Senatorial Delay in Confirming Federal Judges, 1947-1998

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Abstract

Political observers have remarked on a staggering increase in the length of time it takes for the Senate to confirm presidential appointees to the lower federal bench. Here, we focus on the duration of the confirmation process for presidential appointees to the United States Circuit Courts of Appeal between 1947 and 1998, and explain the variation over time in the length of the confirmation process. With newly collected data on the fate of all appellate nominees during that period, we show how ideological incentives and institutional opportunities combine to affect the timing of Senate confirmation of judicial appointees.

Scholars of congress and the courts have recently remarked on unprecedented delays in confirming nominees for the federal bench, delay considered unusual given the historically consensual process for confirming federal judges (Katzmann 1997, 10). Although foot-dragging on presidential nominations is not unique to the contemporary Senate, confirmation of lower court judges is normally viewed as devoid of serious conflict: judicial nominations are rarely subject to recorded votes, and few are rejected by the Senate.

We explore trends in the duration of the Senate confirmation of judicial nominees and argue that the typical portrait of senatorial deference to the president understates fierce competition among presidents, parties, and senators seeking to shape the ideological makeup of the federal bench. To test our account, we collect data on the fate of all nominees to the U.S. Circuit Courts of Appeal over the second half of the 20th century and estimate a duration model to explain variation in the timing of the Senate's confirmation decisions. Ideological differences and institutional rules predictably constrain presidents from swiftly securing confirmation of preferred nominees for the federal bench.

The Timing of Consent

Studies of judicial selection have typically been descriptive and anecdotal (e.g. Chase 1972, Harris 1953), collectively presenting a portrait of inter-branch deference: The Senate historically has been said to defer to the president after his consultation with home state senators of his own party (Chase 1972, 43-5). Formal work on the politics of Supreme Court and executive branch appointments now challenges the received wisdom of inter-branch deference, suggesting instead that presidents' rational anticipation of Senate preferences best account for the rare rejection of their appointees (Calvert, McCubbins and Weingast 1989, Hammond and Hill 1993, Moraski and Shipan 1999, and Nokken and Sala 2000).

Still, focusing on the final outcome of each nomination masks the internal dynamics of the confirmation process (Goldman 1997, Goldman and Slotnick 1999, McCarty and Razaghian 1999, Nixon and Goss 2001). If every presidential appointee were swiftly confirmed, Senate

dynamics would matter little. In fact, there is considerable variation in Senate treatment of judicial nominees. Some are confirmed quickly; others languish for months or years. The Senate set a modern record when it took over four years to confirm federal district court judge Richard Paez to a vacancy on the Ninth Circuit Court of Appeals. If the timing of legislative action is politically consequential (Fenno 1986), explaining the conditions under which the Senate delays confirmation of presidential nominees is essential to understanding how and with what consequence the Senate dispenses advice and consent to the president.

Political context of confirmation

Unlike Supreme Court appointments or high-level executive branch positions, lower court nominations are rarely visible to the public and media (Slotnick and Goldman 1998), and their salience varies widely across senators. Coupled with a norm against recorded roll call votes on lower court nominations, most judicial nominations are salient only within the chamber, insulating senators' treatment of judicial nominees from intense media scrutiny.[1] Nonetheless, appellate appointments-- with their life-time tenure and broad jurisdictions-- are highly consequential for the shape of public policy and law.

The low and uneven salience of judicial appointees grants senators significant discretion over the timing of confirmation decisions. Senators pay few costs for delaying confirmation, because media and public attention to the confirmation process is rare and because most senators seldom take an interest in nominees outside their home state or region. Also, the low visibility but high importance of judicial appointments enhances senators' bargaining leverage with the president over appointments or unrelated matters when they choose to delay a nomination (Biskupic 1999, Goldman 1997, 134).

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[1] The norm is no longer in place, at least for Republican Senate majorities, as the Republican conference adopted a resolution in April 1997 requiring separate roll call votes on each judicial nominee (Henry 1997). Since then, appellate and district court nominees have tended to be subject to a recorded floor vote. Still, no appellate bench nominee has been rejected by floor roll call vote.

Still, obstructing presidential nominees is not a cost-less activity. Senators pursuing their own agendas risk thwarting their success by engaging in excessive delay. Also, because senators are likely to prefer swift confirmation for home-state or other favored nominees, they have an incentive not to obstruct other senators' preferred nominees. Under what conditions then are senators most likely to incur the costs of delaying judicial nominees? We argue that the degree of delay on judicial nominations varies directly with senators' ideological incentives and institutional opportunities.

Ideological incentives

Given the broad jurisdiction of the appellate courts and the life-time tenure of federal judges, ideological considerations are likely to be paramount in senators' calculations on nominations. Because senators should prefer swift confirmation for nominees who share their views and slower movement on ideological foes, the greater the ideological difference between the Senate and a president's nominee, the longer it should take for the Senate to reach a decision on confirmation. Given the paucity of information usually available about lower court nominees, senators are also likely to take account of presidential preferences in assessing each appointee; as the Senate diverges ideologically from the president, we would expect to see the Senate proceed more slowly.

Appointments to fill vacancies on "critical" courts are likely to be treated differently. If a bench leans clearly in one ideological direction, any single appointment will have only a limited impact on decisions reached by the court; but if a court is closely balanced ideologically, that same appointment would have a much greater impact, measurably shifting the ideological balance of the court (e.g. Ruckman 1993). Thus the Senate should take longer to confirm nominees slated for critical circuits.

Institutional Opportunity

Formal work on nominations typically assumes that the preferences of the median senator are pivotal (e.g. Moraski and Shipan 1999). But the capacity for delay is not uniquely held by the

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median senator. Instead, two institutional structures widely allocate the opportunity to obstruct lower court nominations: the committee system protects the interests of home-state senators and procedural rules invest party coalitions with influence over the Senate agenda.

Impact of committees: The gains-from-trade model (Weingast and Marshall 1988) establishes that the committee system grants interested legislators control over policies within a jurisdiction in exchange for giving up control over policies outside the jurisdiction. In the case of lower court nominations, the uneven salience of these appointments across the Senate should sustain the committee's discretion over whether and when to move a nomination forward: only a few senators hold an intense interest in any particular nomination, and thus the chamber relinquishes control to interested senators.

The critical institutional actor in the gains-from-trade perspective is the panel chair, who has significant control over the committee's agenda. As ideological differences between the chair and the president increase, the Senate should take longer to reach a decision on the nominee. Alternatively, chairs might exercise their procedural discretion to the benefit of intensely interested senators who do not serve on the panel, such as home-state senators for the appointee. Because the committee counsel sends out "blue-slips" to the home-state senators for each nominee, deference to such senators is institutionalized (Goldman 1997, 12, note j, and Grossman 1965). Should a senator mark the blue-slip "objection" or refuse to return the slip, tradition dictates that the chair will decline to hold a hearing on the nomination. In practice, negative blue-slips do not always kill a nomination, but they can delay a nomination (Goldman 1997). Because presidents consult with home-state senators of their party before selecting appellate court nominees, only home-state senators who are ideological foes of the president should take advantage of their institutionalized ability to obstruct. Thus the Senate should take longer to render a decision on the affected nominee if a home-state senator is ideologically distant from the president.

Impact of parties: Because the Senate majority leader holds the right of first recognition on the Senate floor, he wields an effective veto over executive session-- the forum in which nominations are considered by the Senate. Thus, we should see a slow down in confirmation when the president's opposition controls the Senate.

Divided government might also affect the speed of confirmations beyond a blanket slowdown across all nominees. Presidential appointments to critical circuits during divided government are likely to swing a court ideologically counter to majority party views. Thus, the majority leader should be especially reluctant to bring up critical nominations during periods of split party control. Divided government should also affect how committee chairs treat negative blue-slips from home-state senators. During divided government, negative blue-slips are most likely to be issued by a home-state senator from the majority party, and we would expect the chair to be most responsive to his own party members. Thus, if the home-state senator is an ideological outlier relative to the president, the Senate should take longer to act on the nominee.

Motions to enter executive session cannot be filibustered, but nominations themselves are subject to extended debate. Thus, the majority has an incentive to consult with the minority before scheduling nominations for Senate consideration, usually in the form of a unanimous consent agreement negotiated by the party leaders and subject to the views of their respective rank and files (Deering 1987). The *de facto* requirement for unanimous consent protects the rights of the opposing party even when it is in the minority. As ideological differences grow between the president and the opposing party median, the Senate should take longer to conclude consideration of pending nominees.[2]

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[2] Using the median member of the opposing party (as opposed, for example, to the most extreme member or the filibuster pivot) is appropriate for several reasons. First, party leaders are typically considered agents of their party (Cox and McCubbins 1993, Sinclair 1995, Smith 1993). Second, neither extreme members nor filibuster pivots are *uniquely* empowered in the process of securing unanimous consent. If a clear majority of a leader's party lends consent, a leader frequently will use his influence to secure consent from more extreme members. Further, judicial nominations below the Supreme Court level are almost never filibustered.

Additional controls

We include a number of controls for the impact of the president and for the context in which the Senate considers nominees. We control for the popularity of the president, the onset of a presidential election (Goldman and Slotnick 1999, McCarty and Razaghian 1999), the quality of each nominee, the number of pending appointments, and the amount of time Congress has left after the president submits a nomination (see McCarty and Razaghian 1999); and we include fixed effects for each president and each Congress to control for any president-specific or temporal trends in the data.

Data and Methods

To test our expectations about the timing of confirmation decisions, we estimate a hazard rate model to test our expectations about the timing of confirmation decisions.[3] We chose the Cox proportional hazards model over a parametric model because we had no *a priori* expectation about the dependence of the baseline hazard rate on time.[4] The coefficients indicate whether a particular variable increases or decreases the hazard rate, using the standard errors to determine whether the effect is statistically significant (Teachman and Hayward 1993). An increase (decrease) in the hazard rate means that the variable has the effect of speeding up (slowing down) a confirmation decision. Because we have multiple observations for any appointee whose nomination failed and was subsequently resubmitted in a later Congress, we calculate robust

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[3]A duration model is particularly appropriate since our data are right-censored: for some nominees, confirmation never occurred during the observation period. Eliminating censored (that is, ignoring failed nominees) would introduce selection bias (Box-Steffensmeier and Jones 1997). Treating nominees with similar durations (regardless of whether they were confirmed or not) would likely lead to biased parameter estimates.

[4] See Box-Steffensmeier and Jones (1997) on the choice between Cox and the parametric alternatives. Results from the alternative Weibull specification were essentially identical to the Cox model results, confirming that the functional form of the model is not driving our results. Also, the standard errors for the Weibull are larger than those for the Cox, suggesting that the Cox estimates are preferable because they are more efficient (Box-Steffensmeier and Jones 1997). The equivalency of the results also suggests that tied durations are not a problem in estimating the Cox model (as the proportional hazards model assumes no tied survival times, Yamaguchi 1991). Alternative methods for handling tied failures were estimated within Stata's stcox routine, with no substantive differences found.

standard errors, clustering on each nominee to control for correlated errors across multiple observations for a single nominee.[5]

Dependent variable

For the dependent variable, we use data on the length of time each nomination was pending in the Senate before being confirmed, as well as a variable indicating whether or not the nominee was right censored (i.e., never confirmed during the period of observation). Data on the duration and fate of nominations come from the Senate Judiciary Committee's Final Legislative and Executive Calendar for each congress, the *Journal of the Executive Proceedings of the Senate,* the Senate Judiciary Committee, and the Federal Judicial Center. The duration of the nomination consists of the number of calendar days from the president's nomination to fill an appellate court vacancy to the Senate's confirmation of the nominee, using all nominations made between the 80th (1947-48) and 105th (1997-98) Congresses.[6] For the right-censored nominees, we need to know the last day on which a nominee was "at risk" for confirmation. For most nominees, this is the last date the Senate was in session for each Congress. For nominations withdrawn by the president, the last date "at risk" is the date of withdrawal. No nominations were defeated on the chamber floor.

Independent variables

We code the following independent variables for each of the 413 nominations to the U.S. Circuit Courts of Appeal between the 80th and 105th Congresses (1947-1998).[7]

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[5] Nominations that were resubmitted during the second session of the same Congress before it became routine to waive Senate Rule 31 were treated as a single observation for the Congress. (Under Senate Rule 31, Clause 6, nominations technically die at the end of each congressional session (i.e. generally the end of the year), unless the rule is waived by unanimous consent. According to McCarty and Razaghian 1999, the rule has been waived routinely since the 1970s, meaning that nominations usually remain alive until the end of the second session.

[6] Following McCarty and Razaghian (2000), we do not distinguish between recess and non-recess days. As they observe, in the modern period recesses are so short as to be inconsequential.

[7] Because there are no home-state senators for nominees from D.C.-- and thus missing data on the blue-slip variables noted below-- we are forced to drop the 35 appellate court nominees from D.C. We also drop the three nominees for whom ABA ratings were never issued (two in the 81st Congress before the

Senate-nominee distance: Following Giles, Hettinger and Peppers's (N.d.) strategy for estimating the ideology of judicial nominees, we use the home-state senator's first dimension DW-NOMINATE score as a proxy for the nominee's ideology if a home-state senator for the nominee hails from the president's party.[8] Senatorial courtesy in such cases leads the president to nominate someone who shares the policy views of the home state senator (Giles, Hettinger, and Peppers N.d.). If both home-state senators hail from the president's party, the two senators' DW-NOMINATE scores are averaged to produce the proxy for nominee ideology. If no home-state senator comes from the president's party, we use the president's DW-NOMINATE score as a proxy for nominee ideology, following Giles et. al.'s assumption that the president is unconstrained by senatorial courtesy under such conditions.[9] We then calculate the absolute difference between the median Senate NOMINATE score and the nominee's imputed NOMINATE score as a measure of Senate-nominee distance.

Senate-president distance: We calculate the ideological difference between the president and the Senate median in each congress as the absolute difference between the DW-NOMINATE scores for the president and the Senate median.

Critical nomination: We use the balance in party affiliations for sitting judges of the relevant circuit court as a proxy for the court's ideological balance. Critical nominations are those to circuits on which the proportion of Democratic judges ranges between 40% and 60%. Critical nominations are coded 1, 0 otherwise. The party composition of each circuit bench at the time of nomination is determined from Zuk, Barrow, and Gryzki (1997) and Martinek (2000).[10]

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participation of the ABA and one in the 100th Congress whose nomination was withdrawn before the ABA issued a rating).

[8] We use the first dimension score whenever we use a senator or president's DW-NOMINATE score. DW-NOMINATE scores are available at http://voteview.uh.edu/dwnomin.htm.

[9] For President Truman, we use his last DW-NOMINATE score from his Senate service.

[10]For example, the partisan balance of the 2nd Circuit during the 103rd Congress (1993-1994) is calculated by summing the party affiliations of all 2nd Circuit judges confirmed before 1993 and still on the

Judiciary chair-president distance: We calculate the ideological distance between the Judiciary chair and the president as the absolute value of the difference between the DW-NOMINATE scores for the president and the panel chair.[11]

Blue-slip potential: To capture the potential for a negative blue-slip, we need to identify home-state senators who are ideological outliers from the president, those most likely to harbor objections to a president's nominee.   To do so, we calculate the absolute value of the difference between the DW-NOMINATE scores for the president and each home-state senator for each nomination.[12] Any senator who is greater than 1.65 standard deviations above the mean distance between the president and all home-state senators is coded 1, 0 otherwise.[13]

Divided government: Split party control of the Senate and the executive branch is coded 1, 0 otherwise.

Opposing party-president distance: We calculate the ideological distance between the president and the median of the opposing party for each Congress as the absolute difference between the president's DW-NOMINATE score and the median DW-NOMINATE score for the party opposing the president.

Controls: To measure the president's popularity at the time of each nomination, we use the president's Gallup approval rating for the month in which the nomination was made (Ragsdale 1998, Gallop Poll Trends 2000), and we code nominations submitted or still pending in the

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bench up to 1994. Thus, when determining the party balance of the circuit for nominations submitted in 1994, any judge retiring in 1994 would be excluded from the calculation.

[11]Committee chairs are determined from Nelson (1993). Halfway through the 84th Senate, Judiciary Committee Chair Harley Kilgore (D-WV) died in office, with James Eastland (D-MS) succeeding him as chair in early 1956. The distance between the president and the committee chair thus varies across the two committee chairmen of the 84th Senate.

[12] The nominee's home state is determined from Zuk, Barrow, and Gryski (1997) and for failed nominees from the Judiciary Committee calendars. As noted above, this necessarily excludes the 35 nominees from D.C. for appointments to the Circuit Court of Appeals for D.C.

[13]The 1.65 threshold isolates true ideological outliers, because it identifies those senators furthest ideologically from the president (i.e. less than 5% of the sample).

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Senate during a presidential election year as 1, 0 otherwise. Nominee quality is based on ratings generated by the American Bar Association (ABA) Standing Committee on the Federal Judiciary. We use a dichotomous variable to indicate whether a nominee received any type of qualified rating, coding qualified nominees 1, 0 otherwise. We also include a dummy variable to distinguish well-qualified nominees from all others. Well-qualified nominees received an "exceptionally well qualified" or "well qualified" rating from the ABA, and are coded 1, 0 otherwise.[14]

For Senate controls, the number of pending appointments at the time of a nomination is determined by counting the total number of judicial nominations (for both appellate and district court vacancies) unconfirmed at the time of the new nomination. Time left in session is equal to the number of days left in the session at the time the nomination is made (determining final session dates from Congressional Quarterly Press 1999).

Results and Discussion

The descriptive statistics for the past half-century show the Senate's uneven treatment of presidential appointees for the federal bench (Table 1). Although 93% of judicial nominees are eventually confirmed, there is substantial variation in how long it takes for the Senate to confirm each nominee. The fastest Senate was the 82nd (1951-2), which took on average just 14.5 days to confirm each nominee; the slowest, the 105th (1997-8), which took a record 205 days.[15] Foot-dragging is not unique to recent Congresses, as the 86th Senate (1959-60) took on average 121

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[14] The ABA discontinued the exceptionally well qualified rating in June 1989 (Zuk, Barrow, and Gryski 1997). We are grateful to Sheldon Goldman for his willingness to share his compilation of ABA ratings for all failed nominees and for successful nominees after 1992. ABA ratings for earlier successful nominees are drawn from Zuk, Barrow, and Gryski (1997). Zuk et. al. report no ratings for Frances Duffy, Austin Staley, Elmer Schnackenberg, or William Thornberry. We follow Goldman's ratings for the latter two. Thornberry's well-qualified rating is based on his ABA rating for his nomination to a district court seat in the previous Congress. Schnackenberg's unqualified rating is based on Goldman's analysis of the ABA's letter to the Senate Judiciary Committee. The ABA did not regularly report quality ratings during the 81st Congress when Duffy and Staley were considered. The ABA also did not report a rating for Hurlbutt in the 100th Congress, as his nomination was withdrawn too early.

[15] Figures exclude nominations that died with the end of the Congress. Including all nominations, the 105th Senate spent on average 285 days per nominee.

days per nominee, showing the effect of Majority Leader Lyndon Johnson's halt to all judicial

nominations in 1959 (Goldman 1997, 134). The data also reveal the strategic value of foot-

dragging: the longer the Senate delays a nomination, the less likely the nominee will be

confirmed.[16] Foot-dragging in presidential election years is also particularly attractive to

senators: over two-thirds of the 51 nominations that initially failed were pending during a

presidential election year, suggesting that senators have an increased incentive to delay nominees

with the approach of a presidential election.

[Table 1 about here.]

Estimation results appear in Table 2.[17] The overall fit of the Cox regression model is

good, as we can reject the null hypothesis that the coefficients are jointly zero beyond the .001

level. In Table 3, we use the parameter estimates from Table 2 to calculate the percentage change

in the hazard rate of confirmation for a given change in the statistically significant variables.[18] To

judge the statistical significance of the coefficients in Table 2, we rely on one-tailed t-tests.

[Tables 2 and 3 about here.]

The preferences of the median senator and her relationship to the president and nominee

have little effect on the length of time each nominee awaits a Senate decision. Neither the Senate

median's ideological distance from the president nor the nominee[19] significantly affects the hazard

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[16]Pearson's r = -.52, significant at p < .001. In other words, there are no "quick rejections": judicial nominations are defeated by Senate inaction rather than action.

[17] The model is estimated via Stata 7.0's *stcox* routine.

[18] Percentage change in the hazard rate is calculated via the *adjust* routine in Stata 7.0. For dichotomous covariates, the hazard rate change is calculated across the values 0 and 1; for continuous variables, we vary the value of the independent variable roughly one standard deviation below and above the mean value.

[19] Similar results obtain when we measure Senate-nominee distance as the percentage of the Senate held by the nominee's political party. Nominees' party affiliations are drawn from Zuk, Barrow, and Gryski (1997) and Martinek (2000). Sheldon Goldman graciously provided party IDs for most of the early and failed nominees.   For the three failed nominees lacking a party ID, we substitute the appointing president's party.

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rate of a confirmation decision.[20] Nor does the Senate generally treat nominees for critical

vacancies differently that it does other nominees. Instead, Senate institutions appear more

regularly to attenuate the independent effect of the median senator. Party coalitions clearly

exploit their procedural opportunities to slow down the confirmation process: the hazard rate of a

confirmation decision declines by 60% as policy differences grow between the president and the

opposing party. If the opposing party is in the majority, it takes advantage of its scheduling

power to delay confirmation; in the minority, it exploits the need for unanimous consent to

prevent swift confirmation of presidential appointees. Even if the median senator prefers quick

approval of a nominee, the views of the opposing party strongly affect the timing of Senate

action.

Divided government constrains in several ways the president's ability to secure swift

confirmation for his appointees. First, the hazard rate of a decision decreases during divided

government by nearly fifty percent compared to periods of unified control, suggesting that the

majority party's influence over the agenda during divided government weakens the president's

ability to alter the policy status quo on the federal bench.[21] Second, divided government has

pervasive effects throughout the confirmation process. The Senate does not treat critical

nominations differently than other nominations, all else equal, suggesting that the ideological

tenor of a circuit is not sufficient to spur Senate delay. But note the statistically significant

negative coefficient for nominations to critical circuits during divided government. If the

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[20]The null results for the ideological incentive hypotheses may result from correlation between
divided government and Senate-president distance (Pearson's r = .57). When we estimate a model that
includes only the ideological incentive variables (excluding controls), the hazard rate significantly
decreases as the Senate moves ideologically away from the president and increases as the nominee's party
share in the Senate grows.

[21]This finding is consistent with studies of Supreme Court and executive branch nominations that
suggest divided government limits Senate deference to the president. Split party control is said to lower the
probability and/or hazard rate of confirmation (Mackenzie 1981, McCarty and Razaghian 1999, Ruckman
1993, and Segal 1987). Divided government also increases the scrutiny of lower court appointments
(Caldeira and Wright 1995, Hartley and Holmes 1997). In contrast, see Krutz, Bond, and Fleisher (1998)
who find that Supreme Court nominations are not more likely to fail during divided government.

president appoints someone to a critical seat during unified government, the Senate majority party should benefit from quickly confirming the nominee, as the appointee would further stack the circuit in the majority party's favor.[22] But if the president attempts to fill a vacancy on a critical circuit during divided government, that nominee would have a significant impact on the policy tenor of the circuit by tilting the circuit against the majority party's favor. As a result, the majority party exploits its procedural rights to delay consideration of the president's nominee. The magnitude of this effect is substantial, as the hazard rate for critical nominations during divided control decreases 42% compared to periods of unified control.[23]

Such findings place into perspective objections of Republican senators to Ninth Circuit nominees appointed by President Clinton. During the period we observe, the Senate took nearly twice as long to consider Clinton's Ninth Circuit nominees than all his other appellate nominees (on average ten months versus five months), delays often long enough to leave nominations in limbo at the end of the Congress. Conservative critics justified their foot-dragging on the grounds that the Ninth Circuit was far too liberal (Palmer 2000). In fact, in each of the last fifteen years we observe, the Ninth Circuit was a critical circuit: Democrats held between 41% and 57% of the bench seats. Republicans might have opposed Clinton's nominees because of the ideological tenor of the circuit's rulings, but they were also likely motivated by the strategic value of the circuit relative to other regional courts of appeal. Confirming Clinton's nominees would have squandered a potential future opportunity to reverse the liberal tilt of a precariously balanced court.

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[22]Because 92% of confirmed appellate judges over the past fifty years hail from the president's own party, we can safely assume that the president's choice will swing the ideological balance of the circuit court to his favor.

[23]The statistical effect is not an artifact of the threshold for identifying critical nominations. When Democrats hold between 45% and 55% of a circuit's seats, the hazard of confirmation still declines during periods of divided control.

Divided government also affects the institutional leverage of ideologically-distant home-state senators. The presence of an ideologically-distant home-state senator does not generally lower the hazard rate of confirmation, as seen in the insignificant coefficient for distant home-state senators. Because administrations tend to consult with home-state senators, it should be rare for a president to nominate someone opposed by the home-state senator. Not so during divided government, when the presence of a strong ideological foe of the president decreases the hazard rate of confirmation by some 92% (compared to the effect such a senator would have under unified party control).[24] Because home-state senators who differ strongly with the president during divided government invariably hail from the Senate majority party, Judiciary panel chairs likely exploit their procedural rights of delay on behalf of fellow partisans. If we lower the threshold for identifying ideologically-distant home-state senators, the variable is no longer significant. A high threshold is important theoretically, however, as the president rarely nominates individuals opposed by home-state senators.

We find mixed support for the idea that presidents can affect the duration of nominations. Popular presidents are no more able to get their nominees approved quickly than less popular ones (but see Krutz, Bond and Fleisher 1998 and Segal, Cameron, and Cover 1992), and the quality of the nominee appears to matter little. Still, nominations made earlier in a president's term move more swiftly, a dynamic also found in studies of Supreme Court confirmations (Krutz, Bond and Fleisher 1998, Ruckman 1993, and Segal 1987).

Conclusions

Divided government is a prominent cause of the institutional slow down, but it is far from the prevalent force influencing the fate of nominees. Instead, Senate institutions predictably

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[24] But note the range of the confidence interval around that percentage. The overwhelming effect is due in part to the extreme delays experienced in the 104th and 105th Congresses by James Beatty, Clinton's nominee for a vacancy on the 4th Circuit. Objections by an ideologically distant home state senator, Jesse Helms (R-North Carolina), contributed to a 287-day wait in the 104th and a record 711-day wait in the 105th (the longest of any nominee over the past half-century) and prevented confirmation both times.

allocate procedural rights to parties and committees, and interested senators are quick to exploit the rules in pursuit of their agendas. Particularly during periods of divided government, the majority party exploits its scheduling powers to restrain presidents from shifting the ideological tenor of the federal bench against the views of the majority party. During divided government, the Judiciary Committee chair is especially responsive to the preferences of home-state senators, and the Senate majority party is particularly likely to hold critical nominations hostage when they threaten to tilt the circuit against the views of the party conference.   Change in the policy tenor of the courts might be inevitable, but senators can forestall such change by strategically exploiting their institutional right to delay. In doing so, interested senators attenuate the influence of the Senate median over the fate of nominees.

Our results have implications for theories of legislative-executive interactions. First, we need to pay more attention to how political salience affects the Senate's response to the president, as we might speculate that the greater visibility of Supreme Court appointees limits the procedural discretion of senators in the confirmation process. Second, our findings suggest that durable party and institutional effects emerge in the confirmation process, even after controlling for the preferences of the median senator. Accounting for the full effects of partisan and institutional is essential for explaining strategic interaction between Congress and the president.

References

Biskupic, Joan. 1999. "Hatch, White House at Impasse on Judgeships*." Washington Post.* June 5, p. A01.

Box-Steffensmeier, Janet M., and Bradford S. Jones. 1997. "Time is of the Essence: Event History Models in Political Science." *American Journal of Political Science* 41:1414-1461.

Caldeira, Gregory A. and John R. Wright. 1995. "Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships." In *Contemplating Courts*, ed. Lee Epstein. Congressional Quarterly Press.

Calvert, Randall L., Mathew D. McCubbins, and Barry R. Weingast. 1989. "A Theory of Political Control and Agency Discretion." *American Journal of Political Science* 33: 588-611.

Chase, Harold W. 1972. *Federal Judges: The Appointing Process*. Minneapolis: University of Minnesota Press.

Deering, Christopher J. 1987. "Damned If You Do and Damned If You Don't: The Senate's Role in the Appointments Process." In *The In-and-Outers: Presidential Appointees and the Transient Government in Washington,* ed. G. Calvin Mackenzie. Baltimore, MD: Johns Hopkins University Press.

Fenno, Richard F., Jr. 1986. "Observation, Context, and Sequence in the Study of Politics." *American Political Science Review*, vol. 80 (March): 3-15.

Gallup Poll Trends. 2000. "Clinton Job Approval." http://www.gallup.com/poll/trends/ptjobapp.asp. Accessed March 21, 2000.

Giles, Michael W., Virginia A. Hettinger, and Todd C. Peppers. N.d. "An Alternative Measure of Preferences for Federal Judges." Typescript, Emory University.

Goldman, Sheldon. 1997. *Picking Federal Judges*. New Haven: Yale University Press.

Goldman, Sheldon, and Elliot Slotnick. 1999. "Picking Judges Under Fire." *Judicature* 82 (May-June):265-84.

Grossman, Joel B. 1965. *Lawyers and Judges: The ABA and the Politics of Judicial Selection*. New York: John Wiley & Sons.

Hammond, Thomas H., and Jeffrey S. Hill. 1993. "Deference of Preference? Explaining Senate Confirmation of Presidential Appointments to Administrative Agencies." *Journal of Theoretical Politics* 5:23-59.

Harris, Joseph P. 1953. *The Advice and Consent of the Senate*. Berkeley: University of California Press.

Hartley, Roger E. and Holmes, Lisa M. 1997. "Increasing Senate scrutiny of lower federal court nominees." *Judicature* 80(May-June)274-8.

Katzmann, Robert. 1997. *Courts and Congress*. Washington, D.C.: Brookings Institution Press.

Krutz, Glen S., Richard Fleisher, and Jon R. Bond. 1998. "From Abe Fortas to Zoe Baird: Why Some Nominations Fail in the Senate*." American Political Science Review* 92 (December): 871-81.

Mackenzie, G. Calvin. 1981. *The Politics of Presidential Appointments*. New York: Free Press.

Martinek, Wendy L. 2000. Lower Federal Court Confirmation Database. Version 1.0. http://www.ssc.msu.edu/~pls/pljp/ConfirmationData.html

McCarty, Nolan, and Rose Razaghian. 1999. "Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*." American Journal of Political Science* 43(October): 1122-1143.

Moraski, Bryon J. and Charles R. Shipan. 1999. "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices." *American Journal of Political Science* 43(October): 1069-1095.

Nelson, Garrison. 1993. *Committees in the United States Congress, 1947-1992*. v. 1. Washington, D.C.: Congressional Quarterly Press.

Nokken, Timothy P., and Brian R. Sala. 2000. "Confirmation Dynamics: Presidential Appointments to Independent Agencies, 1953-88." *Journal of Theoretical Politics* 12 (1): 91-112.

Palmer, Elizabeth. 2000. "Longstanding Judicial Vacancies Revive 'Smaller is Better' Crusade." *Congressional Quarterly Weekly Report*. March 11. 521-3.

Ragsdale, Lyn. 1998. *Vital Statistics on the Presidency : Washington to Clinton*. Washington, D.C. Congressional Quarterly.

Ruckman, P.J. 1993. "The Supreme Court, Critical Nominations, and the Senate Confirmation Process." *Journal of Politics* 55:793-805.

Segal, Jeffrey A. 1987. "Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics." *Journal of Politics* 49 (November):998-1015.

Teachman, Jay D., and Mark D. Hayward. 1993. "Interpreting Hazard Rate Models." *Sociological Research Methods and Research* 21:340-71.

Weingast, Barry and William Marshall. 1998. "The Industrial Organization of Congress." *Journal of Political Economy*. 96:132-63.

Zuk, Gary, Deborah J. Barrow, and Gerald S. Gryski. 1997. "A Multi-user Database on the Attributes of U.S. Appeals Court Judges, 1801-1994." 1st ICPSR version. Ann Arbor, MI: Inter-University Consortium for Political and Social Research.

Table 1. Descriptive Statistics

Variable	Mean	Standard deviation	Minimum	Maximum
Time from nomination to confirmation	92.37	116.79	1	711
Senate-president distance	.44	.12	.22	.64
Senate-nominee distance	.33	.19	0	.87
Critical nominations	.35	.48	0	1
Judiciary chair-president distance	.41	.31	.02	.83
Ideologically-distant home-state senator	.02	.14	0	1
Divided government	.49	.50	0	1
Opposing party-president distance	.73	.09	.52	.88
Critical nomination during divided government	.17	.37	0	1
Ideologically-distant home-state senator during divided government	.01	.11	0	1
Presidential approval	54.70	11.06	28	76
Presidential election year	.22	.41	0	1
Well-qualified nominee	.65	.48	0	1
Qualified nominee	.99	.12	0	1
Number of nominations pending	17.99	14.53	1	67
Time left in session	357.91	187.64	6	722

Table 2. Cox Regression of the Timing of Senate Confirmation Decisions, 1947-1998

Explanation	Variable	Expected sign	Coefficient (robust s.e.)
Ideological incentives	Senate-president distance	-	1.421 (1.139)
	Senate-nominee distance	-	.185 (.351)
	Critical nomination	-	.320 (.160)
Institutional opportunity	Judiciary chair-president distance	-	.517 (.397)
	Ideologically-distant home-state senator	-	.635 (.360)
	Divided government	-	-.671 (.405)*
	Opposing party-president distance	-	-5.412 (3.208)*
Interaction effects	Critical nomination during divided government	-	-.701 (.258)**
	Ideologically-distant home-state senator during divided government	-	-2.302 (1.224)*
Presidential controls	President's approval rating	+	-.012 (.009)
	Presidential election year	-	-1.271 (.181)***
	Well-qualified nominee	+	.080 (.117)
	Qualified nominee	+	1.077 (.748)
Senate controls	Number of nominations pending	-	-.010 (.005)*
	Time left in session	-	-.003 (.000)***
	Log Likelihood		-1774.6999
	Chi2		317.83***
	N		413

Notes: * $p < .05$, ** $p < .01$, *** $p < .001$ (all one-tailed t-tests). Fixed effect controls are included in the model, but not reported above.

Table 3. Magnitude of Substantive Effects on the Timing of Confirmation Decisions

	Change in X	Percentage change	95% confidence interval
Variable	**(from, to)**	**in hazard rate**	**(lower, upper bound)**
Divided government	(unified → divided)	-46.51%	(-49.29%, -46.15%)
President-opposing party distance	(.67 → .82)	-60%	(-65%, -54.73%)
Critical nomination during divided government	(0, 1)	-42.22%	(-54.44%, -27.79%)
Ideologically-distant home-state senator during divided government	(0 → 1)	-92.44%	(-95.67%, -87.28%)
Presidential election year	(0 → 1)	-73.96%	(-75.13%, -72.76%)