

The Timing of Presidential Nominations to the Lower Federal Courts

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Introduction

Presidential appointments to the United States District Courts and the United States Courts of Appeals present a puzzle that has not been satisfactorily addressed in previous scholarship. On the one hand, it is clear that the constitutional prerogative to appoint such judges is an important power of the president. Federal judges on these “lower” courts are important policy makers whose personal political preferences have a substantial impact on the development of national law (Giles, Hettinger, and Peppers 2001; Carp and Rowland 1983; Goldman 1975; Gottschall 1986; Songer, Segal, and Cameron 1994; Baum 1997; Stidham, Carp, and Rowland 1984; Stidham, Carp, and Songer 1996; Rowland and Carp 1996; Songer, Sheehan, and Haire 2000). Once appointed these judges serve “for life”¹ and their discretionary policy decisions are generally consistent with the political preferences of the president who appointed them (Songer and Ginn N.d.). Moreover, since only a tiny fraction of the decisions of the courts of appeals are reviewed by the Supreme Court, they typically have the “last word” on statutory and constitutional interpretation. Consequently, any president who hopes to influence the important sphere of judicial policy making must concern himself with those who sit on these lower federal courts.

On the other hand, presidents frequently appear to move quite slowly to exercise their important power of judicial appointment. In many instances, presidents wait over a year after a judicial vacancy occurs before they announce their nominee. So the puzzle remains. Given the

¹ *While the Constitution merely indicates that judges will serve “during good behavior,” only seven federal judges have been removed from office. Thus, in practice federal judges serve until they die in office or voluntarily retire.*

importance of the power to nominate federal judges, why do presidents so frequently delay the exercise of their power?

An attempt to solve this puzzle requires an understanding of the politics of judicial selection. In particular, it requires more systematic study of the period between the creation of lower court vacancies and the announcement of presidential nominations. This paper contributes to that task by presenting a duration analysis of the length of time between vacancy and nomination for all vacancies in the United States District Courts and the eleven numbered circuits plus the District of Columbia Circuit of the United States Courts of Appeals between 1977 and 1999. We theorize that the judicial selection process may be best conceptualized by viewing presidents as strategic actors who seek to increase the proportion of their partisans on the federal bench and who seek to secure the selection of judges whose values will be as close as possible to the political preferences of the president. As a strategic actor, the president will carefully consider the preferences of the Senate, who must support confirmation, when deciding when to make a nomination to fill a vacancy. The timing of a president's nominations will also be affected by the status quo positions of the courts and constitutionally-imposed temporal constraints.

The Appointment of Federal Court Judges

"In form, the appointment of federal judges could not be simpler: they are nominated by the President and affirmed by majority vote of the Senate" (Richardson and Vines 1970, 58). In practice, however the Senate sitting as a collective body has not generally been viewed as an important player in the selection of federal judges except in the case of the Supreme Court. The prevailing view until recently among students of the judiciary was summed up over thirty years ago, "When the president and relevant Senators agree on a nominee for the lower courts, the nomination usually goes through without delay or obstruction." When agreement is reached with

the home state senators, the remainder of the appointment process is routine and only “perfunctory” hearings are conducted by the Senate Judiciary Committee (Richardson and Vines 1970, 62). This view is echoed by Goldman, who notes that it is unusual for a president to ignore home state senators of his party when selecting a lower court nominee and when “clearance” from such home state senators has been obtained, the rest of the process is usually routine (1991, 192).

To say that neither the Senate as a whole nor its Judiciary Committee has played a major role in the selection of lower court judges is not to say that the president has had a free hand. The conventional wisdom is that a strong norm of “senatorial courtesy” has existed throughout the past century for the selection of district court judges (Harris 1953; Rowland and Carp 1996). Under this norm, if a nominee is unacceptable to a home state senator of the President’s party, the Senate will usually fail to confirm the nominee. While senatorial courtesy’s power is not absolute, it is a strong factor in Senate deliberations (Harris 1953, Fowler 1983). Even during the Reagan administration, when the White House was held by a president strongly committed to influencing the ideological make-up of the lower federal courts, Republican home state senators “had a virtual veto power over unacceptable district court nominees from their states” (Rowland and Carp 1996, 87). While most scholars recognize that presidents play a larger role in the selection of appeals court nominees, there is still a strong presumption that presidents will “clear” prospective nominees with home state senators of their party before formally submitting the nomination to the Senate (Chase 1966, 1972; Sheldon and Maule 1997; Giles, Hettinger, and Peppers 2001; Songer, Sheehan, and Haire 2000).

Consequently, the nominee finally announced is likely to be the product of informal negotiation and bargaining between the president and the home state senator. In fact, most

senators perceive the process as an interactive, bargaining process in which senators and presidents "anticipate each others' preferences and incorporate this anticipation into their selection strategies and criteria" (Rowland and Carp 1996, 90; see also Slotnick 1984). In the absence of a senator of the president's party, presidents will consult with other elites of their party in the home state of the nominees, but have greater freedom to pursue their own preferences. The precise degree of influence exerted on the final selection of the nominee appears to vary from nomination to nomination depending on the relative overall political standing and power of the particular president and senator involved and the importance that each attaches to the nomination relative to other political goals.

The picture of the judicial selection process summarized above is derived from a literature that is typically descriptive and anecdotal (see, for example, Harris 1953; Grossman 1965; Richardson and Vines 1970; Chase 1972; Goulden 1974; Jackson 1974; Navasky 1975; Berkson and Carbon 1980; Howard 1981; Songer 1982; McFeeley 1987; Slotnick 1988; Rowland and Carp 1996; Goldman 1997). These descriptive accounts suggest that the Senate defers to the presidential choice as long as home state senators of the president's party were adequately consulted. However, as Binder and Maltzman (2002) point out, recent formal work on executive branch appointments suggest that instead of inter-institutional deference, the pattern of outcomes noted in these descriptive accounts of the selection process may instead suggest that presidents rationally anticipate Senate preferences (see Calvert, McCubbins, and Weingast 1989; Hammond and Hill 1993; Moraski and Shipan 1999; Nokken and Sala 2000). Despite the consensus in the literature that most of the significant decisions in the selection of lower court judges take place before the announcement of the formal nomination, there has been little empirical analysis of the pre-nomination process.

However, Goldman (1991) warned a decade ago that after 1979, there was some evidence that the Senate Judiciary Committee could no longer be counted upon to “rubber stamp” all nominees who had been cleared by home state senators. More recently, this warning was confirmed as commentators noticed unprecedented delays in the confirmation of nominees for the lower federal courts (Katzmann 1997,10) and an analysis of lower federal court nominations has found that a non-trivial number of presidential nominations have failed to received Senate confirmation (Martinek, Kemper, and Van Winkle N.d.). Since these nominations appeared to have been “cleared” with home state senators of the presidents’ party before being sent to the Senate, these findings suggest that in the past quarter century, the Senate as a whole, or its Judiciary Committee have begun to play an increasingly important role in the judicial selection process. Moreover, two recent studies (Martinek, Kemper, and Van Winkle N.d.; Binder and Maltzman 2002) have noted that there is great variation in the time between nomination and confirmation even for successful nominations to the lower federal courts, suggesting that the process is far from routine or automatic. Attempts to model the variation in the duration of lower court nominations have proven to be quite successful. Studying partially overlapping time periods, both Binder and Maltzman (2002) and Martinek and associates (N.d.) find that a series of political factors, including the ideology of the president and senators, the existence of divided government, and the proximity of elections, appear to influence the degree of delay in the confirmation of lower court nominees.

The recent findings on the correlates of the delay and defeat of presidential nominations to the lower courts suggest that a president would be prudent to anticipate more than just the preferences of home state senators in the search for acceptable nominees. Both the findings of the descriptive literature on the judicial selection process and the fairly extensive literature on the congruence between the policy preferences of presidents and their judicial appointments (Harris

1953; Grossman 1965; Richardson and Vines 1970; Chase 1972; Goulden 1974; Jackson 1974; Navasky 1975; Berkson and Carbon 1980; Howard 1981; Songer 1982; McFeeley 1987; Slotnick 1988; Carp and Rowland 1983; Goldman 1997; Baum 1997; Rowland and Carp 1996; Segal and Spaeth 1993; Songer, Sheehan, and Haire 2000; Giles, Hettinger and Peppers 2001) suggest that presidents generally seek nominees who share, at least roughly, the president's policy preferences.

But the studies cited above also suggest that the president may be constrained by both the preferences of the home state senators and political dynamics associated with the Senate Judiciary Committee and the Senate at large. While the recent work of Binder and Maltzman (2002) and Martinek, et. al (N.d.) has added to our understanding of those constraints and the actual process of confirmation, existing evidence still suggests that the most critical phase of the judicial selection process is the period between the time a vacancy occurs and a formal nominee is announced. During that period, the president must consider potential candidates who are politically acceptable to himself, evaluate the preferences of home state senators, anticipate the probable reactions in the Senate and its Judiciary Committee, and negotiate with home state senators or other politically relevant actors within his party in the nominee's home state.

In addition to the abundant descriptive evidence that this phase is critical, a cursory examination of the duration of the judicial selection process suggests that it is the most time-consuming as well. Our analysis of the data described below shows that for the 1977-1999 period, the time between vacancy and the announcement of a presidential nomination averaged 315 days. In contrast, the time between nomination and the final disposition of a nomination (e.g., confirmation, withdrawal of a nomination, or defeat) averaged only 92 days (Binder and Maltzman 2002). That is, delay by the president in the announcement of a nomination is typically much longer than delay in confirmation due to the actions of the Senate or its Judiciary Committee.

Unraveling the Puzzle of Delay in Presidential Nominations

The present study seeks to unravel the puzzle of presidential delay in the exercise of the important power of judicial nomination by building on recent analyses of the factors that affect the duration and probability of the confirmation of judicial nominees. We seek to understand the dynamics of the process through which presidents make nominations to the lower federal courts. Specifically, we attempt to identify the factors affecting the timing of presidential nominations to the lower federal courts.

When filling court vacancies, presidents prefer to select nominees who share their personal policy preferences. However, presidents have constraints placed on their behavior and are not always able to choose immediately their most preferred judicial candidate as nominee. Most important are the constraints resulting from the need to secure the confirmation of their nominees by a Senate that may or may not be sympathetic to the president's policy goals, the status quo positions of the courts, and constitutionally-imposed temporal constraints. Presidents will respond to these constraints in a strategic manner and will time nominations in such a manner as to maximize the opportunity to influence judicial policy making.

Since the Senate must confirm a president's judicial nominee, when making his final selection the president will undoubtedly need to take the preferences of the Senate into consideration (Binder and Maltzman 2002; Moraski and Shipan 1999; Hartley and Holmes 1997). Even if the Senate does not formally vote to reject a president's nominees, it can delay the final confirmation vote. In fact, if the Senate does not vote on a nominee by the end of the congressional session, then the nomination is effectively defeated. The likelihood of the Senate either rejecting a nominee or delaying confirmation of a nominee depends on the ideological

distance between the Senate and the president (Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle N.d.).²

A strategic president will anticipate the Senate's likely action on a nominee and time nominations accordingly. If there is a large ideological distance between the president and the Senate, the president must expect senatorial delay. If it is early in the congressional session, this delay will most likely not prevent the ultimate confirmation of the nominee. If it is late in the congressional session and the president announces a nomination, then it is quite possible that senatorial delay will prevent the nominee from being confirmed. Moreover, if it is late in the congressional session, the president has an incentive to wait and see if the Senate election results will produce a less ideologically distant Senate for the next session. For these reasons, when the Senate is ideologically distant the president will be more likely to make nominations early in the congressional session. As the congressional session progresses, however, the president will become less likely to attempt to fill judicial vacancies.

However, if the Senate shares the president's policy preferences then the Senate will be much less prone to delay confirmation. There will be less incentive to select nominees early in the session because the potential for senatorial delay is minimal. Instead, the president's main concern will be selecting a nominee before such a favorable session ends. That is, the president will be constrained only by the ending of the Senate session. The later it is in the session, the more likely it is that the president will move to fill a vacancy. In short, we expect the compatibility (or incompatibility) between the Senate's and the president's policy preferences to affect the timing of the president's nominations. But, this effect will be conditioned by temporal dynamics.

² *McCarty and Razaghi (1999) also demonstrate that nominations to executive branch positions will be delayed by the Senate during periods of*

Hypothesis 1: When the Senate is ideologically distant (close) from the president, the president will become less (more) likely to make a nomination as the congressional session progresses.

In addition to the constraints imposed by the entire Senate, presidents must also pay particular attention to a few specific senate members when attempting to make nominations to lower federal appellate courts. Specifically, the Senate Judiciary Committee Chair and the senators from the home state of the potential nominee will exert a great deal of influence over the confirmation process. The Judiciary Committee Chair, like other committee chairs in the Senate, possesses significant control over not only the agenda but also the final decisions of their committee. If the chair serves as a veto gate, then the president must take into account the preferences of this specific senator when making nominations. When the president and the chair are ideologically incongruent, the president can expect to have a harder time with the confirmation of nominees that share the president's policy preferences. Thus, we suggest that a president faced with an ideologically distant Senate Judiciary Chair will not act as quickly to fill a court vacancy as a president who shares the same policy preferences as the committee chair.

Hypothesis 2: The greater the ideological distance between the president and the Senate Judiciary Chair, the less likely it is that the president will make a nomination on a given day.

One of the important institutional norms governing the Senate confirmation process is known as "senatorial courtesy" (sometimes referred to as the "blue slip" process). This norm has played an important role in the selection of lower federal court judges throughout the past century (see Carp and Stidham 1998; Rowland and Carp 1996; Harris 1953). Under the practice of senatorial courtesy, a nomination must come from a group of candidates that are acceptable to the home state senator from the president's party.³ If a nominee is unacceptable to a home-state

divided government.

³ For purposes of simplicity, we will refer to the "home state senator"

senator of the president's party, the Senate will almost always fail to confirm the nominee (Goldman 1997). Therefore, a strategic president must account for the home state senator's preferences when selecting a judicial nominee.

If for a particular vacancy the home state senator is ideologically proximate to the president, then the president has an incentive to make a nomination to fill this vacancy. The president knows that in this situation the home state senator will not veto a nominee that reflects the president's preferences. When a vacancy arises in which the home state senator is ideologically distant from the president, the president will have less incentive to prioritize the filling of that vacancy because a successful nomination will have to involve compromise with that senator. In this latter scenario, the president will not be able to select a nominee who fully reflects the president's policy preferences. Further, the additional bargaining that must occur between a president and a home state senator who are not compatible on ideological grounds will presumably lengthen the period of time it takes to find a suitable nominee. For these reasons, we argue that the president will take more time to select a nominee to fill a vacancy if the home state senator is ideologically distant.

Hypothesis 3: The greater the ideological distance between the president and the home state senator, the less likely it is that the president will make a nomination on a given day.

The timing of the president's nominations will also depend on the desirability of the status quo. Federal appeals courts are usually viewed as having ideological leanings. For example, the Ninth Circuit is typically considered as quite liberal while the Fourth Circuit is seen as one of the more conservative circuits. If when making judicial appointments presidents are seeking to shift judicial outcomes in a favorable manner, presidents will prioritize vacancies that

even though there will often be two home state senators of the president's party.

occur in appeals courts that hand down rulings with which the president disagrees. By making appointments to such a court, the president may be able to shift the outcomes being established by this court. Vacancies occurring on appeals courts that are already populated with judges who have preferences compatible with the president's allow the president less opportunity to influence judicial outcomes. Thus, a policy-motivated president is also constrained by the status quo positions of the appeals courts when confronted with vacancies on these courts (see Moraski and Shipan 1999).

Hypothesis 4: The president will be more likely to make a nomination to fill an appeals court vacancy when the appeals court is ideologically distant from the president.

The final constraint on the president's nomination choices that we consider here is the constitutionally-mandated restriction on the length of time that the president can serve. At the very beginning of his presidential career, the president has, at least, four years to serve in office and thus four years to select the optimal nominees to fill extant vacancies. As the president's four-year term in office nears its end, the president cannot necessarily expect to receive another chance to fill judicial vacancies. Thus, we contend that delays in presidential nominations to lower federal court vacancies are *more* likely to occur at the beginning of a presidential term, rather than at the end of a president's four-year term in office. That is, there is a greater probability of the president acting on a vacancy if it is late in the presidential term. Further, given that once a second term in office ends a president can be certain that he will not serve another term, a president may be more inclined to fill vacancies during the end of his second term in office than earlier in his presidential career.

Hypothesis 5: As the end of the presidential term nears, the president will become more likely to make a nomination to fill a vacancy.

Hypothesis 6: A second-term president will be particularly likely to make a nomination as the end of the term draws near.

Data and Methods

In order to test these hypotheses, we utilized data on all vacancies on the U.S. Courts of Appeals and the U.S. District Courts from 1977 and 1999 ($N = 1,195$).⁴ These data were derived from the Martinek database with the missing values for a handful of variables filled in by the authors with data from the Martindale-Hubbell legal directories and the records of the Senate Judiciary Committee.⁵

The observed dependent variable in our analysis is the length of time, in days, that a lower federal court vacancy lasts or “survives” before the president makes a nomination to fill the vacancy. Time “starts” the day that the vacancy occurs and “ends” the day that the president selects a nominee. For a given vacancy in our data set, there is an observation for each day until a nomination is made.

Given the nature of our theoretical expectations and data, we employ a duration model to test our hypotheses regarding the timing of nominations. While the observed dependent variable in duration analysis is the length of time until an event occurs, the unobserved dependent variable is the hazard rate, or instantaneous risk that an event will occur at time t , conditional on the event not having occurred prior to time t . The hazard of an event occurring at time t is loosely analogous to the probability of an event occurring at t .⁶ For our purposes, the hazard rate

⁴ We excluded all vacancies on the U.S. Federal Circuit Court of Appeals and seven vacancies for which we could not identify the home-state senators.

⁵ These data can be downloaded from <http://www.ssc.msu.edu/~pls/pljp/ConfirmationData.html>. The Martinek data excludes vacancies for which there had not been a nomination made by the year 2000. We identified these missing vacancies using Senate Judiciary Committee records and added them to the data.

⁶ One difference between a probability and a hazard rate is that a hazard rate does not have an upper bound of 1. For a review of duration models and their applicability in political science, see Box-Steffensmeier and Jones (1997).

is the instantaneous risk that a nomination will be made on a given day. A duration model thus allows us to evaluate the effect of our independent variables on the day-to-day hazard of the president making a nomination to fill a judicial vacancy.

It is important to note that there is an inverse relationship between the hazard of the president selecting a nominee and the duration of a vacancy (i.e., the delay between the day the seat is vacated and the day a nomination to fill the vacancy is made). As the hazard of nomination increases, the expected duration of the vacancy decreases. Thus, if an independent variable has a positive effect on the hazard rate, then it has a negative effect on the duration of the vacancy.

From the family of duration models, we select the Weibull model and estimate it with robust standard errors.⁷ This robust estimation technique corrects for any correlation of errors that might occur between multiple observations for a particular vacancy (at times t_1, t_2, \dots, t_j).

We include in our model the independent variables suggested by our hypotheses. All measures of ideological distance are derived from Poole and Rosenthal's DW-Nominate scores.⁸ For instance, the ideological distance between the president and the Senate (*President – Senate Distance*) is measured as the absolute distance between the DW-Nominate score for the president and the DW-Nominate score for the median senator.

Two of our hypotheses (1 and 6) are conditional in nature and thus need to be tested with interaction variables. We argue that the effect of the ideological distance between the Senate and

⁷ *The critical assumption of the Weibull model is that the baseline hazard rate is monotonic. Diagnostics indicate that our data and model meet this assumption. Specifically, the baseline hazard recovered after estimating our model as a Cox proportional hazards model reveals that the baseline hazard increases monotonically.*

The functional form of the Weibull model is
$$h(t) = pt^{p-1}e^{x\beta}$$
where $h(t)$ is the hazard rate, p is the shape parameter, t is "time" (days since the vacancy occurred), x is a matrix of independent variable values, and β is a vector of parameter estimates.

the President (*President – Senate Distance*) will be conditioned by time into congressional session (*Time into Congressional Session*). Thus, we interact these two variables and expect the coefficient to be negative in direction. A negative sign would indicate that when the Senate is ideologically distant, the president is less and less likely to make a nomination as the congressional session progresses. We also anticipate that the sign for the component term *Time into Congressional Session* will be positive, demonstrating that when *President – Senate Distance* is zero (i.e., the Senate and the president share the same preferences) the likelihood of the president selecting a nominee will increase as the session progresses.

We also suggest that the hazard of the president making a nomination will be positively affected by how far into the presidential term it is (*Time into Presidential Term*). Further, we expect this variable to have an even stronger effect when the president is serving a second term. We therefore interact *Time into Presidential Term* with *Second Presidential Term* and also expect a positive coefficient for this variable.

In addition to the independent variables suggested by our hypotheses, we include several control variables in the model. We control for whether there is a home-state senator from the president's party (*Home State Senator*) and the number of lower court vacancies at time t (*Number of Vacancies*). The variable *Appeals Court Vacancy* is included in order to allow the baseline hazard of a nomination being made to vary depends on whether the vacancy is on a district court or an appeals court. Finally, we also include fixed effects controls for the president in office during the vacancy. Specifically, we include dummy variables for Clinton, Bush, and Carter. A dummy variable for Reagan is not included and thus Reagan is the baseline. The measurement of our independent variables is discussed in Appendix I.

⁸ Specifically, we use the first dimension of the DW-Nominate coordinates (see Poole and Rosenthal 1997).

Results

For the 1,164 vacancies in which a nomination was made by 1999 (the last year included in our data), the average length of time between vacancy and nomination (our observable dependent variable) is 315 days. The maximum duration is 1,714 days, while the minimum is one day.⁹ Descriptive statistics for each of the independent variables in our model are presented in Table 1.

Table 1 Here

In our data, there are 31 additional vacancies for which a nomination was not made by the end of 1999. These cases are right-censored in that the event we are examining (a nomination) has not occurred by the end of our time frame. Fortunately, Weibull regression models, like other types of duration model, are designed to handle right-censored data and thus we can include these vacancies in our analysis without biasing the estimated effects of the independent variables (Yamaguchi 1991).

The results of our Weibull regression model are presented in Table 2. A Wald test reveals that our model represents an improvement over a constant-only model. More interestingly, the estimated coefficients for our independent variables largely conform to our expectations. While interpreting these results, it is important to remember that the estimates indicate the effect of the independent variables on the hazard of a president making a nomination to fill a vacancy on a given day. A positive coefficient estimate indicates that as the independent variable increases, the hazard of the president selecting a nominee also increases. An increase in the hazard rate yields a decrease in the length of time until a nomination is selected. That is, the

⁹ *There are actually 51 instances (4.3% of the vacancies) in which a nomination was announced shortly before a seat was formally vacated. In these situations, the nomination is considered to have been made on the day of the vacancy (i.e., duration equals one day).*

greater the hazard rate, the shorter the duration of a vacancy. So a variable that positively affects the hazard rate has a negative effect on the length of time until nomination.

*** Table 2 Here ***

All the variables tapping the dynamics of the relationship between the president and the Senate perform as expected. The effect of the ideological distance between the president and the Senate is dependent on how late it is in the congressional session. The estimate for *President – Senate Distance* is positive and statistically significant ($p < .05$). But, as anticipated, the estimate for *President – Senate Distance * Time into Session* is negative and significant. Taken together, these results demonstrate that when it is early in a congressional session, there is a greater hazard of the president selecting a nominee if the Senate is ideologically distant. However, as the session progresses the hazard of a president making a nomination will decrease if the Senate is ideologically distant. In other words, when the Senate is distant the president will make nominations early in the session. When the Senate is ideologically close to the president, the president is more likely to make nominations later in the session. This latter conclusion is evidenced by the positive and statistically significant estimate for *Time into Congressional Session*, which indicates the effect of time into session when the president and Senate are ideologically congruent. To further illustrate this result, Figure 1 presents a graph of the hazard of the president making a nomination over an entire congressional session.¹⁰

*** Figure 1 Here ***

We have also argued that for any nomination there will be specific senators who will play particularly important roles. Our results confirm this assertion, as the estimated coefficients for *President – Judiciary Chair Distance* and *President – Home State Senator Distance* are negative

¹⁰ To generate this figure, one hazard rate was calculated with *President – Senate Distance* set at its maximum value observed in the data while the second

and statistically significant. The greater the ideological distance between these senators and the president, the less likely it is that the president will be able to successfully appoint a judge that shares the president's policy preferences. Therefore, the president will have less incentive to act quickly to fill these vacancies. The president will, for instance, prefer to make nominations to fill vacancies in which the home state senator is ideologically proximate. Moreover, the greater the ideological distance between home state senators and the president, the longer it may take to conclude the bargaining necessary to reach agreement on a nominee acceptable to both the president and the senators.

The estimate for *President – Appeals Court Distance* does not conform to our expectations, as it is not in the predicted direction. It appears that the president does not act more quickly when it comes to filling vacancies on appeals courts that are ideologically distant from the president. That is, the status quo of the court in question does not appear to affect the timing of the president's nominations.

In addition to the constraints imposed by the nature the president's relationship with the Senate, the president is also constrained by constitutional time limits. The estimate for *Time into Presidential Term* is positive and statistically significant, indicating that as the end of the four-year presidential term nears the hazard of the president attempting to fill a judicial vacancy increases. The result for the *Time into Presidential Term * Second Presidential Term* interaction variable suggests that *Time into Presidential Term* matters even more when the president is serving a second term, and thus certain not to have subsequent opportunities to fill a vacancy.

was calculated with this variable set at its minimum value. All other independent variables were held at their means.

The combined effect of these variables on the hazard of a president selecting a nominee is graphed in Figure 2.¹¹

*** Figure 2 Here ***

In addition to the independent variables suggested by our hypotheses, there are several control variables included in the model whose results are worth a brief discussion. The estimate for *Home State Senator* suggests that the mere presence of a home state senator from the president's party increases the hazard of the president selecting a nominee. Further, the *Number of Vacancies* on a given day exerts a negative effect on the hazard rate while the estimate for *Appeals Court Vacancy* suggests that there is not a significant difference in hazard rates between nominations to district and appeals courts.

Finally, the Weibull regression model also estimates a shape parameter (ρ) that describes the shape of the baseline hazard rate over time, controlling for the effects of the independent variables. In our case, the estimate for ρ is significantly greater than one, suggesting that the baseline hazard increases over time.¹² This means that once the effects of the independent variables are controlled for, the hazard of a president selecting a nominee to fill a judicial vacancy increases as the date of vacancy recedes further and further into the past. Substantively, this result may suggest that as time passes after a seat has been vacated, presidents are under greater and greater pressure to select a nominee to fill that vacancy. Alternatively, presidents may over time accumulate information about potential nominees and thus be more able to make an optimal selection.

¹¹ The hazard function displayed in this figure was calculated by holding all the other independent variables at their means while allowing the presidential time variables to range from the first day of a presidency to the last day of a second term.

¹² If ρ is equal to one then the baseline hazard remains constant over time. If ρ is significantly smaller than 1 then the baseline hazard decreases with time.

Discussion

The results of our analysis yield several interesting implications regarding the appointment of lower federal court judges. To start, there has been much discussion in the popular press regarding the length of time it takes to fill judicial vacancies. Working on the assumption that high vacancy rates lead to an overworked and thus less effective judiciary, legal commentators often bemoan delays in the appointment process. Typically, the blame for such delays has been placed at the feet of the Senate. The data indicate, however, that it is presidents who often take their time in selecting nominees to fill extant vacancies and thus are largely responsible for appointment delays.

Moreover, presidential delay, like senatorial delay (see Binder and Maltzman 2002), is a function of politics. Both our theory and analysis indicate that the timing of presidential nominations depends on the extent to which the president can select a nominee that reflects his policy preferences while facing senatorial and temporal constraints. Senatorial constraints depend on the extent to which the president's policy preferences are congruent with the Senate's preferences. If there is a large ideological gap between the president and the Senate, then the president can anticipate long confirmation delays (Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle N.d.). Thus, if the president is going to make a nomination to fill a vacancy, he will act early in the Senate session. As the end of the session nears, a strategic president faced with judicial vacancies will hold off on making nominations until after the election. If the president and Senate are ideologically congruent, the president need not rush to make nominations early in the session. But, as the session winds down, the president has a great incentive to take advantage of the ideologically proximate Senate by making nominations to fill judicial vacancies.

A third implication involves the norm of senatorial courtesy. Recent studies examining Senate confirmation of judicial nominees either generate mixed results regarding the effect of senatorial courtesy (Binder and Maltzman 2002) or do not account for this norm (Martinek, Kemper, and Van Winkle N.d.). Our results, however, demonstrate that senatorial courtesy plays a significant role in the timing of presidential nominations. As we expected, the greater the ideological distance between the president and a home state senator, the longer it will take for the president to select a nominee to fill that particular vacancy. We argue that this delay results from the president prioritizing the vacancies involving other states with more ideologically proximate senators. Thus, not all vacancies are treated equally at a given point in time. Some nominations to fill judicial vacancies will be quicker than others, depending on the relationship between the home state senator and the president.

Our statistical model also indicates that the presence of a home state senator who is ideologically proximate to the president shortens the length of time it takes the president to make a nomination. Interestingly, the presence of such a senator yields a quicker nomination than a situation in which there is no home state senator of the president's party. We believe this result suggests that home state senators play an important informational role when it comes to judicial nominations. If there is a home state senator of the president's party and this senator shares the same policy preferences as the president, then this senator can shorten the length of time it takes to select a nominee by providing the president with relevant information on the ideological leanings and confirmation prospects of potential nominees from that state. If the home state senator does not share the same policy preferences as the president, then information provided by the senator is less likely to be useful to the president and thus will not shorten the nomination search.

Conclusion

One of the constitutional powers enjoyed by U.S. presidents is the power to nominate judges to fill vacancies in the federal judiciary. As judicial scholars have long noted, federal judges make important decisions that have meaningful effects on the development of legal policy. While the authority to nominate judges grants the president the potential to affect the policy outcomes established by federal courts, presidents often seem to be indifferent to this opportunity as they delay the selection of a nominee for extended periods of time. We have addressed this apparent puzzle by arguing that the timing of presidential nominations depends on the extent to which the president can select a nominee that reflects his policy preferences while facing senatorial, status quo, and temporal constraints.

The results of our duration analysis provide strong support for most of our claims as the ideological distance between the Senate and president combine with temporal dynamics to determine when the president will put forward a nominee to fill a judicial vacancy. Our analysis also shows that the president will take into account the special roles played by the chair of the Senate Judiciary Committee and the senators from the home state of the potential nominee. In short, the timing of presidential nominations is a function of both politics and institutional constraint.

One of the innovative aspects of our examination of the appointment process is that we focus on the timing of presidential nominations, as opposed to the outcome of Senate confirmation votes (see Cameron, Cover, and Segal 1990; Segal, Cameron, and Cover 1992) or the delays associated with the Senate's confirmation role (Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle N.d.). Moraski and Shipan (1999) point out that scholars have neglected the obviously important role of the president in the appointment process and have

focused almost exclusively on the Senate's treatment of nominees. Moreover, with the notable exception of two recent studies (Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle N.d.), researchers have analyzed only the final *outcomes* of the appointment process. There is much to be gained from studying the *dynamics* of the process. By focusing on the timing of presidential nominations, we provide a more nuanced view of presidential choices and strategies during the selection of judicial nominees.

Appendix I: Measurement of Independent Variables

President–Senate Distance_t: The absolute difference between the DW-Nominate score for the president and the median score for the Senate (i.e., the DW-Nominate score of the median senator at time (*t*)).

Time into Congressional Session_t: A counter variable that starts at one on the first day of the congressional session and goes up one unit for each day into the session.

President–Judiciary Chair Distance_t: The absolute difference between the DW-Nominate score for the president and the DW-Nominate score for the Senate Judiciary Committee Chair at time (*t*).

President–Home State Senator Distance_t: The absolute difference between the DW-Nominate score for the president and the DW-Nominate score for home-state senator of the president’s party. When there are two home-state senators from the president’s party, the average score for the two senators is used. If there is not a home-state senator of the president’s party, an appeals court nominee is selected from a different state than the incumbent judge, the vacancy is a result of new seat being created by statute, or the vacancy is on the D.C. Circuit Court of Appeals, then this variable equals zero.

President–Appeals Court Distance_t: The absolute difference between the DW-Nominate score for the president and the median ideological score for the relevant appeals court circuit at time (*t*). To calculate the median ideological position for an appeals court, we measured the judges’ ideologies as the DW-nominate score for the president that appointed them. For district court vacancies, this variable equals the mean value of the distance between the President and appeals courts.

Time into Presidential Term_t: A counter variable that starts at one on the first day of the president’s term and increases by one for each day into his term.

Second Presidential Term_t: A dummy variable coded “one” if the vacancy occurred during a president’s second term and “zero” for first term.

Home State Senator_t: A dummy variable coded as one if there is a home state senator of the president’s party and zero otherwise.

Number of Vacancies_t: The number of extant lower federal court vacancies on a given day.

Appeals Court Vacancy_t: A dummy variable coded “one” for appeals court vacancies and “zero” for district court vacancies.

**Appendix II:
Weibull Regression Results for Separate District Court and Appeals Court Models,
1977-1999**

Independent Variable	Estimated Coefficient (Robust Standard Error)	
	District Court Vacancies	Appeals Court Vacancies
President – Senate Distance	2.962* (1.025)	3.064 (1.934)
Pres. – Senate Dist. * Time into Session	-.005* (.001)	-.005* (.003)
President – Judiciary Chair Distance	-.398* (.208)	-.800* (.336)
President – Home State Senator Dist.	-.598* (.254)	.335 (.575)
President – Appeals Court Distance	NA	-.129 (.223)
Time into Presidential Term	.0006* (.0001)	.0005* (.0003)
Time into Presidential Term * 2 nd Term	.0003 (.0002)	.0008* (.0004)
Time into Congressional Session	.002* (.001)	.001 (.001)
Home State Senator	.427* (.091)	.073 (.222)
Second Presidential Term	.035 (.175)	-.159 (.348)
Number of Vacancies	-.008* (.001)	-.008* (.002)
Constant	-7.995* (.571)	-7.164* (1.098)
ρ	1.128* (.002)	1.090 (.078)
Number of Cases	950	245
Total Days at Risk	305,691	72,444
Log likelihood	-1323.37	-337.53
Chi-Squared	199.25*	100.20*

Notes: * $p < .05$ (one-tailed test). Fixed effects for president confronted with vacancy are also included in these models but these estimates are not reported here.

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Table 1:
Descriptive Statistics for the Independent Variables Included in the Analysis

Variable	Mean	Standard Deviation	Minimum Value	Maximum Value
President – Senate Distance	.502	.124	.285	.65
President – Judiciary Chair Distance	.482	.366	.07	.887
President – Home State Senator Distance	.136	.169	0	.76
President – Appeals Court Distance	.459	.178	.004	.977
Time into Presidential Term	690	400	0	1460
Time into Congressional Session	326	220	0	730
Home State Senator	.660	.474	0	1
Second Presidential Term	.286	.452	0	1
Number of Vacancies	68.6	38.2	5	163
Appeals Court Vacancy	.192	.394	0	1
Clinton	.330	.470	0	1
Bush	.232	.422	0	1
Carter	.172	.377	0	1

Table 2:
Weibull Regression of the Timing of Presidential Nominations
to the Lower Federal Courts, 1977-1999

Independent Variable	Estimated Coefficient	Robust Standard Error
President – Senate Distance	2.795*	.902
Pres. – Senate Dist. * Time into Session	-.005*	.001
President – Judiciary Chair Distance	-.474*	.177
President – Home State Senator Distance	-.474*	.234
President – Appeals Court Distance	-.345	.178
Time into Presidential Term	.0006*	.0001
Time into Presidential Term * 2 nd Term	.0004*	.0002
<i>Control Variables and Component Terms:</i>		
Time into Congressional Session	.002*	.001
Home State Senator	.315*	.084
Second Presidential Term	-.036	.155
Number of Vacancies	-.008*	.001
Appeals Court Vacancy	.152	.085
Constant	-7.520*	.510
ρ	1.114*	.035
Number of Cases	1,195	
Total Days at Risk	378,135	
Log likelihood	-1668.69	
Chi-Squared Statistic (Wald Test, 15 d.f.)	268.99*	

Notes: * $p < .05$ (one-tailed test). Fixed effects for president confronted with vacancy are also included in the model (estimate, standard error); Clinton (-.035, .126), Bush (.003, .150), Carter (.516, .152). Reagan is the baseline.

Figure 1:
The Effect of *President – Senate Distance* on the Hazard of Making a Nomination

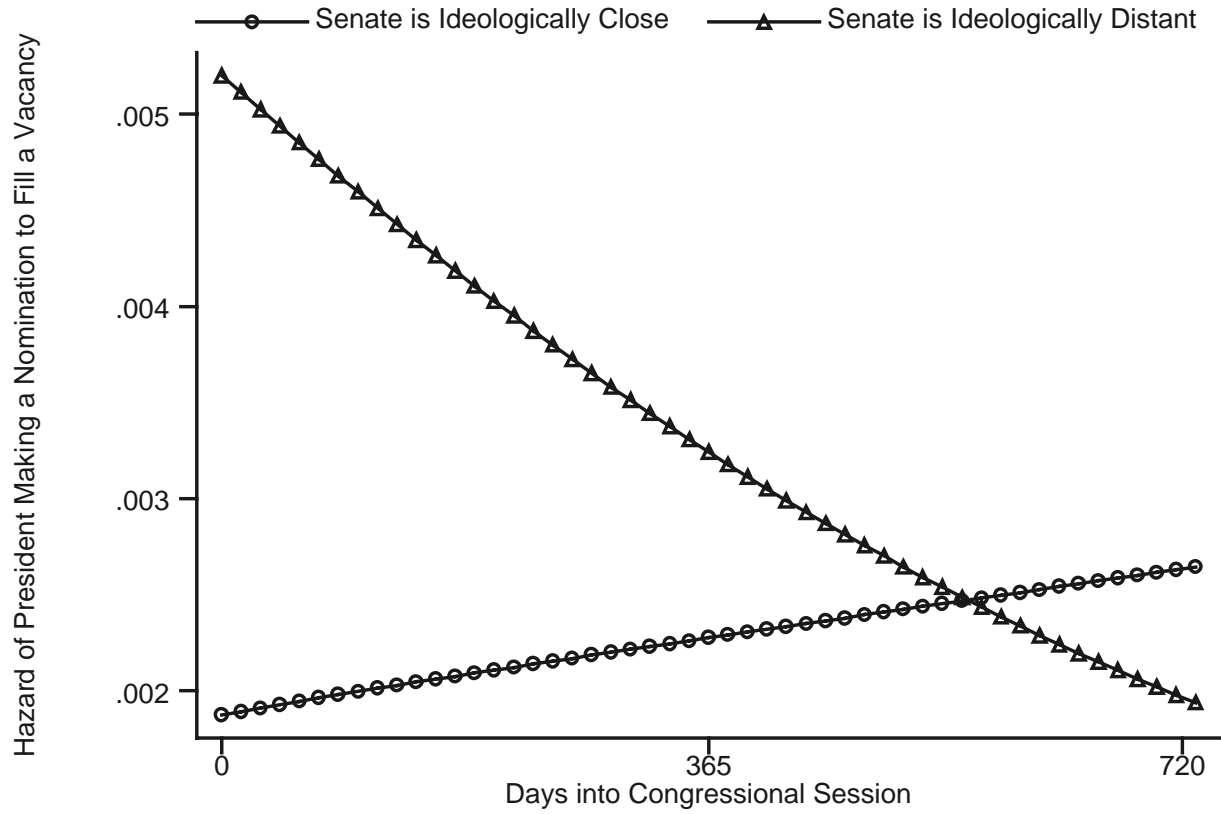


Figure 2:
The Hazard of a Nomination Being Made Throughout a Two-Term Presidency

