

Advice or Contempt?

The Changing Politics of Federal Judicial Nominations

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ABSTRACT: How has the confirmation process in the U.S. Senate changed in recent decades? An analysis of federal judicial nominations finds an increase in the mechanisms of obstruction, which has resulted in increased delay. However nominees to the circuit courts and the district courts are treated very differently. In addition to greater expected delays, circuit court nominees' ideological positions affect the duration of the Senate's confirmation process, whereas district court nominees' ideological positions do not. Our explanation for these differences centers on the greater policy-making power exerted by appellate judges, relative to trial judges. We conclude that shaping the circuit courts' benches is an effective strategy for shaping policy long into the future, and which has resulted in higher levels of conflict and obstruction as the parties have polarized.

1. Introduction

This paper's subject is the trend of increasing obstructionist behavior in the Senate's confirmation of federal judicial nominees. During an eleven-year gap between vacancies on the Supreme Court, ideological groups and political partisans became increasingly aware that lower court appointments present elected officials with an opportunity to shape policy far into the future, due both to judicial appointees' lifetime tenure and to appellate judges' influence over legal interpretation (cf. Hettinger et al., 2006). Nominations can also be symbolic, and it was widely believed that battles over circuit court nominees would set precedent for the president's and Senate's conduct regarding the next Supreme Court nomination. When Democrats filibustered ten of President Bush's circuit court nominees, the ensuing showdown was only narrowly averted by a bipartisan coalition. Although these senators' agreement to oppose filibusters survived the confirmations of two Supreme Court nominees, reinstatement of divided government in 2007 has raised fresh concerns about inter-branch and intra-chamber rivalries.

We address two questions in what follows. First, has obstruction affected both tiers of the federal judiciary equally? We present a theory of federal judges' role in the policy making process that leads us to expect differential treatment of appellate and trial judges. In particular, we expect that nominations to the circuit courts have become increasingly distinguished from nominations to the district courts, revealed by greater salience of ideological considerations and greater levels of obstruction. The second question we address regards the source of the current trend: Is the increase in conflict due primarily to systemic or to nominee-specific factors? One explanation of the trend is that the parties are seeking revenge for past perceived infractions, generating a tit-for-tat cycle of escalation.¹ Senator Orrin Hatch frets that "we have entered a new and uncharted territory of Democratic-led obstructionism," and accuses Senate Democrats

of making “a conscious decision” to “deliberately obstruct and stall judicial confirmation” in response to perceived foot-dragging by Republicans during the Clinton administration (2003: 492, 488). Apologists for Democratic obstruction, including senators such as Patrick Leahy and the editorial page of the *New York Times*,² propose an alternative thesis, which is that President Bush’s nominees are collectively less qualified and more ideologically extreme than previous presidents.’ If the Leahy/*New York Times* thesis is correct, then we ought to observe nominees’ characteristics having the greatest impact on delay; we should find no significant change over time once differences between nominees’ qualifications and ideological positions are controlled. Contrastingly, if the Hatch thesis is correct, then we ought to observe significant differences between the Senate’s treatment of Bush’s and Clinton’s nominees.

The centerpiece of this paper is a duration analysis of federal judicial nominations. This approach is not new, however we make two advances. First, we include new individual nominee-level data on ideology, allowing us to demonstrate the primacy of systemic factors: greater delay in confirmation of circuit court nominees is not limited to individuals who lack qualifications or who display extreme ideology. Obstruction is the new reality for the highly qualified and the ordinary, for the ideologically extreme and the moderate, and during divided government and unified government. Second, we include circuit and district courts nominees in the same analysis, which reveals that district court nominees have not been subjected to the same degree of delays (see too Goldman 2003; Holmes and Savchak 2003), and that district court nominees’ ideology plays a less significant role in their confirmation, compared to circuit court nominees. These patterns deserve an explanation, which we offer in the following section, before we turn to validating their existence.

2. Theory: Judicial Appointments and Deckstacking

In recent years, legislative scholars have studied nominations to evaluate theories of partisan and ideological gridlock (e.g., McCarty and Razaghian 1999), while judicial scholars have studied nominations as a means to substantiate a view of judges as being ideologically motivated (e.g., Moraski and Shipan 1999; Segal and Spaeth 2002; Epstein and Segal 2005).³ Our belief is that the former scholarship underestimates the distinctiveness of appellate court appointments, while the latter scholarship underestimates the importance of federal judicial appointments to judicial and legislative processes. Legislative scholars have increasingly recognized that Congress faces a principal-agent problem regarding statutory implementation. Statutes rarely “set” policy at a preordained location in one or more dimensions, instead they delegate authority to other actors, who execute the law and who might possess interpretive discretion (McCubbins et al. 1987, 1989; Epstein and O’Halloran 1994; Huber and Shipan 2002). By surveying Congress’s three strategies for assuring that its wishes are carried out, it is revealed that judicial nominations might play a significant role in resolving Congress’s agency problem, and that obstruction of judicial nominations might thwart presidential attempts to hijack the policy making process.

A first strategy for Congress to assure compliance is *ex post* oversight: holding hearings to gather information, using rewards and sanctions (or their threat) to create incentives for honest agency, and passing new laws to override adverse statutory constructions. But “supervisory” or reactive control strategies are likely to be ineffective for at least three reasons.⁴ First, *Article III* prohibits reducing federal judges’ salaries or otherwise punishing dissenters. Second, responding to agency decisions is costly for Congress. Delegation gives the agent agenda power, and because of the multiple-principals problem, Congress might leave a large “zone of discretion”

within which the agency can operate. Third, ensuring responsiveness via oversight requires that the same principal who initially delegated to the agent remains in power, i.e., that the enacting coalition maintain its cohesiveness and its control over the congressional process for an extended period. Congress has not demonstrated the capacity to overturn adverse appellate court decisions, even when those cases are highly salient to the public. Despite a clamorous repudiation of the Supreme Court's weakening of private property rights in *Kelo v. City of New London* (2005), Congress failed to pass legislation that would restrict eminent domain in its wake.⁵ And when the Supreme Court ruled in *Hamdan v. Rumsfeld* (2006) that President Bush had overstepped his delegated powers by establishing military commissions to try enemy combatants in the Guantanamo Bay detention facility, Republicans only passed new authorizing legislation when their loss of both chambers in the 2006 election appeared imminent.

A second strategy for assuring compliance is *ex ante* control of agents using a domain-specialized strategy: proactively drafting each piece of legislation to eliminate ambiguity. Under present practices of statutory interpretation, enshrined in the much-cited case of *Chevron, Inc. v. National Resources Defense Council* (1984), the first step in reviewing agency action is to assess whether Congress has explicitly delegated discretion to the agency, or has implicitly created discretion through vague language. By clarifying congressional intent on each potential issue, Congress might minimize a bureaucrat's or a court's interpretive discretion. However, because removing ambiguity requires building consensus, and because many contingencies may be totally unforeseen, the domain-specific strategy increases the political costs of legislating. Being perfectly detailed in writing legislation would undercut the entire justification for delegating to a specialized bureaucracy, i.e., to create a policy that outlives its enacting coalition and is flexibly adjusted (within bounds) to changing conditions (Fiorina 1982; McCubbins 1985). Hence most

legislation remains as “incomplete contracts,” open to interpretation.

A third strategy that Congress could employ is *ex ante* control using a generalized strategy. This would involve manipulating structure, procedure, and personnel, with the intent to “stack the deck” in favor of certain interests (McCubbins et al. 1989). Our contention is that nominations to the federal bench constitute a potentially potent form of deckstacking, for at least four reasons. First, due to federal judges’ lifetime tenures, appointments have durable effect. Second, due to circuit courts’ wide jurisdiction and liberal rules of standing, appointments have broad effect. Third, due to the Supreme Court’s resource constraints (and the infrequency of congressional overrides), federal appellate courts’ decisions have finality. There are presently 179 authorized judgeships for thirteen federal circuit courts (including the D.C. and Federal circuits). In 2004 the federal circuit courts handled 62,762 appeals from the federal district courts and federal agencies (Administrative Office of the U.S. Courts 2006). The Supreme Court granted review to only 87 cases for the recent 2005 term, indicating that appellate panels’ decisions were final in 99.9 percent of the cases they heard.⁶ Fourth, the circuit courts present more frequent opportunities for appointments. Only seven Supreme Court vacancies occurred during the entire period we study, and whereas the Supreme Court has remained fixed at nine members for more than a century, the number of authorized circuit court judgeships has been increased four separate times since 1977.⁷

In short, given the ineffectiveness in exerting *ex post* control over statutes’ interpretation, the infeasibility of eradicating statutory ambiguity, and the appellate courts’ durable, broad and final influence on interpretation, we assert that judicial branch deckstacking has the potential to be a powerful legislative tool. Substantiation of this insight is provided by the emergence of ideological interest groups that lobby senators directly and conduct mass-media campaigns to

mobilize support for or opposition to targeted judicial nominees (see Scherer 2003; Epstein and Segal 2005: 96), as well as by evidence that senators' behavior towards Supreme Court nominees depends on their ideological reputations (particularly when the nominee's qualifications are dubious; see Cameron et al. 1990; Epstein et al. 2006). Because of the multiple principals setting, we are not surprised by further evidence of partisan opportunism: senators oppose nominees more frequently if the president is a lame duck, if his party has a minority of seats in the Senate, or if he suffers from low approval ratings (Segal and Spaeth 2002).

Since few roll call votes on lower court nominees occur (most are confirmed by voice vote or unanimous consent), scholarship has focused on lengths of time to confirmation or probabilities of confirmation, rather than on senators' votes. Greater ideological and partisan conflict between the president and the Senate has been shown to generate greater delays in confirmation of circuit court nominees (Bell 2002; Binder and Maltzman 2002).⁸ Circuit court confirmations have taken longer since Bork's nomination to the Supreme Court in 1987 – a period of almost entirely divided control of the Senate and presidency (Martinek et al. 2003)⁹ – and the effects of divided control are exacerbated if the nomination is to a more evenly-divided circuit (in terms of sitting judges' partisanship; Binder and Maltzman 2002). These analyses leave certain important questions unanswered, however. How much of the recent increase in obstructionist behavior is due to partisan or ideological factors? How much is due to changes in the process (i.e., an increase in the instruments of obstruction), as opposed to changes in the characteristics of nominees? The descriptive analysis in section 3 emphasizes Senate institutions (both formal rules and norms) and institutional change; the extent of increasing obstruction is revealed by aggregate-level data analysis. We turn to individual-level data analysis in section 4.

3. Emergence of Obstruction: Narrative and Aggregate Evidence

The Constitution contains only vague guidelines about the judicial appointment process. The president's power to nominate judges is listed in Article II, Section 2, and his power to make temporary "recess" appointments follows one paragraph later. The Senate's "advice and consent" authority to confirm the president's nominees is also listed here, in Article II (executive powers), rather than in Article I (legislative powers). Given the Constitution's brevity and ambiguity, the Senate has the freedom to adopt and to revise its own rules. Our goals in this section are to describe the primary means by which nomination obstruction occurs, to describe changes in the process over recent decades, and to use aggregate data to identify and validate trends.

For each nomination, four possible conclusions might be reached: confirmation, rejection by vote, rejection by procedure, and withdrawal by the president. Between 1977 and 2004, zero nominations were rejected by Senate vote, and only eight were withdrawn by the president. Therefore, the only two outcomes of significance are confirmation and delay. Senate activity on nominations takes place in the shadow of Rule XXXI, which stipulates that any pending nomination shall be returned to the president if Congress adjourns or takes a recess for more than thirty days. If a nomination is returned, then the president then must nominate that person again in a subsequent session. This requirement can be waived by unanimous consent if Congress is taking a recess, but all nominations that are not finally acted on at adjournment are returned to the president – which has occurred 94 times since 1977 – hence a sufficiently long delay amounts to a rejection. How is obstruction accomplished?

As currently practiced, once the nominee is announced, there are three important steps in the Senate's confirmation process.¹⁰ The first step is referral of the nominee to the Senate Judiciary Committee for hearings, and once these are concluded, the second step is a committee

vote on a recommendation to the full Senate.¹¹ The first site for obstruction, then, is the Senate Judiciary Committee, which can decline to hold hearings or a vote. Senatorial courtesy, a norm of deference to senators representing the state in which the nominee will sit, plays a significant role in the Committee's chairman's decisions (see Binder and Maltzman 2004). The Committee sends a form named a "blue slip" to the appropriate senators, requesting their opinions on the nominee within a week. If a senator raises an objection, then customarily no hearing would be scheduled, although courtesy plays a smaller role for nominees to the circuit court than to a district court (because circuit judges hear cases arising in multiple states). This custom enforces consultation between the president and home state senators, and acknowledges the Senate's "advice" role. The practice of consultation originated in a time when federal judgeships were considered patronage (Richardson and Vines 1970: 61-62), but President Carter took steps to enhance the merit basis of appellate judgeships.¹² In 1979, when Senator Kennedy inherited the chairmanship of the Judiciary Committee, he ruled that that blue slips would not be dispositive, and instead every nomination might be discussed in committee (Hatch 2003: 475-6). A more recent Chairman, Senator Hatch, reports that between 1995 and 2000, he did not schedule hearings for 17 of President Clinton's nominees because of lack of presidential consultation with home state senators (2003: 486). Goldman (2003) notes that the overall percentage of nominees receiving hearings has decreased, as only 85% of district court nominees and 55% of circuit court nominees received hearings in the 107th Congress (down from 100% in the 95th).¹³

If a nomination is reported, the Executive Clerk of the Senate assigns the nominee an Executive Calendar number. The third step is for the Senate to enter Executive Session, debate the nomination, and vote to confirm or reject (see Rybicki 2003). Thus the second site at which obstructionist behavior is observed is the Senate floor. If the Senate enters Executive Session by

unanimous consent, then normally the majority and minority leaders negotiated an agreement that can change the order in which nominations will be considered, set time limits on debates, and specify the date and time of a vote. In the absence of a Unanimous Consent Agreement, a non-debatable motion to enter Executive Session must pass, although the Senate must then begin with the next item listed on the Executive Calendar. Motions to take up a different nomination or to end debate and consider the nomination can be debated, therefore a second locus of Senate obstruction is filibusters in Executive Session. Filibusters on judicial nominees are historically a rarity: eight cloture petitions were filed for circuit court nominations between the 95th and 106th Congresses, and four cloture petitions were filed for Bush's circuit court nominees in the 107th Congress alone, but all twelve nominees were ultimately confirmed.¹⁴

Against this historical background, Senate Democrats' filibusters of ten circuit court nominees in the 108th Congress is startling. Miguel Estrada's nomination was withdrawn in September, 2003, after he suffered seven failed cloture attempts. The other nine nominations were returned to Bush at the end of the 108th Congress, including six that had been returned to Bush once before, at adjournment of the 107th Congress.¹⁵ The first ramification of Democratic obstruction was the Republican leadership's consideration of the "nuclear option," a revision of Senate Rules to undermine filibusters of judicial nominations. The bill sponsored by Senate Majority Leader Frist¹⁶ would have amended the cloture rule (Senate Standing Rule XXII) by reducing the number of yeas votes required to invoke cloture from 60 to 57, then to 54, then to 51, over four successive votes. This bill was not acted on, largely because Frist's resolution would change the Standing Rules of the Senate (and therefore a two-thirds vote would be needed to invoke cloture if Democrats filibustered the motion; see Palmer 2005). A second ramification was President Bush's two recess appointments during January and February 2004. President

Clinton had made the first recess appointment to a Circuit Court in more than twenty years on December 27, 2000, when he placed Roger Gregory, an African-American, on the all-white Fourth Circuit.¹⁷ Bush skirted the confirmation process by installing two of the filibustered nominees, Charles Pickering and William Pryor.¹⁸ After Minority Leader Reid threatened to block all further appointments (Stolberg 2004), the White House and Senate Democrats reached an agreement in May of 2004, whereby President Bush pledged not to make any more recess appointments in the 108th Congress, and Senate Democrats pledged not to block floor votes on 25 nominees (Beth 2005).

When the Senate returned for the 109th Congress, Republicans' majority had increased from 51 to 55 seats, leading to Republican optimism that many of Bush's blocked nominees would now be confirmed (Lewis 2005). Bush resubmitted twelve circuit court nominations, including seven who had been filibustered. Majority Leader Frist reiterated his willingness to change Senate procedures to ensure each nomination received an up-or-down vote. As the leaderships of both parties ratcheted up their rhetoric, a cease-fire was arranged by seven Republican senators and seven Democrat senators.¹⁹ Their "memorandum of understanding on judicial nominations" committed all members to vote against the proposed rules change and for cloture for three of the blocked nominees (William Pryor, Priscilla Owen, and Janice Rogers Brown, all of whom were confirmed with fewer than sixty affirmative votes).

To aid in understanding obstruction's consequences, Table 1 provides aggregate data on circuit court nominations, from the Carter administration through the first term of the Bush administration. The first four columns list the numbers of nominations, Senate Judiciary Committee hearings and reports, and confirmations. The fifth column reports the confirmation rate, which has diminished over time. Between 90 and 100 percent of nominees were confirmed

in the first few congresses, but more recently the confirmation rate has exceeded 55 percent only once. Our primary interest is in the final three columns, which list the numbers of nominees withdrawn, returned to the president at adjournment under Senate Rule XXXI, and subsequently re-nominated. Both returns and re-nominations increase in tandem to double-digit levels.

Insert Table 1.

The story behind the recent increase in returns and renominations reveals the extent to which partisan conflict now afflicts the confirmation process. Following a successful 103rd Congress, when only three of President Clinton's circuit court nominations were returned, eight and then nine were sent back at the 104th and 105th Congresses' adjournments. In 2000, however, with a Republican president about to be inaugurated, the Republican-controlled Senate returned seventeen circuit court nominations to President Clinton at the 106th Congress's adjournment. The 2000 election's results presented Clinton with a unique opportunity since, with the Senate split evenly between Republicans and Democrats, Vice President Gore held the deciding vote until President Bush's inauguration. On January 3rd Clinton opportunistically re-nominated nine individuals, but the Senate did not confirm any, and on March 19th President Bush withdrew all nine nominations from Senate consideration.²⁰ At the 107th Congress's adjournment, the Democratic controlled Congress returned the favor by returning fifteen circuit court nominees to President Bush, although this is hardly the whole story. Democrats had only taken control of the Senate (and thus the Judiciary Committee) when Vermont's Senator Jeffords switched his party affiliation to Independent. The Senate did not reach an agreement to waive Rule XXXI prior to the August 2001 recess (Rybicki 2003: 12), resulting in twenty circuit court nominations being returned to the president mid-session. Bush re-nominated all twenty individuals in September, but only eleven were confirmed. At the 108th Congress's adjournment, another fifteen of

President Bush's nominees fell victim to Rule XXXI despite Republicans possessing a majority of seats in the chamber. By contrast, when Clinton held the presidency and the Democratic Party held the Senate majority, only three nominees were returned, and all three were confirmed in the subsequent congress.

The lag from nomination to confirmation has grown rapidly over recent decades. Schuck (1975: 233) reports that in the 92nd Congress, 41 out of 90 judicial nominations took a single day to go from Judiciary Committee hearings to confirmation votes. Hartley and Holmes (2002: 274) note that before the Carter administration, the number of days from nomination to confirmation averaged on 24 days for district court nominees and 29 days for circuit court nominees. After the Carter administration, the average number of days more than doubled, to 56 and 60 days for district and circuit court nominees, respectively. When Clinton occupied the White House and Republicans controlled the Senate, the corresponding figures skyrocketed to 99 and 124 days (Hartley and Holmes 2002: 272). Goldman (2003) constructs an "index of obstruction and delay," adding the number of nominees for which no final action is taken plus the number of nominees who must wait more than 180 days, divided by the total number of nominees. Goldman's index scores for the circuit courts appear in the last column in Table 1. The circuit court index consistently exceeds 0.5 since the 102nd Congress, indicating that at least half of nominees are delayed or derailed.

A shortcoming of aggregate analyses is their failure to control for covariates. Recall the Leahy/*New York Times* thesis, which is that President Bush's nominees are unqualified and ideologically extreme. Anecdotal evidence is equivocal: two filibustered nominees had received unanimous "Well Qualified" ABA ratings (Miguel Estrada and Priscilla Owen), while two others received some "Not Qualified" votes from ABA committee members (Janice Rogers Brown and

William Myers III). A second potential failing of aggregate analyses is their inability to consider the Senate's calendar. We note that Goldman (2003) took the cautious route by not counting nominees proposed too late in the Congress to receive full consideration; our own count of victims of Senate Rule XXXI does not take into account that some nominations might be received too near to adjournment for hearings and votes to occur. Duration models resolve both potential issues straightforwardly; it is to this form of analysis that we now turn.

4. Causes of Obstruction: Statistical Analysis

In this section we conduct an analysis of individual nominations to lower federal courts. We examine the period from 1977 to 2004, i.e., the 95th through 108th congresses.²¹ Our dependent variable is the number of days that elapse between the date the Senate receives the nomination, and the date the Senate votes to confirm. Our independent variables include both aggregate-level (Congress- or president-specific) variables and individual-level (nominee-specific) variables.

In choosing our aggregate-level variables, we were forced to confront two problems. The first problem is choosing among too many options. Although one could compile an extensive list of variables that capture ideological or partisan conflict between the president and some pivotal actor in the Senate (e.g., the median senator, the median member of the majority party, the chairman of the Judiciary Committee), these variables to correlate with each other.²² Studying cross-temporal dynamics runs an additional risk of overstating statistical significance, since nominations are clustered within a congress. Even though scholarship on Supreme Court nominations suggests that the president's political strength or weakness might also be relevant (Cameron et al. 1990; Epstein et al. 2006), and thus we might wish to include the president's approval rating, whether the president is in his first or second term, and whether the nomination

is sent to the Senate during an election year, we actually have only fourteen degrees of freedom to assess the statistical significance of congress-specific variables, rather than hundreds.

Therefore we sought to construct models that conserve on degrees of freedom.²³ In what we present below, we created four “regimes” by pooling data from periods when the presidency is held by a single party continuously (Carter, Reagan-Bush 41, Clinton, and Bush 43; Carter is the excluded category in the analyses). We also include a variable indicating divided partisan control of presidency and Senate, plus the interactions of regimes and divided control. We also estimate a more parsimonious model with no “proper nouns,” which uses only divided control and a variable for partisan polarization (measured as the ideological distance between the Republican and Democratic parties’ median senators during a congress).

We employ four individual-level variables in our analysis. To measure qualifications, we use a dichotomous variable indicating whether the ABA gave the nominee a unanimous “Well Qualified” rating. To measure nominee ideology, we employ a strategy developed by Giles et al. (2001) which takes advantage of the norm of senatorial courtesy. If no home state senators belong to the president’s party, we assume the nominee shares the president’s ideology; if one home-state senator belongs to the president’s party, we assume that the nominee shares the senator’s ideology; if two home-state senators belong to the president’s party, we assign the average of the senators’ ideologies to the nominee. Ideological locations are measured using Poole and Rosenthal’s (1997) *DW-Nominate* score, measured at the end of the 108th Congress. Finally, we include control variables indicating the nominee's gender and race (Bell 2002).

The statistical technique we adopt is a duration model, which estimates the probability of each individual case “failing” (i.e., being confirmed) each time increment. Our dependent variable is the number of days between nomination and confirmation, and thus initially one

might consider a regression or event-count model, but a duration model is ideal because our dependent variable is right-censored: nominations may be returned to the president or withdrawn before a confirmation vote occurs. This is particularly relevant for judicial nominations, because a vacancy might open on any date, and the President might announce a nomination on any date. A perfectly acceptable nominee might be sent to the Senate too late in the calendar to receive full consideration; we would not wish to group such an individual with the unacceptable nominees. If we were to exclude right-censored observations from the analysis, we would introduce selection bias, since nominees who are withdrawn or returned might differ systematically from those who are confirmed (Box-Steffensmeier and Jones 1997: 1415-1417). If we were to include right-censored observations in the analysis (counting the failure date as the date of return or withdrawal), we would introduce systematic measurement error, since we do not know when a nominee hypothetically would have been confirmed had the process been allowed to continue.

Duration models handle right-censoring during estimation by partitioning the likelihood function: censored observations contribute to the likelihood through the survivor function, which is the probability of a nominee not having been confirmed by time t ; uncensored observations contribute to the failure density function, which is the probability of confirmation occurring at time t (Box-Steffensmeier and Jones 2002: 13-19).²⁴ Let us highlight that a duration model outputs an estimated hazard rate, which is the instantaneous probability that an event (confirmation) occurs at time t , conditional on having not yet occurred. With regard to interpretation, therefore, one must bear in mind that a positive coefficient corresponds to a greater hazard rate – i.e., a *faster confirmation*, not a *longer duration*.

The only wrinkle in our duration model's estimation flows from a concern about unmodeled heterogeneity. Goldman (1997) supplies numerous examples of how idiosyncrasies in

the “advice” process of selecting a judicial nominee can have later implications for obstruction. For instance, when President Clinton nominated a law school classmate, William Fletcher, to fill a vacancy on the Ninth Circuit, Republicans agreed to confirm him under two conditions: his mother, a judge on the same circuit, would retire, and Clinton would nominate a Republican to fill her vacancy (Epstein and Segal 2005: 79). Such idiosyncrasies would be difficult to measure consistently and reliably, but a host of estimation problems might ensue if some individuals are more failure-prone or “frail,” and the conditions affecting frailty are unknown or unmeasured (Zorn 2000: 368-9). Therefore we utilize the Cox proportional hazards regression model²⁵ with a nominee-specific frailty parameter.²⁶

Table 2 presents results of our duration analyses. We provide three separate models for both circuit and district court nominees. Every model includes the same four individual-level variables (nominee characteristics), but employs a slightly different set of aggregate-level variables. Model 1 uses the three presidential regime dummy variables (Carter is the excluded category), and interacts them with divided government. Model 2 replaces the presidential regimes and interactions with the partisan polarization and divided government variables. Model 3 adds partisan polarization to Model 1. Our interpretation of the empirical results will focus on Model 1, for the following reasons. First, comparing Models 1 and 3 reveals that adding partisan polarization yields only a slight increase in fit for the circuit courts, and no increase for the district courts. Second, the coefficient on partisan polarization has a positive sign in Model 3, which is the reverse of estimates from Model 2, for both circuit and district courts. The simple explanation for this result is that partisan polarization has increased over the time period we are investigating, and therefore it is correlated to the presidential regime variables. Although Model 2 is more parsimonious and has no “proper nouns,” a comparison to Model 1 indicates that

partisan polarization and divided government do not explain as much of the variance.

Insert Table 2.

For interpretation, a positive coefficient indicates that higher values of an independent variable hasten confirmation, and a negative coefficient indicates delay. To recap our expectations about individual-level variables, we anticipate a quicker confirmation for highly qualified nominees, which translates into a positive coefficient on qualifications. We anticipate a quicker confirmation for nominees whose ideology is closest to the Senate median, which translates into a negative coefficient for ideological distance. If ideological factors play a greater role for circuit court nominees than district court nominees, then this coefficient should be more negative in the circuit court models. We have no a priori expectations about gender or race.

In Table 2, we observe that the coefficient for nominee qualifications is positive and statistically significant for both circuit and district court nominees, indicating that a well-qualified ABA rating hastens confirmation. The coefficient for ideological distance is negative and statistically significant for circuit court nominees, indicating that a greater distance from the Senate median tends to delay confirmation. This coefficient is smaller in magnitude and statistically insignificant for district court nominees, which provides important evidence that appellate and trial court nominees are treated quite differently in the confirmation process. To summarize, qualifications matter for both circuit and district court nominees, but ideology only matters significantly for circuit court nominees. Note that ethnicity and gender do not have statistically significant effects for either tier.

A measure of the substantive impact of nominees' characteristics is provided in Table 3, where we computed estimated changes in hazard rates.²⁷ The baseline we adopt is a nominee at average ideological distance from the Senate median (.442), who did not receive a well-qualified

ABA rating. If a circuit court nominee at the median of the ideological distance distribution had received a well-qualified ABA rating, her hazard rate would be increased by 99%. If a circuit court nominee with the same ABA rating was located at the 5th percentile (.025) of the ideological distance distribution, then her hazard rate would be increased by 43%; if she was located at the 95th percentile (.814) of the ideological distance distribution, then her hazard rate would be decreased by 27%. A computation of the joint effects of changes in ideological distance and qualifications reveals that a well-qualified rating more than offsets ideological extremity: a nominee at the 95th percentile of the ideological distance distribution with a well-qualified ABA rating has a hazard rate that is 45% greater than the baseline nominee. For district court nominees, we see a slightly smaller effect of a well-qualified rating (73% larger hazard rate), and much smaller effects for movements along the ideological dimension (14% larger for the 5th percentile, and 11% smaller for the 95th percentile).

Insert Table 3.

Turning our attention to the presidential regime variables, we note that Carter is the excluded regime, so all estimated coefficients displayed in Table 2 and estimated impacts displayed in Table 3 must be interpreted as indicating changes in the hazard rate relative to the Carter administration. During Reagan's first three congresses, nominations were confirmed significantly faster than during Carter's two congresses: circuit court nominees' hazard rates were 400% larger, and district court nominees' hazard rates were 370% larger. The onset of divided government led to slower confirmation during Reagan's last congress and all of Bush's administration. Compared to the Carter regime, the hazard rate is 65% smaller for circuit court nominees and 72% smaller for district court nominees. Although one might be tempted to conclude that Reagan's gains during unified government overwhelmed his and Bush's losses

during divided government, one must exert caution in interpreting impact figures: a 357% larger hazard rate is the mirror image of a 72% smaller hazard rate.

Clinton's first congress, which featured unified government, displayed divergent patterns for the two tiers of lower courts: circuit court nominations progressed even more slowly (72% smaller hazard rate, relative to Carter's). The onset of divided government after just one congress had disastrous consequences for Clinton's nominees. Circuit court nominations slowed even further, with a hazard rate 90% smaller (or one-tenth as large) than Carter's nominees. Clinton's district court nominations sped through at roughly the same pace as the Carter's nominees during unified Democratic control, but district court nominations slowed with the onset of divided government, with a hazard rate 80% smaller. As for Bush, although he entered office with unified government, few nominees were confirmed before Jeffords' switch gave Senate control to the Democrats. During divided control, circuit court nominations slowed even further, to a hazard rate that is 95% smaller (one-twentieth as large) than Carter's nominees. Circuit court nominations sped up only slightly when Republicans took control of the Senate in 2002, but still do not approach the pace of Clinton's nominees during his one congress of unified control. District court nominations have headed the opposite direction during the Bush's years in office, accelerating slightly under both unified and divided government.

The observed patterns are reinforced by examining the predicted duration of nominations. Note that a 50% smaller hazard rate does not imply that a nomination will take twice as long, since the hazard rate is the instantaneous probability of failure at each date, which involves a baseline hazard function. To aid interpretation, therefore, we have computed estimated survival functions, which represent the prediction that an individual will not have been confirmed by time t . In Figure 1, we display the survival functions for a nominee who received a well-qualified

rating, is mean distance from the Senate median, and has mean frailty ($v_j = 1$), under six different regimes: the Reagan-Bush years under unified control (97th-99th) and divided control (100th-102nd); the Clinton years under unified control (103rd) and divided control (104th-106th); and the Bush years during divided control (107th) and unified control (108th).

Insert Figure 1.

The slopes in Figure 1A, which displays circuit court nominees' survival functions, are consistently flatter than those in Figure 1B, which displays district court nominees' survival functions. This pattern indicates that circuit court nominees have required longer expected durations. The horizontal line at 0.5 indicates the point at which the probability of a well-qualified (but otherwise average) nominee having been confirmed is 50%. In Figure 1A, one observes that circuit court nominees have passed the 50% threshold more and more slowly. In Clinton's first term, when Democrats controlled the Senate, nominees passed the threshold around 100 days, but this number increased to 160 days when the Senate fell under Republican control, and increased again to 220 days with the presidency in Bush's hands but the Senate under Democratic control. Even under periods of unified government, the gap between the pace of confirmation of Clinton's circuit court nominees and Bush's circuit court nominees is substantial. It is important to recall that these computations fix nominees' ideology and qualifications at mean levels, thus they indicate the impact of obstruction on the average nominee. Ideologically extreme nominees would face an even longer expected duration. In Figure 1B, by contrast, one observes that district court nominees pass the 50% threshold in roughly 100 days, a number which has not increased substantially since the late 1980s.

5. Conclusion

Our analyses reveal the extent to which nominees are victims of their political environment. Because the “Advice and Consent” process divides authority between multiple principals, greater obstruction is expected when the president and the Senate majority have conflicting partisanship or ideology (see also Binder and Maltzman 2005). The deckstacking model’s insight, however, is that these effects should be felt more powerfully with respect to appellate courts than trial courts. Our comparative analysis of two tiers of the federal judiciary reveals that district court nominees experience weaker effects from their ideological distance from the Senate median than do circuit court nominees, and that expected delays for circuit court nominees have grown much longer than for district court nominees, holding ideology and qualifications fixed. This reinforces our belief that obstruction is driven by considerations of public policy, rather than reflexive contempt for the other party or its judicial nominees.

Nominees’ qualifications and ideology can significantly affect the time from nomination to confirmation, but even after controlling for these factors, the delay in confirmation continues to increase. Our aggregate-level analysis reveals a recent growth in the number of nominees who are returned to the president at adjournment, and a parallel growth in the number of nominees sent to the Senate two, three, or even four times before confirmation. These observations lead to concern over the federal bench’s character: the confirmation process increasingly values perseverance and endurance over characteristics such as judicial temperament.

Finally, the descriptive evidence on the means of obstruction reveals the willingness of Democrats and Republicans to reinterpret existing institutional prerogatives (e.g., blue slips, filibusters, recess appointments), and to wage war over institutions. Republicans portrayed their proposal to modify cloture rules as an attempt to re-establish a time-honored norm that every

nominee would receive a vote, but it was widely perceived as an assault on minority rights. The proposal is Exhibit A in the case that policy gains can trump an institution's long-term stability, but the outcome of this episode illustrates a point made forcefully by Riker (1980) about the relationship between institutions and policy outcomes. In the context of a collective choice over multiple alternatives, any "disorder" in the choice between the alternatives (e.g., Condorcet's paradox) infects the choice between various agendas for considering the alternatives. Shifting the debate from the sphere of alternatives to the sphere of institutions cannot circumvent pathologies, as long as the connection between choices in the two spheres is clear.

Republicans' proposal to modify Senate Rule XXII was a transparent maneuver to ease confirmation of controversial nominees; it was an attempt at deckstacking inside a legislative institution to facilitate deckstacking in judicial institutions. But the pattern of support or opposition to the institutional "reforms" reflected the pattern of support or opposition to the nominations, and the rules that empower the minority to block nominations also empowered them to resist institutional change. In 1937, when President Roosevelt sought to change the federal bench with a court-packing scheme, powerful forces rose up to defend the status quo (see Gely and Spiller 1992). Two episodes, separated by seven decades of history, both reveal the power of the Senate's prerogatives in executing its "advice and consent" role. Although the Senate's norms may be somewhat fluid, the Senate's institutions appear to be in equilibrium sufficiently stable to repel majoritarian political assault. The reinstatement of divided government has yielded *détente*, but the Republicans might have already accomplished much of what they desired, stacking the deck by packing the federal bench with conservatives.²⁸ Without a reversal of the parties' increasing ideological polarization, we can only anticipate a resumption of hostilities if Democrats take the presidency in 2008.

6. Notes

¹ Hatch (2003: 467), citing Straub (2002: 1).

² *The New York Times* (2005a, 2005b)

³ However, Goldman (1997) focuses on diversity on the federal bench.

⁴ See especially Weingast and Moran (1983), Moe (1987), Brehm and Gates (1997).

⁵ *Kelo* concerns the constitutionality of a local government's action. Meernik and Ignagni (1997) argue the likelihood of reversal legislation being proposed and enacted depends on factors including public opinion and issue area. The inference that Congress seeks to exert its influence in constitutional interpretation cases is exemplified by the Religious Freedom Restoration Act of 1993 (RFRA), which was designed to overturn the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). See Brent (1999) for Circuit Court decisions applying *Smith* and RFRA.

⁶ We recognize that this calculation underestimates the Supreme Court's effect if the Court is following an auditing strategy, sampling from the set of cases that are not in compliance.

⁷ The number of authorized circuit court judgeships stood at 97 in 1977. It was increased by 35 to 132 in 1978; by 12 to 144 in 1982; by 24 to 168 in 1984; and finally by 11 to 179 in 1990.

⁸ Likewise for Supreme Court nominees; see Shipan and Shannon (2003).

⁹ This positive effect of the post-Bork dummy variable might explain why they also find that the Judiciary Committee's partisan composition does not affect circuit court nominations. Before the Bork defeat, the presidency and Senate were controlled by the same party for five straight congresses. After the Bork defeat, the same party controlled both the presidency and Senate only once. We can circumvent this confound by adding more recent congresses to the analysis.

¹⁰ Goldman (1997) provides a detailed account of what occurs before the Senate receives a nomination, including FBI background checks and an ABA evaluation of potential nominees. Carter instituted major reforms (p. 238-250), many of which Reagan rolled back (p. 287-294). The ABA were kept somewhat at “arms length” during Reagan’s administration (p. 323-327), and any formal role in the process was withdrawn by Bush (see Epstein and Segal 2005: 70-75).

¹¹ See Rybicki (2003: 6-7). The vast majority of nominees who receive Judiciary Committee hearings are reported favorably to the floor. Senate tradition dictates that the Committee report even nominees that do not receive a positive Committee vote. Between 1977 and 2004, six circuit court nominees were given less-than-favorable committee reports, and four were simply reported to the floor without a committee recommendation (Rutkus and Sollenberger, Table 13). Two Supreme Court nominees have been reported without a favorable vote: Bork received an unfavorable Committee report; Thomas received a report without recommendation.

¹² Carter’s primary emphasis was on reshaping practices for judicial recruitment. Carter created a U.S. Circuit Judge Nominating Commission by executive order (11972 and 12059).

¹³ Goldman also finds that the lag from nomination to a committee hearing has increased. In the 95th Congress, the average wait was 26 days for a district court nominee and 21 days for a circuit court nominee. In the 105th Congress, the corresponding figures are 165 and 238 days.

¹⁴ See Beth 2002; Beth and Bach 2003. Not all filibusters are conducted by a minority party member. Senator Morgan’s filibuster of Stephen Breyer in 1980 sought revenge for the Judiciary Committee’s rejection of a separate nomination to a district court seat in the state of Virginia.

¹⁵ Richard Griffin, David McKeague and Henry Saad to the Sixth Circuit; Priscilla Owen to the Fifth Circuit; Carolyn Kuhl to the Ninth Circuit; William Pryor to the Eleventh Circuit.

¹⁶ S.R. 138 was reported favorably and without amendment by the Committee on Rules and Administration on June 26, 2003. Eight of the ten filibustered Bush nominees experienced their first failed cloture vote *after* this date.

¹⁷ President Eisenhower made three recess appointments to the Supreme Court (Warren, Brennan, and Stewart); all three appointments were later confirmed to lifetime appointments.

¹⁸ Pickering had been rejected in the Senate Judiciary Committee by a 9-10 vote; the committee then voted not to report the nomination at all. Pickering retired when his recess appointment expired. Pryor was renominated in 2004, and was confirmed 53-45 in June 2005. His recess appointment was upheld in the Supreme Court in the case of *Evans v. Stephens* (2004).

¹⁹ This “Gang of 14” held a pivotal position in the Senate. With Republicans possessing a 55 to 44 majority, adding seven Democratic defectors would permit Republicans to break a filibuster (62-37), but losing seven Republican defectors would block any majority rule motion (48-51).

²⁰ The list of nine included Roger Gregory, who Clinton recess appointed on December 27, 2000. Bush renominated Gregory on May 9, 2001, and the Senate confirmed him on July 20.

²¹ We made two modifications to the sample to cope with the unusual incidents in the 107th Congress: we drop the nine nominations that President Clinton made in January of 2001, and we compact the twenty nominations that were returned to President Bush in August and resubmitted in September (we set the start date as the initial date of nomination). Neither modification alters the statistical findings meaningfully, but both help assure comparability across congresses.

²² Following are correlations between (a) divided partisan control of the presidency and Senate (dichotomous), (b) the number of Senators not belonging to the president’s party, (c) distance between the president and the median member of the Senate’s majority party, and (d) distance between the president and the Chairman of the Senate Judiciary Committee.

	Divided	Other Party Senators	President → Majority Distance
Other Party Senators	0.84	1	
President → Majority	0.92	0.87	1
President → SJC	0.90	0.67	0.86

Binder and Maltzman (2002, 2005) include a dichotomous variable for divided partisan control and a continuous variable for the ideological distance between the president and the Senate median. They find, paradoxically, that ideological conflict lengthens the duration, while partisan conflict shortens the duration; Shipan and Shannon (2003) attribute this finding to collinearity.

²³ In a preliminary stage, we estimated separate intercepts for each of the fourteen congresses. Based on an inspection of the intercepts, we pooled subsets of congresses, and then exhaustively tested alternative specifications against the original. Results of this estimation are included with this manuscript as an appendix table.

²⁴ The duration model technique is appropriate if one assumes that right-censored nominations hypothetically would have ended in confirmation at some later date. We consider this assumption to be reasonable given that the Senate has not voted to reject a single nominee in the 28-year period we examine, and that nominees who are returned to the president are frequently confirmed after being re-nominated. For instance, fifteen nominees were returned to Bush at adjournment of the 108th Congress (the last in our analysis). Of these fifteen, two were recess appointed and twelve were re-nominated in the 109th Congress; eight of these were confirmed.

²⁵ The Cox model neither parameterizes nor estimates the baseline hazard (the model is “semi-parametric”), but an estimate of the baseline hazard can be obtained ex post, conditional on estimates of β_x (Cleves et al. pp. 127-134). Examination of the estimated baseline hazard rate indicates that it is non-monotonic, which rules out the most common parametric duration models.

²⁶ The frailty parameter, v_j , acts as a multiplier of the hazard rate. For nominee j with a vector of

characteristics x_j and frailty v_j , our hazard rate takes the form $h(t|x_j, v_j) = h_0(t)v_j e^{x_j\beta_x}$, where $h_0(t)$ is the baseline hazard function, and β_x is the vector of regression coefficients. If $v_j > 1$ then individual j is more frail, and thus would face an increased risk (confirmed more quickly); if $0 < v_j < 1$ then individual k is less frail and would face a reduced risk (confirmed more slowly). The frailty parameter is modeled as a latent random effect that follows a gamma distribution with mean one and variance θ . Space considerations dictate against displaying each nominee’s frailty, however Table 2 provides an estimate of θ and an LR test of the null hypothesis $\theta = 0$.

If an individual is nominated multiple times (e.g., after being returned to the president by the Senate), then we assume the frailty parameter should not vary for that individual, so technically we are estimating a “shared” frailty model. To check the robustness of our model, we re-estimated it with individual frailty (nomination-specific, rather than nominee-specific shared frailty) and with date-specific shared frailty instead (since presidents may bundle nominations). Regression parameter estimates were robust, and estimates of θ were slightly lower. We thus proceeded with what we believe is the best justified version of heterogeneity.

²⁷ The “proportional hazard” assumption holds that each individual’s hazard function differs only by a factor of proportionality. That is, comparing two individuals, j and k , and setting their

frailties equal to 1, the ratio of their hazard rates is:
$$\frac{h(t|x_j)}{h(t|x_k)} = \frac{h_0(t)e^{x_j\beta_x}}{h_0(t)e^{x_k\beta_x}} = \frac{e^{x_j\beta_x}}{e^{x_k\beta_x}} = e^{(x_j-x_k)\beta_x}$$

To interpret the substantive significance of each variable, we can measure the proportional change in the hazard rate for an individual with characteristics x_j , relative to some baseline case, denoted in the equations above as x_k . Calculations are provided by Box-Steffensmeier (1996: 367). For a dichotomous independent variable k , the percentage change in the risk of

confirmation is $100 \bullet \frac{(e^{\beta_k \bullet 1} - e^{\beta_k \bullet 0})}{e^{\beta_k \bullet 0}}$. The only continuous variable in our analysis is ideological

distance; we compute the impact of a movement from the 5th to the 95th percentiles (i.e., distances of 0.025 and 0.814, respectively). The percentage change in the risk of confirmation

caused by a z -unit change a continuous independent variable k is $100 \bullet \frac{(e^{\beta_k \bullet (x+z)} - e^{\beta_k \bullet x})}{e^{\beta_k \bullet x}}$.

²⁸ Greenhouse (2007).

7. References

- Administrative Office of the U.S. Courts. 2006. *Federal Court Management Statistics*.
- Bell, Laura Cohen. 2002. "Senatorial Discourtesy: The Senate's Use of Delay to Shape the Federal Judiciary," *Political Research Quarterly* 55: 589-608
- Beth, Richard S. 2002. *Cloture Attempts on Nominations*. Congressional Research Service Report RS 20801.
- Beth, Richard S, and Stanley Bach. 2003. *Filibusters and Cloture in the Senate*. Congressional Research Service Report RL 30360.
- Binder, Sarah A., and Forrest Maltzman. 2002. "Senatorial Delay in Confirming Federal Judges, 1947-1998," *American Journal of Political Science* 46: 190-199
- Binder, Sarah A., and Forrest Maltzman. 2004. "The Limits of Senatorial Courtesy" *Legislative Studies Quarterly* 29: 5-22
- Binder, Sarah A., and Forrest Maltzman. 2005. "Congress and the Politics of Judicial Appointments," in Lawrence C. Dodd and Bruce I. Oppenheimer, Eds. *Congress Reconsidered*, 8th ed. pp. 297-317. CQ Press.
- Box-Steffensmeier, Janet M. 1996. "A Dynamic Analysis of the Role of War Chests in Campaign Strategy," *American Journal of Political Science* 40: 352-271
- 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
- Box-Steffensmeier, Janet M., and Bradford S. Jones. 2002. *Event History Modeling: A Guide for Social Scientists*. Cambridge University Press.
- Brehm, John, and Scott Gates. 1997. *Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public*. University of Michigan Press.
- Brent, Jason C. 1999. "An Agent and Two Principals: U.S. Courts of Appeals Responses to *Employment Division, Department of Human Resources v. Smith* and the Religious Freedom Restoration Act." *American Politics Quarterly* 27: 236-266.
- Cameron, Charles M., Albert D. Cover, and Jeffrey A. Segal. 1990. "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model," *American Political Science Review* 84: 525-534
- Chevron USA, Inc. v. National Resources Defense Council, Inc.* 467 U.S. 837 (1984)
- Cleves, Mario A., William W. Gould, and Roberto G. Gutierrez. 2004. *An Introduction to Survival Analysis Using STATA, Revised Edition*. Stata Press.

- Employment Division, Department of Human Resources v. Smith* 494 U.S. 872 (1990)
- Epstein, David, and Sharyn O'Halloran. 1994. "Administrative Procedures, Information, and Agency Discretion." *American Journal of Political Science* 38: 697-722
- Epstein, Lee, Rene Lindstaedt, Jeffrey A. Segal, and Chad Westerland. 2006. "The Changing Dynamics of Senate Voting on Supreme Court Nominees," *Journal of Politics* 68: 296-307
- Epstein, Lee and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. Oxford University Press.
- Evans v. Stephens*. 544 U.S. 942 (2005)
- Fiorina, Morris P. 1982. "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39: 33-66
- Fisher, Louis. 2005. *Federal Recess Judges*. Congressional Research Service Report RS 22039.
- Gely, Rafael, and Pablo Spiller. 1992. "The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan," *Int. Rev. of Law & Econ.* 12: 45-67
- Giles, Michael W., Virginia A. Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas," *Political Research Quarterly* 54: 623-641
- Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. Yale University Press.
- Goldman, Sheldon. 2003. "Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay." *Judicature* 86: 251-257
- Greenhouse, Linda. 2007. "On the Wrong Side of 5 to 4, Liberals Talk Tactics" *The New York Times*, July 8, 2007.
- Hamdan v. Rumsfeld* 548 U.S. ____ (2006)
- Hartley, Roger E., and Lisa M. Holmes. 2002. "The Increasing Senate Scrutiny of Lower Federal Court Nominees." *Political Science Quarterly* 117: 259-278
- Hatch, Orrin G. 2003. "At Last A Look at the Facts: The Truth About the Judicial Selection Process: Each is Entitled to His Own Opinion, But Not to His Own Facts," *George Mason Law Review* 11: 467-492
- Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. 2006. *Judging on a Collegial Court: Influences on Appellate Decision Making*. University of Virginia Press.

Holmes, Lisa, and Elisha Savchak. 2003. "Judicial Appointment Politics in the 107th Congress." *Judicature* 86: 232-239

Huber, John D., and Charles R. Shipan. 2000. "The Costs of Control: Legislators, Agencies, and Transaction Costs," *Legislative Studies Quarterly* 25: 25-52

Huber, John D., and Charles R. Shipan. 2002. *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy*. Cambridge University Press.

Kelo v. City of New London 545 U.S. 469 (2005)

Lewis, Neil R. 2005. "Senate's New Math May Aid Stalled Judicial Nominees." *The New York Times*, Feb. 12, 2005.

Martinek, Wendy L. 2003. "The Effects of Confirmation Politics on United States Courts of Appeals Decision Making" Paper presented at the 2003 Annual Meeting of the American Political Science Association, Philadelphia, PA. August 28-31, 2003.

Martinek, Wendy L., Mark Kemper, and Stephen R. Van Winkle. 2003. "To Advise and Consent: The Senate and Lower Federal Court Nominations," *Journal of Politics* 64: 337-361.

Meernik, James, and Joseph Ignagni. 1997. "Judicial Review and Coordinate Construction of the Constitution," *American Journal of Political Science* 41: 447-467.

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

McCubbins, Mathew D. 1985. "The Legislative Design of Regulatory Structure," *American Journal of Political Science* 29: 721-748

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. 1987. "Administrative Procedures as Instruments of Political Control." *Journal of Law and Economics* 3: 243-277

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. 1989. "Structure and Process, Politics, and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75: 431-482

Moe, Terry M. 1987. "An Assessment of the Positive Theory of 'Congressional Dominance.'" *Legislative Studies Quarterly* 12: 475-520

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: 1069-1095

Morin, Richard, and Dan Balz. 2005. "Filibuster Rule Change Opposed." *Washington Post*, April 26, 2005.

- The New York Times*. 2005a. "Leading With the Women," April 28, 2005.
- The New York Times*. 2005b. "On the 'Nuclear' Brink," May 21, 2005.
- Palmer, Betsy. 2005. *Changing Senate Rules: The 'Constitutional' or 'Nuclear' Option*. Congressional Research Service Report RL 32684.
- Poole, Keith T., and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting*. Oxford University Press.
- Richardson, Richard J., and Kenneth N. Vines. 1970. *The Politics of Federal Courts: Lower Courts in the United States*. Little, Brown.
- Riker, William. 1980. "Implications from the Disequilibrium of Majority Rule for the Study of Institutions," *American Political Science Review* 74: 432-446
- Rutkus, Denis Steven, and Mitchel A. Sollenberger. 2004. *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003*. Congressional Research Service Report RL 31635.
- Rybicki, Elizabeth. 2003. *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*. Congressional Research Service Report RL 31980.
- Scherer, Nancy. 2003. "The Judicial Confirmation Process: Mobilizing Elites, Mobilizing Masses," *Judicature* 86: 240-250.
- Schuck, Peter H. 1975. *The Judiciary Committees: A Study of the House and Senate Judiciary Committees*. The Ralph Nader Congress Project; Grossman Publishers.
- Segal, Jeffrey A., and Howard Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press.
- Shipan, Charles R., and Megan L. Shannon. 2003. "Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations," *American Journal of Political Science* 47: 654-668
- Stolberg, Sheryl Gay. 2004. "Democrats Issue Threat to Block Court Nominees." *The New York Times*, Marcy 26, 2004: A1.
- Straub, Noelle. 2002. "Judicial Gridlock in the Senate: Same Story, Different Setting," *The Hill*, Feb. 27, 2002: 1.
- Weingast, Barry R., and Mark J. Moran. 1983. "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission." *Journal of Political Economy* 91: 765-800
- Zorn, Christopher J.W. 2000. "Modeling Duration Dependence," *Political Analysis* 8: 367-380

Table 1. Aggregate Confirmation Statistics for Circuit Court Nominees

Congress	Years	Nominees	Reported	Hearing	Confirmed	Percent Confirmed	Withdrawn	Returned	Re-nominated	Goldman's Index
95	1977-78	12	12	12	12	100.0 %	0	0	0	0.000
96	1979-80	49	44	48	44	89.8	1	4	0	0.068
97	1981-82	20	19	19	19	95.0	0	1	1	0.000
98	1983-84	19	15	18	14	73.7	1	4	3	0.143
99	1985-86	33	33	31	33	100.0	0	0	0	0.069
100	1987-88	26	20	20	17	65.4	2	7	3	0.476
101	1989-90	23	22	22	22	95.7	0	1	1	0.063
102	1991-92	31	21	22	20	64.5	0	10	0	0.500
103	1993-94	22	19	20	19	86.4	0	3	3	0.063
104	1995-96	20	15	16	11	55.0	1	8	7	0.526
105	1997-98	30	22	24	20	66.7	1	9	5	0.693
106	1999-2000	34	15	15	15	44.1	1	17	1*	0.793
107	2001-02	32	20	21	17	53.1	0	15	13	0.839
108	2003-04	34	30	30	18	52.9	1	15	12	n/a
109	2005-06	28	19	17	16	57.1	2	10	4**	n/a

Sources: Rutkus and Sollenberger (2004); *Thomas* online; Goldman (2003).

*: We only count Roger Gregory, and not the other eight Clinton re-nominations that Bush withdrew after inauguration.

**: This number could increase as the 110th Congress progresses.

Table 2. Cox Proportional Hazard Model of Confirmation Duration
 Efron Method for Tied Durations;
 Gamma-Distributed Shared Frailty, by Nominee

	Circuit Courts			District Courts		
	Model 1	Model 2	Model 3	Model 1	Model 2	Model 3
Qualifications	0.689 (0.181)	0.702 (0.172)	0.692 (0.184)	0.548 (0.093)	0.650 (0.095)	0.548 (0.093)
Ideological distance	-0.857 (0.445)	0.139 (0.396)	-0.984 (0.451)	-0.322 (0.209)	0.092 (0.207)	-0.324 (0.210)
Ethnicity	0.125 (0.253)	-0.128 (0.234)	0.133 (0.256)	-0.194 (0.118)	-0.323 (0.121)	-0.194 (0.118)
Gender	-0.084 (0.228)	-0.264 (0.216)	-0.011 (0.232)	-0.028 (0.111)	-0.096 (0.115)	-0.028 (0.111)
Reagan-Bush United	1.610 (0.320)		1.443 (0.332)	1.603 (0.156)		1.600 (0.160)
Clinton United	-1.263 (0.368)		-2.978 (0.817)	-0.215 (0.169)		-0.242 (0.370)
Bush United	-1.967 (0.405)		-4.197 (1.035)	-1.495 (0.194)		-1.531 (0.489)
Reagan-Bush Divided	-1.057 (0.339)		-1.814 (0.467)	-1.261 (0.159)		-1.272 (0.211)
Clinton Divided	-2.289 (0.340)		-4.443 (0.973)	-1.631 (0.159)		-1.667 (0.463)
Bush Divided	-2.933 (0.423)		-5.164 (1.029)	-1.280 (0.190)		-1.316 (0.480)
Divided Control		-1.237 (0.219)			-1.215 (0.112)	
Partisan Polarization		-10.759 (1.498)	13.026 (5.589)		-6.208 (0.743)	0.218 (2.666)
Theta (frailty)	0.737 (0.224)	0.641 (0.208)	0.776 (0.236)	0.556 (0.095)	0.639 (0.120)	0.556 (0.095)
Log likelihood	-1368.206	-1393.353	-1365.516	-6664.789	-6766.123	-6664.786
N obs	397	397	397	1331	1331	1331
N groups	341	341	341	1208	1208	1208

(Standard Errors in parentheses)

Table 3. Impact - Percentage Change in Relative Hazard Rate

	Circuit Courts	District Courts
Not Well Qualified and..		
Ideology Near (-2 S.D.)	43.0%	14.4%
Ideology Median*	0%	0%
Ideology Far (+2 S.D.)	-27.3%	-11.3%
Well Qualified and..		
Ideology Near (-2 S.D.)	184.6%	97.9%
Ideology Median	99.1%	73.1%
Ideology Far (+2 S.D.)	44.8%	53.5%
Carter Unified*	0%	0%
Reagan-Bush Unified	400.2%	369.9%
Reagan-Bush Divided	-65.2%	-71.7%
Clinton Unified	-71.7%	-19.4%
Clinton Divided	-89.9%	-80.4%
Bush Unified	-86.0%	-77.6%
Bush Divided	-94.7%	-72.2%

* Denotes baseline condition

Figure 1A. Survival Functions for Circuit Court Nominees
Reagan through G.W. Bush

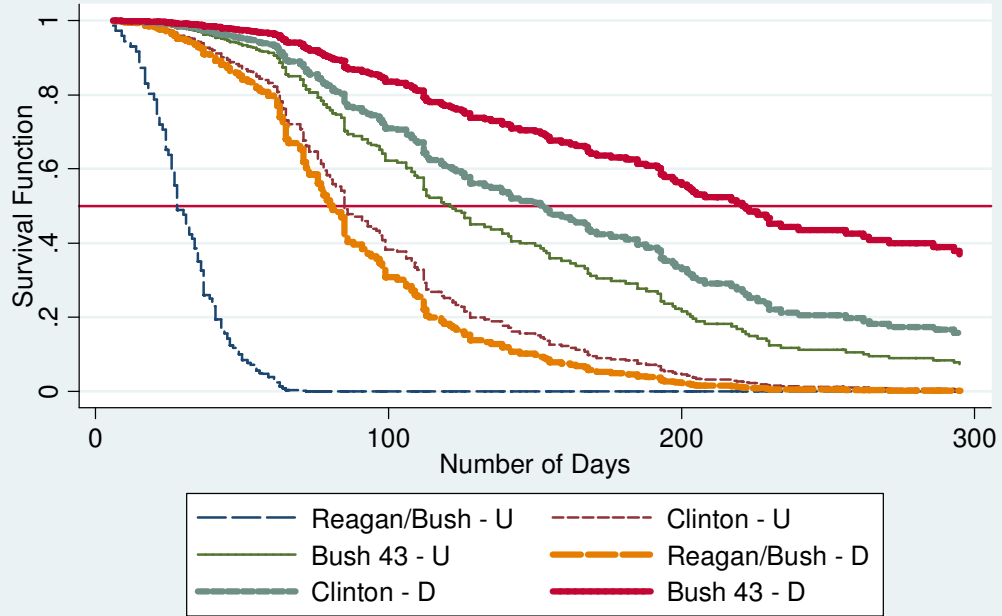
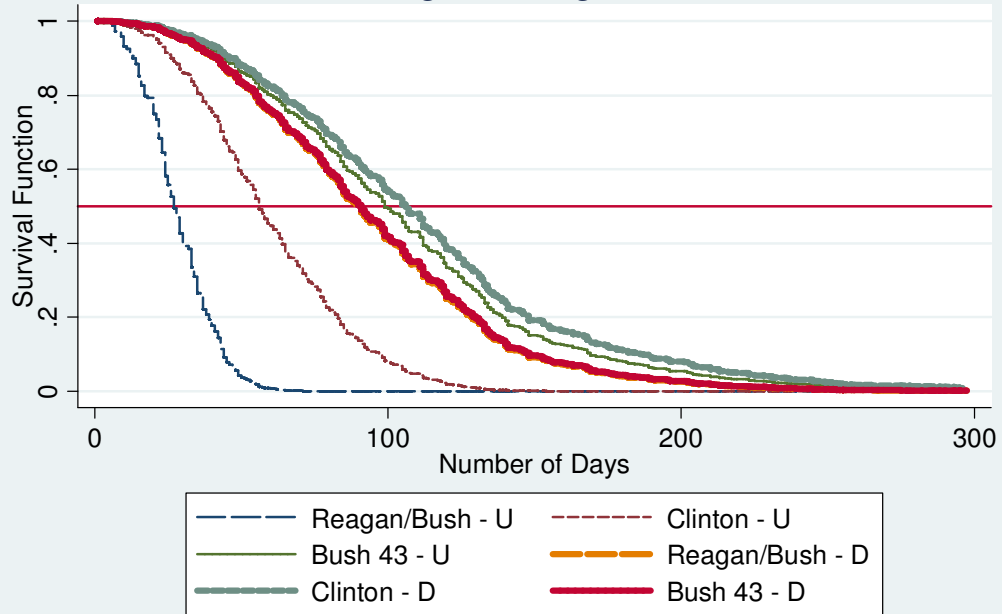


Figure 1B. Survival Functions for District Court Nominees
from Reagan through G.W. Bush



Appendix Table for Reviewers

Cox Proportional Hazard Model of Confirmation Duration
 Efron Method for Tied Durations;
 Gamma-Distributed Shared Frailty, by Nominee

	Circuit Courts		District Courts	
Ideological Distance	-0.849	(0.423)	-0.295	(0.212)
Qualifications	0.440	(0.180)	0.444	(0.095)
Ethnicity	0.014	(0.242)	-0.175	(0.119)
Gender	0.088	(0.219)	-0.019	(0.112)
96th Congress (Carter)	-2.564	(0.486)	-1.650	(0.250)
97th Congress (Reagan U)	0.056	(0.530)	0.613	(0.282)
98th Congress (Reagan U)	-1.014	(0.584)	0.507	(0.284)
99th Congress (Reagan U)	-0.632	(0.506)	0.051	(0.266)
100th Congress (Reagan D)	-3.774	(0.573)	-2.701	(0.289)
101st Congress (Bush-41 D)	-2.226	(0.544)	-1.558	(0.304)
102nd Congress (Bush-41 D)	-3.703	(0.570)	-2.992	(0.272)
103rd Congress (Clinton U)	-3.276	(0.539)	-1.576	(0.262)
104th Congress (Clinton D)	-4.454	(0.591)	-2.957	(0.287)
105th Congress (Clinton D)	-4.279	(0.561)	-3.079	(0.282)
106th Congress (Clinton D)	-4.805	(0.585)	-3.150	(0.301)
107th Congress (Bush-43 D)	-5.012	(0.565)	-2.665	(0.276)
108th Congress (Bush-43 D)	-4.487	(0.570)	-2.984	(0.284)
Theta (frailty)	0.570	(0.190)	0.553	(0.094)
Log Likelihood	-1345.686		-6623.428	
N Observations	397		1331	
N Groups	341		1208	

Cell entries are coefficients, with standard errors in parentheses.