLE 6

RICE INDEX OF COHESION FOR DEMOCRATIC, REPUBLICAN AND NORTHERN DEMOCRATIC SENATORS ON ROLL CALLS MODIFYING OR REVERSING SUPREME COURT DECISIONS

	Party		
	Democratic	Republican	Northern Democratic
Rice Index (71 roll calls)	33.4	60.6	59.3

respectful and courteous attitude toward" the courts.[37] This imperative is frequently reiterated by the courts in a very direct manner. As a Nevada court stated: "It is the special duty and obligation of members of the bar to protect the good name of the courts against ill-founded and unwarranted attacks."[38] Specifically referring to the lawyer's obligation to the courts, the *Canons of Professional Ethics of the American Bar Association* are described as undertaking "to codify the traditions and practice recognized over the centuries as part of the common law with respect to lawyers' obligations."[39] This canon is very explicit:

> It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor....[40]

The intimate relationship between the organized bar and state and federal judicial systems is also constantly reinforced by the development of reciprocal obligations such as the traditional advisory role fulfilled by the bar regarding modification of judicial rules.[41] Thus lawyers not only are professionally socialized to maintain respect for the courts, but they also may presumably be motivated to maintain a system within which they enjoy a preferred status.

Commonly held assumptions about the consequences of legal professionalism for either the stability of judicial systems or the behavior of lawyer legislators in contested roll call situations are presumably founded upon this often reiterated norm of professional responsibility toward the courts. If the traditional obligation of the legal profession to respect, assist, and protect the judiciary is of compelling influence, it would be difficult to conceive of situations in which the Supreme Court would be seriously endangered by congressional attacks. This presumably would follow because the House of Representatives and Senate, in modern times, have had, on the basis of comparative cross-national and intra-national criteria, an "extra-

37. 7 AM. JUR. 2d *Attorneys at Law* § 4 (1963).
38. *Id.* at n.1, *citing In re* Breen, 30 Nev. 164, 93 P. 997 (1908).
39. 7 AM. JUR. 2d *Attorneys at Law* § 4 n.1 (1963).
40. AM. JUR. 2d DESK BOOK 222 (1962).
41. *See, e.g.*, Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945 (1954).

ordinary over-representation of lawyers."[42] For the period investigated in this research report, 1937–68, the number of lawyer-legislators in both the House and the Senate was not only significantly high but the high proportions remained relatively stable. The mean percentage of House lawyer-legislators was 57 percent, varying from 55 percent to 59 percent. In the Senate the mean percentage was 66 percent, fluctuating between 57 percent in the 83rd Congress and 74 percent in the 75th Congress.[43] Lawyers not only maintained large majorities in each session, but also monopolized the key committees from which legislation affecting the status of the Supreme Court would, in most instances, originate—the House and Senate Judiciary Committees. Lawyer-legislators were not only present in large numbers, but had, historically, acquired a privileged status—that of monopolistic control of the House and Senate committees which dealt most directly with matters likely to affect the status of the legal profession and the courts before which members of the legal profession practiced. The members of these two committees obviously were in a position to exercise unusual influence in situations where the sanctity of the Supreme Court was at stake.

A summary of the computed lawyer/non-lawyer scores in Figures 1A and 1B indicate that the pro-Court voting behavior of lawyer legislators in both the House and the Senate did not differ significantly from that of non-lawyer legislators. Similarly a more detailed examination of the voting behavior of members of the lawyer-monopoly committees (Judiciary) of the House and Senate was made separating Type 1 (Court curbing) and Type 2 (reversal of statutory interpretation) roll calls. The results were identical in Figures 2A-2D, with no significant difference between lawyer-legislators who served on the House and Senate Judiciary Committees and all other members of the respective chambers.

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42. For cross-national comparisons see Patterson, *Comparative Legislative Behavior: A Review Essay,* 12 MIDWEST J. POL. SCI. 599, 604 (1968); Pedersen, *Lawyers in Politics: The Danish Folketing and United States Legislatures,* in COMPARATIVE LEGISLATIVE BEHAVIOR: FRONTIERS OF RESEARCH 27 (S. Patterson & J. Wahlke eds. 1972).

43. The entire analysis of the role of lawyer legislators is based upon two studies by John R. Schmidhauser, Larry L. Berg, and Justin J. Green: *Lawyers in Congress: Proportions and Consequences for Congressional Relations with the Supreme Court* and *The Supreme Court and Congress: The Lawyer Monopoly Committees and the Myth of Reverence Toward the Supreme Court* in THE ROLE OF LAWYERS IN AMERICAN SOCIETY, forthcoming.

Figure 1A

Distribution of Adjusted Mean Scores
by Occupation,
House of Representatives, 1937-68

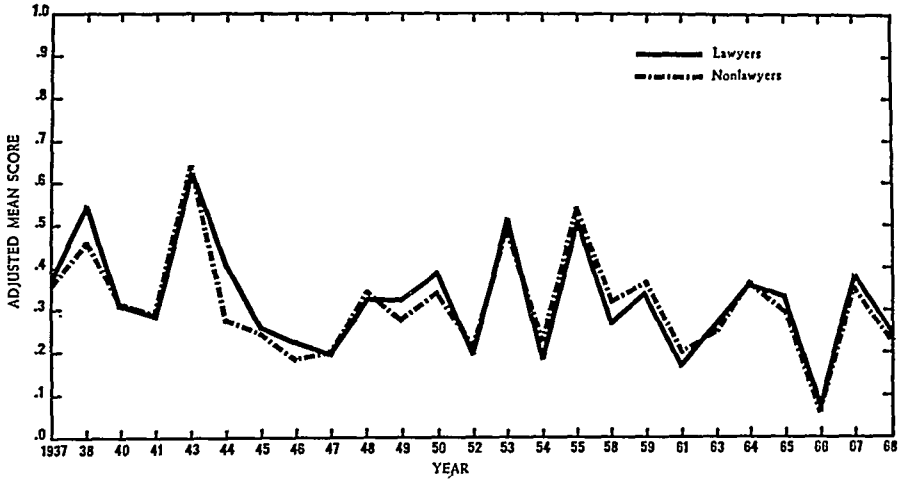


Figure 1B

Distribution of Adjusted Mean Scores
by Occupation,
Senate, 1937-68

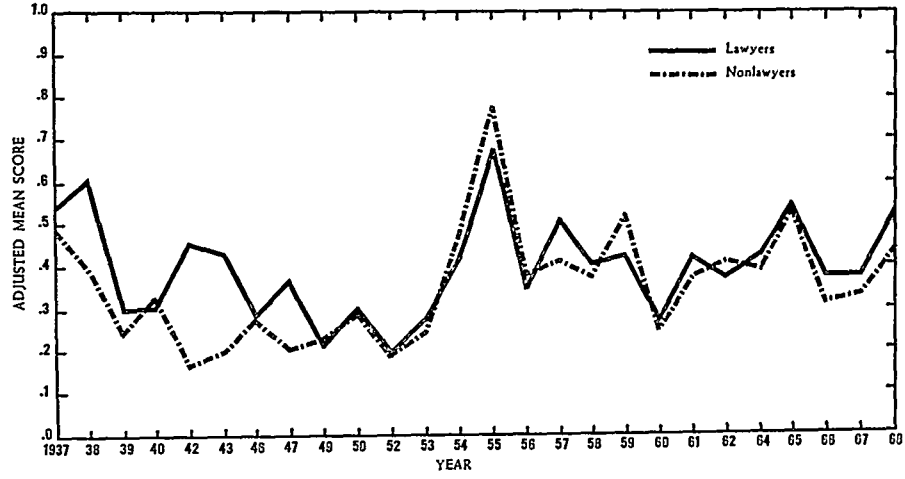


Figure 2A

Distribution of Adjusted Mean Scores
on Type 1 Roll Calls by
U.S. House of Representatives, 1937-65
JUDICIARY COMMITTEE MEMBERS, AND ALL OTHER MEMBERS

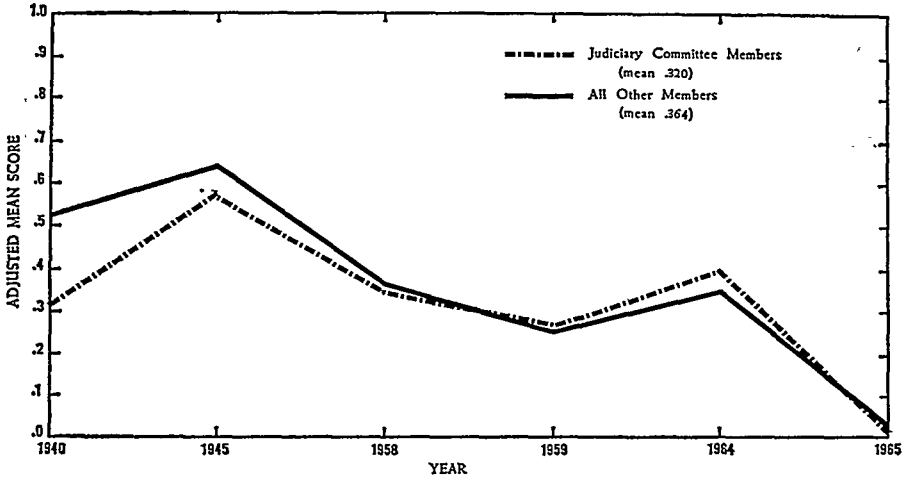


Figure 2B

Distribution of Adjusted Mean Scores
on Type 1 Roll Calls by U.S. Senate, 1937-68
JUDICIARY COMMITTEE MEMBERS, AND ALL OTHER MEMBERS

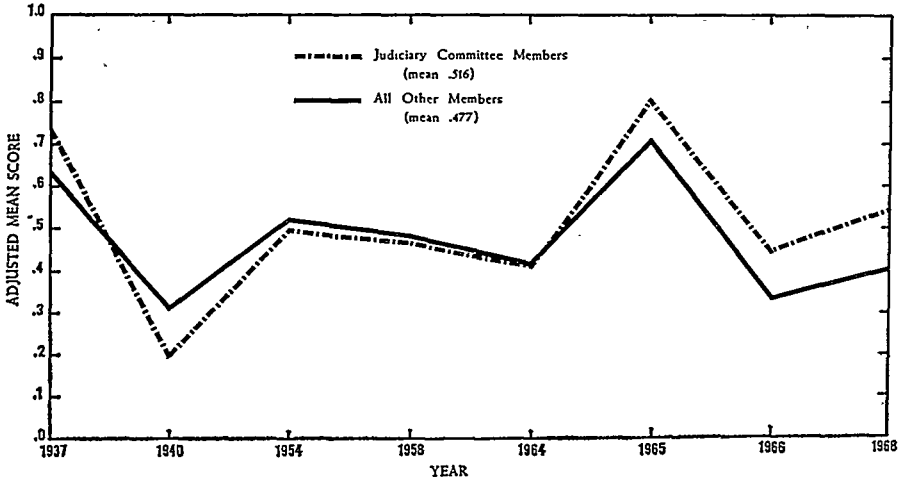


Figure 2C

Distribution of Adjusted Mean Scores
on Type 2 Roll Calls by
U.S. House of Representatives, 1937-66
JUDICIARY COMMITTEE MEMBERS, AND ALL OTHER MEMBERS

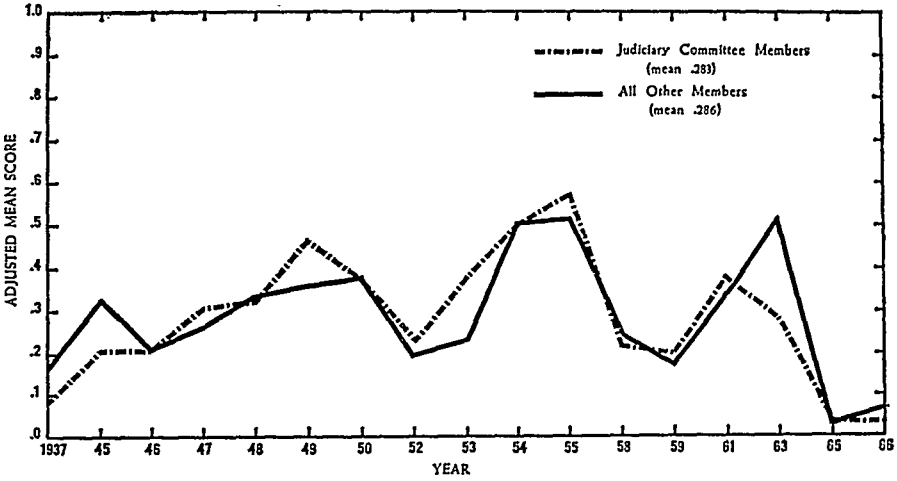
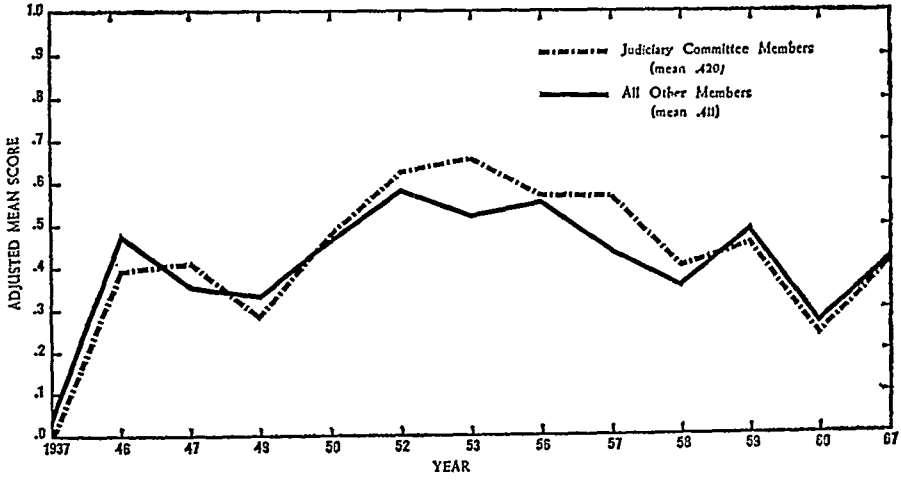


Figure 2D

Distribution of Adjusted Mean Scores
on Type 2 Roll Calls by U.S. Senate, 1937-67
JUDICIARY COMMITTEE MEMBERS, AND ALL OTHER MEMBERS



CONCLUSION

In short, the conventional wisdom that assumed and continues to assume that lawyer legislators will exhibit, in voting behavior, an attitude of support and reverence for the Supreme Court based upon professional socialization is not supported by the evidence. Thus the entire subject of the norms of institutional behavior of the Supreme Court—especially the issues involving secrecy and conflict of interest—assumes far greater importance. Contextually, the evidence provided suggests that the resolution of judicial norm issues can not, realistically, be treated as if they were merely of significance to the justices or judges themselves or of importance to the more interested or attentive leaders of the organized bar. Institutional norms are intimately related to the basic characteristics identified by Max Weber, Emile Durkheim, and a small number of American scholars as fundamental to institutional legitimacy and system maintenance itself. Full recognition of this important dimension of the problem is a vital precondition of the intelligent development of a more relevant change.