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Stephanie Dean Kerce Date

Strategic Presidential Response to Appointment Constraints:
Judicial Nominations in a Polarized Era

By

Stephanie Dean Kerce
Doctor of Philosophy

Political Science

Tom S. Clark, Ph.D.
Advisor

Micheal W. Giles, Ph.D.
Committee Member

Jeffrey K. Staton, Ph.D.
Committee Member

Accepted:

Lisa A. Tedesco, Ph.D.
Dean of the James T. Laney School of Graduate Studies

Date

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Stephanie Dean Kerce
Master of Arts, Duke University, 2003
Bachelor of Arts, Meredith College, 1997

Advisor: Tom S. Clark, Ph.D.

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Abstract

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Judicial Nominations in a Polarized Era
By Stephanie Dean Kerce

A president's prerogative to appoint judges to the federal courts for lifetime appointments can serve as one of his most enduring legacies. As the president seeks to nominate his most preferred candidate, this effort will be hindered by the relative level of constraint surrounding an individual vacancy. As the confirmation of judicial nominees becomes more contentious in the Senate, presidents must be increasingly strategic about their choice of nominee. When faced with constraints in the Senate, presidents have several available strategies to try and win confirmation of their judicial nominees. This dissertation examines two specific bargaining strategies a president might use to maximize their influence over the federal judiciary. First, they may choose to bargain with the Senate over one or more nominee attributes with respect to a single vacancy. Presidents should have a preference for young, ideologically proximate nominees who will have a lengthy career shaping the law in a manner consistent with the president's policy goals. Senators of the opposing party, however, should have a preference for older, more moderate nominees that will limit the president's legacy on the courts. This analysis tests these predictions regarding nominee ideology and age under varying levels of constraint for Courts of Appeals nominations from 1977-2012. The findings suggest that presidents of both parties respond to the constraints of divided government and polarization, but that home state senators have minimal impact in constraining a president's choice of nominee. Under conditions of high constraint, the president may opt employ a second strategy of bundling two or more nominees together in an attempt to win successful confirmation of multiple nominees. This bargaining strategy is examined using case study analysis of vacancies on the Courts of Appeals during the presidencies of Jimmy Carter and George H. W. Bush. The presidential records from these administrations demonstrate that bundling is a logical, rational response to the highest levels of constraint. The analysis of these presidential bargaining strategies suggests that increasing polarization and constraint in the Senate may have a moderating effect on the federal judiciary.

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Chapter 1

Inside the Black Box of Lower Court Nominations

On March 17, 2009, Barack Obama made his first federal judicial nomination. With little fanfare, he nominated U.S. District Court Judge David Hamilton to a vacancy on the Seventh Circuit Court of Appeals. Judge Hamilton was familiar with the Senate confirmation process, having been nominated to serve on the district court by President Clinton in June 1994. His appointment to the Southern District of Indiana had gone smoothly, and he was easily confirmed with a voice vote four months after his initial nomination. In 2009, he was eminently qualified to be elevated to a federal appellate court. At the time of his nomination to the Seventh Circuit he had 15 years of experience as a federal judge and he was rated "highly qualified" by the American Bar Association. He was a graduate of Yale Law School and a former clerk on the Seventh Circuit Court of Appeals.[1] In addition to those credentials, he had the support of both senators from his home state of Indiana, Democrat Evan Bayh and Republican Richard Lugar.[2] Hamilton also had the backing of the head of the Indiana chapter of the Federalist Society, who asserted that his judicial philosophy was "well within the mainstream." David Hamilton was a relatively safe nominee, who one administration official claimed was intended to serve as a "signal" as to the kind of nominees

[1] Neil Lewis, "Moderate Is Said to Be Pick for Court," *The New York Times*, page A14, March 17, 2009.

[2] Warren Richey, "Obama Court Nominee David Hamilton Clears Senate Hurdle." *The Christian Science Monitor*, November 17, 2009.

Obama planned to put before the Senate.[3]

Despite having sterling credentials and considerable political backing from both sides of the aisle, Hamilton's confirmation to the Seventh Circuit did not proceed without opposition. After an April hearing on the nomination, Republicans on the Judiciary Committee successfully argued that they did not have enough time to prepare for the hearing and insisted that a second hearing be scheduled.[4] The Democrat-controlled Judiciary Committee agreed to a second hearing and then held a vote in which all seven Republicans voted against Hamilton's confirmation. The opposition in committee was led primarily by ranking Republican member Jeff Sessions, who claimed that Judge Hamilton was a judicial activist who had "used his position as a district court judge to drive a political agenda." Conservative activists and bloggers also raised more specific objections to some of Judge Hamilton's rulings on abortion and prayer in Indiana,[5] and criticized his work for the controversial group ACORN during the summer of 1979.[6] Senator Sessions summed up his opposition to Hamilton in an address to the Federalist Society, asking the audience to consider "whether [his] personal political ideological views will overcome [his] commitment to the law."[7] After a considerable delay and attempted filibuster, the Senate voted for cloture on November 17, 2009, allowing for Hamilton's eventual confirmation the following day, eight months after he was first nominated. In the floor vote on his confirmation, the only Republican who voted in favor of Judge Hamilton's elevation to the Seventh Circuit was Senator Richard Lugar of Indiana, Hamilton's home state.[8]

In addition to the criticism directed at Judge Hamilton from the right there was criticism targeted at President Obama from the left. The election of Barack Obama in 2008 raised the hopes of many liberal activists that the federal judiciary would be quickly and

[3]Lewis, "Moderate Is Said to Be Pick for Court."

[4]Letter to Chairman Leahy, March 31, 2009

[5]Kate Phillips, "Conservatives Oppose Judicial Nominee," *The New York Times*, November 12, 2009

[6]Warren Richey, "Senate OKs David Hamilton to Be US Appeals Judge," *The Christian Science Monitor*, November 19, 2009.

[7]Phillips, "Conservatives Oppose Judicial Nominee."

[8]Meredith Shiner, "Senate Confirms Controversial Judge," *Politico*, November 19, 2009; Richey,"Senate OK's David Hamilton to be US Appeals Court Judge."

effectively reshaped.[9] After eight years of Republican administration in which George W. Bush successfully appointed conservative jurists across the country, including a new Chief Justice of the Supreme Court, Democrats were eager to tilt the ideological balance on the courts with their own preferred judges. For the liberal activists who had been anticipating this first nomination for months since the November election, the choice of an "ideologically indistinct" judge was both anticlimactic and deflating. One observer suggested that even though Hamilton was confirmed in the end, it was "hard to view what happened...as a victory for Obama," arguing that the administration's emerging tendency to make "cautious, moderate picks" was "seriously misguided."[10] He went so far as to complain that Obama should focus on putting his stamp on the courts rather than remaining "fixated on wooing Republican senators who seem determined not to be wooed."[11]

The disappointment with President Obama's nominees did not end after the first appointment. At various points throughout his first term, Obama faced considerable criticism for the manner in which his administration handled judicial nominations. He was criticized for his administration's slow and lackluster nomination process, as he was accused of dragging his feet in naming nominees.[12] Liberals were especially disappointed that he did not move more swiftly to fill key seats in critical circuits like the Court of Appeals for the District of Columbia.[13] Activists criticized the nominations that he did make, claiming he appointed judges that were too moderate instead of following the lead of his predecessor in identifying more ideological judges to putt his stamp on the courts.[14] Finally, those that were hopeful for a future Supreme Court pick from the ranks of Obama's lower court

[9]E.g. Mark Sherman. "Election Pivotal for Nation's Courts," *The Washington Post*, February 6, 2012.

[10]David Fontana, "Going Robe," *New Republic*, December 17, 2009.

[11]Fontana "Going Robe."

[12]E.g. "Obama's Judicial Nominations," *The New York Times*, November 17, 2009; Al Kamen, "Obama Continues to Lag When It Comes to Judges." *Washington Post*, April 7, 2010; Michael A. Fletcher, "Obama Criticized as Too Cautious, Slow on Judicial Posts," *The Washington Post*, October 16, 2009.

[13]E.g. Robert Barnes, "Obama's Impact on Federal Judiciary," *The Washington Post*, December 23, 2010; Joan Biskupic, "Analysis: Republicans Lead Obama in War For Judicial Dominance." *Reuters*, Oct 5, 2012.

[14]See Charlie Savage, "Obama Lags on Judicial Picks, Limiting His Mark on Courts." *The New York Times*, August 17, 2012 and Bouie, Jamelle. "How Obama Has Jeopardized the Future of Liberalism." The Washington Post, October 9, 2012.

nominees were disappointed that his nominees were older on average than the nominees of his immediate predecessors.[15] The constitutional power to nominate federal judges for life-time appointments affords a president the opportunity to shape federal law for years after they leave office, so many observers were puzzled that Obama did not use the appointment process more aggressively to put his mark on the federal bench.

As the dust settled on individual nominations, however, political insiders acknowledged that there was definite logic behind the Obama strategy, even as they expressed disappointment with the administration's choices. Several noted that in early March, the Republican caucus had put the President on notice with an open letter in which they indicated they would block nominations if they felt Republican home state senators were not properly consulted in advance (Goldman, Slotnick and Schiavoni 2011).[16] At least one advocate suggested that both the anticipation of and the Republican's actual use of blue slips to aggressively block nominees probably altered Obama's nominating strategy throughout his first term. Observers from both sides of the aisle agreed that Obama engaged in far more consultation with opposite-party senators than had his predecessors. Finally, while Obama was extraordinarily successful in diversifying the federal bench in terms of race, ethnicity, and gender, observers speculated that the administration shied away from pushing for "experiential diversity" as well because they felt they had a better chance of getting a former prosecutor confirmed than a public interest lawyer (Goldman, Slotnick and Schiavoni 2013). In sum, the consensus from political observers was that Obama's team made an assessment about the confirmation environment they faced and moderated their nominations in response. As one Obama staffer put it, "[the] goal was to fill vacancies."[17]

The choices President Obama made in identifying nominees for the lower federal courts raise questions about the strategies used by all presidents in making judicial nominations.

[15] See e.g. Biskupic 2012 and Serwer, Adam. "Obama Must Get Tougher on GOP Obstructionism." *The Washington Post*, August 11, 2011.

[16] The full text of this letter is accessible on the Senate Republican Conference blog: https://www.republican.senate.gov/public/index.cfm/blog?ID=3C522434-76E5-448E-9EAD-1EC214B881AC

[17] Michael Grunwald, "Did Obama Win the Judicial Wars?" *Politico*, August 8, 2016.

The confirmation process has been much more contentious since the 1990s, creating additional layers of complexity that require increased attention from the administration, additional expenditures of political capital, and a careful balancing of presidential goals. A president's judicial appointments can be one his most enduring legacies, but prolonged confirmation battles can also distract from important legislative accomplishments or other more immediate policy questions. As the confirmation crisis has heated up in the last several decades, attention from both scholars and the media has been increasingly focused on identifying the factors that slow down Senate confirmation of judicial nominees. An important question that largely goes both unanswered and unasked, however, is whether and how the increasing contentiousness in the Senate systematically affects the presidential prerogative to choose a nominee. The effects of heightened Senate scrutiny are apparent in the increasingly lengthy time to confirmation after a nomination and in the lower confirmation rates of those put before the Senate. The degree to which that scrutiny might be affecting presidential choice, however, and ultimately altering the slate of nominees presented to the Senate is a question of considerable consequence. The judicial selection process in the United States staffs a judiciary that is powerful and independent, so any shift in how those appointees are identified is potentially significant.

The goal of this project is to identify a theory of presidential response to constraints on judicial appointments. The manner in which a president chooses their judicial nominees will be an indication of their personal priorities and political realities, but it should also reflect the incentives created by institutional context. A critical assumption is that judicial nominations further the goals of the president as much as possible within the confines of a particular confirmation context. Presidents may have different priorities and goals with respect to the federal courts, but all presidents should employ a similar set of strategies in the face of a hostile Senate. When the president faces a friendly Senate, he will be able to nominate his most preferred individual for the federal bench. As the confirmation environment becomes more constrained, however, presidents may find it necessary to temper their

choice of nominees in some way to increase their likelihood of confirmation. That compromise may happen over the identify of a single nominee, as the president may choose individuals with characteristics that may be more likely to win support from political opponents. When a suitable compromise over an individual vacancy is not possible, however, the president may bundle several nominations together, effectively compromising over a wider scale. Importantly, these strategies reflect a logical, systematic response to exogenous institutional constraints, not just the individual preferences of particular presidents. Increasing scrutiny of judicial nominees has had a deleterious effect on confirmation outcomes, but it is the contention here that the effects of a contentious Senate process extend to the nomination process as well.

1.1 Lower Court Appointments in the Modern Era

President Obama's unexpectedly difficult first judicial nomination highlights several prominent features of the modern judicial appointment process. While many were surprised by the obstacles Judge Hamilton had to overcome to be confirmed, his experience is becoming more common in the twenty-first century. The U.S. Constitution grants the appointment power jointly to the president and the Senate, a process which has remained unchanged since George Washington's administration. But like many other functions of government, the basic process can play out differently in the modern context. The circumstances surrounding David Hamilton's nomination suggested that the administration viewed him as a model judicial nominee who would face an easy confirmation. The intensity of the criticism and unified opposition that he faced indicates the extent to which the Obama administration may have initially misread the political context. What was once a matter of regional politics largely decided between the president and the relevant home state Senate delegation has become increasingly nationalized as the parties became more polarized and the vital policy role of the Courts of Appeals becomes more apparent. With the additional attention

cast on judicial nominees come additional obstacles that potential jurists must clear before they are successfully confirmed.

Presidential Goals

In the aftermath of the Hamilton confirmation, many questions centered around President Obama and the extent to which judicial appointments figured into his political agenda. Some interpreted the White House's attempts to build consensus as an indication that the federal courts just weren't a priority for this administration, suggesting that his administration viewed judicial selection as secondary to the more immediate legislative imperatives such as responding to the economic crisis. Such observations, while perhaps inaccurate or unfair, do highlight the degree to which appointments reflect the goals and priorities of individual presidents. The initial assumption of most observers is that the staffing of the federal courts is inherently political and that presidents can use the appointment power to secure long-term ideological advantage. Some conservative observers criticized Obama's choice of Hamilton as overtly political, accusing him of nominating someone who would use his position to shift jurisprudence in a liberal direction. Liberal critics, in contrast, were unhappy that Obama chose someone who would not do *enough* to shift existing law. Both sides, however, took as their starting point the assumption that the president was (or should be) primarily concerned with the political ramifications of the appointment.

President Obama's stated goals with regards to judicial appointments were to nominate highly qualified, mainstream jurists who represented the diversity of the nation. He was on the record believing that political change should be accomplished through the elected branches, so he did not seek out judicial ideologues who would necessarily change the direction of the courts.[18] In addition to these publicly stated goals, advisors to his administration suggested an additional goal of Obama's was clearly to spend his political capital on other major issues of the day. His staff indicated clearly that they wanted to "reduce the

[18] Grunwald, "Did Obama Win the Judicial Wars?"

partisan contentiousness"[19] and to walk away from the "confirmation wars."[20] The choice of David Hamilton indicated the administration's respect for the judiciary by emphasizing experience and merit, fidelity to the law, and the attempted avoidance of partisan fights. Other presidents have had stated goals with regards to the courts that were more expressly policy-oriented, but all presidents use the appointment power in a way that complements their overarching goals for their administration.

Influence of Home State Senators

The choice of Hamilton also demonstrated the Obama administration's appreciation for the prerogatives of home state senators. In processing regional appointments, senators generally defer to the wishes and judgment of their colleagues that represent the state in which a vacancy is located. Presidents have historically understood the implications of the traditions of senatorial courtesy and have worked with home state senators to identify potential candidates for lower court vacancies. In an open letter to President Obama early in his term, the entire Republican caucus in the Senate pledged their commitment to this principle, threatening to block nominations for which adequate consultation had not taken place. The first judicial nomination Obama presented to the Senate was one that had the support of both home state senators representing both political parties. This was certainly not the most critical vacancy, as it was not classified as a judicial emergency. It also was not the most longstanding vacancy, as Hamilton's predecessor had retired only four months prior. Rather, this nomination seemed to be offered up first because the administration had confidence in its success, as Hamilton had strong bipartisan support within his home state. The staff personally indicated this initial nominee would be a model for others to follow, indicating the role that home state senators would continue to play, even if from the opposing party. From the first nominee, the Obama administration took seriously the

[19]Grunwald, "Did Obama Win the Judicial Wars?"
[20]Lewis, "Moderate Is Said to Be Pick for Court."

Senate expectation of consultation.

In many ways, however, Hamilton's nomination suggested a role for home state senators that extended beyond mere consultation. While liberal political activists were disparaging of the choice of an establishment moderate as the first nominee, the administration almost certainly thought that Hamilton's was the exact type of nomination that would sail through the Senate. The choice of David Hamilton has all the indications of being a traditional patronage appointment. Judge Hamilton was not just a competent sitting judge with a reputation respected by the political establishment; he had personal connections with both senators from his home state. Hamilton had served as legal counsel to Democratic Senator Evan Bayh when Bayh was governor of Indiana in the early 1990s. At the time of his nomination, David Hamilton attended the same Methodist church as Republican Senator Richard Lugar.[21] Hamilton's father was a minister at that church for years, suggesting the family connections with Lugar might have been even deeper than the political connections to the Democratic Party. It is not immediately clear why or how Hamilton's name first came up for the open seat, but his connections to the state's Senate delegation are undeniable. It seems likely that the two senators had a large role in picking Hamilton as the nominee, an exercise of influence often reserved for district court nominations. The naming of David Hamilton as the Indiana nominee for the Seventh Circuit clearly demonstrated the bipartisan cooperation that had taken place behind the scenes as well as the power of political patronage.

Nationalization of Lower Federal Judicial Appointments

Hamilton's experience is also indicative of the increasing complexities in the confirmation process that have arisen as nominations garner attention from a more national audience. Despite having solid support from the President and both members of his home state senators, he faced significant opposition in committee and on the floor of the Senate. At earlier

[21] Grunwald, "Did Obama Win the Judicial Wars?"

points in the twentieth century, bipartisan support in a nominee's home state would have almost guaranteed successful confirmation. In David Hamilton's case, the Senate opposition to Hamilton did not originate from his home state; rather it was largely driven by Senator Jeff Sessions of Alabama, the ranking Republican on the Judiciary Committee. The Seventh Circuit Court of Appeals has jurisdiction in Illinois, Indiana, and Wisconsin, so the elevation of Judge Hamilton to the Court of Appeals would have little direct impact on the state that Senator Sessions represented. While there would seem to be little reason for him to object, Sessions's position on the Judiciary Committee, however, gave him a heightened involvement in vetting judicial nominations and an opportunity to influence the Republican caucus. Senator Sessions used his platform to rally opposition to Hamilton with a speech on the Senate floor and an attempted filibuster. Notably, the 111th Congress included one of the largest majorities for the majority party in recent decades, so Democrats were generally able to get the votes necessary to end a filibuster with a cloture vote. While the filibuster had little chance of success in preventing Hamilton's elevation to the Court of Appeals, it was very successful at organizing a conservative opposition to judges they perceived to be too liberal and putting Obama on notice that his nominees would not get an easy pass.

The controversy surrounding Hamilton's confirmation hints at an additional set of actors influencing confirmation outcomes: political activists. As one commentator put it, "The world of judicial nominations is an odd D.C. subculture, closely watched by insiders but mostly invisible to the public."[22] The modern nomination process appears to contain few repercussions for Senators who obstruct nominees, and almost certainly no electoral consequences. But the more politically aware and more politically influential interest groups that closely follow appointment politics are more likely and probably more able to inflict punishment for mishandling a nomination that matters to them. The sincerity of Senator Sessions's conservative beliefs can not seriously in doubt, but the involvement of outside groups may have been an important influence in how the rest of the Republican

[22]Grunwald, "Did Obama Win the Judicial Wars?"

caucus viewed and acted on Hamilton's nomination. In a political environment where the activists that back you are likely watching, but the citizens who vote for you are almost certainly not, the incentives clearly exist to attend to the concerns of groups and activists with whom you may be allied.

In response to the criticism from both Senator Sessions and the conservatives who backed him, Republican Senator Lugar of Indiana spoke out passionately in support of Hamilton's confirmation on the floor of the Senate. As a fellow member of the church that Hamilton attended and for which Hamilton's father was a minister, he was in a strong position to specifically and forcefully rebut the charges that Hamilton was anti-Christian. But despite his impassioned speech personally vouching for Hamilton's character and merit, 29 of his Republican colleagues voted to support a filibuster against the nominee and all of them voted against his confirmation. This was not just opposition to Judge Hamilton, or to President Obama, but a complete rejection of the political judgment and the patronage prerogatives of a fellow partisan. This lack of deference from Senator Lugar's own party with respect to a vacancy in his state indicates the complexities surrounding the role of home state senators in this new confirmation environment. As lower court appointments are more frequently debated on a national stage, the number of obstacles and potential opponents increases for each nomination. It remains clear that home state senators have a significant influence over the nominations from their states, but it is no longer clear that their voice is the decisive one.

Much has been written speculating about the causes of these developments in federal appointment politics. Regardless of why the confirmation environment has shifted, the reality is that the president must continue to anticipate the likely outcome in the Senate and act accordingly to ensure the success of his slate of nominees. The erosion of traditional norms surrounding lower court appointments have created additional obstacles in the appointment process. When the home state senators were clearly the veto players over regional nominations, the president could identify a clear strategy to identify their most preferred candidate

who could also get the approval of a specific senator or delegation. In the modern context the president must anticipate additional obstacles and give more consideration to the preferences of other key leaders in the Senate as well as the distribution of preferences in the Senate generally. The evidence of that anticipation should be apparent in the identity and characteristics of the nominees they choose and send to the Senate. When faced with higher levels of constraint in the Senate for particular vacancies, the president might moderate his choice to ensure likely confirmation. As such, the characteristics of judicial nominees submitted to the Senate should vary with the level of constraint that surrounds the vacancy for which they were nominated.

1.2 The Black Box of Judicial Nominations

Judicial confirmations in the Senate are largely a visible process, with publicly-accessible documents, open hearings, and, in some cases, news coverage. In contrast, the process surrounding the identification of a judicial nominee by the White House is rarely discussed until a formal nomination is announced. In this information vacuum, interested observers are left to speculate about presidential strategies and motivation, with only the occasional leak or rumor to inform the public about which individuals are under consideration at any given time. Indeed, much of what is now known about Obama's goals for staffing federal courts is the result of informal comments and interviews with former staffers. The vast majority of the information that can be gleaned this way, however, pertains more directly to efforts to fill Supreme Court vacancies. Given the number of vacancies for the lower courts and the reality that lower court appointments are of interest to a relatively smaller number of people, very few details regarding a president's nomination strategies for the lower court are available for public consumption. We are given very few glimpses inside the black box of lower federal court nominations.

This lack of transparency surrounding nominations has influenced the way in which

scholars have studied and understood appointments to the lower courts. Given the visibility and data availability surrounding the processes of the Senate, existing work on the lower courts has focused a great deal on explaining the confirmation process. Thus, there are ample studies examining how and why the Senate's handling of judicial nominees has changed in recent decades. However, a focus on confirmations alone has left largely unexamined the extent to which the variation and changes in the Senate process may affect the nomination process as well. A critical question that remains unanswered, is the effect that an increasingly complex bargaining environment is likely to have on the strategies adopted by the president as he considers potential nominees. While the constraints on and potential impact of presidential nominations to the United States Supreme Court (e.g. Krehbiel 2007, Moraski and Shipan 1999, Rohde and Shepsle 2007) are generally well documented, we have very little understanding as to how recent changes in Senate confirmations affect presidential strategy in making lower court nominations.

More problematic than ignoring judicial nominations is the tendency to interpret changes in confirmations as an overall barometer of the health and stability of the appointment process. Many observers, particularly in the media, assert that the fluctuations in the confirmation rate indicate increasing constraints on the president. The confirmation wars of the 1990s and 2000s were certainly indications that the appointment process had become more openly contentious (as had many other policy areas), but it cannot be assumed that prior to that time consensus prevailed. The confirmation rates of over 90% prior to the 1990s indicate successful bargaining, to be sure, but they tell us very little about the nature of the bargaining process that led to that successful outcome. By the time a nomination is sent to the Senate, any possible bargaining has already taken place. Unlike the introduction of a Senate bill, an official nomination is not the starting point for negotiations, as a nomination is obviously not subject to amendment. Thus, fluctuations in the confirmation rate may actually understate the extent to which increased Senate scrutiny has constrained the president. A strategic president will likely anticipate Senate action and may moderate his

choice of nominee to gain successful confirmation. As such, the best evidence of constraint may be found not in the proportion of successful confirmations, but rather in the changing profile of judicial nominees. An exclusive focus on the Senate process obscures where much of the decision-making is happening.

1.3 Presidential Strategic Response to Confirmation Constraints

The goal of this project is to present and evaluate a theory of presidential nomination strategies to the lower federal courts. The opportunity to choose federal judges for lifetime appointments can extend a presidential legacy for decades, making it a particularly influential element of presidential power. Presidents can use judicial appointments to further a variety of goals in line with their overall vision for their time in office. Judicial appointments can certainly be a vehicle to set public policy, so presidents will normally look for nominees with a similar ideological background or party loyalties. However, appointments can also be used to secure or enhance political capital, by appealing to a specific demographic group, rewarding a loyal supporter with a patronage appointment, or ensuring the continued support of party activists. The prioritization of these goals and the intensity with which the goals are held will vary to some degree by president and by party. The president can use his formal proposal power to identify the nominees with the set of characteristics that allow him to further his policy and/or political capital goals most effectively. He will likely consider a nominee's qualifications and judicial temperament as well as demographic factors like gender, race, and age. There are no constitutional or statutory limits on the nomination power, so technically the president can nominate anyone he chooses.

The president shares the appointment power with the Senate, however, so the choice of a nominee is subject to additional scrutiny before he or she takes the bench. Thus, the president's nomination strategy will be conditioned by several institutional constraints that

are specific to the context of that particular vacancy. There is a clear expectation in the Senate that the president will consult with home state senators prior to making a lower court nomination, so the identity and preferences of those senators may restrict presidential choice, particularly if those senators are members of the opposite party. Similarly, the president can expect his nominees to get a more critical reception if the Senate is controlled by the opposite party, especially during periods of extreme polarization. The majority party will control the median vote, which is needed for confirmation, as well as controlling the key leadership posts in the chamber. The president should consider the preferences of these key individuals when evaluating possible nominees. The nature of the vacancy will constrain the president as well. Nominees to appellate courts or to the Supreme Court, where the policy making role is more evident, will likely face tougher scrutiny in the Senate than will a district court nominee. Similarly, a nomination that has the potential to alter the partisan balance on an appellate court will likely be considered more carefully than will a less consequential nomination.

A strategic president will anticipate Senate preferences and actions and will then choose the most favorable nominee that he believes can be successfully confirmed. When the institutional context makes easy confirmation likely, presidents are free to choose their most preferred nominees that satisfy both their policy and political goals. If the president faces a friendly Senate and the home state senators are copartisans, he is likely to choose a nominee whose ideological preferences closely approximate his own. In this institutional context, he will likely also choose a nominee who is young in an attempt to lengthen his or or her time on the bench and, by extension, the president's influence. The president is also free to use the nomination to build political capital by nominating a loyal supporter or build support from a particular demographic group. When the president faces few constraints in the Senate, he will take the opportunity to choose a nominee that brings the most benefit to further multiple presidential goals.

However, as the institutional context makes confirmation less certain, the president will

increasingly need to moderate his choice of nominee if he or she is to be successfully confirmed. In the face of heightened Senate scrutiny and resistance, presidents may choose to nominate individuals that reflect a compromise on one or more dimensions of particular interest. When the president faces a Senate of the opposite party, a highly motivated opposition due to the significance of a vacancy, or a home state delegation with divergent preferences, he may be increasingly forced to bargain with key senators. That bargaining might result in the nomination of a more ideologically moderate individual. The president may also attempt to compromise over a second nominee characteristic, such as nominee age or race, in an attempt to win approval of a nominee that shares his ideological preferences. Nominating an older judge who is still ideologically proximate, for example, could lessen the opposition by effectively shortening the new judge's time on the bench. Alternatively, the president might consider how the race or gender of the nominee might assuage the reservations of the opposition. A Democratic Senate, for example, might be willing to confirm a more conservative judge if that particular appointment will help diversify the court in question.

In some circumstances, the context surrounding a vacancy may prevent any successful compromise over the choice of a nominee. When faced with the highest level of constraint the president may be unable to get any of his preferred nominees successfully confirmed, the president must choose from a set of even less appealing options. Those options would include nominating a preferred individual who cannot be confirmed, nominating an individual that is less preferred, or making no nomination at all and leaving the seat vacant. However, a more appealing option would be to change the nature of the negotiations by considering multiple nominations together whenever possible. If there are multiple vacancies that can be considered together, both the president and an opposing senator can get a nominee of their choosing by packaging the nominations. If the primary obstacle is ideology, the effect of bundling two nominations together could blunt the impact of a single nominee. Where the primary obstacle is a demand for a particular individual, both the

president and a key senator can get a nominee of their choosing. Thus, where compromise over an individual vacancy is not possible, the president might still be able to initiate a bargaining solution that generates positive outcomes for both parties.

Importantly, the level of constraint that presidents face will vary both across and within congressional sessions. Some of the factors that constrain a president's choice of nominee are specific to the particular Congress in session at the time of the nomination. The presence of divided government, and the level of polarization, for example, will not change in most circumstances during a specific two-year session, but it may vary quite a lot across several sessions. However, other constraints are specific to the court in question and will vary by vacancy. Court-specific factors, such as the ideological status quo on the court and the party loyalties of the home state senators, will vary across vacancies within a single Congressional term. All of these sources of constraint are exogenous to the vacancy and relatively stable, so the president should be able to both anticipate and react to these potential obstacles. The multiple sources of constraint suggest that the context of nominations will vary within a single presidential term, so an individual president should employ a variety of strategies in staffing the lower courts. The use of those strategies should be evident in the slate of nominees he sends to the Senate for approval.

1.4 Impact of Lower Court Nominations

Scholarly and media attention is often understandably focused on the appointment of new Supreme Court justices. The infrequency with which Supreme Court vacancies arise and the tremendous influence afforded a new justice to shape the law certainly warrant attention and careful analysis. But the judges that sit on the lower courts, particularly the Courts of Appeals, have tremendous influence over the outcomes of countless more cases and the lives of many Americans. With the Supreme Court hearing less than 75-80 cases a year (or less than 4% of the cases appealed from below), the lower courts are the final arbiters in

the bulk of cases filed in the federal system (Epstein et al. 2012). The Courts of Appeals hear roughly 35,000 cases a year. While many of those cases may be automatic appeals with little impact or significance, lower federal court judges essentially vet the issues that arise and send them up the judicial hierarchy if they merit serious attention. The circuit splits that often give rise to intervention by the Supreme Court evidence the critical nature of some of those cases. The lower federal courts play a critical role in the development of the law (Howard 1981, Songer, Sheehan and Haire 2003). Thus, we should take seriously the manner in which lower court judges are chosen.

Additionally, a closer look at lower federal court nominations is helpful in understanding appointments more generally. Nomination politics for various levels of the federal hierarchy each have distinctive features, but the processes are similar and linked in critically important ways. Over the course of the last several decades, the strategies attendant to a certain level of the court have often migrated to other courts. The level of scrutiny that used to be reserved only for the nominees to the high court has started to trickle down to the Courts of Appeals. Some argue that it is no accident that Courts of Appeals nominations became especially contentious in the late 1990s and early 2000s, but rather that the confirmation wars resulted in part from an unusually long period in which no vacancies arose on the Supreme Court. Organizations and strategies that emerged to battle over Supreme Court vacancies were essentially refocused on the lower courts during that time. But the strategies migrate upward as well. Prior to 2016, a Supreme Court nominee could expect to get a hearing and a vote on the Senate floor. But the lack of consequence for routinely refusing to move forward with Courts of Appeals nominations may have emboldened the majority party enough in 2016 to adapt that strategy for the Supreme Court vacancy that resulted from Antonin Scalia's death. The political developments for one type of nomination have the potential to affect other nominations. So if we care about any appointments in particular, we should care about all appointments in general.

In addition to the potential for strategies to migrate, the individual nominees before

the Senate also tend to migrate. Eight of the nine current justices of the Supreme Court were elevated from the ranks of the Courts of Appeals, a practice that has happened with increasing regularity. Just as that strategy for nominations to the Supreme Court has had consequences, so too do shifts in presidential appointments at the level of the lower courts. A change in the identity of the judges who sit on the lower courts will likely have important implications for the law more generally. The confirmation conflicts certainly have consequences that include heightened partisanship, unfilled vacancies, and potentially the loss of distinguished future jurists who are unwilling to endure the selection process. But when considered through the lens of presidential nominations, the increased confirmation scrutiny may generate positive outcomes in the form of more extensive and careful bargaining. At bare minimum, additional constraints have the potential to block the most ideological nominees from being confirmed. A strategy that involves diversification has obvious appeal as well. But even in a period of extreme polarization, a strategy of appointing older judges and ensuring turnover on the courts should be considered a positive development. The identity and characteristics of the nominees who are appointed to the lower courts are consequential, making an understanding of the nomination process itself all the more important.

1.5 Outline of Chapters

The remainder of the dissertation develops and evaluates the theory of presidential strategic response to confirmation constraints. The next two chapters explain the developments in the confirmation process that create additional constraints on presidential choice and present a theory of nomination strategies that presidents can use in response to those constraints. The remaining chapters evaluate that theory against existing evidence from the presidencies of Jimmy Carter through Barack Obama.

Chapter Two presents the necessary background for studying presidential nominations

in context, including developments in both the political arena and the academic literature. This chapter starts by identifying the important foundations of and recent trends in the Senate confirmation process. Those trends include the development of modern dynamics and erosion of some traditional norms in the Senate and current explanations for those dynamics in the judicial selection literature. Chapter Two also analyzes the demographics of both recent nominees and appointees and evaluates the relationship between those demographic shifts and the changes in the appointment process.

Chapter Three presents a complete explanation of the theory of presidential strategic response to confirmation constraints. This chapter analyzes presidential goals with respect to appointments and the specific institutional factors that threaten to constrain the presidential prerogative of nominations. The chapter then identifies the nomination strategies that a president has available and the conditions under which he should be expected to use them. These predictions form the foundation for the second half of the dissertation.

Chapters Four and Five present empirical evidence that presidents anticipate various constraints in the Senate and moderate their nominations accordingly. Chapter Four is a statistical analysis of presidential attempts to compromise over individual nominee traits as constraints increase. This chapter analyzes data from Courts of Appeals nominations between 1976 and 2012 to test several hypotheses with regards to nominee choice. Using a measure of judicial nominee ideology based on their contributions to political campaigns, the first analysis suggests that in the face of additional constraint presidents will choose a more ideologically moderate nominee. A second analysis of the interaction between age and ideology suggests that presidents might compromise on age instead of ideology; by nominating an older individual the effective term of that judge is shortened and the stakes are lowered such that the president can appoint an ideologically-proximate nominee.

Chapter Five analyzes the presidential strategy of "packaging" as a bargaining tool. Presidents are likely to employ this strategy under more restricted circumstances when other roads to a successful confirmation are closed. These packages occur when a pres-

ident makes a deal with a particular senator or delegation in order to secure successful confirmation of a particular nominee that they favor. Because the evidence of these deals is rarely explicitly made public, this chapter relies on case study analysis using the presidential records of two particular presidents. The first case investigates Jimmy Carter's nominations to the Fourth Circuit Court of Appeals and his efforts to diversify the circuit. The second case evaluates George W. Bush's nominations to the Sixth Circuit and his efforts to break a years-long stand-off and shift the court ideologically. Each case provides evidence of a reluctant, but successful, deal that was brokered to package together multiple nominees in a way to break a particular stalemate over judicial appointments.

Finally, chapter Six evaluates Barack Obama's appointment strategy in the aftermath of his presidency as well as consider the likely future strategy of the Trump presidency with respect to judicial selection. The comparison of the institutional constraints on these two administrations and the nomination strategies that they employ will serve as an ongoing evaluation of the theory of strategic presidential response to confirmation constraints.

Chapter 2

The Shifting Judicial Appointment Process

In December 2006, the nomination of U.S. District Judge Terrence Boyle to the Fourth Circuit Court of Appeals was returned to the president. Despite being nominated by Ronald Reagan and unanimously confirmed in 1984 to the federal bench in the Eastern District of North Carolina, Boyle's appointment to the Fourth Circuit was ultimately unsuccessful after being nominated on seven different occasions. He was first nominated in 1991 by George H.W. Bush, and then later renominated by George W. Bush, but there was little movement forward of his nomination during most of his time as a nominee. When the Democratic-controlled Senate took no action on his nomination in 1991, Helms blocked all subsequent North Carolina nominees to the Fourth Circuit during the Clinton administration. Once the Republicans regained the White House in 2001, North Carolina Democrat John Edwards blocked Boyle's renomination, preventing the ongoing vacancy from being filled. Throughout the long saga, there were allegations of political payback, questions about Boyle's relationship with Helms (on whose staff he worked earlier in his career), and rhetoric about the Circuit being overstaffed. Throughout the decades-long battle over the North Carolina seats on the Fourth Circuit, the public explanations for Senate inaction varied but the result was ultimately the same: the state was under-represented on the circuit

and Terrence Boyle was never confirmed to the Court of Appeals.[1]

Judge Boyle's experience is certainly not typical, but it does highlight the growing contentiousness surrounding the confirmation process. For much of the twentieth-century, the Senate confirmation of lower federal judicial nominees was a routine process that generated little scrutiny. With confirmation rates well above 90%, the formal approval process in the Senate was marked by consensus and relative efficiency. Over the last several decades, however, there has been a dramatic shift in both the operation of and the outcomes produced by the Senate confirmation process. While the formal rules governing judicial appointments have remained fairly consistent, shifts in the larger political arena have altered the manner in which political actors use these institutions to their maximum benefit. The result is a process that is both more lengthy and contentious and that likely generates slates of nominees that are notably different from their predecessors.

2.1 Contentious Confirmation Politics

Like all federal judicial officers, nominees to the lower courts are appointed following the process outlined in Article II, Section 2, Clause 2 of the U.S. Constitution. Judges on the U.S. District Courts and U.S. Courts of Appeals are nominated by the president and confirmed by the Senate in the same manner as Supreme Court justices, ambassadors, executive department heads and "other officers of the United States." This constitutional process described in the "advice and consent" clause has remained unchanged since the founding of the Republic, meaning that the nominees under George Washington and Barack Obama followed essentially the same appointment procedure. The formal Senate rules adopted to carry out the constitutional responsibility to provide "advice and consent" have remained relatively stable as well. Broadly speaking, Senate confirmation procedures include consideration of the nominee by the relevant committee (the Judiciary Committee for judicial

[1] David Firestone, "With New Administration, Parisan Battle Resumes Over a Federal Appeals Bench," *New York Times*, May 21, 2001.

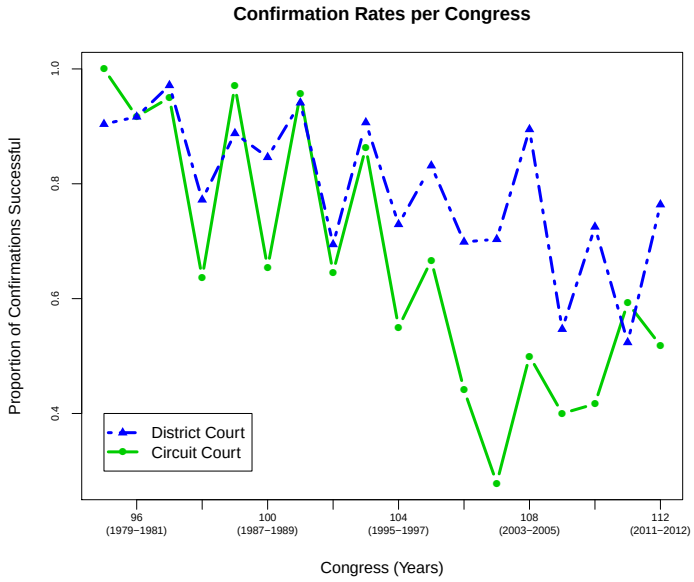

Figure 2.1: Rate of Successful Confirmations for Lower Federal Judicial Nominees

nominees) and then floor debate and a vote.

While there have been relatively few changes in the formal rules adopted by the Senate to process judicial appointments,[2] the manner in which nominees have been processed and the outcome of such confirmations has evolved over the decades. As one observer put it, "the inner workings of the nomination and confirmation processes are the product of the gradual accretion of executive and legislative practices and prerogatives developed over time" (Wilson 2003, p. 30). One recent result of this is that the proportion of lower federal judicial nominees that were successfully confirmed in the Senate dropped notably in the 1990s (Figure 2.1). The data illustrate a cyclical trend reflecting the difference between Congressional sessions ending in a presidential election year (indicated by even-numbered Congresses) and those that do not (odd-numbered Congresses), but overall the proportion of successfully confirmed nominees has been in decline. The Senate confirmed 91% of President Carter's nominees to the lower federal courts, but only 75% of Clinton's nominees were confirmed (Rutkus and Sollenberger 2004). These success rates remained low under

[2]The most obvious rule changes have been with regard to filibuster and cloture procedures, but until recently filibusters rarely affected nominations (Koger 2010).

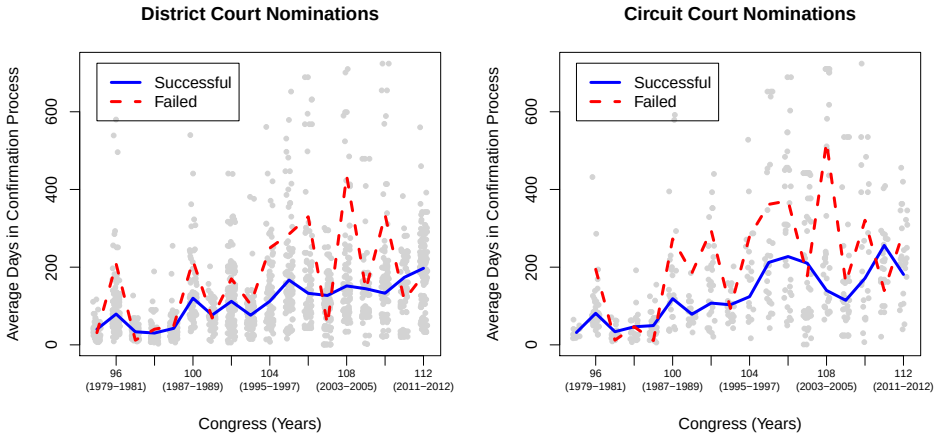

Figure 2.2: Length of Confirmation Proceedings for Lower Federal Judicial Nominees

George W. Bush and Barack Obama (Wheeler 2012).

During the same period of time in which confirmation rates dropped, the length of the confirmation process increased significantly. The average number of days in the confirmation process increased for both successful and unsuccessful nominations and for both district and circuit court nominations (Figure 2.2). The average successful confirmation in 1977 was less than 40 days; by 1999 the average successful confirmation took 175 days. During Obama's first term, the average confirmation process took 245 days for circuit court nominees and 212 days for district court nominees (Wheeler 2012). Individual nominees have waited far longer. President Clinton nominated Helene White to a vacancy on the Sixth Circuit in January 1997, but no action was taken on her nomination for the remaining four years of Clinton's presidency. Similarly, President George W. Bush nominated Terrance Boyle to the Fourth Circuit in May 2000, but the nomination was withdrawn at the end of 2006 with no floor vote ever being scheduled.

Chief Justice John Roberts used his 2010 year-end report on the federal judiciary to chastise both President Obama and the Senate for what he called "the persistent problem of judicial vacancies."[3] At the midpoint in Obama's first term, 1 in 8 federal judicial seats

[3]"Roberts Seeks More Judicial Confirmations," *New York Times*, December 31, 2010.

were vacant[4] creating a "critical case backlog" in some circuits.[5] While political observers disagree as to who is most responsible for the backlog, these ongoing vacancies appear to be the result of some combination of presidential delays in the nomination process, Senate delays in the confirmation process, and a lower proportion of successful confirmations (Wheeler 2012).

These shifts in the confirmation process have generated a growing literature among judicial and congressional scholars, as observers attempt to explain what appears to be a deteriorating system of appointments. These studies tend to fall into one of three existing lines of inquiry. One set of explanations examines confirmation outcomes with reference to competing pivots and veto players, attempting to determine which senators have the most impact on the outcome of nominations (e.g. Primo, Binder and Maltzman 2008). A second set of studies focuses on broader institutional shifts and changes in the political climate to account for the changes in the confirmation process (e.g. Basinger and Mak 2010, Bell 2002*a*, Scherer 2005). Finally, a third set of studies focuses on individual nominee characteristics to examine whether certain nominees are likely to face more resistance in the Senate (e.g. Allison 1996, Martinek, Kemper and Van Winkle 2002). Nearly all of these studies, however, focus on the causes of confirmation delay and confirmation defeat. Very few studies examine what the consequences of the heightened Senate scrutiny might be or how changes in the confirmation process might affect the manner in which presidents choose their nominees.

2.2 Shifting Pivots

The focus of many scholars has been trying to identify the individual senators that have the most influence on the confirmation process. The increasing contentiousness of Senate confirmation processes affects both Supreme Court and lower court appointments, but the

[4] "Where are the judges," *LA Times*, September 4, 2010.
[5] "Judges' deaths add to 9th Circuit backlog," *LA Times*, October 15, 2011

heightened scrutiny manifests differently for lower court appointments. While substantially similar to the process for other appointments, the regional nature of lower federal court appointments empowers an additional set of veto players that present more obstacles to successful confirmation. The fate of Supreme Court nominees is usually in the hands of the median voter on the Senate floor, as nominees to the high court have almost always been afforded a final up or down vote by the Senate (Sollenberger 2004).[6] Nominations to the U.S. Courts of Appeals and U.S. District Courts, however, are far more likely to be derailed at some earlier point in the process rather than face a purely majoritarian decision. As suggested in Figure 2.3, successful Senate confirmation of lower court nominees requires winning the approval (or atleast avoiding the opposition) of several key members of the Senate, including the senators from the state associated with the open seat, the chair and median voter on the Judiciary Committee, and the majority leader and median voter of the Senate as a whole. Most failed nominations to the lower courts never face a final vote on the Senate floor, as the nomination usually languishes at some earlier point in the process. Because there is often no decisive final vote on a nomination, it is not uncommon for presidents to submit a nominee's name multiple times in several different Congresses in the hopes of a different outcome.

2.2.1 Home State Senate Delegation

The senators with the most influence over the outcome of a specific lower federal court nomination are likely to be the senators who represent the state in which the vacancy is located. Because of the local and regional nature of lower federal courts, these appointments have traditionally been handled in a more decentralized fashion than nominations to the Supreme Court, relying on the preferences and advice of the home state senators. The jurisdictional boundaries of U.S. District Courts are confined within a single state, so mem-

[6]The most notable exceptions were the defeat of Johnson's nomination of Abe Fortas to be Chief Justice in 1968 (Abraham 1999) and Obama's nomination of Merrick Garland to be an associate justice in 2016.

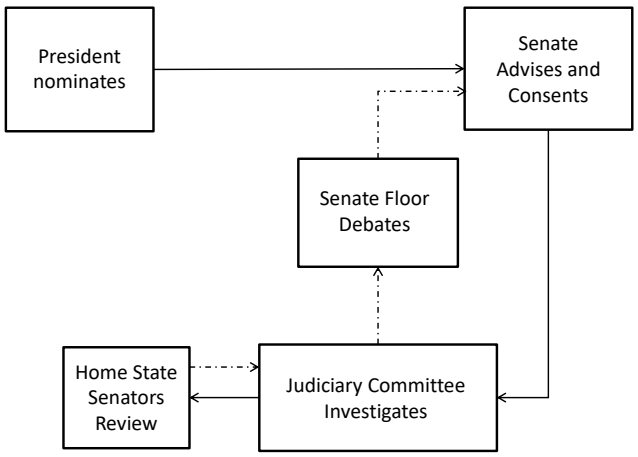

Figure 2.3: The Lower Federal Judicial Appointment Process

bers of the Senate delegation from that state have clear incentives to attempt to influence that appointment. Since the creation of the modern Courts of Appeals with the Judiciary Act of 1891, senators have also had heightened influence over nominations to the seats associated with their state on the relevant Court of Appeals as well (Rutkus 2008). While each of the Courts of Appeals draw jurisdiction from several states, each seat in the circuit has been traditionally associated with a particular state and nominees are usually drawn from the same state as their predecessor. This practice creates similar incentives for the home state delegation surrounding a vacancy on the circuit courts.[7]

The most obvious mechanism for the influence of home state senators is the practice of senatorial courtesy. This traditional deference to home state senators grew out of the Senate's rejection of George Washington's first presidential nominee to a naval post in the Port of Savannah. Despite being given a qualified nominee by the president, senators deferred to the wishes of the Georgia delegation who had their own favorite candidate (Gerhardt 2000, Rutkus 2008). Since then it has been commonplace for the Senate to give

[7]There are no home state senators for the Courts of Appeals for the D.C. Circuit and the Federal Circuit, whose seats are not associated with any state.

great weight to home state senators' evaluations of nominees. Importantly, while senatorial courtesy requires a wise president to consult with senators, it is more properly understood as the deference senators show to each other. This norm of deference has been enforceable through the recognition among senators that they benefit from a logroll; senators allow their colleagues considerable control over vacancies that arise in their home states in exchange for their support on nominations affecting their own states (Binder and Maltzman 2009, Jacobi 2005). In the twentieth century the Senate formalized this deference in the form of the "blue slip." It became regular practice for the judiciary chair to send a letter (on blue paper) to the home state senators asking for their approval of the nominee; failure to return the letter to the chair signaled reservations about or opposition to the nominee. The Democratic majority introduced the blue slip in 1913 primarily as a means to reduce uncertainty and inefficiency in the chamber. The creation of a formal mechanism to consult with home state senators at the beginning of the confirmation process enables the Senate leadership to better anticipate problematic nominees at an earlier stage and manage the business of the chamber (Sollenberger 2010).

The logroll generated by the practice of senatorial courtesy made the confirmation process more efficient, but it also allowed presidents to better anticipate confirmation outcomes in the Senate. With the institution of the blue slip practice, presidents have generally recognized the need to consult with the relevant home state senators early in the process to ensure the success of their nominations. While the Senate occasionally objected to a nominee that was deemed unqualified, the conventional wisdom was that the Senate could be expected to consent to most presidential judicial appointments to the lower courts, in part because key senators are consulted in advance. The level of involvement a senator might expect under the norm of senatorial courtesy varies according to the type of vacancy, the senator's party, and the preferences of the judiciary chair, but they can certainly expect to have a significant influence on the confirmation process, if not the nomination itself (Rutkus 2008, Wilson 2003). Senators generally exert less influence over the selection of circuit court

nominees than they do district court nominees, but presidents often at least consult with the home state senators from either party to better anticipate any opposition (Rutkus 2008). Existing research confirms that opposition from one or both of the home state senators accounts for many confirmation delays and failures, especially for the district courts (Binder and Maltzman 2002, 2009, Primo, Binder and Maltzman 2008). Importantly, given the expected advisory role of home state senators, studies of their influence at the confirmation stage may actually underestimate their overall influence by neglecting the significance of their role before the nomination is made.

2.2.2 Judiciary Committee Chair

Once a nomination has been formally submitted to the Senate, the judiciary chair exercises tremendous influence on the initial process. All judicial nominations are first investigated by the Judiciary Committee before being considered on the Senate floor, in much the same manner that the Senate handles all of its business. Nominees to any Article III court can expect that formal inquiry to begin with the submission of a written questionnaire documenting their qualifications, experiences, published articles, and written legal opinions. The nominee can also expect to attend individual interviews and meetings with key senators on the Judiciary Committee and those in leadership positions. The formal investigation of the nominee culminates with a public hearing providing the senators on the committee an opportunity to publicly engage with the nominee, as well as hear any relevant testimony from the nominee's supporters or detractors. The duration and intensity of these proceedings increase with the prestige and significance of the seat to which the individual is nominated. Finally, the committee votes by majority on whether to recommend the nomination to the floor for further debate.

As the leader of the committee overseeing these proceedings, the judiciary chair has tremendous influence over how and how quickly the nominee is processed (Binder and Maltzman 2002, Martinek, Kemper and Van Winkle 2002). His preferences can shape

Table 2.1: Negative Blue Slip (NBS) Policies of Recent Judiciary Chairs

Chair	Party	Year	Policy
James O. Eastland	D-MS	1956-1978	NBS stopped nomination.
Edward Kennedy Jr.	D-MA	1979-1981	NBS did not stop nomination.
Strom Thurmond	R-SC	1921-1987	NBS did not stop nomination.
Joseph R. Biden	D-DE	1987-1995	NBS stopped nomination if there was no consultation.
Orrin G. Hatch	R-UT	1995-2001	NBS stopped nomination if there was no consultation.
Patrick J. Leahy	D-VT	2001-2003	NBS stopped nomination.
Orrin G. Hatch	R-UT	2003-2005	NBS stopped nomination if there was no consultation.
Arlen Specter	R-PA	2005-2007	NBS stopped district but not circuit nominations.
Patrick J. Leahy	D-VT	2007-2015	NBS stopped nomination.

when (and whether) a hearing is scheduled, when (and whether) a committee vote is held, and the nature of the recommendation that gets sent to the floor. A judicial nomination will not proceed to the floor without having successfully cleared each of these hurdles. The same process applies to Supreme Court nominees, but nominations to the high court are almost always reported out of committee in order for the full Senate to vote (Sollenberger 2004). However, the larger number of lower court vacancies and the comparatively lower stakes of those seats generally allows for a lack of attention to lower court nominees. These regional appointments tend to be highly salient to only a small, shifting minority in the Senate, so both the sense of urgency and the costs of obstruction are fairly low. Thus, it is not uncommon for lower court nominations to languish in committee in the face or opposition of time constraints (Binder 2001).

The chair of the Judiciary Committee is in many ways the enforcer of senatorial cour-

tesy and has the power to expand or limit the influence of home state senators. As noted earlier, "blue slips" have been used since 1913 to solicit the opinion of the home-state senators of the nominees in question, but it is largely up to the Judiciary chair to determine whether those recommendations will be followed with appropriate committee action (or inaction). There is some confusion in the literature as to whether senatorial courtesy extends only to senators from the president's party or to all home-state senators; this confusion largely stems from the shifting use of the blue slip over time. From the 1950s through 1978, James Eastland followed a policy of moving forward with a hearing on a nomination only if both senators, regardless of party, returned favorable blue slips. While this policy was operational, home state senators had an effective veto over nominations in their states (Rutkus 2008, Sollenberger 2003). Since 1979, the blue slip policy has varied depending on the preferences of the judiciary chair, described in Table 2.1.[8] Even within these stated policies, some chairs have required that the blue slips from both home state senators be returned before moving forward on a nomination, while others have only required one. Some chairs have refused to hold a hearing in the absence of positive blue slips, while others have proceeded and noted the objection in the committee recommendation to the floor. Ultimately, the judiciary chair has the power to craft a blue slip policy at the beginning of a new Congress to achieve their desired outcome on nominations in that specific context, often depending on which party is in control of the White House at the time(Maltese 2003, Sollenberger 2010).

2.2.3 The Senate Majority Leader

The majority leader can have tremendous influence over the final outcome of a nomination (Binder 2001, Binder and Maltzman 2004). Once a nomination is reported out of committee, the Senate majority leader controls when and how the nomination gets scheduled on the

[8]These data are from the "Blue Slip Senate Archive," hosted by Ohio State University, catalogs individual blue slips and the blue slip policies operation under each chair. http://politicalscience.osu.edu/faculty/jbox/blueslip/index.php

executive calendar for consideration by the full Senate. If the majority leader is hostile to a specific nomination or a set of nominations, he can effectively restrict the agenda to prevent the nomination from coming up for a vote (Binder 2001). While he theoretically has this power over any nomination (or any piece of legislation), the lower costs of obstruction make this type of agenda restriction more likely with district or circuit court nominations.

The majority leader may also use this scheduling power to honor holds that have been placed on the nomination by individual senators. Any member can place a hold on a nomination by signaling their wish to do so to the leadership, likely preventing the nomination from being reported out of the Judiciary Committee or being scheduled on the floor (Sollenberger 2004). Holds are intended to be temporary, indicating a senator's desire to have extra time to study an issue or a vote. However, some holds may originate from senators representing states other than those associated with a vacancy, but with a particular interest in the nomination itself. Holds have also been used recently to delay nominations by senators seeking a side-payment such as another nomination or a particular benefit for his or her state (Steigerwalt 2010). It appears that the use of holds is on the rise, but because they are often not made public the frequency of their use is difficult to quantify (Sinclair 1997). Because the senator requesting the hold is not known, it is difficult to disentangle the effect of the hold system from the majority leader who ultimately enforces it.

2.2.4 The Senate Filibuster Pivot and Median Voter

Despite the considerable influence of the leadership, final outcomes depend in large part on the approval of the pivotal voters in the regular membership of the Senate. While votes in the Senate require only a majority vote, there is general consensus that the enactment of most policies in the Senate requires the approval of the filibuster pivot in order for a cloture vote to be successful (e.g. Krehbiel 1998). Unlimited debate has been a feature of Senate practices since the early nineteenth century (Binder and Smith 1997), but its use and effectiveness have varied over time as coalitions have shifted and the workload of the Senate

has increased. A traditional filibuster plays out like a war of attrition as each side tries to outlast the other, with one side likely to disproportionately bear the burden of delay (Koger 2010). As the Senate's workload became larger at the beginning of the twentieth century, the costs of delay increased, making filibusters ever more effective. The adoption of the cloture rule in 1917 and the subsequent lowering of the cloture vote threshold at various points throughout the century allowed the chamber to conclude debate and move forward with a vote if the requisite super-majority voted for cloture. Increasingly, the majority party has been willing to table further action when a filibuster is threatened or make use of the chamber's multiple calendars to continue the business of the Senate. The result of using cloture motions and multiple calendars to continue the business of the Senate is that a threatened filibuster has decreased in costliness and increased in effectiveness (Koger 2010, Wawro and Schickler 2006).

Like holds, the filibuster is a Senate tool that existed long before it was regularly used to block judicial nominations. Prior to the recent rule changes in the Senate, filibusters had been on the rise in the Senate in general and had become more common as a means for the minority party to block judicial nominations during unified government (Koger 2008). Several Obama nominations including those of Goodwin Liu, Caitlin Halligan, and Nina Pillard were unable to successfully overcome filibuster threats.[9] Shortly after Pillard and several others failed to overcome filibusters, the Democratic majority approved a rule change on November 21, 2013, effectively ending the use of the filibuster to executive nominees and lower federal judicial nominees. On April 6, 2017, a Republican majority extended that rule change to bar filibusters of Supreme Court nominees as well, clearing a path for the confirmation of Neil Gorsuch.[10] These rule changes essentially prevent a minority party under unified government from blocking nominations, and further empowers

[9]Carl Huse, "G.O.P. Blocks Judicial Nominee in a Sign of Battles to Come," *New York Times*, May 19, 2011; Charlie Savage and Raymond Hernandez, "Filibuster by Senate Republicans Blocks Confirmation of Judicial Nominee," *New York Times*, December 6, 2011; Jeremy W. Peters, "Republicans Again Reject Obama Pick for Judiciary," *New York Times*, November 12, 2013

[10]Matt Flegenheimer, "Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch," *New York Times*, April 6, 2017.

the median voter.

The ultimate confirmation of a judicial nominee has always technically depended on the vote of the median voter, as only a simple majority is required in the floor vote. However, by the time a nomination reaches the floor the final vote is often a formality. Indeed, if the nominee has the support of all the other veto players, he or she is unlikely to be rejected in a vote on the floor. Until recently, votes on lower court nominations were rarely recorded with roll call votes because nominees were normally easily confirmed by wide margins. Recent exceptions demonstrate the power of the median voter, however. After the rule change was made limiting the use of the filibuster, Democratic Majority Leader Harry Reid scheduled a vote for Nina Pillard resulting in her confirmation by a 51-44 vote.[11] Once the filibuster pivot was removed as a veto player, it truly was the Senate median voter that decided her confirmation.

2.3 Shifting Institutional Dynamics

The increasing contentiousness of the confirmation process has been the subject of many prior analyses, as scholars have attempted to identify the factors most responsible for the shift. However, studies examining the relative impact of various leaders and Senators are inadequate in accounting for this shift over time because the institutional rules in with they operate have remained largely unchanged. A second set of studies has sought to tie these developments in the confirmation process to changes in the larger political arena. This account suggests that shifts in various other institutions have altered the incentives lawmakers face, leading them to take different actions under the same set of formal rules. Several explanations have been put forward, suggesting that multiple changes are taking place simultaneously, including shifts to political parties, the balance between the branches, and the internal workings of the Senate.

[11] Jeremy W. Peters, "Tempers Flare as New Rules Strain Senate," *New York Times*, December 12, 2013.

2.3.1 Changes to Political Parties

The most dominant narrative explaining the increasingly contentious confirmation process focuses on the rise of polarization between the two major political parties. As the two major political parties have become more homogeneous and the party medians have moved further from the ideological center (Poole and Rosenthal 1984), the cooperation and deference that surrounded lower court nominations in prior decades has become harder to sustain. The logroll that was prevalent for much of the history of the country was operational in part because lower court appointments were largely viewed as a source of patronage, rather than as a vehicle to achieve policy goals. Individual senators used federal judgeships to reward supporters and loyal party members in their home states, rather than as a means to influence the outcome or direction of court decisions (Binder and Maltzman 2009, Scherer 2005). Under these circumstances of distributive politics, senators had been willing to relinquish control over appointments in other states in order to gain greater discretion over appointments in their home states (Jacobi 2005). The increasing polarization of the political parties has put pressure on that logroll, making it more difficult to sustain.

Nancy Scherer's "elite mobilization theory" expands on that dynamic, contending that shifting party structures have created incentives to politicize judicial appointments. During the late 1960s and 1970s, changes in the party system meant that senators became more beholden to party elites and ideologically-driven activists than to individual voters or loyal supporters. Congressmen who had previously won the support of their constituents on a personal level, suddenly found it necessary to maintain coherent positions on issues of interest to their voters (Fenno 2000). The shift from a personal politics to a mass politics model has implications for electoral dynamics. In turn, shifting electoral strategies have an effect on how senators use judicial appointments. The need to achieve policy goals and appease key ideological supporters began affecting the way in which both parties viewed judicial appointments. Gradually the potential to make electoral gains by winning over ideological activists became a wiser strategy than rewarding individual supporters for party

loyalty (Scherer 2005).

2.3.2 Shifting Balance Between the Branches

Some characterize the increased contentiousness not as a breakdown in cooperation between senators, but rather as a breakdown in bargaining between the Senate and the president as a result of a shift in power to the presidency. Some have argued that despite the stability of the constitutional framework, the role of home state senators has declined, especially in the selection process. One version of this theory asserts that the breakdown is the result of a centralization over power of nominations in the presidency at the expense of the Senate as a whole. Carter's implementation of merit commissions is seen as a critical moment in breaking senators' control over nominations. While Carter may not have specifically intended to shift power to the presidency, by limiting the ability of senators to distribute appointments as patronage it made it easier for presidents to exercise more control over nominations to fill the gap (Law 2004). Whereas senators once expected to name the actual nominee to a district court, more recent presidents have requested a list of candidates from which they make the final choice (Chase 1972, Rutkus 2008). Proponents of this explanation assert that obstruction in the Senate is the result of incomplete or inadequate consultation by a president prior to making a nomination, a charge that is often made by obstructing senators.

The increasing power of the courts has also been cited as an explanation for the heightened scrutiny surrounding lower judicial appointments. Since the mid-century the federal courts have become more prominently involved in salient issue areas in a manner that that has brought attention to their role as policymakers. In the 1950s and 1960s, more of the Supreme Court docket shifted away from private economic issues and towards social issues like civil rights, the rights of the accused, and civil liberties. At the end of WWII, these salient social issues accounted for only 28% of the cases granted review, but by 1970 they accounted for 60% of the cases heard by the Court (Epstein et al. 2012). This change

was mirrored in the Courts of Appeals: between 1930 and 1970, criminal appeals, civil liberties, and civil rights cases grew from 13% of the caseload to more than 50% (Songer, Sheehan and Haire 2003). As the work of the courts began to have more salient policy consequences the implications of lower court appointments became more apparent to partisan activists. Interest groups and party activists began pressuring Senators to vote against nominees from other states whose views were inconsistent with those of the party elite (Scherer 2005). This prioritization of ideology over personal or even party loyalty put pressure on the existing status quo of patronage appointments.

2.3.3 Decreased Costs of Obstruction

One final explanation is that Senate procedures have made obstruction less costly to individual Senators. There are few, if any, electoral costs to blocking a confirmation, as nomination politics is largely an elite preoccupation. Any cost of obstructing a nomination would most likely arise as a reputation cost affecting future interactions with Senate colleagues and the loss of future cooperation or logrolls. As the likelihood of cooperation independent of individual actors has decreased, this reputation cost has probably become even less important. Under a patronage-based logroll, interfering with the confirmation of another senator's favored nominee might have repercussions for one's own preferred nominees. If the logroll is weaker, however, the costs of disrupting it are likely more diffuse.

Small shifts in Senate rules and practices may have further decreased those costs. For example, earlier in the twentieth century there was a very real cost to launching a filibuster, if only considered in the effort expended filibustering and other the legislation that gets bumped from the agenda. As the majority party has increasingly tabled controversial bills or resolutions at the mere threat of a filibuster, the costs of launching a filibuster dropped dramatically making obstruction a more successful strategy for opponents of legislation and nominations (Koger 2010, Wawro and Schickler 2006)). Similarly, the tradition of unanimous consent has evolved into a hold system that provides an even less costly means

of obstruction than the filibuster. Holds are often kept secret, so there is little to no electoral or reputation cost, and they require almost no effort (Sinclair 1997, Steigerwalt 2010). The increasing use of holds in recent decades has certainly provided a nominee's opponents with an easy means to obstruct their confirmation.

In the end it is likely that each of these institutional shifts has played a role in altering the Senate confirmation process for lower court nominees. The changes in the composition of the political parties, the changing balance between the president and Congress, the rise of the judiciary, and evolving Senate rules are all well documented. It is difficult to adjudicate between these theories, as they are really not "competing theories" but rather complementary theories. It is likely the case that each of these institutional changes has had an impact on the way the Senate conducts its business in general and on the confirmation process in particular.

2.4 A Shifting Nominee Pool

A final set of explanations for the changes in the judicial process focuses on the nominees themselves. There has been general agreement that the ideology and/or qualifications of a potential justice explain a lot of variance in Supreme Court confirmations (Cameron, Kastellec and Park 2013, Epstein et al. 2006, Segal 1987, Shipan and Shannon 2003). A similar line of work on lower judicial nominations has investigated whether nominee characteristics account for which nominations are successful and which ones are not (Allison 1996, Martinek, Kemper and Van Winkle 2002, Nixon and Goss 2001, Stratmann and Garner 2004). These studies ask in part whether the Senate has continued to apply the same level of scrutiny at the confirmation stage to a different set of nominees, as the changes in the process have happened while the nominee pool itself has changed in significant ways.

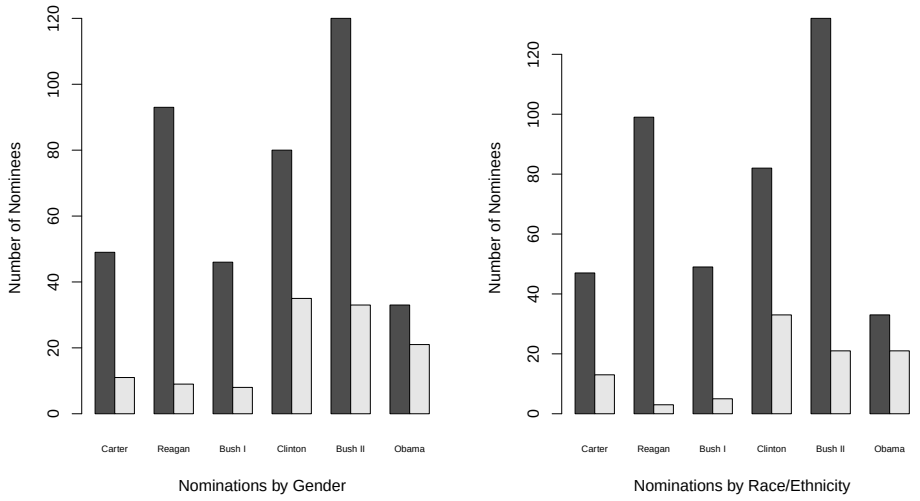

Figure 2.4: Circuit Court Nominee Gender and Race by President

2.4.1 Nominee Race and Gender

The most obvious shift in the nominee pool has been the increasing number of women and minorities as both parties have made attempts to diversify the federal bench. President Carter was explicit about his desire to appoint more women and minorities, giving that criteria to the merit selection committees established in each state during his administration (Goldman 1997). Of his Courts of Appeals nominations, which he handled more directly, 18% were women and 22% were minorities (Figure 2.4). Since then, other Democratic presidents have generally supported and expanded that goal, with Clinton and Obama naming women to 30% and 35% of the Courts of Appeals vacancies that arose during their terms. Of those same vacancies, a similar proportion went to minority nominees.

The Republican Party has not been as aggressive at diversifying the bench as Democratic presidents have. Reagan named women to only 8% and minorities to only 3% of the vacancies that arose during his administration. George H.W. Bush improved on those numbers significantly, nominating women to 14% and minorities to 8% of vacancies. Those percentages nearly doubled by 2001 at the start of George W. Bush's term: he gave nominations to women 27% of the time and to minorities in 14% of vacancies. Thus, while

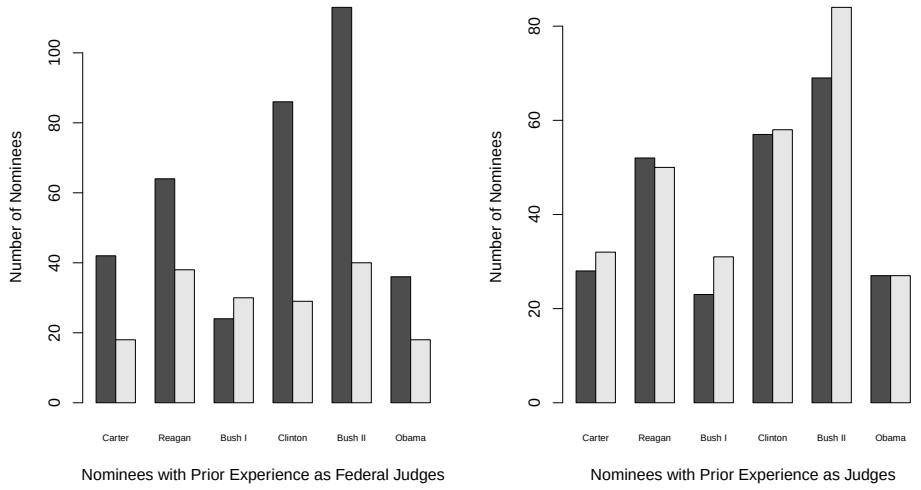

Figure 2.5: Nominee Experience by President

Republicans still nominate women and minorities less frequently, the overall trend in both parties has been toward diversification.

2.4.2 Nominee Occupation and Experience

There have been shifts in the background experiences of nominees since the 1970s as well. Federal judges enjoy life tenure, so the political actors involved in their selection have an interest in choosing appropriately qualified individuals who will both serve well on the bench and be more easily confirmed. Data from the Federal Judicial Center and nominee questionnaires suggest shifts in prior experience have occurred as well. The tendency to choose nominees with prior judicial experience has been consistent since Carter's administration, with roughly half of all nominees to the Courts of Appeals having some experience as a state or federal judge (Figure 2.5). Interestingly, though, there has been a drop in the number of nominees who are elevated to the Courts of Appeals. Whereas 40% of Reagan's and 54% of George H.W. Bush's nominees served on a lower federal court, only 28% of Clinton's and 29% of George W. Bush's nominees were elevated. This trend may be related to the diversification trend described above, as Clinton's and Bush's attempts to

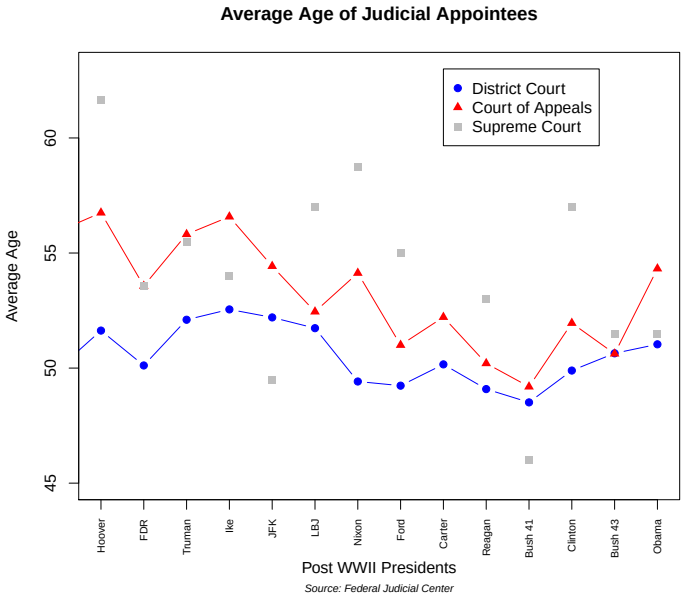

Figure 2.6: Average Age of Judicial Appointees

appoint women and minorities may have been incompatible with a plan to elevate district court judges due to the lack of diversity on the bench they inherited.

While nominees are slightly less likely to be federal judges, they are more likely to have clerked with a federal appellate judge. In the 1980's only 16% of the circuit court nominees had experience clerking with a judge on the Courts of Appeals or the Supreme Court. That percentage rose to 24% under Clinton and continued to rise to 45% under Obama. At the same time, nominees are less likely to have experience as professors today than in the past. Under Carter, 40% of nominees had some background as a professor, whereas only 15% of Obama's nominees listed "professor" as their prior occupation. Democrats have been slightly more likely to nominate academics than Republicans, but the same downward trend is evident among the nominees from both parties.

2.4.3 Nominee Age

While observers of judicial appointments have focused a great deal of attention on the race and gender of nominees, nominee age has less often brought commentary. Importantly,

a judge's age at the time he or she takes the bench can effectively lengthen or shorten their term so it is a important demographic to investigate. The ideal age for a nominee likely depends on the goal that the political actors have in making the nomination in the first place. If patronage is the primary goal, it likely makes sense to nominate individuals who are older. This strategy both ensures more frequent turnover for additional patronage opportunities and rewards supporters after an established period of loyalty. However, if affecting policy is the primary goal, it makes sense to nominate younger judges who will have a more extended term to affect law and policy.

For much of the twentieth century, there was a steady decline in the average age of new judges for both the district and circuit courts (Figure 2.6). As one would expect, the average district court judge has been younger than the average circuit court judge at least since Hoover was president. The overall trend in age for both levels is downward, however, until nominee age seems to bottom out during George H. W. Bush's administration. Since that point, the average age of judicial appointees has been on the rise, with Obama's appointees back up nearly to the average age of Kennedy's appointees. The decline in age seems consistent with the idea that policy became more important throughout the twentieth-century. The sudden rise in ages starting with Clinton is harder to explain.

2.4.4 Nominee Ideology

Finally, the descriptive literature has long supported the idea that presidents nominate potential judges from within their party (e.g Goldman 1997). It is also likely that presidents nominate individuals from that subset who have similar ideological views to their own. Unlike these other nominee characteristics, however, nominee ideology is much harder to measure, making it difficult to know how ideologically-proximate nominees are to the president who nominates them. To date, there is no existing measure that estimates ideology for all nominees for any portion of time.

Figure 2.7 uses ideology scores for nominees and presidents that are drawn from Adam

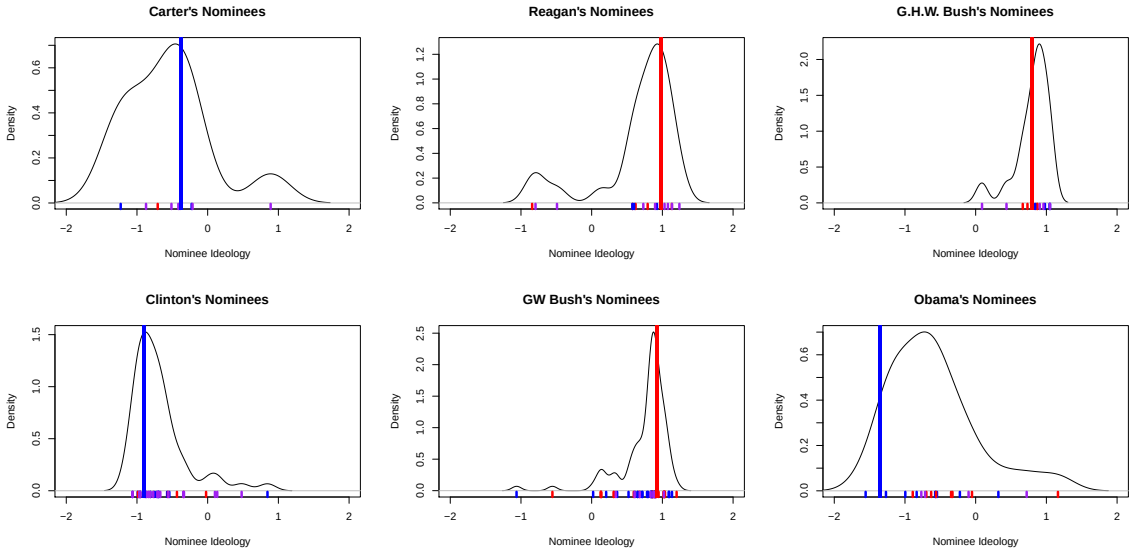

Figure 2.7: Nominee Ideology by President (Based on CF Scores)

Bonica's Database on Ideology, Money in Politics, and Elections (DIME). The DIME data contain ideology estimates (CF scores) generated from more than 100 million records of campaign donations made between 1979 and 2012 (Bonica 2013). The estimates are generated based on a spatial model of giving that assumes donors assess candidate ideology and distribute available funds to the candidates whose preferences they share. Nominees for the federal bench are obviously not included among the recipients of campaign funds, but they are a group of active citizens who are likely to be campaign donors. Through a process of matching on nominee name, location, and occupation, I identified a set of 112 donors that I positively confirmed as nominees to the Courts of Appeals, accounting for roughly 32% of the 415 individuals who were nominated between 1977 and 2012.

Each of the plots in Figure 2.7 shows the distribution of each president's nominees (the "rug" hash marks) relative to that president's CF Score (the vertical line) for the set of nominees in the DIME database. First, the plots demonstrate that Republican and Democratic presidents pull the bulk of their nominees from opposite ends of the ideological spectrum with the distribution in many cases being centered around their ideal point. Secondly, it appears that the Republicans have been more successful at choosing ideologically-proximate

nominees, as the distributions for the Democrats are much wider. While there does not appear to be a great trend toward greater ideological proximity or less in more recent years, there do appear to be more outliers in recent years. For example, George W. Bush nominated Roger Gregory to the Fourth Circuit Court of Appeals after Gregory was given a recess appointment by President Clinton. So while presidents have tended to identify nominees who share their party and political preferences, each of the presidents since the 1990s have made a few nominations that seem inconsistent with their ideological views.

2.5 The Impact of Contentious Confirmation Politics

Taken collectively, these three major lines of thought and the trends they highlight paint a picture of the causes of the current state of Senate confirmations. Most of this literature, however, isolates the confirmation process from the nomination process rather than considering the ways in which they are intertwined. As indicated by the solid arrows in Figure 2.8, the focus on these inquiries has been almost exclusively on explaining the causes of the confirmation crisis, without considering the ways in which the confirmations might have a reverse effect on the wider political arena. It is possible, for example, that confirmation fights have contributed to the increasing partisan rancor and polarization or shifting power structures in the Senate. The recent change to the fillibuster rule can be directly attributed to the use of filibusters to derail nominations. It is important to continue to investigate confirmation politics as a cohesive system.

This study is focused in particular on the dynamics represented by the dashed arrow in Figure 2.8. Studies have asked whether the new demographics of the nominee pool have contributed to confirmation delays and failures, and the answer is generally that it has not. A potentially more important question, though, is whether the changes in the confirmation process are generating a different set of nominees over time. We do not know, for example, whether the changing confirmation process affects presidential choice at the nomination

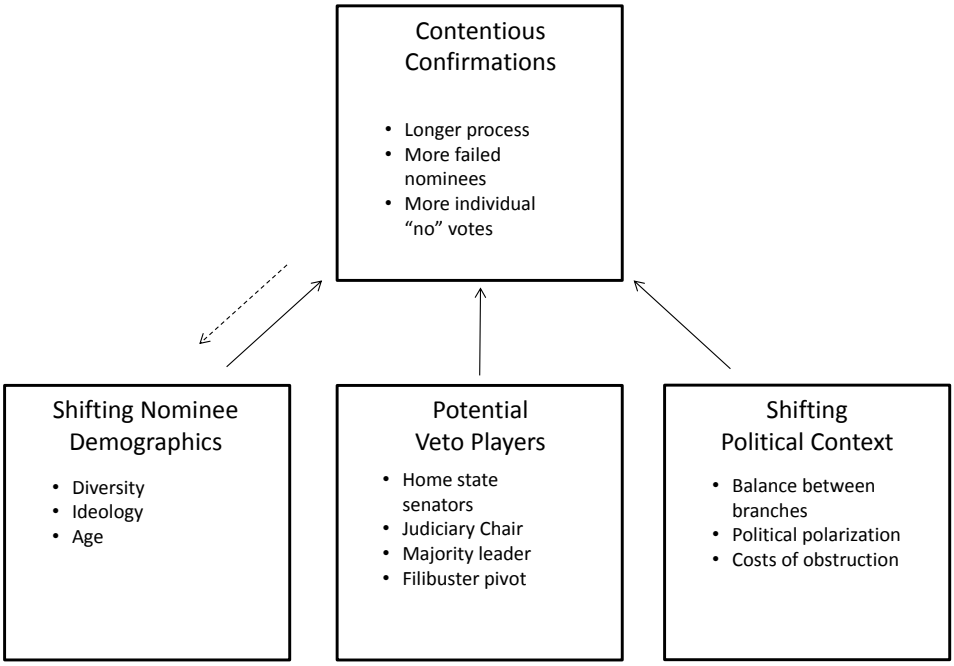

Figure 2.8: The Confirmation Crisis

stage. The three presidents from whom we have seen an increase in nominee age, Presidents Clinton, Bush, and Obama, have all directly commented on what they perceived to be obstruction in the Senate.[12] This raises the question of whether the increase in judicial appointee age is a function of the increasingly contentious nature of the confirmation process. Under divided government, for example, might the president use nominee age as an additional bargaining dimension to gain confirmation for his most ideologically-preferred judges? Similarly, the outliers in terms of ideological-proximity seem to occur during the same period when confirmation rates are at their lowest. It is easy to see that heightened Senate scrutiny can effectively shape the federal bench, but we must also take a step back and consider the impact on the president's choice of nominees at the outset of the process.

Importantly, despite an increasingly contentious confirmation process, many nomina-

[12]See Maltese 2003 and Al Kamen, "Judicial Nominees: Beware the Thurmond Rule," *Washington Post*, February 2012.

tions still follow an easy path to confirmation. In fact, the vast majority of nominations follow what has been termed a "non-controversial" track, with only a small minority visibly drawing the attention of detractors or opposing senators (Steigerwalt 2010). This description is helpful in understanding the contours and boundaries of the confirmation crisis and steers attention away from the routine nominations in order to zero in more closely on the controversial ones. However, this vantage point overlooks the critical question of why a particular nominee is on a non-controversial path in the first place. It is important to consider what mix of nominee characteristics or institutional factors might influence the "track" a nominee enters when he or she goes through the confirmation process. So while there is clearly variation in the amount of opposition nominees face in the Senate, with many nominees facing little opposition at all, the effect of presidential choice in determining the type of confirmation his nominees will face is left unexplained.

Finally, it is not obvious that a "non controversial track" can be assumed to indicate a lack of constraint on presidential choice. It is not clear that during periods of high confirmation rates the Senate is more deferential to the president than in periods with more rejections. Rather, a successful confirmation may reflect a strategic choice on the part of the president to submit a compromise nominee in the face of institutional constraints. As the first-mover in the bargaining over lower court vacancies, the president may have the ability to affect the "track" a nominee will likely face and choose a nominee that will ultimately be successful.

The next chapter addresses some of these questions by laying out a theory of presidential nomination decision-making. Chapter 3 explains how a strategic president will respond to the varying levels of constraints he may face in appointing nominees to the lower federal courts. The level of constraint surrounding a nomination will vary with several factors specific to the Congressional session and to the vacancy. As the level of constraint increases, the president will be forced to temper his choice of nominee, compromising on individual nominee characteristics across one or more vacancies. Importantly, the effects of that bar-

gaining will likely not be evidenced by the confirmation process, but rather in the slate of nominees he submits to the Senate.

Chapter 3

A Theory of Nominations: Strategic Presidential Response to Appointment Constraints

As discussed in Chapter 2, there has been a subtle, but significant, shift in the manner in which the United States Senate handles the confirmation of judicial nominees in the last few decades. The Constitutionally-mandated appointment process of presidential nomination and Senate confirmation leaves unspecified the procedures to be followed by each institution. The formal rules established in the Senate have remained remarkably stable since the first appointments under George Washington, but the informal practices have shifted over time as senators have demonstrated less willingness to defer to the wishes of the president or their Senate colleagues. As a result of this heightened scrutiny, judicial nominees have faced increasingly lengthy confirmation proceedings and greater uncertainty as to the likely outcome of their nomination. Presidents have often found their slate of nominees facing considerable hurdles in the Senate and have seen a higher rate of rejection.

A strategic president will adapt his nomination strategies to meet the realities of the new confirmation environment. This chapter lays out a theory of strategic presidential response to appointment constraints, explaining how the president might alter his nominations in anticipation of changing scrutiny in the Senate. Judicial appointments can be used as tools to further multiple goals, including making policy gains and bolstering political capital for future bargaining. The president may use his formal proposal power to choose any mix of

nominee characteristics from which he derives the most benefit, but his nomination strategy will be conditioned by the institutional constraints specific to an individual vacancy. When the institutional context makes easy confirmation likely, presidents are free to choose their most preferred nominees that satisfy both their policy and political goals. However, as the institutional context makes confirmation less certain, presidents are increasingly forced to bargain over one or more dimensions, such as ideology, race, or age. When the president faces the highest level of constraint and is unlikely to get any of his preferred nominees successfully confirmed, he must choose from a set of even less appealing options, including nominating preferred individuals that are unlikely to be confirmed, nominating less preferred individuals, or nominating no individual at all and leaving the seat vacant. The levels of constraint will vary both across and within Congressional sessions and within a single presidential term. As presidents assess the likelihood of successful confirmation for individual vacancies, they should employ a variety of these strategies in staffing the lower courts.

This chapter proceeds by first examining presidential goals and the ways in which judicial appointments can be used to further those goals. The next section describes the various types of constraint that the president might face and the ways in which that level of constraint will vary across his presidency. The final section identifies the most preferred strategy that the president should adopt under various levels of constraint as he attempts to use judicial appointments to achieve his larger political goals.

3.1 Judicial Nominations: Presidential Goals

The president is a political actor who is motivated by policy preferences. It is an uncontroversial assumption that the president has policy goals and that he has multiple opportunities to shape policy so that it most closely approximates those preferences. The president is uniquely situated to shape legislative outcomes as both an agenda setter (e.g. Light 1999)

and as a veto player (e.g. Cameron 2000, Krehbiel 1998). Once legislation is passed, he can influence the implementation of that policy by playing an active role in the creation and formulation of executive agencies (Lewis 2003) as well as their staffing (Lewis 2008). The president's potential power and influence extends to all stages of the policy-making process, including the interpretation of these policies by the judiciary. The presidential prerogative to appoint judges gives the president the ability to choose the slate of officials that are the final arbiters of many federal policies.

The president's ability to achieve his policy goals at each of these stages, however, is limited in the American "separated system" of government, in which most of the president's formal, constitutional powers are shared with Congress (Jones 2005). As Richard Neustadt contended, a president's power depends on his personal capacity to influence other political actors through persuasion and bargaining, relying on his reputation or public prestige to gain advantages. Thus, an effective president will understand that "power is prospective" and will be ever vigilant to build and maintain a reservoir of support as a means of achieving his future political goals (Neustadt 1960). By building political capital among elite supporters and potential supporters, the president can solidify future bargaining advantages to advance his most preferred policy outcomes in the future.

Importantly, presidential political capital is distinct from presidential approval or public opinion. The ability of the president to persuade is contingent on a number of factors, including the nature of the policy or issue in question. On certain highly salient issues that garner attention from the general public, the president may benefit from high approval ratings as the weight of the public is behind him in negotiations. He may find it advantageous to "go public" as a means of generating public attention to the issue and bolster support for his position (Kernell 1997), especially when public opinion is generally in his favor (Canes-Wrone 2006). However, on less publicly salient issues like lower court nominations, the president must bargain more directly with elite actors, relying on his reputation and influence as bargaining advantages. Here, the president gains strength and power from political

capital, or a reservoir of support among public officials, activists, and other elites (Jones 2005). Presidential approval may be one component of political capital, but it is primarily important only to the extent that it creates a bargaining advantage with respect to other elites. On the majority of issues, including judicial nominations, presidential approval is less likely to be important than the support the president enjoys from other political officials and activists.

3.1.1 Political Goals and Judicial Appointments

The appointment of judges can be a powerful tool for presidents to shape public policy. Political scientists have established that the preferences or ideology of Supreme Court justices clearly have an impact on the votes they cast in individual cases (Maltzman, Spriggs and Wahlbeck 2000, Segal and Spaeth 2002, Segal and Cover 1989). By nominating ideologically proximate justices, the president can affect the votes that are cast on the Court that will potentially determine the outcome of future cases (e.g. Johnson and Roberts 2004, Krehbiel 2007, Moraski and Shipan 1999). Descriptive studies of Supreme Court appointments find a strong role for ideological compatibility in the presidential choice of a nominee (Abraham 1999, Yalof 1999). If successful in shifting the dominant coalitions on the Court, the president can have an enduring impact on the interpretation of existing precedent and the creation of new policy.

The desire to influence policy outcomes extends to the lower courts as well, particularly with regards to the Courts of Appeals. Because of their position in the judicial hierarchy, lower court judges are more constrained by precedent and the possibility of review by a higher court than are Supreme Court justices (Cameron, Segal and Songer 2000, Cross and Tiller 1998, Kastellec 2007, Lax 2003, Songer, Segal and Cameron 1994). Legal factors undoubtedly play a significant role in determining judicial votes on lower courts, but once these legal constraints are accounted for ideological voting is evident on the Courts of Appeals, as judges often vote in established blocks that are defined by issue type (Cross

2005, 2003, Goldman 1966, 1975, Songer, Sheehan and Haire 2003). These patterns in individual votes have been associated with the party of the appointing president (Giles, Hettinger and Peppers 2001, Songer and Ginn 2002) and the home state senator when senatorial courtesy is operable (Giles, Hettinger and Peppers 2001). In areas where a legal outcome is clearly dictated, the ideology of the judge or panel of judges is less likely to be a determining factor in the outcome, but in areas where the law is unsettled or unclear judicial preferences can play a key role in how judges vote to decide these cases.

Thus, just as with Supreme Court nominees, presidents can further their policy goals by identifying potential lower court judges that will make decisions that are in line with presidential preferences (Giles, Hettinger and Peppers 2001, Goldman 1997). The relationship between appointments and policy was clearly elucidated in a memo by a young staffer in the Nixon White House: "Perhaps the least considered aspect of Presidential power is the authority to make appointments to the federal bench –not merely to the Supreme Court, but to the Circuit and District benches as well. Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office." He went on to note, "In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made" (quoted in Goldman 1997). Nixon endorsed the memo's interpretation and urged that his staff adhere to its suggestions. All modern presidents have used lower court nominations to further their policy goals to some degree, though the manner in which they prioritized competing goals may have varied (Chase 1972, Goldman 1997).

3.1.2 Political Capital Goals and Judicial Appointments

Presidents use judicial nominations as a tool to solidify their political capital as well. In the nineteenth and early twentieth centuries, this solidification of political capital was accomplished primarily by nominating individuals who were personal or party supporters as a form of patronage (Goldman 1997). Political parties have traditionally helped presidents

and other politicians solve the collective action problems associated with mobilizing voters to win election and the subsequent social choice problems inherent in the enactment of policy (Aldrich 1995). The president, as the most prominent and powerful member of his national party coalition, used the distribution of judgeships and other federal jobs to reward loyal party members as a means of furthering party or personal goals. This patronage-based appointment system operated in close consultation with the home-state senators of the president's party under the norm of senatorial courtesy. By distributing patronage within his party, the president was able to reward supporters and assist senators in his party, bolstering his political capital by maintaining a coalition of political allies. While the potential nominee's loyalty to the president's favored policy issues may have been a criterion, the stronger consideration was often fealty to party.

Over the course of the twentieth century, however, presidents have become less reliant on political parties for electoral and legislative support and more reliant on more purely ideological activists and supporters. The growth of the presidency throughout the century has allowed modern presidents to operate more independently of their political party, as they instead build personal networks of supporters at all levels of government (Milkis 1993). Since the 1970's, presidents have been more likely to use judicial appointments to build political capital by nominating individuals expected to appease key interest groups and party activists (Bell 2002*b*, Scherer 2005). With interest groups rivaling political party structures as a necessary supporter of candidacies and policies, judicial appointments are increasingly used as a way to build support with a wide variety of elites and not just party loyalists. An important component of this new reality is that activist groups desire judges with loyalty to a particular ideology or judicial philosophy, whereas traditional patronage appointments encouraged fidelity to a party or politician.

A result of this shift is that the presidential desire to further policy and political capital goals may more often converge on single candidates in the modern era than in the past. Whereas Goldman (1997) describes presidents balancing their personal, party, and political

goals in making appointments, these three types of goals are likely to be even less distinct now. In many cases, a single nominee may allow presidents to make both policy and political capital gains, as both sets of goals are increasingly aligned with ideological goals. As the political parties have become increasingly polarized and internally homogeneous, the distinction between party and ideology has blurred. As long as a primary means of building political capital is through ideological appointments rather than patronage, the president can more often achieve his party and political capital goals simultaneously.

Importantly however, the realization of policy goals necessarily requires successful confirmation while in some cases political capital goals may be realized merely through the nomination process. President Obama's nomination of Goodwin Liu to the Ninth Circuit Court of Appeals, for example, was a choice of someone who shared his policy preferences and also was also popular with Democratic activists. Liu's liberal credentials were well established as an outspoken law professor at UC-Berkeley, and as a young minority he fit an ideal demographic. Even though Liu's nomination pleased liberal elites, it did not help Obama achieve his policy goals because Liu was filibustered by Senate Republicans and never took the bench.[1] Thus, nominations that further policy goals will likely simultaneously further political capital goals as presidential supporters are increasingly ideologically aligned, but the reverse is not also true as failed nominations will not affect judicial policy outcomes.

3.1.3 Presidential Goals and Nominee Characteristics

Presidents have several advantages that enable them to successfully use judicial appointments to further their policy and political capital goals. For example, while the president cannot control the timing of a vacancy, he does have control over the timing of the nomination to fill that vacancy. A strategic president should act quickly to avoid election year

[1] Paul Kane, "Senate Republicans Block Judicial Nominee Goodwin Liu," *The Washington Post*, May 19, 2011.

nominations that are likely to take longer and are less likely to end in successful confirmation (Allison 1996, Martinek, Kemper and Van Winkle 2002). The president may also gain a bargaining advantage by generating publicity in support of his nominees (Groseclose and McCarty 2001, Johnson and Roberts 2004, Kernell 1997, Maltese 1995). More generally, the president has the advantage of being the formal proposer and first mover. While senators are often in a position to suggest potential candidates for nomination to the White House, the president has the sole power to nominate the individual with the most desirable set of traits across several dimensions. With his policy and political capital goals in mind, presidents are likely to consider multiple attributes of potential nominees in addition to ideology (and clarity of ideology), including the nominee's quality, race, gender, and age. While he will have preferences with regard to each of these dimensions, the eventual choice of a nominee will reflect both presidential preferences and the level of constraint surrounding the vacancy.

Nominee Ideology: The lifetime tenure of federal judges makes the appointment of like-minded jurists a powerful tool for presidents to further their policy goals, but that same feature makes it all the more important to identify a suitable nominee. The framers specifically created an institutional design in which judges would *not* be the agents of the presidents that nominate them or the senators that vote to confirm them. The independence of the judiciary is largely protected by insulating judges from sanctions, such as removal or a loss of salary. Thus, the only reliable way in which the president can attempt to ensure that his nominees adhere to his policy preferences is to carefully choose nominees that share those preferences before placing them on the bench.

As presidents prioritize their policy goals, they should seek out ideologically proximate nominees, particularly with regard to highly salient issues. Presidents have traditionally considered members of their own political party for the bench as they seek assurance that the judge would share their preferences, but presidents increasingly look for ideological compatibility even amongst party members. President Roosevelt, for example, was con-

cerned that his judges would support his New Deal policies, particularly after hundreds of injunctions were issued between 1935 and 1936 blocking New Deal legislation. While much attention has focused on FDR's reaction to unfavorable Supreme Court decisions, Goldman (1997) finds that policy concerns clearly dominated his lower court appointments as well with more than half of his Courts of Appeals appointments being driven with policy outcomes in mind. While ideology is certainly correlated with party membership, in many cases the distinction has been significant. Presidents Kennedy and Johnson were particularly attentive to Southern nominees' views on civil rights, with a stated goal to avoid appointing segregationists to the Fourth or Fifth Circuits (Goldman 1997). More recent presidents have routinely employed "litmus tests" to ensure their nominees have preference in line with the administration's on key issues like abortion (Scherer 2005). As policy goals have become more important than party goals in recent decades, presidents are increasingly likely to prioritize ideology over party loyalty if the two are in conflict.

There is some measure of uncertainty involved in clearly identifying the true preferences of a potential nominee. While candidates on the short list may be forthcoming with a general judicial philosophy, they may be unwilling or unable to clearly identify how they would vote on particular issues that may arise before the courts. Recent presidents have nominated more than 200 judges per term, making it difficult to carefully vet and screen individual nominees, even when evidence of their preferences is available (Rutkus and Sollenberger 2004). As the number of vacancies increases for the lower federal judiciary, available resources are stretched even thinner, potentially exacerbating the uncertainty over any individual nominee's true preferences. Thus presidents must often rely on other cues to determine the true ideological preferences of their nominees. Individuals with prior judicial experience, an academic publishing record, or political activism may have a clearer record indicating how they might rule on cases that potentially fall before them.

Nominee Quality: The president will also consider the resume of potential nominees, looking for individuals with the requisite experience and legal effectiveness. Identifying

high-quality nominees is desirable for two reasons. First, evidence suggests that high-quality nominees face easier confirmation for both the Supreme Court (Cameron, Cover and Segal 1990, Epstein et al. 2006) and for lower courts (Allison 1996, Martinek, Kemper and Van Winkle 2002). Nominees to both the Surpreme Court and the lower courts have found their confirmations derailed when the Senate found them to be lacking in judicial experience or temperament. Harriet Miers, for example, asked George W. Bush to withdraw her nomination to the U.S. Supreme Court only weeks after it was announced, amid widespread speculation that she was ill prepared to serve as a justice (Goldman et al. 2007). Similarly, Michael Wallace, a George W. Bush nominee to the Fifth Circuit, was never confirmed after the American Bar Association rated him "unqualified." A second reason to ensure nominees are highly qualified, an ideologically proximate, high-quality nominee will be more effective at furthering the president's policy goals than will a lower-quality nominee. A well qualified jurist will be more able to convince his colleagues and the judges and justices on higher courts through skilled legal argument and analysis, insuring a broad impact of his or her decisions.

Like ideology, a nominee's competence may be hard to determine, due to both a lack of information and some degree of subjectivity as to which attributes deem a judge "competent." Easily observed background experiences like a nominee's educational pedigree may be an initial indicator of competence. Years of experience and prior work as a judge, lawyer, or law clerk are are frequently used to predict the future capability of a potential federal jurist. But in addition to a nominee's resume, the president will want to examine the written work product generated by those endeavors. Published legal opinions, legal briefs, and law review articles can all be scoured for indications of a potential nominee's qualifications and judicial temperament. For sitting judges, reversal rates and citation rates may also be an indication of legal effectiveness, as well as any media coverage of any high profile cases in which the nominee was involved. The presidential files routinely contain such documents used to vet potential nominees.

Given the variety of indicators that might demonstrate levels of competence, the question really becomes determining whom the president trusts to conduct that analysis of quality and how to counter assessments with which he disagrees. Some vetting will be done by the president's staff and the Justice Department, but in reality there is reliance on the judgment of others. President Carter formally emphasized quality by creating a merit commission to aid in the selection of judges to the Court of Appeals (Goldman 1997), and he encouraged senators to set up similar commissions in their states to evaluate the qualifications of potential district court nominees. Starting with Eisenhower, all presidents except for George W. Bush have relied on the American Bar Association's ratings of nominees, submitting the names of individuals they are considering to the ABA for vetting prior to formally announcing the nomination. In response to questions of potential ideological bias in the ABA's evaluation of potential nominees, President Bush declined to send his potential picks to the ABA before making his nominations (Goldman et al. 2003). The Judiciary Committee refused to consider nominees without the ratings, however, contributing to the difficulties encountered by Michael Wallace when he was unanimously rated "unqualified" by the ABA.

Nominee Race and Gender: As noted in the last chapter, the trend in both parties over the last few decades has been towards diversification of appointments. While Democrats have nominated more nontraditional jurists to the federal bench than have Republicans, the relative numbers have been on the rise in both parties. Such efforts to increase the number of female and minority judges on the bench can be understood as a means to build political capital with key constituencies who favor diversification as a way to make the federal courts more representative (Scherer 2005). Thus, increasingly presidents may seek out nominees of a certain race, gender, religion, or other particular demographic, particularly when that group is unrepresented or underrepresented on the court in question. Nominating a set of judges intended to diversify the bench is an easily observed strategy likely to win support among particular activists. Whereas a nominee's ideology and quality might be difficult

to identify in some cases, a nominee's membership in underrepresented groups is easy to identify and tout.

The relationship between these demographic considerations and policy goals is not immediately clear. It is easy to assume that by nominating minority or female judges a president would be more likely to end up with a liberal nominee, a strategy that would only benefit Democratic presidents. Yet, Republicans as well as Democrats have made efforts to diversify, indicating that nontraditional judges cannot be assumed to be liberal. It may actually be the case that introducing a demographic factor as a second bargaining dimension may more directly benefit Republican presidents, who can use diversity as a bargaining tool to get confirmation for their more ideologically preferred candidates. George H.W. Bush's appointment of Clarence Thomas to the Supreme Court is an obvious example. In nominating an African American to the seat previously held by the civil rights icon Thurgood Marshall, President George H.W. Bush gained successful confirmation for arguably the most conservative justice in decades. Appointing nontraditional candidates is clearly an independent goal of both parties to some degree, but race and gender might also be used as bargaining tools to win confirmation of certain nominees.

Nominee Age: Finally, presidents are likely to consider the age of the nominee before sending a nomination to the Senate. Age has been an indicator of nominee quality used by the American Bar Association in rating judges, as there was understood to be a baseline of prior experience that signaled competence (American Bar Association 2009). At the same time, however, presidents have been reluctant to nominate individuals older than 65, due in part to the ABA's tendency to rate them as less qualified.[2] Carter gave great consideration to nominating the former Watergate Special Prosecutor Archibald Cox to the First Circuit Court of Appeals, despite his being 67-years old at the time of consideration.[3] Ultimately, Carter ended up nominating the much younger Chief Counsel of the Judiciary Committee,

[2]Discussed in Attorney General Bell's Memo to President Carter of May 8, 1979, Staff Secretary's Files, Jimmy Carter Library.

[3]Memo from Lipshutz to President Carter, May 3, 1979, "Cox, Archibald [and Age Limit for Judges]" folder, Box 10, Counsel's Office, Jimmy Carter Library.

Stephen Breyer, to that particular vacancy.

The preferred age of a nominee has likely changed over time, however. Under a patronage system, an older individual may have more likely worked his way up and payed his dues within the party. Most importantly, with judges enjoying lifetime appointments, the age of a nominee essentially sets the length of the term. As long as judicial appointments are distributed as patronage, appointing older judges with more frequent turnover and more opportunities for patronage should be the preferred strategy. Thus, a patronage-driven appointment system creates a disincentive to nominate younger judges.

As ideological concerns have become paramount in recent decades, however, however, the age of the nominee is much more significant in furthering policy goals. Because nominee age likely affects the length of the nominee's term on the bench, presidents can further their policy goals by choosing nominees who are both ideologically proximate and young. As presidents care increasingly about policy goals, they ought to care increasingly about the age of nominees as well. Reagan, for example, openly sought out younger nominees to increase his influence by effectively extending the term of office for his appointee (Goldman 1997). Appointing younger judges also allows for the possibility that those individuals can later be elevated to higher courts. The impact on policy of nominees that are ideologically proximate to the president will be greater as they spend more time on the bench and as they advance through the judicial hierarchy. Thus, age is better understood not as an independent second dimension, but rather as an extender of ideological impact. For nominees that share the president's ideological preferences, he should prefer younger judges to older judges.

3.1.4 Obstacles to Achieving Presidential Goals

In attempting to use judicial appointments to further their policy goals, presidents must overcome two distinct obstacles: identifying their most preferred nominee and winning successful confirmation of that nominee. As traditionally understood, the appointment of

federal judges (and most executive officials) is a specific example of policy bargaining in a closed-rule, unicameral legislature. The formal proposal power is held exclusively by the president, but his ability to maximize his policy benefits is constrained by the relative location and intensity of Senate preferences (Krehbiel 2007, Moraski and Shipan 1999, Primo, Binder and Maltzman 2008). Complicating this choice is the reality that the true impact of the potential nominee may be unknown, as there may be uncertainty surrounding the ideology of the nominee, particularly for nominees without prior experience as judges or legal commentators (Nemacheck 2008, Primo, Binder and Maltzman 2008). In making nominations to the Supreme Court, presidents have been more likely to prioritize the confirmability obstacle under divided government and choose moderate candidates most likely to be confirmed, while under unified government presidents are more likely to prioritize the nominee "true type" problem and choose jurists with more clear and proximate ideological preferences (Nemacheck 2008). We should expect a similar presidential strategy in nominating lower court appointments.

In nominating judges to the lower federal judiciary, presidents face a similar set of obstacles in successfully appointing judges that will maximize their policy benefits. In fact, the uncertainty as to the nominee's true preferences is likely to be more severe at the lower court level, due to the sheer number of appointments and the limited resources available to vet potential nominees. Additionally, the bargaining problem is likely to be even more complex, because the level of constraint surrounding a specific vacancy is contingent on several factors such as senatorial courtesy in addition to divided government. However, we can expect the same general strategy in prioritizing these obstacles at the lower court level. As the confirmation process surrounding a vacancy becomes more constrained, a strategic president must prioritize the bargaining obstacle. When presidents are forced to shift their attention to the confirmability of the candidate, they should nominate a slate of judges that are observably different on several dimensions than the judges they would nominate when they are less constrained.

Lower federal court nominations have evolved into a more complicated process because of the regional nature of those judicial seats. Bargaining over lower court nominations involves additional actors with the ability (and willingness) to block a nominee. The system of senatorial courtesy and the "blue slip" empowers home state senators to block nominees to judicial seats assigned to their state. The chair of the judiciary committee can (and does) block objectionable nominees by refusing to schedule hearings and/or move the nomination to the floor. The majority leader can (and does) block nominees by refusing to schedule a floor vote. Finally, individual senators can (and do) use anonymous holds or filibusters to prevent a confirmation vote on a nominee.[4] While the rules of the Senate in no way preclude the use of these obstructionist tactics against Supreme Court nominees, in practice these tools have been employed with much more frequency to obstruct lower court nominations, perhaps because of the lack of publicity and attention to the lower court confirmations.[5]

3.2 Judicial Confirmations: Constraint on Presidential Choice

The president's ability to appoint his most preferred nominee is constrained by the preferences of relevant senators. Members of Congress, like the president, are motivated by both policy and political capital goals, but for Congressmen (for whom there are no term limits) those goals are more likely to be prioritized in a way that is directly tied to their reelection prospects (Mayhew 1974). Like the president, senators have a history of distributing government jobs under their control as a form of patronage, solidifying support from key party members within their districts. However, as Congressional representation has gradually shifted from a "person-intensive" style of representation to a "policy-intensive" style (Fenno 2000), this system of patronage seems to be undergoing changes as well. Just as

[4]On November 21, 2013, the Democratic majority approved a rule change effectively ending the use of the filibuster to block executive nominees and nominees to the lower federal courts. This change in Senate rules effectively eases the bargaining problem by eliminating the filibuster pivot as a potential veto player. However, the filibuster remained in effect through the period of time addressed by this study.

[5]An oft-cited exception is the successful filibuster of Lyndon Johnson's nomination of Abe Fortas to be Chief Justice in 1968 (Abraham 1999).

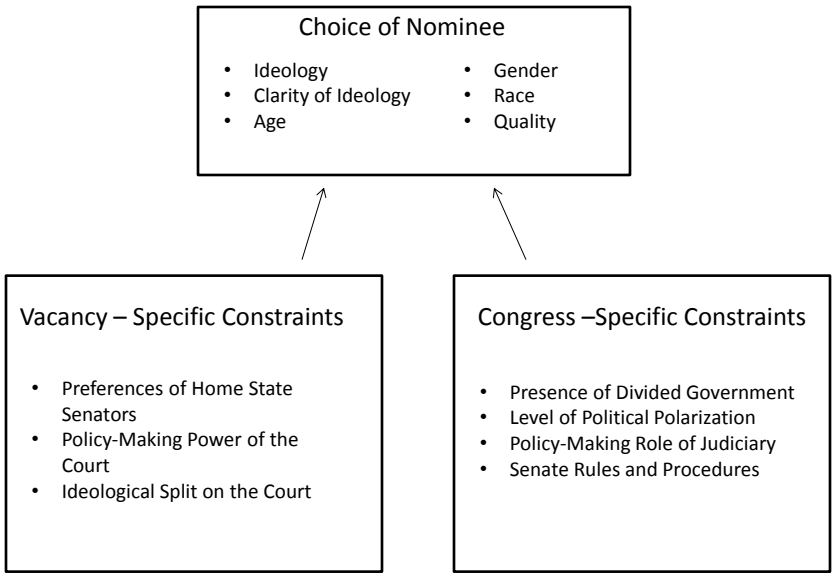

Figure 3.1: The Presidential Nomination Choice in Context

the president has come to rely less on his political party for support of his goals, members of Congress have turned to other groups for support of their reelection campaigns. The influence of interest groups has made members of Congress less willing to support the patronage efforts of their colleagues and more likely to scrutinize the ideological leanings of potential nominees (Scherer 2005). The result is an increasingly politicized Senate confirmation process, where policy concerns outweigh the benefits of the system of patronage. When choosing a nominee, the president must consider and respond to these changes in the level of constraint in the Senate both over time and across vacancies within a single congressional session (Figure 3.1).

3.2.1 Varying Constraint Across Congresses

As described in chapter 2, the increasingly contentious proceedings in the Senate have highlighted additional constraints on the ability of the president to successfully appoint his most preferred nominee. Prior studies have identified several institutional factors that are

likely to constrain presidential choice. It is generally agreed that the presence of divided government is a significant constraint on the ability of the president to appoint his most ideologically preferred candidate (e.g. Bell 2002*a*, Binder 2001, Binder and Maltzman 2002, 2009, Maltese 2003, Massie, Hansford and Songer 2004). There is considerable agreement that the presence of divided government makes confirmation proceedings longer and less certain (Binder 2001, Maltese 2003, Massie, Hansford and Songer 2004). Since the end of WWII, the Senate and White House have been dominated by opposite parties for 16 of 35 Congresses, and since 1971 divided government has existed in half of all congressional sessions. Divided government clearly constrains presidential choice by generating distance between presidential preferences and those of the median Senate voter, as well as other potential veto players like the judiciary chair and the majority leader.

The effect of divided government is exacerbated by the increasing polarization of the two political parties. As the parties become more homogeneous and ideologically distant from each other, the distance between both the president and the median voter and between the president and other potential veto players increases even further. Additionally, increased polarization puts increasing pressure on the logroll that supports the practice of senatorial courtesy, as senators as less willing to defer to their colleagues on nominations. The polarization of the political parties essentially magnifies the effect of divided government in constraining presidential choice in judicial appointments.

An additional institutional change over second half of the twentieth century is the increasingly prominent policy role of the judiciary, including the lower courts. In part, this is the result of the shifting of Supreme Court and lower court dockets towards more salient issues like civil liberties and civil rights (Epstein et al. 2012, Scherer 2005, Songer, Sheehan and Haire 2003). However, some of that policymaking power stems directly from Congressional delegations of authority to the courts, through the empowerment of private litigants to enforce statutes (Farhang 2006, 2008) or through legislative deferrals to avoid accountability (Lovell 2003). As long as the policy making role of the lower courts remained

minimal, or at least unacknowledged, senators had low-intensity preferences with regards to the policy benefits of a nomination. As the court's involvement in setting federal policy on major issues has become more apparent, judicial appointments have become more important and senators' preferences have intensified. The practical result of those intensified preferences is that the range of judges that a senator finds unobjectionable becomes smaller, constraining presidential choice.

Finally, small changes in Senate rules and practices have affected the costs associated with obstruction. Prior to the adoption of the cloture rule and the subsequent lowering of the cloture vote threshold, a Senate filibuster played out like a war of attrition, where delay was costly to the entire chamber. As the leadership has been increasingly willing to table bills rather than stymie the chamber, both threatened and actual filibusters have decreased in costliness and increased in effectiveness (Koger 2010, Wawro and Schickler 2006). The use of secret holds has also been on the rise, allowing individual senators to delay movement on bills or nominations simply by indicating their desire to do so (Sinclair 1997). The practice of senatorial courtesy has also varied across Congresses as well, at its operation depends on the policies and practices of the chairman of the judiciary committee. Some chairmen have only honored "blue slips" from members of the president's party whereas others have honored the objections of any home-state senator, regardless of party. To some extent, this variation is explained by whether the Senate majority, and thus the judiciary committee, is controlled by the president's party. However, most recent chairmen have honored objections from all home-state senators, regardless of party (Sollenberger 2010). This expansive operation of senatorial courtesy combined with the decreased costs of filibusters and holds allows Senators to object to a wider range of nominees, effectively constraining presidential choice. As these obstructionist tactics are increasingly employed, presidents find themselves increasingly unable to appoint their most preferred nominee.

Each of these institutional changes has been cited as a cause of the judicial vacancy crisis, both in lengthening the confirmation process over time and in increasing the number

of confirmation failures. As the bargaining environment becomes more constrained over time, we should also see presidents reacting by nominating a different slate of nominees in subsequent Congresses.

3.2.2 Varying Constraint Within Congresses

In addition to the institutional factors that vary across Congresses, other sources of constraint are specific to the vacancy in question. Critically important is the party membership of the home state senators. The system of senatorial courtesy and the "blue slip" empowers home state senators to block nominees to judicial seats assigned to their state on both district courts and the Courts of Appeals (Rutkus 2008). In earlier decades, the main obstacle to successful confirmation came from home state senators of the president's party. Recognizing this constraint, presidents have traditionally consulted with those senators in identifying nominees, generally ensuring a successful confirmation. The presence of at least one home state senator from the president's party increases the chances of successful confirmation (Binder and Maltzman 2009), which initially suggests a lack of restraint. However, evidence suggests that when a home state senator is from the president's party, the nominee more likely reflects the preferences of the senator than the president (Giles, Hettinger and Peppers 2001). Thus, confirmation rates may be an unreliable indicator of constraint on judicial appointments. The senators from the state to which a particular vacancy is assigned will have a particular interest in that nominee, regardless of which party is represented in the White House. If one or both of those senators are from the opposing party, the president's choice will be more constrained and the greater the distance between the senators and the president, the more severe that constraint will be.

Several aspects of the vacancy in question affect the intensity of individual senator's preferences over the nomination. Evidence suggests that the composition of the district or circuit in question affects the likelihood and speed of confirmation (Binder 2001). The confirmation of appellate court nominees has been more contentious than confirmation

of district court nominees, presumably due to the larger policy role played by the circuit courts. This should be especially true when the vacancy has the potential to shift the partisan or ideological balance on an evenly or near-evenly divided circuit court. Thus, the president's choice will be more constrained when the vacancy is on the D.C. circuit, or on a closely-divided circuit. For judicial vacancies that do not involve critical seats and for which there is a home state delegation from the president's party, the president's choice should be relatively unconstrained so he should be better able to maximize both his policy and political capital benefits by appointing his most preferred nominee.

3.3 Presidential Strategic Response to Confirmation Constraint

A strategic president motivated by policy and political capital goals will tailor his nomination strategy to the level of constraint he anticipates in the Senate for his slate of judges in a particular Congressional session as well as for individual nominations to fill specific vacancies. Presidents that are primarily concerned with winning confirmation for their nominees as a result of significant constraints will nominate judges that are observably different from those nominated under minimal constraint. Successful confirmation involves satisfying the preferences of multiple senators, which may require a nominee with more moderate or obscure preferences or bargaining over additional dimensions.

3.3.1 Nominations Under Minimal Constraint

When the institutional context suggests that confirmation is relatively assured under minimal constraint, the president will use a nomination strategy designed to clarify the preferences of potential nominees and maximize his policy and political capital gains. This bargaining environment is characterized by substantial overlap in the set of judges deemed acceptable to both the president and to the Senate, allowing the president considerable

Level of Constraint	Characteristics	Nomination Strategy
Minimal Constraint	Unified government, low polarization, same-party home state senate delegation, low salience vacancies	Appoint most preferred nominee
Moderate Constraint	Divided government, high polarization, opposing home state senators, low cost opposition, salient vacancies	Consult widely; appoint compromise nominee; introduce age or race as an additional bargaining dimension
High Constraint	Entrenched Pivotal Senator	Leave seat vacant (with no nomination or a likely-to-fail nomination); alter the bargaining space through packaging of nominations or other policies.

Figure 3.2: Predicted Nomination Strategy Under Varying Constraint Levels

choice as to the individual that is ultimately nominated. The president is likely to be minimally constrained under unified government, when political polarization is low, when the home state senators are of the president's party, when the vacancy in question has fewer policy consequences, and when Senate rules are more restrictive of the prerogatives of individual senators.

The presence of a substantial set of potentially confirmable nominees allows the president to focus resources on identifying the most ideologically proximate individual. A logical response to uncertainty as to nominee preferences will involve choosing nominees that have some clear record indicating their preferences in the past. This might involve elevating like-minded judges from the lower courts to fill vacancies in higher courts. The president might achieve the same purpose by choosing clear partisans or activists within his party. The president is likely to also use informational cues like organizational memberships (such as membership in the Federalist Society) as a means of reducing the level of uncertainty.

3.3.2 Nominations Under Moderate Constraint

When the institutional context suggests that the confirmation of the president's preferred nominee is likely to be more difficult, the president will shift more attention and resources to the bargaining obstacles. This bargaining environment will be characterized by minimal overlap between the set of judges that are acceptable to both the president and the Senate. This level of constraint may result from divided government, increased political polarization, a state Senate delegation that includes a member of the opposing party, Senate rules that allow low-cost holds and filibusters, and a more salient vacancy.

A nomination strategy that is more heavily focused on solving the bargaining problem will involve a different process and will likely produce a different set of nominees. When the president employs a nomination strategy focused on bargaining, the process should involve consultation with a broader set of parties and should thus be more time consuming. Rather than simply consulting the home state senators from his party according to the traditional dictates of senatorial courtesy, the president might also consult with senators from the opposing party and the party leaders to ensure a smooth confirmation. This nomination strategy will necessarily be less efficient than a strategy focused solely on solving uncertainty surrounding the candidate.

A critical implication though, is that this institutional context suggests that bargaining will require some sort of compromise over the nominee in order to secure confirmation. This compromise might take a number of forms. Most obviously, the president might nominate the most ideologically proximate nominee from the set of individuals that are acceptable to both the White House and the Senate. The result would likely be a moderate candidate that requires a minimal expenditure of political capital but also provides the president with only moderate policy gains.

Alternatively, the president may attempt to alter the bargaining environment by introducing a second dimension, such as gender or age, to extract additional policy gains. Nominating an older judge may allow the president to nominate a more ideologically extreme

candidate than they would normally expect to be confirmed. President George H.W. Bush's nomination of Clarence Thomas to the Supreme Court forced the Senate to simultaneously vote on a minority nominee and a very conservative nominee. Using other demographic factors as a second dimension in bargaining may allow the president to successfully appoint a nominee that is closer to his policy preferences.

3.3.3 Nominations Under High Constraint

Finally, when the president is completely constrained, the president will be unable to offer a preferred candidate for whom he can expect successful confirmation. This bargaining environment is characterized by the lack of any overlap in the set of judges that are acceptable to the president and the set acceptable in the Senate. This level of constraint is likely to be the result of intense preferences held by a pivotal senator, such as a home state senator who backs a particular candidate and refuses to support any other nominee.

Policy gains can only be made through successful confirmation, so in this highly constrained bargaining environment, the president will not be able to further his policy goals. However, despite this level of exogenous constraint, the president may still choose to nominate (or in some cases renominate) an individual that is unlikely to win confirmation in order to appease ideological activists and gain political capital. Importantly, in this highly constrained environment, the president may simply choose not to name a nominee. The process of identifying and vetting nominees and bargaining with key members of the Senate involves a substantial expenditure of time and resources. For particular vacancies where no candidate has already been identified (such as renomination from the prior session), the president may not gain enough political capital to overcome the costs associated with choosing a nominee. Thus, among vacancies for which the president expects a highly constrained confirmation environment, he should limit his nominations to those seats for which the costs of nominating are the lowest.

Alternatively, the president may attempt to win support for his preferred nominee by

packaging several nominations together or offering side payments. Packaging multiple nominations more widely distributes benefits, easing the confirmation of the president's preferred candidate. President George W. Bush, for example, agreed to nominate a liberal Democrat that had been previously favored by Bill Clinton alongside his preferred conservative nominee to fill two vacant seats on the 6th Circuit in 2008 when the Michigan Democratic senators threatened to block all future nominees to the circuit.[6] While a president would certainly prefer to fill both seats with nominees of his choice, maintaining the current split on the court by splitting the seats is likely a preferred outcome to leaving both seats vacant for the next president to fill.

3.4 Discussion

As a president begins the work of staffing the lower courts, he should make use of a variety of strategies that correspond to the level of constraint surrounding each individual vacancy. The Framers designed a system in which terms of office do not perfectly align across institutions, so even a one-term president may find himself facing a different level of constraint in the second half of his administration and his appointments should reflect that change. Even within a single Congressional session, however, vacancies on some courts and in some states will be more constrained than others, so every president should face some mix of minimally, moderately, and highly constrained confirmation environments. As a result, there should be evidence of each nomination strategy evidenced by all presidents.

The remaining chapters examine the evidence to support this theory of strategic presidential response to appointment constraints. Chapter Four tests predictions as to strategies presidents should use under minimal or moderate constraint: compromise over ideology or a combination of ideology and other demographic factors. Chapter Five presents a case study analysis to examine the strategy of bundling or packaging, a strategy that presi-

[6]Neil Lewis, "White House and Democrats Move on Ohio Court Plan." *The New York Times*, May 8, 2008.

dents should use only in highly constrained confirmation environments. The data presented chapters are drawn from nominations from Jimmy Carter's administration to that of Barak Obama, to capture variation of the most important sources of constraint. The theory of strategic presidential response to appointment constraints, however, is a general theory that sheds light on nominations in most periods, not just the most recent presidential administrations.

Chapter 4

Bridging the Ideological Divide: Compromise in Two Dimensions

The sudden death of Antonin Scalia on February 13, 2016 was the political equivalent of a lightening bolt. Obama suddenly found himself with the responsibility and opportunity to appoint a third justice to the U.S. Supreme Court. Liberals saw an unexpected opportunity to shore up the liberal wing of the Court and possibly tilt the entire direction of the federal courts. Conservatives mourned the loss of a conservative icon and lamented the possibility that his vacancy might be filled by a Democratic president. The tensions that had been simmering around judicial nominations for decades were on full display with this vacancy, as several factors associated with increased constraint were present. Scalia's death left the Court evenly divided on many salient issues between the traditionally liberal and traditionally conservative justices, making this a critical and closely watched seat. Political polarization and partisanship had been on the rise throughout Obama's presidency. Finally, interest in cooperation was low, as Obama was in the last year of his two presidential terms and many senators were facing reelection.

Obama acted quickly to ensure the Senate got the nomination well before the summer when the Senate often stops processing judicial nominations. On March 16, 2016, he nominated well-respected Merrick Garland, Chief Judge of the D.C. Circuit Court of Appeals, to be the next associate justice of the Supreme Court. As the media reported on the nomination, the administration emphasized that Garland was a "moderate" and "the subject of

effusive bipartisan accolades for decades."[1] The response from the Republican leadership in Congress was both swift and negative, however. Majority Leader Mike McConnell and Judiciary Chair Chuck Grassley both insisted there would be no movement on the Garland nomination. Many Republican senators also refused to even meet with him. Ultimately the nomination failed for lack of movement and was returned to the president at the end of the 114th Congress.[2]

Amid the speculation swirling around Obama's shortlist, many were initially surprised by the choice of Merrick Garland, as many were expecting a nontraditional jurist as Obama's last Supreme Court nomination. Garland was clearly chosen as a nominee that could be confirmed, or at least a nominee that would put pressure on Republicans if they refused to confirm him. In this highly constrained confirmation environment, Obama's best option was to appoint a well-qualified, moderate individual who had supporters on both sides of the aisle. But the extent to which Garland truly was a compromise nominee becomes more evident when he is compared to others rumored to have been on the shortlist. One judge that was supposedly considered was Sri Srinivasan, a 49-year-old Indian American who sat on the Court of Appeals for the D.C. Circuit after being appointed by Obama. Another suggestion was Paul Watford, a 48-year old African American who a judge on the 9th Circuit. All three of these appeals courts judges had reputations for being moderates and highly-qualified. But Merrick Garland clearly stood out in the shortlist: he was a traditional white nominee in his 60s. It seems evident that Obama compromised on several nominee characteristics simultaneously in making this nomination.

When faced with heightened confirmation constraints, a strategic president should moderate his nomination strategy, offering up a compromise nominee more likely to win the consent of the Senate. A sensible and obvious strategy would be to compromise on nominee ideology, offering up a moderate candidate who would be relatively unobjectionable.

[1] Juliet Eilperin and Mike DeBonis, "President Obama nominates Merrick Garland to the Supreme Court," *Washington Post*, March 16, 2016.

[2] Jess Bravin, "President Obama's Supreme Court Nomination of Merrick Garland Expires," *The Wall Street Journal*, January 3, 2017.

In an era of growing political polarization, however, that type of compromise may be less effective as fewer Senators inhabit the middle of the political spectrum or cross party lines. As presidents face increasingly high levels of constraint, they may find it necessary to compromise over more than one nominee attribute or dimension. In this chapter I evaluate that possibility by examining the presidential strategy of bargaining on two nominee traits together, the ideology and age of a judicial nominee.

4.1 Presidential Strategic Response to Appointment Constraints

As discussed in Chapter 3, presidents have multiple goals in making judicial appointments, including making policy gains and bolstering their political capital. The president can use his advantage as the first-mover in the appointment process to identify the nominees that combine the mix of personal traits that are most helpful in furthering his goals. The success of that nomination, though, will be conditioned by the level of constraint that he faces in an individual Congress and an individual vacancy. When he faces a low-level of constraint and anticipates a successful confirmation, a president is likely to nominate the individuals that maximize both his policy and political goals. As the institutional context makes confirmation less certain, a strategic president will likely present a more ideologically moderate candidate as a compromise. However, he may instead choose to bargain over a second dimension such as age or gender in an attempt to make ideological gains where he might otherwise be unsuccessful in getting his most preferred nominee confirmed.

4.1.1 Nominee Attributes and Presidential Goals

With their policy and political capital goals in mind, presidents will consider multiple nominee attributes as they screen potential candidates. Chief among these is likely to be the ideological preferences of the individuals they consider nominating. In furthering their

policy goals, presidents should seek out ideologically proximate nominees, particularly with regard to highly salient issues. Presidents have traditionally appointed members of their own party to the bench, but presidents increasingly look for ideological compatibility even amongst party members (Goldman 1997). Modern presidents are likely to prioritize ideology over party loyalty and look for the nominee that mostly clearly represents his preferences.

A president that cares about ideology should also care about the age of the nominee. In a modern environment where policy concerns often trump patronage goals, the age of the nominee becomes more important in furthering policy goals. Federal judges are entitled to life tenure on the bench, so the age of a nominee affects the length of his or her term and, by extension, the president's legacy. Choosing to appoint younger judges to the Courts of Appeals also creates a pool of potential Supreme Court nominees from which to draw when future vacancies arise. The impact on policy of nominees that are ideologically proximate to the president will be greater as they spend more time on the bench and as they are potentially elevated in the judicial hierarchy. Thus, while the president may not have independent preferences over the age of his nominees, a strategic president will view nominee age as a potential multiplier of ideological impact. By choosing nominees who are both ideologically proximate and young in age, presidents can extend their influence on the judiciary even further.

Modern presidents should have clearly ranked preferences over the nominee types created by ideology and age. Presidents should most prefer to appoint judges who are both ideologically proximate and young in age (Figure 4.1) as a means to further their policy goals. If the president is forced to compromise on one of those two dimensions, he should prefer an older, ideologically proximate candidate who will share his preferences to a younger, ideologically distant nominee who will not. The president can still further his policy goals with an older nominee, but not with an ideologically distant one. Similarly, if the president is compelled for some reason to nominate someone who does not share his

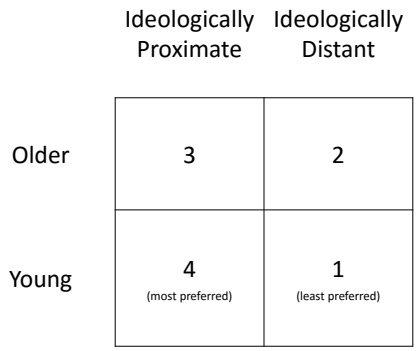

Figure 4.1: Presidenital Preferences of Nominee Age and Ideology

ideological preferences, he should prefer an older nominee who will serve a limited term to a young nominee who will likely continue on the court for decades.

In addition to ideology, modern presidents are likely to consider the gender and race of potential nominees, but they may do so for one of two reasons. Democrats have often cited racial and gender diversity as a stated goal, which can be understood as a means to build political capital (Scherer 2005). Nominating a set of judges intended to diversify the bench is an easily observed strategy likely to win support among liberal activists. Given the stand-alone importance of diversity as a goal for Democrats, they may be willing to give up some degree of ideological gains in order to put women and minorities on the bench. The story is likely different for Republicans, however. When used as a second bargaining dimension (rather than as a stand-alone goal), the diversity of nominees may allow the president to make ideological gains in a more conservative direction, as in the appointment of Clarence Thomas to the Supreme Court.

4.1.2 Constraints on Presidential Choice

The president's ability to appoint his most preferred nominee will be limited by the level of constraint he faces in the Senate. The effective level of constraint will be a combination of both the distribution of preferences in the Senate during a particular Congressional session

and the intensity of preferences specific to a particular vacancy.

Session-Specific Constraints

A Senate controlled by a party opposite the president's is a significant constraint on his ability to win successful confirmation of his most preferred nominees (e.g. Bell 2002*a*, Binder 2001, Binder and Maltzman 2002, 2009, Maltese 2003, Massie, Hansford and Songer 2004). As in policy-making in general, the presence of divided government constrains the president because it increases the distance between the president's preferred outcome and those of the median Senate voter. In the case of lower court nominations, other potential veto players, including the chair of the judiciary committee (Binder and Maltzman 2004) and the majority leader (Binder 2001) are likely to also be a member of the party opposite the president adding additional sources of constraint. The effect of divided government will be exacerbated by an increase in polarization between the two parties, as increasing polarization increases the distance between the president and veto players from the opposite party. The polarization of the political parties essentially magnifies the effect of divided government in constraining presidential choice in judicial appointments. Finally, there is compelling evidence that the timing of elections also constrains the president by increasing incentives to delay confirmations and leave seats vacant for the incoming president (Binder 2001, Massie, Hansford and Songer 2004).

Vacancy-Specific Constraints

The main obstacle to successful confirmation is likely the preferences of the home state senators. Both senators from the state with which a particular vacancy is associated will have a particular interest in that nominee, regardless of the party they represent. While senators will have less influence over a circuit court nomination from their state than they will a district court nomination, they usually expect that presidents will at least consult with them in attempt to find a suitable candidate (Rutkus 2008). Thus, if one or both of those

senators are from the opposing party, the president's choice will be more constrained. It also follows that the greater the distance between the home state senators and the president, the more severe that constraint will be.

The level of constraint will also vary as the intensity of individual senators' preferences increases for some vacancies. The status quo on the circuit or district in question is likely to affect the level of constraint the president faces. For example, a critical seat, one in an evenly divided circuit, is likely to face heightened scrutiny as the potential policy consequences of that appointment will be more apparent (Binder 2001). This is the same reason that the confirmation of appellate court nominees has been more contentious than confirmation of district court nominees, presumably due to the larger policy role played by the circuit courts. Thus, the president's choice will be more constrained when the vacancy is on the D.C. circuit, or on a closely-divided circuit.

4.1.3 Presidential Nomination Strategy in Two Dimensions

Presidents that face significant constraints will nominate judges that are observably different from those nominated under minimal constraint. When the institutional context suggests that confirmation is relatively assured under minimal constraint, the president will use a nomination strategy to maximize his policy and political capital gains. The president is likely to be minimally constrained under unified government, when political polarization is low, when the home state senators are of the president's party, and when the vacancy in question has fewer policy consequences. Under these circumstances, the president should be most likely to nominate a judge who is both ideologically proximate and young.

As the institutional constraints increase the president will have to make concessions over his most preferred candidate if he wants them to be successfully confirmed. This compromise might take a number of forms. Most obviously, the president might nominate the most ideologically proximate nominee from the set of individuals that are acceptable to both the White House and the Senate. The result would likely be a moderate candidate

that requires a minimal expenditure of political capital but also provides the president with only moderate policy gains. However, the president might instead choose to introduce a second bargaining dimension such as age, in an attempt to maximize his policy gains. He may, for example, nominate a potential jurist who shares his ideological preferences but is older at the time of nomination. The older nominee's impact on the judiciary would be more limited as they would likely serve a shorter term, thus lowering the stakes for the opposition. By compromising over age instead of ideology, the president can get a more preferred nominee confirmed and extract additional policy gains.

4.2 Data and Methods

I test this theory of presidential strategy under appointment constraints using a selection of nominations to the United States Courts of Appeals between 1977 and 2012. Data on nominations between 1977 and 2004 are available from the Lower Federal Court Confirmation Database (Martinek, Kemper and Van Winkle 2002). This dataset includes indicators recording the nominee, the nominating president, the congressional session, and the final outcome. To extend this data through 2012, I obtained the Congressional records of judicial nominations accessible via Thomas and processed that data into a similar format. In order to assess presidential strategies in choosing nominees, I have paired these data on the nominations with additional information on nominee attributes such as race, gender, and birthday. For nominees who were successfully confirmed to the Courts of Appeals or had been confirmed to another federal judgeship prior to their nomination, these attribute data were obtained from the Federal Judicial Center. For the subset of judges who were never confirmed to the Courts of Appeals or to a lower federal court, I coded their individual attributes from the written questionnaires they completed as part of their vetting by the Judiciary Committee when available. For the few remaining nominees, I relied on news reports and their online profiles to identify their nominee characteristics.

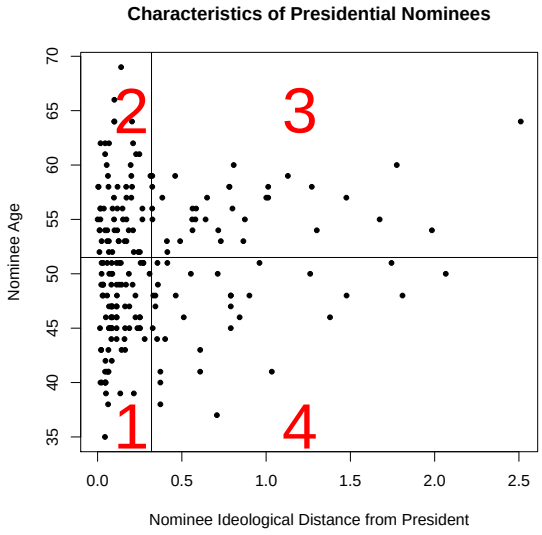

Figure 4.2: Attractiveness Scale

4.2.1 Dependent Variable

This theory identifies at least two possible strategies the president might employ when faced with increasing constraints in the Senate. One strategy is to bargain directly over ideology, sending a nominee to the Senate that may be a more moderate nominee than the president would prefer. Under this strategy, a compromise nominee is one who is further from the president's ideal point than he would prefer. Thus, the first set of analyses predicts the ideological distance between the nominee and the nominating president. As the level of constraint increases in the Senate, the nominee should be more ideologically distant from the president that nominates him or her.

A second possible strategy, though, is to introduce a second bargaining dimension in an attempt to give up less ideology in the compromise. Here, I examine the specific strategy of bargaining over both ideology and age. The second set of analyses takes as the dependent variable the ranking of the president's nominee on an ordinal "attractiveness" scale. The scale ranks the four different combinations of nominee age and ideological proximity created when the continuous variables age and ideology are split at their midpoints (Figure 4.2). The most attractive nominee type is a nominee who shares the president's preferences

and is relatively young, as those judges are mostly likely to help the president achieve their policy goals for a extended period of time. A nominee is assigned an attractiveness score of 4 if they are below the median age and ideologically proximate to the president. The next most attractive nominee type (assigned a 3) is the set of nominees that are above the median age and ideologically proximate. Those nominees are likely to further the president's policy goals, but for a shorter period of time. Of potential nominees that are more ideologically distant, the president should prefer an older nominee to a younger nominee to somewhat limit their time on the bench. Thus, a nominee that is above the median age and is ideologically distant is assigned a 2 on the attractiveness scale. Finally, a nominee that is below the median age and ideologically distant would be the least desirable nominee type and is assigned a 1. The distribution of nominees on the attractiveness scales suggests that presidents are less likely to appoint a young, ideologically distant nominee as one would expect.

A major obstacle for any analysis of judicial nominations is finding an appropriate measure of ideology. Here, the ideal measure would be analogous to the Segal-Cover scores that are often used for the study of Supreme Court nominations (Segal and Cover 1989). These measures, based on newspaper editorial coverage of the nominations are available for both confirmed and failed nominees, sensibly predict judicial behavior for sitting justices, and are exogenous to most questions being studied by judicial scholars. No such measure currently exists for the lower courts, however, for several reasons. First, the number of nominees is much higher, making the generation of a such a measure more labor intensive. Secondly, lower-court nominees get substantially less media coverage, making the collection of such data less plausible. A commonly used set of ideology scores for judges on the Courts of Appeals are GHP scores, which attribute ideology of the appointing president or home state senator (when senatorial courtesy is operable) to the judge. For many questions of judicial behavior, these scores are appropriate, but because they assume a different theory of nominations they can not be used as a measure of ideology here.

Instead, ideology scores for the nominees and the president are drawn from Adam Bonica's Database on Ideology, Money in Politics, and Elections (DIME). The DIME contains ideology estimates (CF scores) generated from more than 100 million records of donations made between 1979 and 2012. The estimates are generated based on a spatial model of giving that assumes donors assess candidate ideology and distribute available funds to the candidates whose preferences they share. A significant benefit of Bonica's methodology is the ability to scale both contributors and recipients of campaign funds in a common space, using contributors that give to multiple candidates across both state and federal elections as bridging observations (Bonica 2013). Nominees for the federal bench are obviously not included among the recipients of campaign funds, but they are a group of active citizens who are likely to be campaign donors making the donor CF scores useful for this type of study.

In order to extract ideal points from the database, I first identified all individual donors that shared the same first and last name as the nominees to the U.S. Courts of Appeals between 1977 and 2012 and then culled that list using other available information such as state of residence, employer, and the timing of the donation to biographical information on the nominees. Through this process I identified a set of 112 donors that I positively confirmed as nominees to the Courts of Appeals. In addition, Bonica himself generally shared a set of scores that he generated from the database using a different search algorithm. His search identified an additional 38 nominees, bringing the total to 155 nominees or roughly 38% of the nominees.

For the purposes of measuring ideology of nominees to the lower federal bench, these estimates are still not ideal, but have considerable advantages, nonetheless. Scores generated from campaign donations are likely a valid estimate of preferences while at the same being exogenous to the questions surrounding their nomination. When compared to GHP scores (right panel, Figure 4.3), the CF scores are generally in agreement about which nominees are located at the extremes of continuum, while have less agreement around the

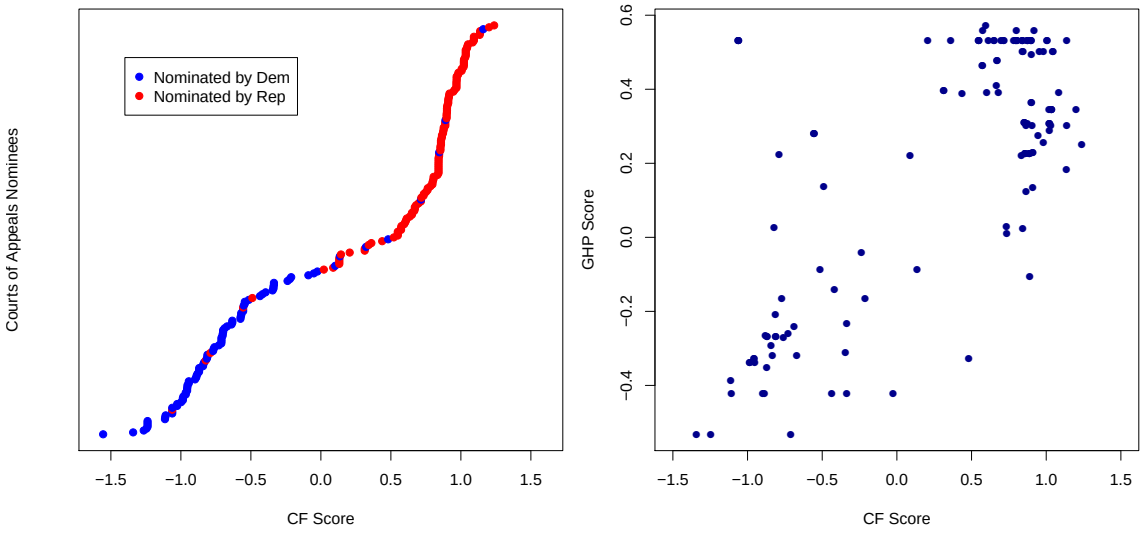

Figure 4.3: CF Scores for Courts of Appeals Nominees

middle. That sort of ambiguity about "moderates" is a common feature of many ideology measures as the input data is less effective at discriminating those types. Because the CF scores for donors draw on less data that the scores for recipients, however, these scores may be less reliable, especially for more moderate donors. A rank ordering of the CF scores suggests they are generally in line with what we would expect given the party of the appointing president (left panel, Figure 4.3).

A concern that merits particular attention is whether this subset of nominees for whom I have ideology point estimates are representative of the nominee pool as a whole or whether selection bias will be introduced into the analysis. Table 4.1 presents a comparison of the individual nominees to the larger set of nominees across various attributes of interest. In terms of key demographics like gender, race, and age, this subset is substantially similar to the larger population of nominees. The final confirmation rates are similar as well. The primary difference I am able to identify is in their level of qualification. Where as roughly one-third of the nominees have prior experience as a federal court judge, only one-fifth of the donor nominees were on the federal bench. The difference in their ABA scores can likely be attributed to this different level of expertise as well. It makes perfect sense

Table 4.1: Nominee Donors v. Non-Donors

	All Nominees	Donor Nominees	All Nominations	Donor Nominations
Proportion Female	.21	.23	.22	.24
Proportion Non-White	.17	.18	.18	.19
Proportion Prior-Judge	.35	.20	.32	.17
Mean ABA Score	4.80	4.61	4.73	4.53
Mean Age	50.9	50.8	50.9	50.6
Proportion Confirmed	.81	.81	.63	.58
N	414	155	537	217

for sitting judges to be less likely to donate money to political campaigns to avoid the appearance of bias, so this particular difference is not particularly concerning.

The risk of selection bias would be greater if the set of donor nominees were ideologically different from the non-donor nominees. There is no reason to think that nominees who are political contributors are more likely to lean in one political direction or another, but they are certainly politically active citizens who may be more ideologically extreme than their non-donor colleagues. It is also possible, however, that these donors are just less savvy about concealing their ideological preferences than a nominee like John Roberts. Clarity of preferences is an entirely different dimension from location of preferences (or even intensity of preferences), so absent a competing measure of ideology it is difficult to answer this question with certainty. But the possibility of selection bias certainly exists, so it is prudent to remain vigilent.

The common-space CF scores drawn from DIME are a reasonable indicator of ideology, so I proceed with caution. The scores are centered around 0, with negative scores indicating

a more liberal ideology and positive scores indicating a more conservative ideology. To measure nominee ideological proximity, I use the absolute value of the difference between the president's CF recipient score and the nominee's CF donor score. For the attractiveness scale, the cutpoint between an ideologically proximate and ideologically distant nominee is the mean of this distance measure.[3]

4.2.2 Independent Variables

The degree to which a president must compromise on his nominee will be determined by the level of constraint surrounding the individual vacancy. A significant source of constraint is the composition of the Senate at the time of the nomination. The presence of divided government creates an obstacle for the president primarily because by definition the median voter in the Senate will be a member of the opposing party and likely have opposing preferences. In the case of lower court appointments, however, it is perhaps more important that the the majority leader and the judiciary chair will be from the opposite party as well. Divided government is indicated by a dummmy variable and is expected to decrease the desirability of the presidential nominee.

Similarly, increasing political polarization generates constraints on presidential choice as it increases the distance between the president's most preferred outcome and those of members of the opposite party. Polarization will be particularly problematic when the president faces a majority in the Senate of the opposite party. As polarization increases under divided government, the president's ability to win confirmation for his most preferred nominees would diminish. I have used NOMINATE scores to generate a measure of polarization, which is the absolute value of the difference between the mean party ideology for each Congress. Because the president should be more constrained by high levels of polarization when he faces divided government than when he faced unified government, I include an interaction of the indicators for polarization and divided government.

[3]Using the median as the cutpoint does not generate substantially different results.

The composition of the home state senate delegation should constrain the president's choice as well. While several members of the Senate can potentially derail a confirmation, the senators from the nominees' state are the most likely to have the incentives to do so. When one of these senators is ideologically distant from the appointing president, he or she is more likely to object to the president's nominee. To account for this dynamic, I run two models with alternate measures of this constraint. The first model relies on party identification to measure potential opposition. The measure is a count of the opposing senators, taking a value of 2 if neither senator is from the president's party, 1 if one senator is from the president's party, and 0 if both senators are from the president's party. The second model relies on ideological distance as an indicator of opposition. This model uses a measure of the distance between the NOMINATE scores of the president and the senator who is the more ideologically distant. As the president faces increasing constraint from the home state delegation, he should name a less attractive nominee. Unfortunately, because there are no senators associated with the D.C. Circuit or the Federal Circuit, the inclusion of this measure effectively eliminates these circuits from the analysis.

There is good evidence that the president will be more constrained during a presidential election year (Martinek, Kemper and Van Winkle 2002), as the opposing party has an incentive to keep the seat open in the hopes of submitting their own nominees for the open seats after the election. To account for this effect, I include a dummy variable indicating the fourth year of a presidential term when an election is looming. I expect that during a presidential election year, the president's nominations will be more constrained.

Additionally, the attributes of the vacancy itself are likely to create varying levels of constraint. The president is more likely to face opposition in Congress while trying to fill a "critical" seat, or a vacancy on a closely divided circuit. If the seat has the potential to alter the ideological balance of the entire circuit, the president may be less likely to name his most preferred candidate as he anticipates resistance in the Senate. Following Binder and Maltzman (2009), I include a dummy variable indicating the circuit is a "critical circuit"

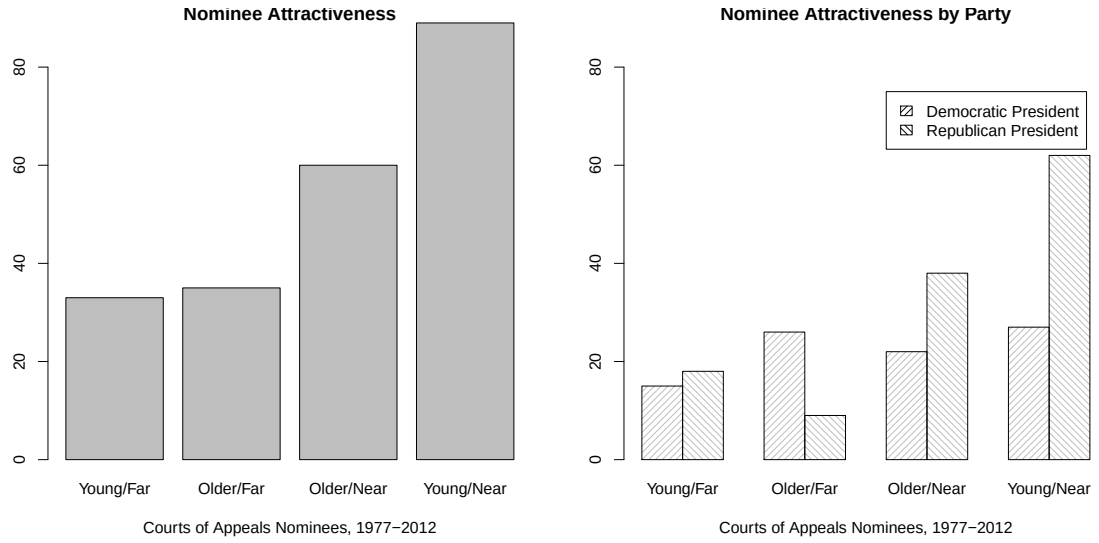

Figure 4.4: Distribution of Nominees on Attractiveness Scale

if between 40% and 60% of the judges on that circuit at the time of the vacancy were appointed by Democrats. I expect that a nomination to a "critical circuit" will be more constrained than nominations to noncritical circuits.

Finally, I include several measures to account for other factors that may affect the president's choice of nominee on the attractiveness scale. Because there is reason to believe Republicans have been more aggressive in attempting to further policy goals by appointed young, ideological judges than Democrats (see Figure 4.4), I include a dummy indicating the party of the president. I also include dummy variables for the race and gender of the nominee to separate out any ideological effects that may be associated with those demographics.

4.3 Results

The results of the analysis are presented in Table 4.2. Models (1) and (2) are OLS regressions predicting the ideological distance between president and the nominee. Constraints on presidential choice would force the president to choose nominees that are more ideo-

Table 4.2: Effect of Constraint on Nominee Ideology and Nominee "Attractiveness"

	Dependent variable:			
	Ideological Distance		Nominee Attractiveness	
	(1)	(2)	(3)	(4)
Distant HSS	0.122		0.053	
	(0.113)		(0.566)	
Num. Opposing HSS		0.043		-0.161
		(0.045)		(0.238)
Polarization	2.385***	2.226***	-7.519**	-7.357**
	(0.783)	(0.748)	(3.157)	(3.215)
Divided Government	2.201***	2.073**	-6.397**	-6.295**
	(0.843)	(0.821)	(3.066)	(3.215)
Polarization * DG	-3.129**	-2.949**	8.952**	8.818**
	(1.209)	(1.179)	(4.170)	(4.250)
Presidential Election	-0.035	-0.038	-0.516	-0.513
	(0.098)	(0.096)	(0.405)	(0.404)
President's Party	-0.330***	-0.304***	1.063***	1.123***
	(0.100)	(0.092)	(0.457)	(0.393)
Critical Seat	-0.198***	-0.198***	0.658*	0.671**
	(0.075)	(0.076)	(0.345)	(0.340)
Nominee Gender	-0.108	-0.107	0.831**	0.866**
	(0.071)	(0.071)	(0.382)	(0.371)
Nominee Race	-0.047	-0.040	-0.096	-0.064
	(0.110)	(0.105)	(0.526)	(0.533)
Constant	-0.772*	-0.652		
	(0.443)	(0.483)		
N	176	176	176	176
R^2	0.179	0.176		
Adjusted R^2	0.134	0.132		

Note:Robust SE's clustered on nominee. *p<0.1; **p<0.05; ***p<0.01

logically distant, so a positive coefficient in these first two models would be evidence of constraint. Models (3) and (4) are ordered logits predicting the nominee's desirability on the attractiveness scale, combining ideological distance with age of the nominee. In these models, a negative coefficient would be evidence of constraint, as the president would be forced to choose a less desirable nominee. The results are reported with robust standard errors clustered on the nominee to account for the individuals in the data who are nominated multiple times before being confirmed or completely withdrawn from consideration.

A significant finding across all models is the impact of presidential party on both the ideological proximity of the nominee and the overall attractiveness of the nominee. A change from a Democratic president to a Republican president is associated with a roughly 0.33 decrease in the ideological distance between the president and the nominee, slightly less than one standard deviation. This finding confirms initial trends in the data as well as existing claims in the literature that Republicans have made a more concerted effort to appoint judges with ideological considerations in mind (Goldman 1997, Scherer 2005). Importantly, this finding holds once nominee age is included in the analysis, as Republican presidents also appoint more attractive nominees overall. Figure 4.5 provides a comparison by party of the predicted probabilities of appointing each nominee types. The solid lines in the two left-hand plots indicate the probability that the president will nominate his most preferred type: a young, ideologically-proximate potential jurist. A comparison of those two lines demonstrates that Republican presidents are more likely overall to appoint their most preferred nominee-type than Democrats at every level of polarization. While presidents from both parties have sought to influence the staffing on the Courts of Appeals, Republican presidents have made more of a concerted effort to shift the long-term policy implications of those appointments.

The effect of increasing political polarization and divided government also have a statistically significant affect on the president's nominee choice in all four models. As polarization increases, the ideological distance between presidents and their nominees increases.

Similarly, as polarization increases presidents are less likely to appoint an attractive nominee under unified government (Figure 4.5, left panels). Under unified government, presidents of both parties are most likely to appoint an older, ideologically proximate nominee when polarization is at a minimum. But as polarization increases, the president is more likely to appoint a less desirable nominee.[4] Presidents of both parties are constrained in the same way, though the cut points marking a shift to a less desirable nominee are higher for Republicans. Even under conditions of unified government, shifts in polarization can constrain presidential choice. The rules of the Senate empower individual Senators to block a nominee through holds or filibusters, so it may be that even if the median voter is a member of the president's party significant polarization can constrain the president through other means.

Under divided government, presidents from both parties are likely to be constrained in their choice of a nominee (Figure 4.5, right panels). Rather than sending their most preferred nominees to the Senate, all president are more likely to send someone older, or even more ideologically distant. Under these circumstances, changes in polarization do not seem to have much of an effect on the choice of a nominee, as the president is already considerably constrained. This is the opposite of the expectation: it was reasoned that under divided government polarization would sharply increase the level of constraint on the president by further entrenching the opposing party.

Unexpectedly, none of the models indicate any constraint attributable to the preferences of the home state senators. The literature is mixed on the impact of the home state Senate delegation on the confirmation process, but it is widely assumed that the effects of senatorial courtesy are more likely to be seen at the nomination stage. Because the president knows that the home state senators will be influential in the confirmation outcome of their nominees, he normally consults with both senators prior to naming his nominee to avoid a

[4] A concern here is that polarization measures may also capture an underlying time trend, as polarization has steadily increased for most of the time period being studied. This result holds, however, when time is directly modeled through the inclusion of year dummies.

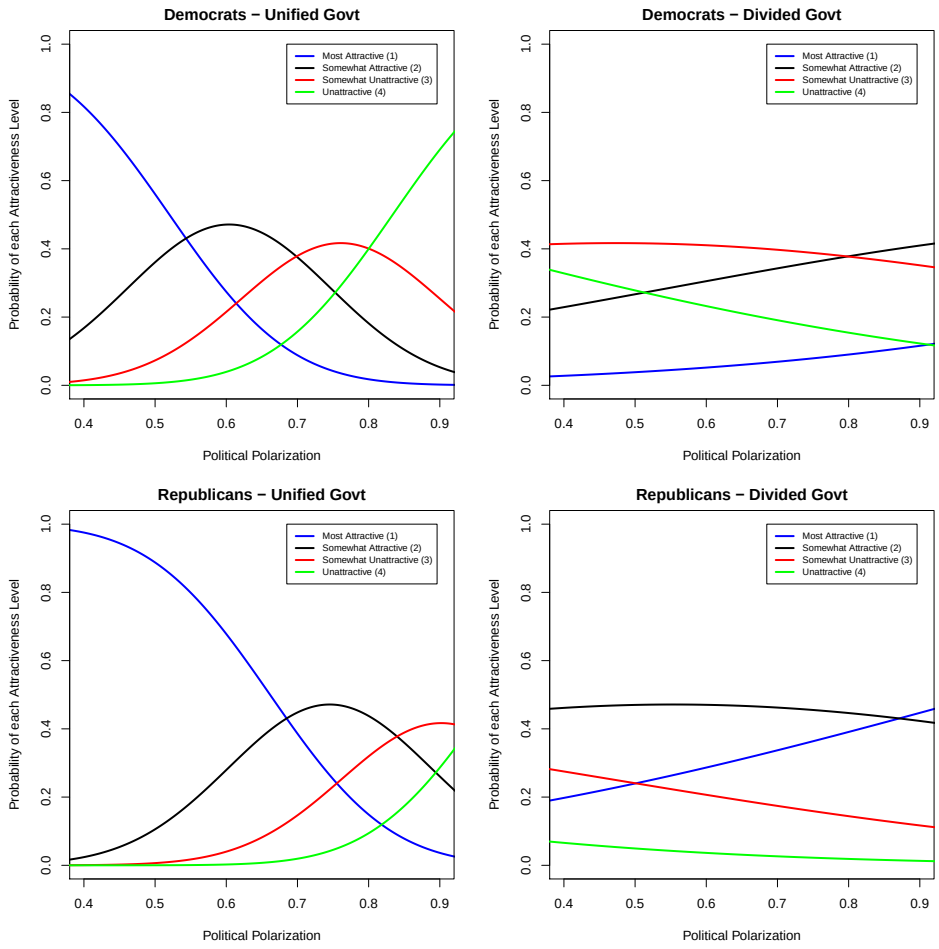

Figure 4.5: Effect of Constraints on Attractiveness of Male Nominees

contentious confirmation process. However, there is no evidence here that such consultations result in an ideologically different nominee. In fact, George W. Bush's two California nominees to the Ninth Circuit are among his most conservative picks, despite facing two of the most liberal senators in Barbara Boxer and Dianne Feinstein. The role of home state senators is well documented for district court nominations, but the findings here suggest the selection of Courts of Appeals nominees has become a national process more akin to the selection of Supreme Court justices. One explanation for the increasingly contentious confirmation process is the tendency of presidents to assert more authority over the selection process at the expense of home state senators (who then block the nomination in the Senate) (Law 2004). This result lends some credence to that interpretation, as it does not

appear that individual senators have much influence over these particular nominations.

The heightened salience of a critical seat is a statistically significant factor affecting presidential choice in all four models, but the direction is the opposite of the theoretical expectations. A circuit that is evenly split will be the subject of heightened scrutiny in the Senate, so a strategic president could be expected to moderate his choice to make confirmation more likely. The prediction was that he would be constrained by the intense preferences he would likely face in Congress, but the opposite seems to be the case. When the vacancy is on a critical circuit, or a seat that could sway the ideological balance of the court as a whole, the president is actually likely to appoint a nominee that is more ideologically proximate than if the seat were not critical. During the late 1990s and the early 2000s, for example, the 6th Circuit remained closely divided with several open seats, giving presidents Clinton and Bush an opportunity to dramatically shift the balance on the circuit. Under those circumstances, Clinton nominated Helene White, who, with the exception of two nominees to the D.C. Circuit, was the most liberal Clinton nominee in these data. Similarly, George W. Bush nominated Henry Saad, who was his 3rd most conservative nominee in these data. Both nominations were made in the face of opposition from home state Senators and thus faced very difficult confirmation prospects.

This result suggests that rather than being constrained with regards to critical circuits in the hopes of a successful confirmation, presidents have been more likely to focus their efforts on rallying supporters for his most preferred nominee. Given a desire to further both policy and political capital goals, this strategy makes sense. An appointment to a critical circuit can have a disproportionate impact on future policy, so even if the chances of confirmation are lessened the risk may be worth it. A president would likely rather pool his resources to fight for a seat on critical circuit than to evenly spread his efforts across all seats. A strategy of nominating a "pure" pick and fighting for her is likely to appeal to party supporters, generating political capital even if the nomination fails.

Lastly, a nominee's gender does seem to be related to their overall attractiveness, sur-

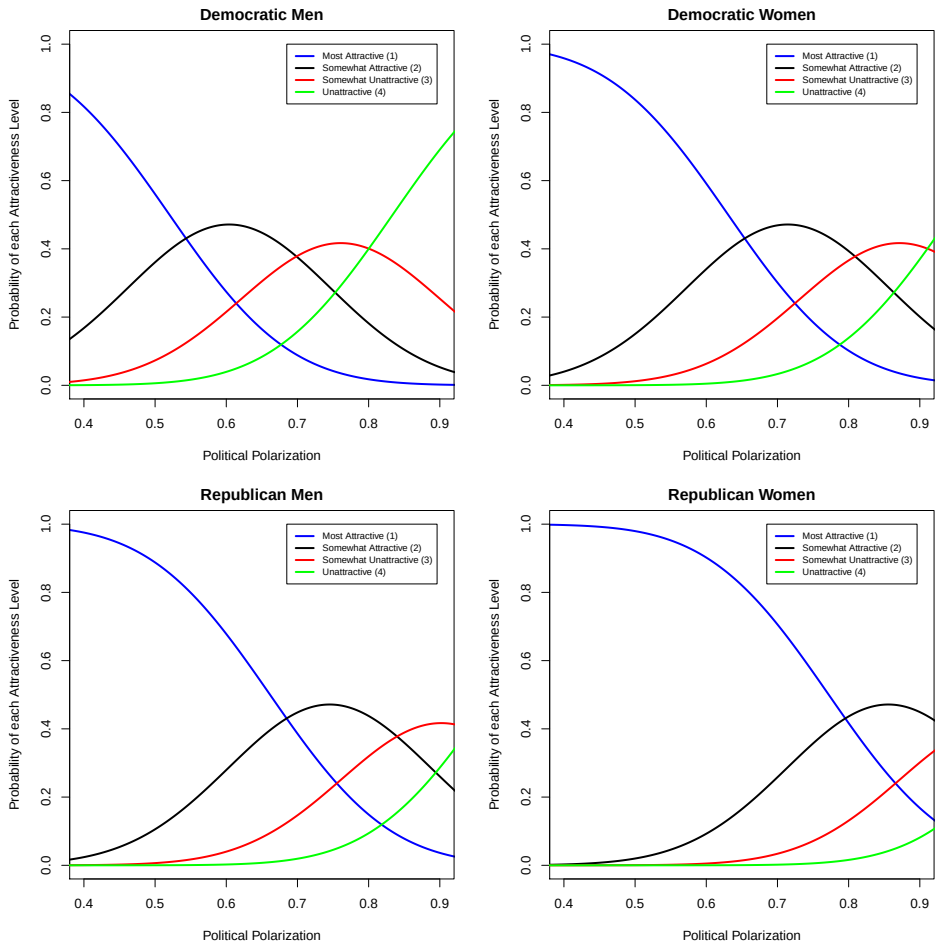

Figure 4.6: Effect of Constraints on Attractiveness of Female Nominees

prisingly. Whereas these demographics do not seem to explain ideology of the candidate directly in the OLS models, there is a strong relationship between a nominee's gender and their overall attractiveness. The nomination of a woman does seem to enable the president to choose a more appealing candidate overall when age and ideology are taken together. For both Democrats and Republicans, the likely attractiveness level of their nominee is higher when the nominee is a woman (Figure 4.6). For both parties, the cutpoints marking the shift in predicted probabilities to a less preferred nominee move to the right, indicating that under higher levels of polarization a female nominee is more likely to be of the most preferred nominee type. Indeed, under George W. Bush, 12 of the 20 female nominees were under the mean age and ideological distance. Of Clinton's 14 female nominees, 9 were

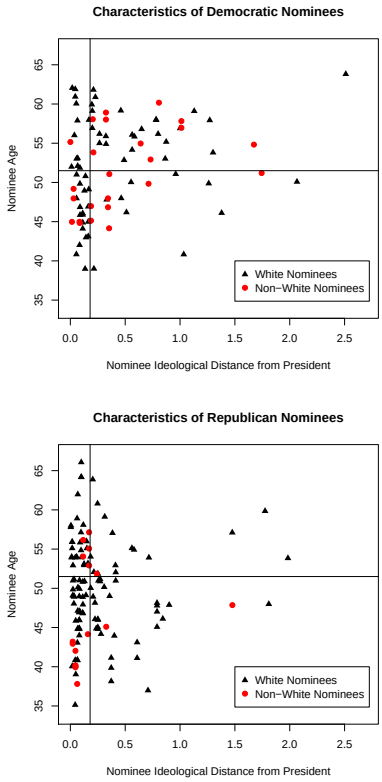

Figure 4.7: Age and Ideology of Non-White Nominees

under the mean age and ideological distance. The slates of women who were nominated were better candidates on the whole from the perspective of the nominating presidents.

It is not immediately clear why this would be the case. It may be that the president anticipates less opposition to a female nominee given the general trend of diversification, so he may be willing to send a younger, more ideologically proximate nominee. This result may also be a reflection of the nominee pool, in that women who are successfully considered for a circuit court appointment may come to the attention of political leaders through a different mechanism. It may be the case that the women in the nominee pool are just younger and more ideologically distinct than their male counterparts. At any rate, this result is interesting in that it challenges a traditional idea that a more diverse bench is automatically a more liberal bench. Presidents of both parties have been able to achieve both policy goals and political capital goals simultaneously through gender diversification of the bench.

This analysis does not indicate that nominee race has an impact on either of the dependent variables. Of the nominees included in this analysis, only 18% are non-white, making the statistical effect hard to identify. It may also be the case, however, that Republicans and Democrats use race in different ways that have opposite effects on the dependent variables. Figure 4.7 identifies the non-white candidates that were included in this analysis and the party of the president who appointed them. Nearly all of the non-white nominees sent to the Senate by Republican presidents are ideologically proximate. In contrast, non-white jurists nominated by Democrats are much more representative of the the slate of nominees as a whole. One possible explanation for this might be that Republicans recognize the value that Democrats place on diversification of the federal bench and are able to nominate more conservative candidates knowing Democrats will be more hesitant to reject nominations of nontraditional candidates. It may also be that Republicans are leery of the political beliefs held by non-whites on some salient issues, and as a result seek out candidates that are more clearly conservative. Given the paucity of the data with respect to race, it is difficult to know for sure, but if Republicans and Democrats have different objections with regards to race this analysis would not pick up that difference.

4.4 Discussion

This analysis reviews and then tests some of the key implications of a theory of strategic nominations. The findings suggest that as the president faces increasing constraints in the Senate he is more likely to offer a compromise nominee by giving up some of that seat's potential policy impact. Divided government appears to have a dramatic impact on dampening presidential choice in making a nominee. When presidents face a Senate controlled by the opposite party, they are not likely to send their most preferred nominee to the Hill for a confirmation hearing. Even under unified government, though, high levels of polarization can constrain presidential choice as well.

An important and significant additional finding, however, is that individual home state senators may have less influence in the nomination process than is often assumed. In fact, studies of judicial nominations have maintained a fairly sharp divide between the analysis of the Supreme Court and the lower courts, recognizing the different mechanisms at play for lower courts. The Courts of Appeals have been largely considered a "lower court" for the purposes of these analyses, suggesting the appointment process operates more like the highly decentralized process of appointing district court nominees than the president-centered appointment process of appointing Supreme Court justices. It is certainly true that in the past, Courts of Appeals nominations were regional affairs, but this analysis suggests that modern presidents may be taking more of an interest in the middle courts and asserting more control over the process. The implication of that centralization of the selection mechanisms would be an appointment process that mimics more closely the selection of justices to the Supreme Court.

This analysis, like all social science studies, is limited in scope by the data that are available. A theory of strategic nominations suggests that presidents in earlier decades may have been less constrained by the overall composition of the Senate and more constrained by individual home state senators. Unfortunately, the ideological data to further test that assumption do not exist. Confidence in these findings could certainly be bolstered both by increasing the number of observations in the years studied and by extending the analysis backward to cover additional years. Both strategies require additional data on the ideological preferences of nominess, something that does not currently exist.

Importantly, this analysis also does not take into account an additional presidential option, the option to leave a seat vacant if there is no agreeable candidate either by making no nomination at all or by nominating someone who will appeal to active party elites even if they are not confirmable. Because this particular bargaining environment does not require a result, the preferences in the Senate may have less impact than if an immediate resolution were required. The president can simply choose to do nothing–this evidence of constraint

is not apparent in this analysis. Similarly, the most clear measure of constraint would be a comparison of these nominees to individuals who were on the short-list but ultimately not chosen. In the absence of data on the set of negative-cases, a comparison of actual nominees to each other (as opposed to nominees v. non-nominees) is a reasonable first step. The evidence of constraint here may actually understate the degree to which the president must compromise on achieving his policy goals.

While the increasingly contentious confirmation process is usually criticized as an example of gridlock and partisanship, a newly invigorated bargaining process could ultimately be beneficial for the judiciary. The finding that a contentious confirmation process amounts to heightened scrutiny of nominees and in some cases leads to a tempered choice on the part of the president is a welcome result. If presidents are forced to make concessions over the ideology or attributes of their nominees, we may see a more moderate judiciary in the long run which would result in a more stable jurisprudence over time. If presidents compromise over age and appoint older judges there will be more turnover on the bench, making the judiciary more "democratic" and less removed from the people.

The current level of contentiousness in the judicial nominations process is concerning, both because of the persistent vacancies and the resultant workload problems. But while understanding the causes and short term implications of the changes in the confirmation process is important, the critical implication is the long term impact these changes are likely to have on which individuals are successfully nominated and confirmed and how those appointees shape the law. We have some sense of how a president strategically responds to constraint when nominating Supreme Court justices, but that understanding does not necessarily translate to lower court appointments which operate differently. With the Supreme Court hearing less than 75-80 cases a year (or less than 4% of the cases appealed from below), the lower courts are the final arbiters in the bulk of cases filed in the federal system (Epstein et al. 2012). As such, the lower courts play a critical role in the development of the law (Howard 1981, Songer, Sheehan and Haire 2003). Shifts in presidential

appointment strategies are likely to produce a different set of judges for the lower courts which likely have important implications for the law more generally. The composition of the lower courts is consequential for the future development of American jurisprudence. Understanding whether and how presidents have adapted to the new realities of Senate confirmation is a critical first step in examining the impact of lower court staffing and ultimately on the impact of those changes in the law.

Chapter 5

The Whole Package: Compromise Through Bundling

In February 2017, Democratic Senator Tom Udall of New Mexico proposed an unconventional solution to avoid a confrontation between newly-inaugurated President Donald Trump and angry Senate Democrats. In the first weeks of his administration, President Trump nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals to fill the vacancy left by the death of Supreme Court Justice Antonin Scalia nearly a year earlier. The nomination got a hostile reception from Senate Democrats who still fumed over the Republican majority's refusal to process Obama's nomination of Judge Merrick Garland to fill that vacancy during the last year of his presidency. As Democrats discussed whether they could support Gorsuch and whether they would attempt to prevent his confirmation with a filibuster, Udall offered a compromise: confirm both Gorsuch and Garland together. His suggestion was to secure the resignation of a second justice who would consent to be replaced by Garland and then move both nominations simultaneously. [1]

Udall's proposal did not get a favorable response from either the White House or the media, however. The Trump administration never seriously considered the proposal, with a spokesperson bluntly stating that they were focused on the "only seat" that was vacant.[2]

[1] Jordain Carney, "Dem Senator: Confirm Gorsuch, Garland simulatenously," *The Hill*, February 27, 2017; Joseph P. Williams, "Udall Proposes Confirming Both Merrick Garland and Neil Gorsuch," *U.S. News & World Report*, Feb 27, 2017.

[2] Killough, ibid.

News reports described the plan as "a far-fetched idea"[3] and "a longshot at best."[4] Reporters also delighted in pointing out that the idea was similar to the plot line of a season 5 espisode of the television drama *The West Wing*, suggesting that Udall's proposed compromise was the stuff of fictional entertainment rather than serious political decision making. In response to this criticism, Udall's spokeperson insisted meekly that he was not a follower of the television show and that his suggestion was, in fact, a serious proposal he thought could de-escalate the looming conflict.

While this plan may have been an unlikely strategy for filling a vacancy on the Supreme Court, Udall's suggestion of bundling together two nominees to settle a bargaining conflict has a certain appeal and a clear logic. In fact, such deals are not an uncommon tactic in the regular legislative process or in the negotiations to successfully fill vacancies on the lower federal courts, where the institutional dynamics are slightly different. Appointments to United States District Courts and to the United States Courts of Appeals are well suited for this type of "packaging" because the regional nature of these appointments facilitates distributive political deals. Individual senators have heightened incentives to attempt to exercise control over the appointments in their states, creating the conditions under which the president can and should negotiate with key influential senators instead of the entire chamber.

Political scientists know little about these types of bargains in the lower court appointment process, however, other than that they happen on occasion. Existing studies of appointment politics tend to use approaches that make these bargains hard to detect and analyze. First, judicial scholars have tended to focus on final outcomes of the appointment process, looking almost exclusively at Senate confirmation procedures and decisions to judge the success of a president's appointments. By examining appointments through this lens, the negotiations and compromises that generate the final outcome are obscured. Sec-

[3] Ashley Killough, "White House dismisses Udall plan to confirm Gorsuch, Garland to SCOTUS together," *CNN Politics*, February 28, 2017

[4] Williams, ibid.

ondly, most statistical empirical studies separate out district court and Courts of Appeals nominations, assuming that the selection processes are different, and they assume that each nomination is an independent event. Such approaches are likely to overlook both the evidence of and the impact of these appointment bundles, as these deals are likely made before a nomination is even announced and may involve nominations to several different courts. Finally, the descriptive studies that have addressed these bundles tend to treat them as anomalies and interesting anecdotes, rather than as the logical result of institutional incentives. These deals can be consequential both in successfully filling vacant seats and in determining the ultimate composition of the lower courts. Thus, the strategy of bundling multiple nominees deserves a closer look.

In this chapter, I examine several of these deals in light of the theory of presidential strategic response to confirmation constraints. As the president faces increasing constraints on his ability to win successful confirmation for his most preferred nominees, he will be forced to compromise on specific nominee characteristics or face rejection in the Senate. Chapter 4 discussed how that compromise might take place regarding individual nominees as they bargain over candidate traits like ideology, age, and gender. This chapter presents the conditions under which that compromise is likely to take the form of a package of multiple nominees. I then use these conditions to examine several appointment conflicts and the nomination bundles that have emerged in the administrations of recent presidents.

5.1 Empirical Puzzles

A common, and well supported, assumption regarding appointments, is that presidents nominate judges who share their partisan preferences, if not their more specific ideological goals with respect to particular salient issues (e.g. Goldman 1997, Scherer 2005). While that is certainly true, presidents do appoint members of the opposite party on occasion. According to Goldman, close to 10% of the jurists appointed by Nixon, Ford, Carter, and

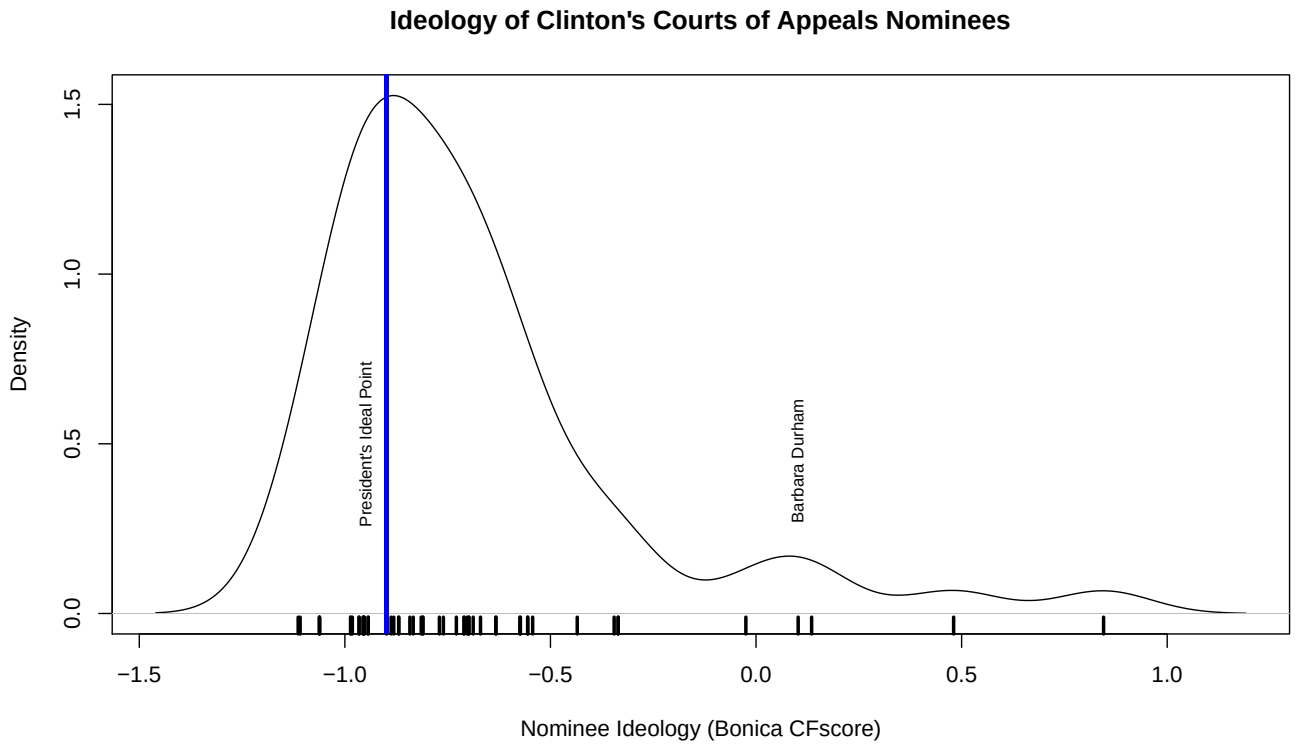

Figure 5.1: Presidential Preferences and Nominee Ideology

Reagan were not members of their political party. The incentives driving a president to choose the 90% who share their party loyalties are clear, but the explanation for the remaining cross-party appointments is not immediately apparent. It is not at all obvious why a president would nominate members of the opposite party for lifetime appointments on the federal courts where they will likely exercise influence for decades.

A similar puzzle is apparent in apparent in Figure 5.1, which compares President Clinton's ideology to the preferences of his nominees for the U.S Courts of Appeals. This comparison relies on CF Scores from Adam Bonica's Database on Ideology, Money in Politics, and Elections, which presents ideological estimates generated from campaign donations (Bonica 2013). While judges do not receive campaign donations, many of them are donors themselves, allowing scholars to get a sense of their political preferences. These data tend to support Goldman's findings in terms of party preferences: when preferences

are considered in terms of ideology instead of just party, the same pattern emerges. The bulk of President Clinton's nominees are centered around his ideal point reflecting a desire to make a policy imprint on the federal bench. However, a few of the nominees are located in a tail that extends far into more "conservative" ideologies. The existence of these nominees in the tail raises questions about why Clinton chose those particular individuals for appointment.

Among this group of unconventional nominees was Washington Supreme Court Justice Barbara Durham. Durham had a unique resume, having served in a variety of capacities on the courts in Seattle and Washington State,[5] but she was an unlikely candidate for nomination by a Democratic president with substantially different ideological preferences. In this case, the answer to the puzzle is that she was nominated as part of a deal with Republican Senator Slade Gorton of Washington State.[6] President Clinton wanted to appoint a personal friend and supporter, William Fletcher, to a seat on the Ninth Circuit Court of Appeals, but Senator Gorton placed a hold on the nomination preventing it from going forward in the chamber. The impasse was resolved when Clinton agreed to nominate a candidate suggested by Senator Gorton to a second seat that emerged on the Ninth Circuit after Fletcher's mother, Betty Fletcher, agreed to take senior status. William Fletcher was confirmed by the Senate in late 1998, and Clinton sent Durham's nomination to the Senate in January of the next year.

5.2 Controversies in Lower Court Appointments

These bundling deals have been rarely discussed in prior work on lower court appointments. The formal process of lower judicial appointments has remained unchanged since the Founding, but in recent decades there have been considerable shifts in how that process

[5]"Barbara Durham; Chief Justice of Washington State," *Los Angeles Times*, January 3, 2003

[6]Neal A. Lewis, "A Nomination is Withdrawn, And a Deal is Threatened," *New York Times*, May 28, 1999.

has worked in practice. Within this new context, a considerable amount of scholarship has attempted to explain the more recent circumstances creating controversy over nominees. For example, there is wide agreement that the presence of divided government makes confirmation proceedings longer and less certain (Binder 2001, Maltese 2003, Massie, Hansford and Songer 2004). The timing of elections can shape the process, by increasing incentives to delay confirmations and leave seats vacant for the incoming president (Binder 2001, Massie, Hansford and Songer 2004). Some evidence exists to suggest that composition of the circuit or district in question and the number of pending nominations affects the likelihood and speed of confirmation (Binder 2001). Still other studies demonstrate the complexity of the Senate prerogative, demonstrating the variety of both personal and political reasons that a nominee may held up by a particular Senator (Steigerwalt 2010). In sum, this body of literature on lower judicial appointments has focused a great deal on explaining the confirmation process and how it has recently changed, but this quantitative work overlooks the deals that were made before a formal nomination was announced.

A second body of more descriptive work has focused in more detail on the political dynamics that drive appointment decisions. Goldman has done important work to describe the inner processes used by post-war presidents to achieve their various political, party, and personal goals via the appointment process (e.g. Goldman 1997, Goldman and Slotnick 1997, Goldman et al. 2005). We also know, for example, that increased attention from party activists and interest groups has created incentives for modern presidents to use appointments as a means to garner support from their base, whether through diversification of the bench or ideological purity (Scherer 2005). While these studies provide good descriptive detail of some of the deals being made, none of them make it a primary goal to explain the existence of such deals. They are generally presented as anecdotes that support some other argument about the appointment process.

Finally, Steigerwalt (2010) describes several distinct paths that nominees might take in the Senate and examines the relative successes and pitfalls associated with each of those

paths. She finds that while most nominees follow an easy path to confirmation, two other paths - the "senatorial courtesy" path and the "private political" path - highlight the various ways in which appointment politics can set the stage for deal making. She argues that many of the obstacles nominees face on those two paths are non-ideological in nature, but rather reflect institutional tensions between the Senate and the Presidency or are retaliatory in nature. While she highlights important variation among the experiences of nominees and answers several important empirical questions about the confirmation process, her inquiry examines the Senate at the exclusion of the Presidency. A critical question that naturally emerges from her study is how a nominee ends up on a specific track in the first place and whether the president can alter that fate with the choice of his nominee. Thus, understanding the role of presidential choice in setting up or avoiding these confirmation battles is critical to understanding their complete impact.

Deal-making is an essential part of bargaining and, therefore, an important part of both the legislative and appointment processes. We have some sense that these bundling deals have happened with lower federal court appointments, but the tendency has been to dismiss them as anomalies rather than attempt to examine them systematically in terms of the appointment process as a whole. What follows is an analysis of the incentives at play in the theory of presidential strategic response to confirmation constraints and the conditions under which bundling deals are likely to result.

5.3 Bundling as Bargaining

The theory of strategic presidential response to appointment constraints suggests that presidents should only engage in bundling or packaging deals under very specific circumstances. These nomination deals should be reserved for the most highly constrained circumstances when other paths to a successful confirmation are not available. Bundling two or more nominees together in effect cedes the nomination power over one of those vacancies to

another political actor, something the president should be reluctant to do under most circumstances. We should only see the president being willing to make that concession when there is political gain to be made with respect to his particular goals. This section quickly reviews the incentives and constraints at issue and then presents the conditions under which deals should be most likely to occur.

5.3.1 Presidential Incentives and Constraints

As explained in Chapter 3, the theory of strategic presidential response to appointment constraints starts with the assumption that presidents use lower court appointments to achieve their policy and political capital goals. The president is a political actor who is motivated by policy preferences, and presidents will seek to identify potential lower court judges that will make decisions that are in line with presidential preferences (Giles, Hettinger and Peppers 2001, Goldman 1997). Presidents can also use judicial nominations as a tool to solidify their political capital. Since the 1970's, presidents have been likely to use judicial appointments to build political capital by nominating individuals expected to appease key interest groups and party activists (Bell 2002*b*, Scherer 2005). With interest groups rivaling political party structures as a necessary supporter of candidacies and policies, judicial appointments are increasingly used as way to build support with a wide variety of elites and not just party loyalists. Presidents can use appointments to make both policy and political capital gains, but the prioritization of these goals varies across time and over presidencies.

The increasing contentiousness of Senate confirmation processes affects both Supreme Court and lower court appointments, but the heightened scrutiny manifests differently for lower court appointments. While substantially similar to the process for other appointments, the regional nature of lower federal court appointments empowers an additional set of veto players that present more obstacles to successful confirmation. Nominations to the Courts of Appeals, however, are far more likely to be derailed at some earlier point in the process rather than face a purely majoritarian decision. Successful Senate confirmation of

lower court nominees requires winning the approval (or atleast avoiding the opposition) of several key members of the Senate.

The senators with the most influence over the outcome of a specific lower federal court nomination are likely to be the home state senators, through the operation of senatorial courtesy. The degree of influence a senator might have under the norm of senatorial courtesy is higher for district court nominations, but they can certainly expect to have a significant influence on the confirmation process, if not the nomination itself for appellate court nominations as well (Rutkus 2008, Wilson 2003). Existing research confirms that opposition from one or both of the home state senators accounts for many confirmation delays and failures, especially for the district courts (Binder and Maltzman 2002, 2009, Primo, Binder and Maltzman 2008). Given the expected advisory role of home state senators, estimates of their influence at the confirmation stage may underestimate their overall influence by neglecting the important of their role before the nomination is made.

Once a nomination has been formally submitted to the Senate, the judiciary chair and majority leader exercise tremendous influence on the confirmation process as the nomination proceeds through the Senate. As the leader of the committee overseeing the examination of the nominee, the judiciary chair has final control over the scheduling of a hearing and reporting the nomination to the full Senate (Binder and Maltzman 2002, Martinek, Kemper and Van Winkle 2002). The manner in which the judiciary chair handles "blue slips" from home state senators also determines how much power those senators have to block a nomination (Denning 2002, Sollenberger 2010). Once the nomination is reported out of committee, the Senate majority leader controls when and how the nomination gets scheduled on the executive calendar for consideration by the full Senate (Binder 2001, Binder and Maltzman 2004). If the majority leader is hostile to a specific nomination or holds have been placed, he can prevent the nomination from coming up for a vote (Binder 2001). The ultimate confirmation of a judicial nominee has always technically depended on the vote of the median voter, as only a simple majority is required in the floor vote. However,

before that vote is even scheduled, the president must get the tacit consent of the potentially pivotal senators who can prevent the vote from taking place: the home state senators, the judiciary chair, the majority leader, and (prior to 2013) the filibuster pivot. The ability of these particular senators to obstruct a nomination makes appointment politics particularly fertile ground for deal making.

5.3.2 Conditions for a Bundle

The president will not automatically agree to a packaged deal when he faces high constraint with regards to a vacancy. When faced with a difficult confirmation, he always has the option to simply leave a seat open and make no nomination at all. There is potential benefit in this approach, because as long as the seat remains vacant, the possibility of successfully appointing a favored jurist remains. The benefit of maintaining an open seat is magnified at the level of the Courts of Appeals, where the policy implications of an appointment are more apparent and the expectation of presidential control is greater. Under those circumstances, the decision to voluntarily cede some of the appointment power to a senator in the form of a package or bundle seems rather extreme. Yet, that is exactly what Bill Clinton chose to do in making a deal with Senator Gorton giving him control over the nomination for a second seat on the Ninth Circuit.[7] Indeed, presidents should only make such deals in highly constrained confirmation environments, which is likely characterized by the opposition of a pivotal senator. Each of four specific conditions should be present before a president would be willing to share the nomination power over a Court of Appeals nomination with a senator from the opposing party and negotiate a packaged deal of multiple nominees.

1. **The opportunity for clear gains as a result of the deal.** A strategic president will not cede a portion of his power to the Senate, and certainly not to a senator of the op-

[7] When Gorton's choice withdrew after Clinton's choice was successfully confirmed, Clinton did not allow Gorton the opportunity to pick a second candidate.

posing party unless he has something to gain from the transaction. Thus, we should not see this sort of deal making happen as a matter of course whenever the president's nominees face an obstacle in the confirmation process. Rather we should see these deals in the smaller subset of vacancies where the president has a heightened interest and something in particular to be gained. When President Clinton agreed to make a deal with Senator Gorton, he was interested in rewarding a close personal friend who had run his campaign in California. This particular nomination was not a routine appointment among the hundreds that cross a president's desk; this was a nomination he had a personal interest in and one that would further his personal goals. The circumstances that make a vacancy salient for a president will vary according to his goals with respect to nominations in general. Democrats have been particularly interested in diversifying the bench, while Republicans have on the whole been more interested in achieving ideological consistency in their nominees (Scherer 2005). Thus, at minimum we should expect the type of vacancies that convince a president to strike a deal to be different across the parties.

2. **An entrenched pivotal senator**. A president is unlikely to cede power as long as other bargaining options exist, but when an entrenched pivotal senator effectively blocks an otherwise nomination (or multiple nominations) from moving forward, bundling may be a good option. When faced with unified opposition from the opposing party, this type of deal making will likely be ineffective in securing the necessary support to clear the obstacles of confirmation. But in the case of the lower courts, the obstacle is likely to be a particular senator or delegation who works to block the nomination for any number of reasons. As a result of senatorial courtesy, however, a president is powerless to overcome a home state senator or committee chair who has the support of his or her colleagues. When a president is faced with a standoff with a home state senator over a particular nominee, he may be able to use that situation for leverage to get something that he wants out of the deal. Agreeing to bundle two

nominees may be a smart tactic in that situation, if condition 1 is also met. In the case of Barbara Durham, President Clinton faced resistance from other Republicans that was resolved separately,[8] but the primary obstacle was Sen. Gorton's desire to have his own nominee appointed instead. In that situation with little room to bargain, a package deal makes sense.

3. **Time constraints.** One of the most consistent findings in the literature concerns the increased difficulties nominees face as a presidential term comes to an end (Allison 1996, Binder 2001, Martinek, Kemper and Van Winkle 2002, Segal 1987). The system of life-tenure for appointed judges creates strong incentives for the opposition party to block confirmations as an election gets closer and the possibility of a new president looms larger. Similarly, as the end of his term approaches, a president is more likely to come to the bargaining table and agree to package multiple nominees in an attempt to fill whatever vacancies he can. Such deals will have little precedential value at the end of a term, so the decision to deal with one delegation will not create incentives for other senators to attempt to gain leverage the same way. More importantly, as the opportunities to fill vacant seats become less numerous, the president may be more willing to accept a smaller gain in the present to avoid a loss in the future. Thus, we should not expect to see presidents making package deals at the beginning of their presidencies, but rather towards the end of their term. President Clinton first nominated William Fletcher midway through his first term, but it wasn't until it looked like his second nomination was about to fail that he cut the deal with Senator Gorton. Rather than nominate Fletcher for a third time in the final legislative session of his presidency, he opted to fill a newly open second seat with Gorton's personal choice and secure confirmation for Fletcher before time ran out.

4. **A second vacancy over which the entrenched senator has a credible claim.** Be-

[8]When Republicans objected that Fletcher's mother was already a judge on the Ninth Circuit, Betty Fletcher took senior status to allow for her son's appointment.

fore a package deal can be made, a second suitable vacancy must be available, either on the same court or on the district court. In the absence of a second seat, the president may offer some other side payment or deal, but the specific bundling strategy considered here of bundling together nominees requires at minimum two seats to distribute. In addition to regular turnover on the bench, new seats have been occasionally authorized by Congress to keep up with the increasing workload of the federal courts. President Clinton was able to offer a vacant seat to Senator Gorton's preferred nominee when Betty Fletcher took senior status, creating an additional vacancy.

Each of these four conditions is necessary for a president to agree to package nominees together. In the absence of any of these conditions, the president will either be willing or forced to adopt a different strategy, including leaving the seat vacant. If the confirmation obstacle is general opposition to a nominee, a bilateral deal will be ineffective. If there are not pressing time constraints, the president can afford to wait for a potential shift in the institutional context. If there is not a second vacancy, a bundling deal is not possible (though some other deal might be made). Finally, if the president can't make significant progress towards his goals, then he is better off leaving the seat vacant.

In light of these conditions, it becomes clear that the package suggested by Tom Udall to ease the confirmation showdown over the Supreme Court vacancy was, indeed, a long-shot. While his suggestion included a mechanism for creating a second vacancy through a strategic retirement, this condition was not immediately met. While there was great pressure to fill the seat after a year-long vacancy on the Supreme Court, major crisis did not fall on the country with a vacant seat on the Supreme Court for more than a year, and with the nomination coming very early in his term there were almost no time constraints and little pressure for Trump to bargain. The opposition to Gorsuch came from the entire Democratic caucus, which would have made a package deal much more visible and less likely to succeed. Finally, as became obvious through the successful confirmation of Gorsuch, President Trump really had nothing to gain by allowing a Democrat to pick the replacement of

a second justice (who would likely be the true swing vote on the Court). So in the case of Neil Gorsuch, it appears that none of the four conditions were met, perhaps making it a "far-fetched idea" indeed.[9]

5.4 Case Study Analysis of Presidential Records

As discussed in brief previously, the nature of bundling deals make them difficult to study with quantitative methods, so in this chapter I rely heavily on case study analysis. Case studies are particularly useful when investigating questions that are highly contextual, allowing for a closer analysis of the set of conditions that contribute to a particular phenomenon (George and Bennett 2005). Given the variation in presidential goals and shifting institutional contexts, focusing on several specific instances where deals were ultimately made allows a better understanding of the fuller context that contributes to the bundling of nominations. Similarly, case study analysis is especially helpful at identifying a particular casual mechanism that may not be apparent through statistical analysis. It is not apparent which nominations are the result of deals in a large dataset, as even nominations presented on the same date lack evidence of particular intention without drilling further down into the details. More than one nomination is often sent to the Hill at a time for the purposes of administrative expediency, so the type of deals envisioned here are not indicated in existing datasets. By focusing closely on several specific cases, I am able to more effectively assess the utility of this set of conditions for bundling.

In order to build these case studies, I turned to the presidential records from several recent administrations to examine the package nomination deals that have been made in order fill judicial vacancies. As part of this collection of data, I visited four presidential libraries in the southeast United States over the course of seven months. Those libraries included the Jimmy Carter Presidential Library in Atlanta, Georgia; the George Bush Presidential

[9] Killough, ibid.

Library in College Station, Texas; the William J. Clinton Presidential Center in Little Rock, Arkansas; and the George W. Bush Library in Dallas, Texas.[10] At each library, I reviewed the available records related to judicial selection, which predominantly came from the files kept by the Office of the White House Counsel. Files related to judicial selection were also often included in the files of the staff secretary, copies of presidential correspondence, and other political staff. Typical contents include resumes and recommendation letters for potential nominees; vetting materials, such as written opinions or other work product and media coverage of nominees; minutes and/or notes from judicial selection meetings; and internal memoranda.

The availability of these documents varies across presidential administrations for several reasons. First, the archivists in charge of preserving presidential records do not reorganize them, so the availability of records reflect the organizational systems and capacities of the staff (or their assistants) who originally compiled them. For example, Lee Lieberman in George W. Bush's administration kept nearly pristine files, but the Carter administration's files lacked a consistent organizational scheme across the four years of his presidency. Oversights in organization result in both duplication of some materials and gaps in others. Secondly, the records are governed by different laws that allow for the release of different types of information. Starting with President Reagan, presidential records are governed by the Presidential Records Act of 1978, which both requires preservation of most types of records, but also restricts public access to certain types of information. Some of those restrictions are lifted after a period of years (for example, the restricted access to conversations between the president and his advisers), while other restrictions are more permanent (e.g. disclosure that would invade the privacy of non-public figures.) As a result, in some cases records had been redacted or completely rescinded from files. For the two cases that follow, adequate materials were available in the presidential records to assess the conditions set forth in the last section.

[10]Special thanks to James Sieja for the generous use of his personal collection of documents from these and several other presidential libraries.

In choosing cases, I necessarily started with nominations that resulted from deals. While not all deals end in successful confirmation, the nominations that are ripe for this analysis all involve some sort of bundling deal that was offered or agreed to by the president. Given the inquiry here, the charge of "selecting on the dependent variable" could be levied. However, even though a deal was eventually made in each of the cases that follow, each instance contains multiple rounds of negotiation under shifting institutional contexts that functionally operate as additional observations. Thus, there is within case variation on both the independent and dependent variables in the nominations I evaluate, allowing for a rigorous assessment of the conditions that lead to bundling of nominees.

5.5 Carter and the Fourth Circuit

It is well known that President Jimmy Carter had two stated goals with regards to the federal courts. The first of goals was to reform the selection process that relied heavily on the networks of senators in order to identify potential nominees based on merit rather than patronage. The second publicly stated goal was the diversification of the federal courts through the appointment of more women and minority judges. On the whole, Carter made great strides towards both goals during his administration. He established a nominating commission system to fill vacancies to the Courts of Appeals, with a panel designated to make recommendations for each of the federal circuits, and he successfully encouraged the creation of district court nominating systems in several state. He also appointed a record number of nontraditional jurists, as he took aggressive action to identify more women and minorities that were qualified for the federal bench (Goldman 1997). He did not always have willing partners in the Senate, however, and his efforts at diversifying the Fourth Circuit met with particular resistance.

Both of Carter's reforms, the establishment of nominating commissions and heightened diversification efforts, came at the expense of senatorial patronage efforts. In many cases,

home state senators were unwilling to give up the leverage they had with respect to court appointments because these nominations were a significant way to reward loyal supporters in their states. Whether or not they agreed with President Carter on the need to diversify the federal bench, many were reluctant to cede control to nonpartisan nomination commissions. Similarly, efforts to diversify the bench in practice often meant elevating a woman or minority candidate at the expense of a more traditional political supporter of the senator, as one of the barriers to entry for women and minorities were the political connections that formed the basis of patronage appointments. North Carolina Senator Robert Morgan expressed these concerns in a March 1979 newsletter to his constituents, accusing Carter of "asking [his] consent without soliciting [his] advice" with respect to a vacancy on the Court of Appeals.[11] Morgan maintained that he had not been consulted in either the creation of the nominee list or on the composition of the commission panel, and he insisted that he deserved more input at an earlier stage. He concluded by saying, "[Q]uite frankly, I would prefer to appoint a friend rather than someone who has opposed me because that is the way I believe the system works."[12] Senator Morgan's comments asserting his prerogative of patronage over appellate court nominations are indicative of the resistance Carter faced, even from his own party. Carter faced an uphill battle in his attempt to simultaneously change both the selection procedures and the profile of the jurists nominated through that new process.

The passage of the Omnibus Judgeship Bill of 1978 midway through Carter's term created an opportunity to increase his efforts in identifying promising female and minority candidates for the bench.[13] The legislation created 152 new judgeships, including at least one new seat on each of the Courts of Appeals. Because these vacancies were newly created, Carter viewed these new judgeships as an opportunity to identify and appoint additional female and minority candidates to the federal bench outside of the normal selection

[11]"Senator Robert Morgan Report to the People", March 16, 1979, "Judgeships - 4th Circuit Court" folder, Box 253, Doug Huron's Files, Counsel's Office, Jimmy Carter Library.

[12]Ibid.

[13]PL 95-486, passed October 20, 1978.

channels. As his staff put it, the opportunity to appoint judges that accounted for more than 25% of the federal judiciary could essentially be used as "an instrument to redress an injustice."[14] The strategy they proposed indirectly acknowledged the leverage they had with multiple vacancies: they agreed to focus particularly on district courts with more than one open seat and to consider all of the nominees from a state simultaneously rather than making "ad hoc" decisions about individual vacancies.[15] The administration believed that dealing with multiple vacancies increased their chances of winning the support of home state senators in their diversification efforts.

As the legislation neared passage, the White House took several steps to generate a renewed commitment to diversifying the bench through these new vacancies. In May 1978, the president amended the original executive order establishing the Circuit Judge Authorizing Commission, instructing each panel "to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees."[16] Additionally, the White House sent letters to the members of the nominating commissions and Democratic senators, telling them that President Carter was "deeply concerned" about the lack of progress made to that point regarding the diversification of the bench and asking them to "redouble your efforts" in finding qualified minority candidates.[17] By making both a general proclamation and personal entreaties to the individuals suggesting nominees, Carter hoped to deepen the pool of minority and female candidates presented to him.

Despite these efforts, Carter faced significant obstacles with the Fourth Circuit Court of Appeals. Carter had successfully added an African American judge to seven of the Courts of Appeals, but the Fourth Circuit had yet to be integrated midway through Carter's presidency. A vacancy created by the death of James Craven in 1977 had gone to James D.

[14]Memo, Jordan, Lipshutz, and Moore to Carter, April 12, 1978, "4/17/78" folder, Staff Secretary's Office files, Jimmy Carter Library.

[15]Ibid.

[16]Executive Order 12059 - United States Circuit Judge Nominating Commission, Section 4(c), May 11, 1978. Copy in "Judgeships(Active): Executive Order" Folder, Box 27, Robert Lipshutz's Files, Counsel's Office, Jimmy Carter Library.

[17]Memo and letters, Lipshutz to President, January 31, 1979, "2/2/79", Files of the Staff Secretary's Office, Jimmy Carter Library.

Phillips Jr. of North Carolina after a fairly contentious and lengthy nomination process. The panel was appointed in July and acted quickly, submitting its list on September 1, but the announcement of a nominee was delayed for almost a full year. North Carolina Senators Jesse Helms (a Republican) and Robert Morgan (a Democrat) voiced opposition to the process, the composition of the panel that was formed to interview potential nominees and make a final recommendation, and most of the individuals on the final list of nominees.

The list of nominees presented by the panel consisted of three academics, one sitting U.S. District Court Judge, and a black civil rights activist. The two potential nominees that were most favored by Carter's staff were the most opposed by the Senators: lawyer and activist Julius Chambers, who had argued on behalf of black families in the Charlotte-Mecklenburg busing decision,[18] and U.S. District Court Judge James B. McMillian, who had handed down the initial decision requiring busing to achieve racial integration of the school system. From the list of five potential nominees, it seemed that Phillips was the only individual who had an "acceptable measure of those qualities deemed desirable by North Carolina politicians" (Fish 1979, p. 637). While Attorney General Bell and former N.C. Senator Sam Ervin advocated for McMillian, law professor James Dickerson Phillips was seen as the candidate with the best chance of getting support from the North Carolina senators.[19] He was nominated July 20, 1978 and confirmed less than a month later.

The passage of the Omnibus Judgeship Bill of 1978 gave President Carter a second opportunity to appoint a nontraditional judge to the Fourth Circuit, as it authorized three additional seats on the circuit bringing the total number of judges to 10. The first two of those seats were filled by Francis D Murnaghan, Jr. of Maryland and James M. Sprouse of West Virginia in early 1979. The last of the three vacancies was slated to go to North Carolina, which meant that Democratic Senator Robert Morgan and, to some extent Republican Senator Jesse Helms, would again exert significant influence over the fate of the

[18] *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[19] Letter, Sam Ervin to Bell, December 9, 1977, Staff Secretary's Files, ; Memo, Bell to Carter, December 21, 1977, 12-28-77[2] folder, Staff Secretary's Office, Jimmy Carter Library; Hodierne, Robert, "Politics Killed McMillan Court Nomination," July 14, 1978, *Charlotte Observer*

eventual nominee's Senate confirmation.

Carter's attempt to appoint an African American to the Fourth Circuit was further complicated by his public commitment to the nomination commissions. He had chosen all of his nominees to the Courts of Appeals from lists generated by a nominating commission in each state. In this instance, though, the list created by the Nominating Commission for the Fourth Circuit contained exclusively white men.[20] As early as May 1979 the Attorney General declared the effort to integrate the Fourth Circuit "hopeless" unless an unforeseen vacancy arose.[21] Carter's staff, however, still believed in June that there was time to amend the list and nominate an African American to the last remaining vacancy on the Fourth Circuit. One possibility was to revert to an earlier list generated by the Commission that did have an African American candidate, Julius Chambers. A second option was to nominate an individual they had considered for a district court position, Richard Erwin, who had been recently appointed to the North Carolina Court of Appeals. Neither strategy, however, would strictly uphold the ideals Carter espoused in announcing the nominating commissions. In this instance, Carter's twin commitments to racial diversification of the courts and commission system were in conflict. In fact, memoranda from a judgeship meeting suggest the choice between Chambers and Erwin was largely viewed in terms of which decision "would be least offensive to the Commission's system."[22]

The biggest obstacle, however, was Senator Morgan's support for a specific nominee for the Fourth Circuit vacancy. Former Senator Samuel Ervin, Jr. of North Carolina had lobbied for his son, Samuel Ervin, III to be nominated for the first vacancy in his state.[23] The nominating commission, however, did not include his name on their first list of qualified candidates, so the White House was immunized against the political posturing by a previously established judicial selection process. However, the new list that was operable

[20]List, Candidates Recommended by Nominating Commission for the Fourth Circuit, NC, "Judgeships - Personnel Matters" folder, Box 255, Doug Huron's Files, Counsel's Office, Jimmy Carter Library.

[21]Memo, Bell to Carter, May 17, 1979, 5/17/79[2] folder, Staff Secretary's Office, Jimmy Carter Library.

[22]Memo, Huron for the File, 6/15/1979, "Judgeship Files - Judicial Vacancies(Summaries)" folder, Box 252, Doug Huron's Files, Counsel's Office, Jimmy Carter Library.

[23]Letter, Ervin to Carter, September 2, 1977, "FG 52/#4" folder, Box FG-165, Jimmy Carter Library.

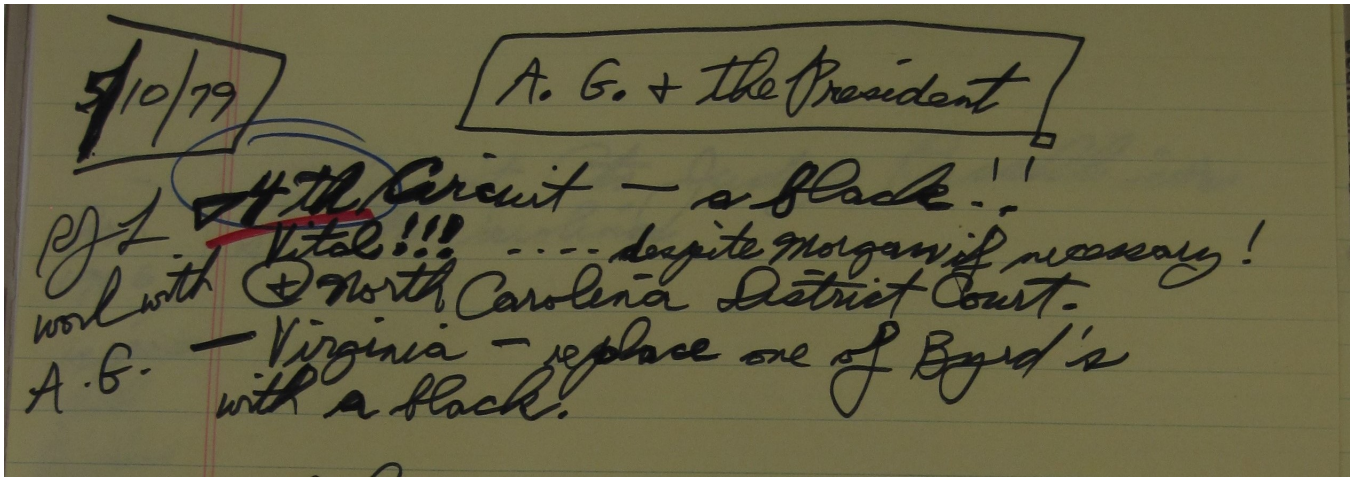

Figure 5.2: An Institutional Struggle

in May of 1979, did include Samuel Ervin, III as one of the five white males recommended for the vacancy, putting pressure on the White House to choose him for this second vacancy. Senator Ervin's successor, Senator Robert Morgan, came out firmly in favor of Sam Ervin, Jr, making it politically difficult for the White House to counter with a different nominee.

The records indicate the extent to which this became a battle of wills and an institutional struggle for control over the nomination process itself. Despite Morgan's official position, Carter staffer Doug Huron noted after a meeting, "The President is determined not to let Morgan make this decision."[24] Carter's staff recognized the need to work with Morgan to identify an acceptable nominee, but at the same time the administration was clearly reluctant to hand over control of the nomination to an obstinate senator. Given Carter's both personal and publicly stated commitment to appointing more African Americans to the bench, the stakes were much higher than they might have otherwise been. Huron's notes from another meeting (Figure 5.2) highlight a similar sentiment, noting that "a black!!" was considered "vital!!!....despite Morgan if necessary!"[25] This particular vacancy was especially symbolic for the President in his attempts to integrate the federal courts, particularly

[24]Memo, Huron for the File, 6/15/1979, "Judgeship Files - Judicial Vacancies(Summaries)" folder, Box 252, Doug Huron's Files, Counsel's Office, Jimmy Carter Library.

[25]Notes, Meeting with A.G. & the President, "Judgeships - 4th Circuit Court" folder, Box 253, Doug Huron's Files, Counsel's Office, Jimmy Carter Library.

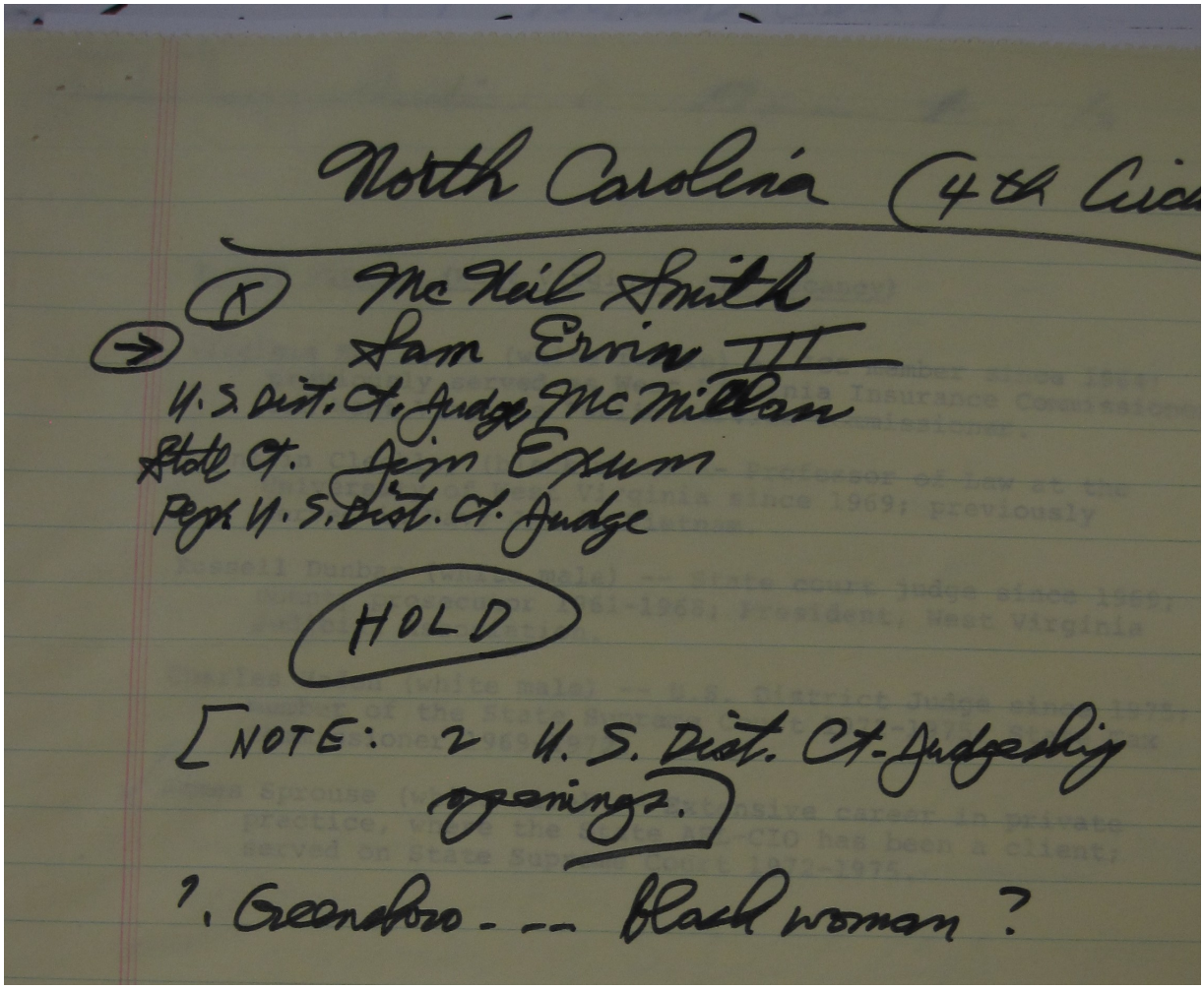

Figure 5.3: A Bundling Strategy Emerges

in the South. A standoff with a senator over any nomination probably would not trigger the level of attention given by the administration, but Carter's staff, at his directive, considered this particular nomination to be worth the fight.

The beginnings of a deal began to emerge as a possibility during the summer of 1979. Doug Huron's personal notes contain a hand-written copy of the commission's list for the Fourth Circuit with the words "HOLD [Note: 2 U.S. Dist.Ct.Judgeship openings]," indicating that the administration was indeed activating its strategy to consider all of the vacancies from a single state at the same time (Figure 5.3). By September 1979, Carter's staff had secured agreement from Morgan to support an African American for one of the District Court

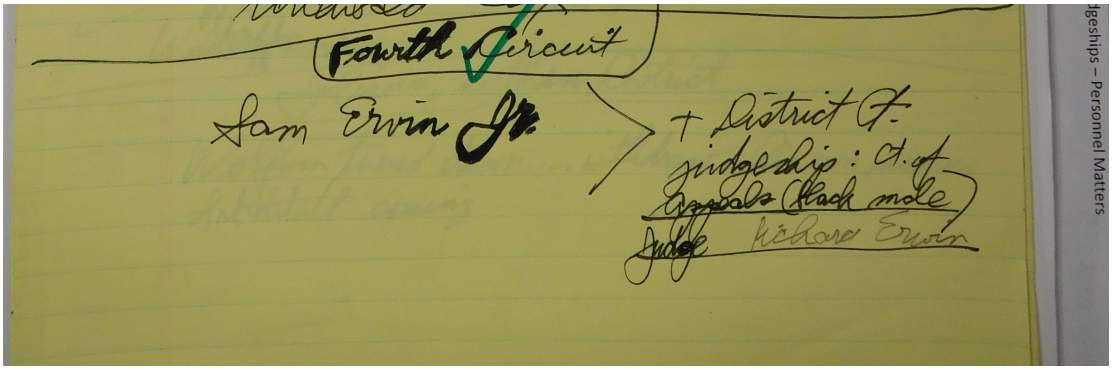

Figure 5.4: The Making of a Deal

positions.[26] When the formal recommendation was made to the president that he nominate Sam Ervin, III, to the vacancy on the Fourth Circuit, his staff insisted that also nominate NC Appellate Court Judge Richard Erwin be nominated for one of the vacant seats on the district court in North Carolina (Figure 5.4).[27] Samuel Ervin III was nominated to the Fourth Circuit on April 2, 1980 and was confirmed on May 21, 1980. As promised, Richard Erwin was nominated on June 11, 1980 to the US District Court for the Middle District of North Carolina and was confirmed on September 29, 1980.

5.5.1 The Fourth Circuit and Conditions for a Bundle

The series of events surrounding Carter's handling of this appointment to the Fourth Circuit provides an opportunity to assess the four necessary conditions for a bundle of multiple nominees. The first condition is that the president must be in a position to make gains from the bundle. Carter had stated publicly his commitment to diversifying the federal bench, which included integrated courts in the South. His administration made great progress towards this goal, but midway through his term the Fourth Circuit had seen less diversification than other areas of the country. In this situation, Carter was given one last opportunity to diversify the Fourth Circuit, increasing the salience of this particular vacancy. While

[26]Memo, Vacancies Pending As of September 10, 1797, "Judicial Selection, 1980" folder, Box 275,Doug Huron's Files, Counsel's Office, Jimmy Carter Library.

[27]List, Fourth Circuit Candidates Recommended by Nominating Commission, "Judgeships - Personnel Matters" Folder, Box 255, Doug Huron's Files, Counsel's Office, Jimmy Carter Library.

he was not particularly committed to any one candidate for the position, he was deeply invested in the idea of nominating an African American. Making one nomination contingent on another made sense under these circumstances: when it became clear that he would not be able to appoint an African American to the Court of Appeals, his staff realized he could still use the vacancy to make strides towards diversification on a lower court. While Carter did not get the outcome he ultimately wanted, he did make gains towards his goal of diversification that he probably would not have made otherwise. Without this deal, the appointment of an African American to either court would almost certainly not have happened.

The second condition requires that the president be facing an entrenched senator who has essentially blocked the path forward for the nomination in question. In this case, Senator Morgan's support for a particular candidate was based on a personal relationship and a public commitment, leaving almost no room for negotiation. While Carter's staff at first tried to imagine various ways to work around Morgan in an attempt to retain control over the nomination, eventually they recognized that Morgan could not be swayed. Once they realized that Morgan would not support a different candidate and would certainly block an African American who was not even on the commission list, they turned to the next best bargaining position: an attempt to extract something in exchange for giving Morgan what he wanted.

The third condition states that the president must be facing time constraints and the fourth condition states that there must be additional vacant seats. Both of these conditions were met with Congress's passage of PL 95-486 midway through Carter's term. This legislation created 152 new vacancies across the country with multiple vacancies in North Carolina in particular. Both the overarching strategy for filling these new seats and the specific strategy of holding Ervin's nomination until they were able to fill the district court seats highlight the significance of this legislation in creating multiple vacancies to use as bargaining leverage. The fact that the legislation was passed with only two years for Carter

to fill the vacancies created a sense of urgency going into 1979. But the momentum for the deal really emerged towards the end 1979 as the time in Carter's term began to run out. In the end, both nominees were processed and confirmed well into the last year of President Carter's term as the Congressional session was nearing its end.

While various details of this deal have been described in prior work (e.g. Goldman 1997, Scherer 2005), the conditions under which the deal took place have received insufficient attention. In addition to being an interesting anecdote about the depth of Carter's desire to bring diversity to the federal bench, it is fundamentally a story about a rational president acting strategically in response to an evolving set of constraints and specific opportunities. President Carter's staff handling the vacancies on the Fourth Circuit evinces a clear strategy to further the President's goals within the confines of varying Senate constraint.

5.6 Bush and The Sixth Circuit

When President George W. Bush took office in 2001, he inherited a logjam in the Sixth Circuit that was the result of a multi-year standoff. When he became president, there were three vacancies on the Sixth Circuit from Michigan alone, and by the end of his first year in office, a fourth Michigan vacancy arose. By the end of 2001, eight of the sixteen seats on the Sixth Circuit were vacant, putting tremendous pressure on the President and Senate to act to identify potential jurists in order to ease the growing backlog of cases. Importantly, though, the vacancies also gave Bush an opportunity to influence the direction of the entire circuit for years to come. Vacancies from Tennessee and from Kentucky were quickly filled, and after some controversy the two Ohio nominees were confirmed midway through Bush's first term. The history of the Michigan seats made quick confirmation difficult to accomplish, however, and those vacancies remained an issue for Bush's entire presidency.

One of the Michigan vacancies had existed for nearly 6 years, and one for almost 2

years, as President Clinton had been unsuccessful in getting Senate Confirmation or even a hearing for two of his three Michigan nominees to the Sixth Circuit.[28] The two women Clinton nominated for those seats, Helene White and Kathleen Lewis, were held up by Michigan Senator Spencer Abraham with the support of his Republican colleague, Judiciary Chair Orrin Hatch. While Democrats accused Republicans of obstructionism, the Republicans accused President Clinton of shirking his duties to consult with relevant senators. Senator Abraham told Clinton's aids that he could not support White or Lewis because the White House had broken an earlier agreement with him. He asserted that Clinton's team had failed to properly consult with him before sending the nominations to the Hill and had reneged on a prior arrangement to find a mutually agreeable consensus candidate.[29] As a result of Abraham's opposition, those two seats, along with the two additional vacancies that arose in 2000 and 2001, were left to George W. Bush to fill.

President Bush was unable to immediately capitalize on the opportunity to reshape the Sixth Circuit, however, because he faced a solid wall of resistance as he attempted to fill the four Michigan vacancies. In 2001, newly-elected Senator Debbie Stabenow joined forces with her Democratic colleague, Senator Carl Levin, to oppose any efforts by President Bush to fill those seats with his own nominees. Levin and Stabenow insisted that Clinton's nominees had been given unfair treatment by the Republican-controlled Senate and refused to support any new nominees. The Michigan Democrats informed the White House of their intent to prevent the Republicans from profiting from what they felt was unjustified obstruction of Clinton's nominees. They indicated their intention to use the prerogatives of the blue slip to block Bush's nominees to the Sixth Circuit, and demanded that White and Lewis be renominated and given a hearing.[30]

With the White House determined to make their own nominations and the Michigan

[28]"Judgeships on Hold," August 28, 2000, *The Washington Post*, page A18.

[29]Letter, Abraham to Nolan, October 29, 1999, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W. Bush Library.

[30]Letter, Brenson to Chuck Wilbur, 8/14/2001, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library.

Senators determined to prevent the Republicans from getting the seats they felt should have been Clinton's, there seemed to be no room for compromise. Even so, Bush's staff made efforts to consult with Levin and Stabenow in early May before identifying any nominees in the hopes of finding a path forward.[31] Discussions continued throughout 2001, and several compromises were indeed offered. Initially, the Michigan senators suggested that a bipartisan commission should be created to determine the best nominees for the now-four vacancies from Michigan on the Sixth Circuit.[32] This suggestion had the appeal of allowing a neutral, nonpartisan organization break the deadlock, preventing the Republican party from directly profiting from the obstruction of the previous term. But for the White House, this meant losing control over a prerogative that they felt was rightly the President's, so they did not agree to this suggestion. Even though such commissions existed in other states with respect to district court vacancies, they were not willing to extend the practice, claiming that "circuit Court appointments are uniquely matters of presidential prerogative."[33]

In response, the Bush administration made several offers of their own to compromise and break the deadlock. One suggestion was to nominate the Clinton holdovers to vacancies on the district court and move forward with Bush's nominees to the Sixth Circuit. The appeal of this solution to the President is obvious, but Levin and Stabenow did not view that as a legitimate compromise, insisting that the two women were entitled to hearings for the seats to which they had originally been nominated. A second suggestion made by the White House was to move forward with two of the four vacancies, while allowing the Michigan Senators to hold the other two seats hostage.[34] Since the standoff originated from the treatment of only two of Clinton's nominees, the Bush administration hoped the senators would release the two other vacancies and move forward. Both of these suggestions were

[31]Email, Bereson to Camp, April 30, 2001, "Binder-Judicial Selection: Congressional Correspondence II[2]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library.

[32]Letter, Berenson to Chuck Wilbur, 8/23/2001, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library.

[33]Letter, Gonzales to Levin and Stabenow, 11/2/2001, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library.

[34]Letter, Berenson to Chuck Wilbur, 8/23/2001, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W. Bush Library.

rejected by Senator Levin, however, who understood the leverage they had and threatened to continued to block all Michigan nominees unless Lewis and White were renominated.[35] As Levin's Chief of Staff put it, the suggestions put forward by the Bush administration would "set a dangerous precedent" by allowing "obstructionist tactics" to turn into victories.[36]

Importantly, the ebb and flow of this relationship between the Michigan Democrats and the Bush Administration was contingent on which party had control of the Senate. As demonstrated in Table 5.1, very little changed throughout Bush's presidency with respect to these vacancies except for the leadership in the Senate. Both Levin and Stabenow were in office throughout Bush's presidency, and during Bush's first term there were no changes in the nominees that were submitted to the Senate. One of the few sources of contextual variation is the identity of the Judiciary Chair and the control of the chamber. When Bush first took office in 2001, the Senate was evenly divided between Republicans and Democrats, with Vice President Dick Cheney as the tie breaker. President Bush submitted his first slate of judicial candidates to a friendly Judiciary Committee for confirmation. In May of 2001, however, Vermont Senator James Jeffords announced that he was leaving the Republican Party to caucus with the Democrats, effectively giving the Democrats control of the chamber. As a result, the chairmanship of the Judiciary Committee switched from Republican Orin Hatch to Democrat Patrick Leahy for the rest of the 107th Congress, a development with significant implications for the processing of judicial nominees.[37]

Once they had an ally in the chair of the Judiciary Committee, Levin and Stabenow dug in either further and raised the stakes. They wrote to Chairman Leahy late in 2001 asking him to not only honor their home-state objections by preventing the Michigan nominees from moving forward in committee, but to also refuse to move forward *any* nominations to the Sixth Circuit (whether from Michigan or any other state), until the confrontation was

[35]Letter, Chuck Wilber to Berenson, 10/5/2001, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library.

[36]Ibid.

[37]Lewis, Neil. "Road to Federal Bench Gets Bumpier in Senate," *The New York Times*, June 26 2001, A16.

Table 5.1: Attempts to Fill the Michigan Seats

Congress	Michican Senators	Judiciary Chair	Michigan Nominees	Confirmed Judges
2001-2003 (107th)	Levin (D) Stabenow (D)	Hatch (R), Leahy (D)	Neilson, Saad McKeague, Griffin	None
2003-2005 (108th)	Levin (D) Stabenow (D)	Hatch (R)	Neilson, Saad McKeague, Griffin	None
2005-2007 (109th)	Levin (D) Stabenow (D)	Specter (R)	Neilson, Saad, McKeague, Griffin, Murphy, Kethledge	Neilson, McKeague Griffin
2007-2009 (110th)	Levin (D) Stabenow (D)	Leahy (D)	Murphy, Kethlege White	Kethlege, White

resolved to their satisfaction.[38] Notably, all the Senators from the other states in the Sixth Circuit were Republicans, so the conflict was primarily between Bush and the Michigan senators. As long as Levin and Stabenow had Leahy in their corner, however, the conflict over the Michigan nominees threatened to boil over and hold the entire circuit hostage. As the tensions rose, Counsel to the President Alberto Gonzales personally attempted to intervene, attempting to persuade Leahy, Levin and Stabenow to "stand back from the brink of confrontation." [39] His appeal was of limited utility, however. He argued that the Bush Administration could not be responsible for the actions from a prior presidency, but he also widened the conflict by adding that Democrats mistreated several of President George H.W. Bush's nominees even before Clinton took office. In this institutional context, very little progress was made to fill any of the seats on the Sixth Circuit.

When control of the Senate flipped to the Republicans in 2003, however, the Republi-

[38]Letter, Stabenow and Levin to Leahy, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library.

[39]Letter, Gonzales to Levin and Stabenow, 11/2/2001, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library. Letter, Gonzales to Leahy, August 17, 2001, "Binder-Judicial Selection: Congressional Correspondence II[1]" Folder, Box 17, Brad Berenson Files, Counsel's Office, George W Bush Library.

cans regained the chairmanship of the Judiciary Committee for the next four years. Chairmen Hatch and Specter were less inclined to help the Michigan Democrats hold up nominations, so the Bush nominations moved through committee and to the floor despite the objections of the Michigan Democrats. In the 108th Congress, two Sixth Circuit nominees were confirmed from Ohio, over the Democratic objections that they were too ideological.[40] Despite being in the minority, Levin and Stabenow were not powerless, as they were joined by their Democratic comrades in filibustering the Michigan nominees as part of a larger group of nominees that other Democrats found objectionable. In July 2004, Michigan nominees Henry Saad, Richard Griffin, and David McKeague became the eighth, ninth, and tenth of Bush's nominees to face a filibuster in the Senate.[41] Most of the nominees who were filibustered were targeted because Democrats felt they were out of the mainstream,[42] but the Michigan nominees were filibustered because the Democrats felt that Chairman Hatch had disregarded Senate traditions by moving the nominations forward over the objections of Levin and Stabenow.

The standoff over judicial nominations continued well into the 109th Congress, with the Republican leadership threatening to invoke the "nuclear option" and change the Senate rules to do away with the filibuster.[43] After several failed attempts at compromise by the leadership,[44] the showdown was finally broken through the agreement of the bipartisan group of Senators dubbed the Gang of 14.[45] The group's agreement to oppose judicial filibusters specifically named several nominees for whom they would vote to invoke cloture and two nominees for whom they would not: the nomination of 6th Circuit nominee Henry

[40]Lewis, Neil A. "Bush Judicial Choices Set to Clear Senate Quickly,"*The New York Times*, January 23, 2003, A16.

[41]Dewar, Helen. "Senate Democrats Block 3 More Bush Judicial Nominees," *The Washington Post*, July 23, 2004, A05.

[42]Lewis, Neil A. "More Battles Loom Over Bush's Nominees for Judgeships," *The New York Times*, April 7, 2002.

[43]Dewar, Helen and Mike Allen. "Frist Seeks to End Nominees Impasse; Majority Leader's Plan Would Limit Tactics Used in Senate to Block Judicial Picks." *The Washington Post*, A12.

[44]Hulse, Carl. "Senators May Compromise to End Impasse on Judges." *The New York Times*, April 26, 2005, A14. Lewis, Neil A and Carl Hulse, "Jockeying Intensifies in Battle Over Nominees for Courts," *New York Times*, May 10, 2005, A12.

[45]Hulse, Carl, "Bipartisan Group in Senate Averts Judge Showdown," *New York Times*, May 24, 2005, A1.

Table 5.2: The Four Conditions for a Bundle

Case	Vacancies	Time Constraints	Pivotal Senator	Presidential Gains	Bundle?
Carter	Yes	Yes	Yes	Yes	Yes
Bush 1	Yes	No	Yes	Yes	Yes*
Bush 2	Yes	No	No	Yes	No
Bush 3	No	No	No	Yes	No
Bush 4	Yes	Yes	Yes	Yes	Yes

Saad was specifically allowed to fail as part of the agreement.[46] In the aftermath of this deal, three of the four Michigan nominees were confirmed in late 2005, leaving one remaining vacant seat from Michigan.

The conflict reemerged in 2006, however, when Bush nominated Raymond Kethledge to the remaining Michigan seat and nominated Stephen Murphy to the vacancy created by the untimely death of recently appointed Judge Neilson. Levin and Stabenow renewed their original objections, once again insisting that the Clinton nominees should be considered for the two seats. Before the standoff could be resolved, however, control of the chamber shifted back to the Democrats in 2007, and Chairman Leahy was once again in control of the Judiciary Committee and in the position to honor the Michigan delegation's objections. It was under those conditions that a deal was finally struck to end the years-long conflict. Bush withdrew one of his two nominees to the Sixth Circuit, appointing him to the district court instead, and nominated Clinton's original nominee from 1995, Helene White.[47] Despite opposition from some Republicans who were unhappy with Ms. White's nomination, both nominees were narrowly approved by the judiciary committee.[48] Both were confirmed by the Senate on June 24, 2008: Kethledge passed the Senate with a voice vote, while White's nomination went to a recorded vote of 63-3.

[46]"Text of Senate Compromise on Nominations of Judges," *New York Times*, May 24, 2005, A18.
[47]"Impasse Over Michigan Judges Ends," *New York Times, April 16, 2008, A19.*
[48]Lewis, Neil A., "Deadlock on Appeals Court Judges Ends," *The New York Times*, June 13, 2008, A19

5.6.1 The Sixth Circuit and Conditions for a Bundle

George W. Bush appointed Helene White to the Sixth Circuit Court of Appeals eleven years after she was first nominated by Bill Clinton. There was plenty of commentary at the time and since then debating who got the better end of the deal. Activists on both sides were disappointed that they did not get a clear victory, with each arguing that the other side had extracted a better deal (Goldman, Schiavoni and Slotnick 2009). The Washington Post summed up the mood best: "White House aides are not complaining about the apparent plan...but they are also not squealing with delight, either."[49] Regardless of which side won, the deal that was struck was a logical compromise given how the circumstances stack up against the conditions for a bundle.

Most obviously, the fourth condition, that multiple seats be vacant was met during the entire time of Bush's presidency. With the exception of a few months in 2005, there were at least two Michigan vacancies on the Sixth Circuit Court of Appeals as well as vacancies on the district court (Table 5.1). This bare minimum condition for a deal was met at all times during the Bush Administration.

The third condition requires that the president be facing time constraints. From the beginning of his term, there was a sense of urgency injected into the conversation because there were so many vacancies. By the end of Bush's first year in office, half of the seats on the Sixth Circuit were vacant, with four of those seats drawing from Michigan. The Associate Counsel to the President warned the Michigan Senators that "given the vacancy crisis in the Sixth Circuit, we cannot wait indefinitely."[50] Such conditions do heighten the importance of the vacancies and stress the patience of the political actors involved. The third condition, however, was not fully met until the end of his term when time truly started to run out to make a deal. Even with four vacancies, there was no earlier point when the president was in a position where he needed to give up control over one of the seats.

[49] Abramowitz, Michael, "Ye Shall be Judged – Not," *Washington Post*, May 5, 2008.
[50] Letter, Berenson to Wilbur

The second condition - the presence of an entrenched pivotal senator - is critical in explaining this series of events, because the effectiveness of the opposition varied. The two serious attempts to strike a deal through bundling of nominees came very early in Bush's presidency, when Levin and Stabenow were able to credibly threaten to hold the entire circuit hostage with Chairman Leahy support, and again in the last two years of the Bush term when Leahy returned to control the Judiciary Committee. The Michigan Senators did not waiver in their opposition to Bush's nominees, but the effectiveness of that opposition varied due to Chairman Hatch's willingness to move the nominees to the floor without returned "blue slips." In this sense, it was not the Michigan delegation that was pivotal, but rather the judiciary chair. The only deals were offered when Bush faced a Democratic-controlled Judiciary Committee that was willing to hold up nominees in committee. Importantly, there was little to no discussion about the nominees themselves being objectionable, with the possible exception of Henry Saad. This dispute was almost entirely a struggle over institutional powers.

Finally, the initial condition - that the president be able to make gains through a deal - was also met at the beginning of his term and the end of his term. These vacancies were highly salient, in part because the Sixth Circuit was evenly split when Bush became president. Any new judges could potentially alter the balance of the entire circuit. In 2008, there were 8 Republican judges, 6 Democratic judges, and 2 vacancies.[51] At the beginning of his term, Bush stood to make gains by giving away two district court seats to the former Clinton nominees in order to get the eight nominees from four states in the Sixth Circuit through. The potential costs of this standoff extended beyond just Michigan if Leahy was willing to hold up all nominees to the Circuit. As long as that threat was real, giving up two district seats is a small price to pay. At the end of his term in office, the deal made sense from a purely ideological standpoint. Levin and Stabenow were in a position to prevent either of his two final nominees from being confirmed, so getting one of the two confirmed

[51] Lewis, Neil A, "White House and Democrats Move on Ohio Court Plan," *New York Times*, May 8, 2008, A26.

in the final months of his presidency could reasonably be construed as a political gain.

So here again, when all four conditions of a bundle line up, we see a deal being made. As summarized in Table 5.2, when any one of the four conditions fails to be met, the president either lacks the opportunity or need to make a deal. It can be argued that the first Congress in Bush's term is an exception, because serious attempts at deal making were made. The compromises that were offered by the White House, however, did not involve allowing the senators to name a nominee to the Courts of Appeals. Viewed in that light, the administration's proposed compromise of naming Lewis and White to the district court was hardly a compromise at all (the Senators clearly felt that way), in that senators have greater influence over the district court nomination process in the regular course of business. Earlier in his term, when all four conditions were not met, the president stood behind his Courts of Appeals nominees and refused to make that deal. But as time ran out and the opposition became less surmountable, the deal was made.

5.7 Discussion

The practice of bundling nominees in the Courts of Appeals has important consequences for our understanding of the state of the federal appointment process. A close examination of these deals demonstrates that bundling occurs under very specific circumstances that reflect the incentives of the political actors involved. Prior work has tended to cast these deals as anomalies that are interesting, but not particularly useful in understanding anything systematic about the political system. But the cases examined here demonstrate a regularity to these deals that can help illuminate how the most contentious political problems are solved. President Carter and President Bush had very different goals with respect to the Courts of Appeals, due both to their political party affiliations and the political eras in which they served. The sources and motivations of the obstacles they encountered were also distinct. But the nature the opposition was fundamentally the same: a single entrenched

Senator or delegation attempted to obstruct the president's nominations in a show of force to protect their prerogatives. In each instance, as the time constraints became more pressing, the likelihood of a deal increased.

Notably, neither of these conflicts was entirely, or even mostly, centered around objections to the president's preferred nominee. Rather, the conflicts involved senatorial support for specific individuals, making a compromise more difficult, if not completely impossible. In these instances, patronage was very much still in play, as Senator Morgan supported Sam Ervin III and the Michigan Democrats supported Clinton's initial nominees. While President Carter and President Bush were motivated to shape the federal courts and fill vacancies, the senators involved were focused equally on the internal political mechanisms of their states. In that sense, the outcome of these deals perfectly reflect the national outlook of a president and the local outlook of a senator in the normal course of senatorial courtesy. Both deals reflected the struggle between senators and the president for control over lower court nomination and the competing national and regional interests at stake.

While the general contours of the deals are similar, the factors that are likely to lead to a highly constrained confirmation environment under each president reflect the shift in institutional context between the late 1970s and the 2000s. While Carter ran into significant opposition with regards to diversification of several of the Courts of Appeals, he did not face that level of opposition in general. The obstacles were limited to a few Senate delegations and a few seats, primarily in response to Carter's attempts to break the cycle of patronage appointments and move toward nontraditional appointees. George W. Bush's appointments, however, were much more colored with partisan fighting. The Sixth Circuit (as well as the Fourth Circuit) had become hotly contested during the Clinton years, so even though the conflict was with particular senators the stakes were higher than the individual nominees. Here, the ideological tilt of the entire circuit was at play, as well as setting the tone and precedent for future nominations to the court. Despite this difference in motivations and contexts, these two presidents used a similar strategy in response to essentially the same

type of constraints.

These deals also demonstrate the extent to which nominations are tied to each other and tied to the larger legislative arena. These cases contained several instances of district court vacancies being used as bargaining leverage in Courts of Appeals nominations, so an examination of individual nominations makes it more difficult to understand these deals. While there are important differences in how presidents approach district and circuit court nominations, it is also important to appreciate the extent to which the two appointment systems are inextricably linked. These particular cases deal only with bundles of nominations, but there are suggestions in the records that in some instances, nominations were made contingent on votes on other unrelated issues. Carter's staff, for example, was concerned about how Morgan would vote on ratification of the Panama Canal Treaty. While there does not appear to have been any direct deal in that regard, the implications of the North Carolina vacancies clearly extended beyond the federal courts.

Finally, these successful deals perhaps vindicate a bargaining strategy that is sometimes frowned upon by observers. Packaging of this sort is often derided as political deal-making in which politicians sell-out on their principles. Both President Carter and President Bush were criticized by partisans and activists for making these deals. In fact, President Bush was criticized both by conservatives for giving up a seat and by liberals for not giving up enough. However, from the vantage point of the system as a whole, these cases demonstrate that bundling can be an effective form of compromise that often results in desirable outcomes. Neither president was in a position to get everything they wanted, and in accepting the compromise the seats got filled. A potentially worst-case scenario would be even more vacancies resulting from an inability to find suitable candidates and an even more backlogged judicial system. In an era of increasing partisanship and polarization, any form of compromise is worth considering. Senator Udall's proposal to bundle two Supreme Court justices was certainly not taken seriously, but perhaps under slightly different circumstances in the future even that compromise could be given consideration as a viable

political strategy.

Chapter 6

The Future of Appointments: Nominations Under Minimal Constraint?

Barack Obama famously said that "elections have consequences," and that was undoubtedly true of the 2016 presidential election, especially with respect to the future of the federal courts. One of the most immediately consequential implications of Donald Trump's victory over Hillary Clinton was the vindication of the strategy of delay put forward by Senate Republicans during most of the calendar year leading up to the election. President Obama had nominated Merrick Garland in mid-March to fill the vacancy on the Supreme Court, but Garland never received a hearing or a confirmation vote in the Republican-controlled Senate. Instead, President Trump was able to nominate Judge Neil Gorsuch from the Tenth Circuit Court of Appeals and the Republican-controlled Senate quickly confirmed him in April of 2017. The election determined not only the presidency for four years, but perhaps the future of the Supreme Court for several decades.

President Trump's election has consequences for the future of the lower courts as well, as Trump inherited a large number of vacancies that were not filled in the last congressional

session of Obama's presidency. Some of those seats were held open during the last year of Obama's term in office despite having nominees before the Senate. Others were lower court vacancies in Republican controlled states for which no nominee was ever presented. Given these existing vacancies and the new ones that arose after he became president, the impact of President Trump's presidency on the federal courts will likely be substantial. His influence in this regard may largely be determined by whether the Senate continues to eliminate the ability of the minority party to constrain presidential choice under conditions of unified government.

6.1 Obama's Judicial Legacy

At the end of President Obama's sixth year in office, the Senate had confirmed a record number of his lower court appointees, leading some media observers to declare an early victory in the confirmation wars. Headlines like "The Senate Just Cemented Obama's Judicial Legacy" in the *Huffington Post* and "Obama's Judges Leave Liberal Imprint on U.S. Law" by Reuters were a marked departure from the criticism he received earlier in his administration. Party elites and liberal activists openly celebrated Democratic Majority Leader Harry Reid's success in moving Barack Obama's nominees through the Senate chamber.[1]

Indeed, Obama's imprint on the federal courts is due in part to Senator Harry Reid's assertive use of Senate rules and, ultimately, his decision to change those rules in the face of Republican opposition. Despite being in the majority for much of Obama's administration, the Democrats had been stymied by Republican opposition in attempting to confirm many of his appointees. Especially problematic was their inability to break a filibuster of three Obama nominees to the Court of Appeals for the District of Columbia Circuit. After a prolonged standoff, Reid rallied 52 Democrats to vote for the so-called "nuclear option" and

[1] Jennifer Bendery, "The Senate Just Cemented Obama's Judicial Legacy." *Huffington Post*, December 17, 2014 and Lawrence Hurley, "Obama's Judges Leave Liberal Imprint on U.S. Law" *Reuters*, August 26, 2016.

eliminate the filibuster for lower federal court and executive appointments. After this rule change was made in 2013, the Senate confirmed an impressive number of judges during the 113th Congress. When the filibuster was operable, fewer than 50 of Obama's nominees were confirmed each year, but in the congressional session after the rules change 89 judges were confirmed. The 113th Congress was clearly the high point for Obama's judicial nominations, however. After the Republicans regained control of the Senate in November 2014, only 22 of Obama's judges were confirmed in his last two years in office. All told, Obama appointed 329 judges, including two Supreme Court justices, a total that is in line with his predecessors. However, the number of vacancies that remained unfilled when he left office was higher than his predecessors. When Obama left office in 2017, there were 86 district court and 17 circuit court vacancies, almost double the number that Obama inherited in 2009.[2]

Despite the early criticism from liberal activists, Obama clearly made considerable gains with respect to his goals for judicial appointments during his time in office, particularly with respect to the continued diversification of the federal courts. At the end of his term, women and minorities make up a majority of the judges on the Courts of Appeals, representing a wide variety of backgrounds including the first female Native American judge and more LGBT judges.[3] Importantly, while some liberal critics derided the Obama strategy of identifying mainstream moderates instead of liberals who would push the contours of the law, most observers expect his judges to have an impact on the future of American jurisprudence. In defending Republican obstruction throughout Obama's presidency, conservative activists argued that a the moderate nominees would end up voting the same as a more aggressive liberal on the important cases facing the country. If they are correct, the future voting behavior of Obama's nominees may vindicate his administration's strategy of avoiding "politically damaging but substantively inconsequential fights."[4]

[2]Bendery, "The Senate Just Cemented Obama's Judicial Legacy."
[3]Bendery, "The Senate Just Cemented Obama's Judicial Legacy."
[4]Michael Grunwald, "Did Obama Win the Judicial Wars?" *Politico*, August 8, 2016.

At the end of his presidency, Democratic-appointees were in the majority on nine of the thirteen Courts of Appeals and several circuits had undergone particularly dramatic transformations. For example, Obama's judicial legacy can be clearly seen on the Court of Appeals for the District of Columbia. Thanks in large part to Harry Reid's changing of Senate rules, Obama was able to appoint 4 nominees to shift the ideological balance on what had been an evenly split court. Obama's appointees also have transformed the Fourth Circuit, where Democratic appointees now hold a substantial majority on what was once one of the more conservative Court of Appeals in the nation. The future impact of those judges is already apparent in the decisions they have handed down. In April 2016, a panel from the Fourth Circuit, with two Obama appointees in the majority, validated a transgender student's claim to have access to the boy's restroom at school. Later in the year in August, Obama appointees joined with a Clinton appointee to strike down and condemn in unusually critical language the voter identification law that had been passed in North Carolina.[5] Decisions on these issues have not been handed down by the Supreme Court, so the law on these issues is still very much under development. But it somewhat surprising to see these decisions coming from the long-conservative Fourth Circuit. Obama's appointments have had and will continue to have an impact on the nation.

6.2 Trump's Judicial Future

Less than a year into the Trump presidency, lower federal judicial appointments are only beginning to be processed in the aftermath of Gorsuch's Supreme Court confirmation. However, there are several indications as to how President Trump will use the appointment power. His handling of judicial nominations, like many policy areas under his administration, will likely be notably different from many of his predecessors in several respects.

[5]Hurley, "Obama's Judges Leave Liberal Imprint on U.S. Law"

Presidential Goals

There has been quite a bit of uncertainty surrounding President Trump's goals with respect to the judiciary. Trump's candidacy and fidelity to the Republican Party has always been viewed with some suspicion by the Republican establishment. Since Trump's ideological leanings and background were less obvious than other traditional conservatives, many activists doubted that they would be able to trust a President Trump. Partly in order to quell such hesitation and to unify Republican support during the campaign, Trump released an initial list of model Supreme Court nominees that he might choose to nominate for the vacancy created by the death of Antonin Scalia. Very little was said about the process through which the names were chosen, but Trump himself indicated the list was drawn up in consultation with the conservative groups the Federalist Society and the Heritage Foundation. The list contained the names of 11 jurists he would consider: all of them white, most of them male, and all of them very conservative. At the time, the release of the list was seen as a campaign, position-taking move so it was unclear whether the list would truly be a guide to his nominations.[6]

By fall of 2016, it was very clear that the winner of the presidential election would indeed get to name the next Supreme Court justice. As the election loomed, conservatives began to rally around their candidate reminding voters of the importance of the Supreme Court. As part of that overall strategy, Trump released a second list of potential nominees in September and assured Republicans that the list would be "definitive" moving forward, as any justices that he named would come directly from that list. At the time, the release of this list was perceived by the media much as the first one had been, with skepticism that it was mostly a campaign tactic.[7]

The day after the election, however, court observers resurrected the second list and be-

[6] Alan Rappeport and Charlie Savage, "Donald Trump Release List of Possible Supreme Court Picks." *The New York Times*, May 18, 2016.

[7] Adam Liptak, "Trump's Supreme Court List: Ivy League? Out. The Heartland? In.", *The New York Times*, November 14, 2016.

gan immediately scrutinizing it for clues as to what impact President-Elect Trump would have on the federal courts. The list was notable in two respects. First, the list, like the first, was clearly meant to solidify Republican support by reassuring court watchers that Trump would choose conservative judges. Trump again signaled his intentions with respect to the court by crediting the Federalist Society and the Heritage Foundation with helping to prepare the list. The list included several Court of Appeals judges that had faced tremendous opposition from liberals during their confirmations to the circuit court, including William Pryor of the Eleventh Circuit.

The list was also notable, however, in that it clearly indicated Trump's intention to diversify the pedigree of the Supreme Court. The judges on his list were drawn almost equally from state supreme courts and Courts of Appeals judges. Rather than drawing up a list of graduates from Yale and Harvard Law, Trump presented potential nominees who attended Notre Dame, Northwestern, and Tulane. The list also included Courts of Appeals judges who served in the "heartland" in circuits like the Tenth and the Eighth, rather than from circuits associated with the coastal elite like the Second and the DC Circuit. Notably absent from the list was Judge Brett Kavanaugh, a George W. Bush appointee to the D.C. Circuit. At the time of Kavanaugh's appointment to the Court of Appeals, there was speculation that he would make a good nominee to the Supreme Court. But in the context of the potential nominees on Trump's list, Kavanaugh's Yale Law degree and close ties to the Washington establishment may have been a liability rather than a benefit. Thus, the list simultaneously served to "reassure the conservative legal establishment" and also "represent a rebellion against it."[8]

President Obama, like his predecessors, took office with a well developed vision for the role the judiciary should play in the United States, and set about finding judges and justices that would adhere to and enhance that vision. President Trump, as a newcomer to national politics, has not indicated that he has a particular vision for the courts in terms of policy

[8]Liptak, "Trump's Supreme Court List: Ivy League? Out. The Heartland? In."

goals. However, Trump has demonstrated keen awareness of the manner in which nominations can be used to build political capital and support. His initial communications with respect to the courts have served to signal support to the key constituencies from which he gets the most loyal support as well as the conservative legal activists whose support he recognizes that he needs. The geographic and educational diversity of his list of appointees indicates a clear understanding of the groups forming the basis of his support and a transparent attempt to assure them of his mutual support.

Constraint on Presidential Goals

The level of constraint Trump will face will likely be quite low for most nominations in the 115th Congress. The Senate is controlled by the Republican Party, which by definition means that the majority leader, the chair of the judiciary committee, and the median voter are all Republicans. Assuming that President Trump's priorities for the lower courts are in line with his apparent goals for the Supreme Court, his nominees should have little trouble getting confirmation. The most effective tool available to the minority party to block the confirmation of judges was eliminated in 2013 when Harry Reid and the Democratic caucus used the "nuclear option" to prevent the filibuster of judicial nominees. Thus, the constraints specific to the congressional session are minimal through at least 2018. During the one analogous congressional session during Obama's presidency, the 113th Congress, the Democrats were able to confirm a much larger number of Obama's nominees. Now that the Republicans enjoy unified government and a minority party with few weapons, we should expect to see them confirming judges at a similarly high rate.

In fact, it seems that not only does Trump face few constraints in the Senate, the Republican leadership may place a higher priority on judges than President Trump does himself. Rather than the Senate being a check on presidential nominations, the Senate seems to be currently functioning as a propulsive force in moving nominations forward to fill vacant seats. Majority Leader Mitch McConnell, at the urging of conservative activists, has indi-

cated that he will prioritize judicial nominees over other appointments. He was quoted as saying "Priority between an assistant Secretary of State and a conservative court judge – it's not a hard choice to make."[9] As majority leader, McConnell has complete discretion to set the Senate calendar, so prioritizing nominees it certainly a prerogative of his, just as it was within his powers to refuse to schedule floor time to vote on Obama's nominations during his last term of office.

Strategic Response to Appointment Constraints

As of June 2017, there were 132 vacancies on the federal courts, accounting for 13% of the federal judiciary. By mid-June, the Senate had confirmed only two nominees to the federal courts, with 14 other nominees pending. The first of those confirmations was for Supreme Court Justice Neil Gorusuch, who was confirmed to the U.S. Supreme Court on April 7, 2017. The second set of proceedings were for Amal Thapar, who was confirmed to the Sixth Circuit Court of Appeals on May 25, 2017. Both jurists are relatively young, at 49 and 48 respectively, and both were on the lists of possible Supreme Court nominees that Trump publicized during the campaign. These two appointments were made under circumstances of minimal constraint and are consistent with what we should expect with few limitations in place in the Senate.

The nomination and confirmation of Amul Thapar, an Indian-American, to the Sixth Circuit Court of Appeals may at first glance seem to be an unusual first lower court nomination for Trump. However, two factors explain the quick movement on Thapar's nomination. First, Thapar, like Gorsuch, was on the second campaign list circulated by Trump, which is a strong signal of his solid conservative credentials. Ideologically, he is exactly the type of nominee one would expect under conditions of minimal constraint. Not only did he have the support of conservative court-watching groups, it seems likely that his name was

[9]Fred Barnes, "McConnell Goes to the Mattresses for Trump's Judicial Nominees," *Weekly Standard*, October 11, 2107.

suggested by those very groups.

Secondly, and perhaps more importantly, the seat to which Thapar was confirmed on the Sixth Circuit is a Kentucky seat, over which Mitch McConnell has direct influence. The seat had been vacant since 2013, because Obama's nomination of Lisabeth Hughes in 2016 was never processed by the Judiciary Committee. Both Kentucky Senators, Rand Paul and Mitch McConnell are Republicans, which likely prevented the Judiciary Committee from moving forward in 2013, but it likely facilitated movement forward on Thapar's nomination in 2017. Just as President Obama's first nomination was one that had support from both home state senators, President Trump's first nomination to move forward had strong backing from the home state senators. importantly, however, because McConnell is also the majority leader of the Senate, he is in a position to both have strong influence over the identity of the nominee and to move the nomination expeditiously through the Senate. As of June, no other nominees had even had hearings before the Judiciary Committee.

Importantly, Amul Thapar's appointment makes clear the distinction between minimal constraint and widespread support. Both the cloture motion to proceed to a floor vote and the final vote on Thapar's confirmation were straight party-line votes. McConnell gathered all 52 Republican votes on both the procedural and the substantive votes, and that was all he needed for successful confirmation. Despite being one of the most efficient nominations in recent memory, there was plenty of opposition. In this case, however, the opposition had few tools to derail the nomination. Constraint is a measure of both ideological will and institutional capacity. Democrats have plenty of willingness to block Trump's nominees, but so far they have not had the institutional capacity to do so.

At such an early point in Trump's administration, it is impossible to know whether additional constraints will have any moderating affect on his nomination strategies. At this point, the one source of variation with respect to constraint on judicial nominees is the norm of senatorial courtesy and the identity and party loyalties of senators in the states where vacancies arise. At this point, there are four types of lower court vacancies he has the

opportunity to fill: vacancies with Republican delegations for which Obama was not able to offer up an agreeable nominee, vacancies with Democratic delegations for which existing nominees were held up in the last Congress, vacancies with split delegations for which nominees were likely offered but stymied by Republican blue slips, and new vacancies that have arisen in 2017 for which no nominee has yet been offered. We should expect to see the vacancies with Republican delegations to move relatively quickly as those nominations face truly minimal constraint, while the others should move more slowly as potential opposition from Democratic home state senators must be taken into account. How his administration handles this source of variation will be the first test of his nomination strategy.

6.3 The Future of Nomination Constraints

Majority Party, Minority Rights?

One result of the increased contentiousness in the Senate appears to the consolidation of power in the majority party. The future of the filibuster with respect to judicial nominations was in doubt as early as 2005, when Majority Leader Bill Frist threatened a rule change in response to Democratic filibusters of 10 nominees sent to the Senate by George W. Bush. While that confrontation ended with a compromise agreement from the so-called Gang of Fourteen, a bipartisan group of moderate Senators, the die was already cast. After Obama's reelection to a second term of office, Majority Leader Harry Reid rallied Democrats behind a rule-change to prevent filibusters of lower federal court nominees and executive nominees. The filibuster is really only a useful tool to block nominations under unified government; under divided government the minority party is generally interested in moving nominations forward. During the next period of unified government, Republicans extended the rule changes to include Supreme Court nominations after Democrats filibustered Supreme Court nominee Neil Gorsuch.

This series of steps has tremendously weakened the minority party's ability to constrain

presidential choice of nominees. The minority party is not powerless, however. Because the Senate largely operates on unanimous consent agreements, the minority party still has the ability to refuse unanimous consent, requiring additional floor time to move to a vote. Unlike a filibuster, though, this tactic is effective only at delaying a vote, not preventing a vote altogether. Refusing unanimous consent to move to a vote on a nomination requires the majority leader to use the cloture process to cut off debate and requires an additional four days. On a single nomination, refusing unanimous consent will hardly change the outcome, but for a series of several nominees when the Senate is time-crunched the tool can be quite effective. Critically, unanimous consent is required for the Senate to move swiftly on any business, so an extreme strategy from the minority party could essentially bring the Senate to a halt by objecting to every unanimous consent agreement offered by the majority leader.[10] Thus, while the filibuster rules changes certainly neutralized one obstructionist tactic, there is at least the potential that it will weaponize another.

The absence of the filibuster also raises the stakes for the majority party. Now that the majority party's power advantage over the minority party is vastly increased, the incentives to use that power to maximum effect while you have it are tremendous. Neither party has had more than 60 votes in the Senate since the 1970s, and control of the Senate has flipped more frequently than control of the House. The immediate effect of reducing the rights of the minority party seems to be energizing the majority party before they find themselves in the minority. In an interview with conservative columnist Fred Barnes, McConnell acknowledged that concerns about potentially losing the Senate in 2018 add to the since of urgency now.[11] For Republicans in the majority under unified government, the risk is both losing the Senate in 2018, which would likely slow confirmations to a halt, and then losing the presidency in 2020, which would hand over vacancies to a Democratic presidency. Thus, the increasing differential in power of the majority party and the minority party seems

[10] Adam Jentleson, "Senate Democrats Have the Power to Stop Trump." *The Washington Post*, January 27, 2017.

[11] Barnes, "McConnell Goes to the Mattresses for Trump's Judicial Nominees."

to have both greased the wheel and heightened the stakes during unified government.

Home State Senators and the Future of the Blue Slip

The level of constraint that future presidents will face is somewhat uncertain because the "blue slip" policy seems to be the latest target of the majority party. Senatorial courtesy used to be understood as the right of same-party senators to consult with the president on nominations within their state. Increasingly, however, withholding blue slips has been a tool utilized by the minority party as the most effective check on the presidential nomination power. Indeed, during the 113th Congress, the Democrats were very successful in moving nominees forward once the filibuster rule was changed *except* in the states that were represented by a Republican delegation, like Texas. In the states with two Republican senators, nominees did not move forward in the Judiciary Committee or no nominee was offered at all, even for district court vacancies.

Majority Leader Mitch McConnell indicated in September that he was in favor of changing the way blue slips are honored. In an interview with *The New York Times* he suggested that in his view a withheld blue slip for a circuit court nomination should be advisory, and not an automatic veto of a nominee. The precipitating events were apparently the withholding of three blue slips for two Trump nominees. Senator Al Franken of Minnesota announced that he would not return a blue slip for the nomination of Minnesota Supreme Court Justice David Stras to the Eighth Circuit. Senators Ron Wyden and Jeff Merkley of Oregon indicated they would not return blue slips for Ryan Bounds, an assistant US attorney. In both cases, the Democrats claimed that the nominees are outside of the mainstream, but more importantly they objected to the lack of consultation prior to the nominations. Several other vacancies on the Courts of Appeals are in states with Democrats in the delegation, raising the likely possibility of additional blue slips being withheld.[12]

[12]Carl Hulse, "As G.O.P Moves to Fill Courts, McConnell Takes Aim at an Enduring Hurdle." *The New York Times*, September 13, 2017.

The decision to honor or disregard the withholding of blue slips is in the hands of the judiciary chair, not the majority leader. The tradition of blue slips are not written into the formal rules of the Senate, but rather they reflect traditional practices and respect for the prerogatives of individual senators. In 2014, former Judicary Chair Orrin Hatch, a Republican, wrote an impassioned defense of the blue slip, arguing that the primary impact of blue slips is "enhanced consultation and cooperation between home state senators and the White House." He argued together the filibuster and the blue slip "make meaningful 'advice and consent' a reality" and "preserve a real check on the president's appointment power."[13] Like the filibuster, members of both party are on the record supporting the use of blue slips for both district and circuit court appointment. But also like the filibuster, such declarations of support tend to come more loudly from the minority party at any given moment. Grassley has indicated his support for blue slips in the past, but the role of blue slips for the rest of the 115th Congress (and possibly beyond) is squarely in his hands. It is not immediately clear whether or how long the blue slip policies will remain in effect.

The decision to honor or disregard blue slips will be an extraordinarily consequential decision. The role of home state senators in lower court nominations is one of the last holdouts of the old system of patronage appointments. As long as senatorial courtesy is in effect and blue slips are honored, the system of appointments operates as a form of distributive politics where individual senators can build their own political capital within their constituencies and their states. The rest of the judicial selection apparatus has moved towards nationalization as policy activists pressure party leaders to take more decisive actions on appointments (Scherer, Bartels and Steigerwalt 2008). A blue slip policy that recognizes the home state prerogatives of individual senators maintains a hybrid system of sorts, where the Senate as a whole operates on the basis of policy, but individual senators may operate under the influence of their specific communities. Home state senators are certainly in a position to have better information about nominees than the ideologically motivated inter-

[13] Orrin Hatch, "Protect the Senate's Important 'Advice and Consent' Role." *The Hill*, April 11, 2014.

est groups pressuring elected officials. The effect of a change in the blue slip policy would likely to be incentivize the choice of more extreme judges to appeal to ideological activists.

Implications of Rule Changes

The rule changes in the Senate - both actual and potential - are additional evidence of the continued nationalization of all appointments. As the process to become more contentious, the "creeping partisan rancor" becomes increasingly consequential.[14] The tactics and strategies that were well worn at the level of appellate courts but rarely or never employed in Supreme Court confirmation proceedings, like the use of filibusters and refusing to hold a hearing, have begun to affect Supreme Court nominations. Similarly, procedures that are problematic to the presidents party for lower courts, like the blue slip, are suddenly on the chopping block in an attempt to make Courts of Appeals nominations more closely mirror the efficiency of a Supreme Court nomination. Perhaps most surprisingly, over the past decade the tactics that were used to successfully block Courts of Appeals nominees have drifted down to the district courts, as several of Obama's district court nominees were blocked through filibusters. As the tactics and strategies leap from one court to the next, the essential differences between the parts of the judicial hierarchy become obscured.

The changes of late in Senate procedures also highlight an existential question facing the Senate. In the past, many observers have argued that the predominate cleavage creating the confirmation crisis was an interbranch conflict over control of the appointment process (e.g. Law 2004). Presidents often emphasize that it is the duty of the Senate to "consent," insisting that hearings be held and votes be scheduled. Senators can often be heard to assert the important role of their institution in advising on nominations, asserting the power of home state senators and independent investigations by Senate staff. However, the rule changes in the Senate are the result of an interparty cleavage. As the parties become increasingly polarized, the cleavage threatens to overtake and overshadow the Senate's im-

[14]Matt Flegenheimer,"Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch"

portant role in confirming judges. As noted by former Chairman Hatch, both the filibuster and the blue slip are important Senate traditions that empower the entire chamber vis a vis the president. By continuing to weaken the power of the minority party within the chamber, the Senate will resign itself to a rubber stamp during times of unified government and an automatic veto during divided government. In that scenario, the only relevant cleavage is between Democrats and Republicans.

For the theory of strategic presidential response to appointment constraints, the critical implication of these changes is that important sources of constraint are eliminated, reducing a president's incentive to bargain or compromise. Indeed, we have already seen instances under past presidents where the relationship with an opposite-party delegation was so contentious that vacancies went unfilled for years. If what was once a complicated system of multiple sources of constraint is collapsed into a straight party-line vote for all nominations, we are likely to see no compromise at all during times of unified government and fewer nominations and even fewer confirmations during divided government. Neither of those likely outcomes would create an effective, stable judiciary.

6.4 Conclusion and Implications

The current state of judicial nominations is concerning, both because of the persistent vacancies and the resultant workload problems. The level of contention also raises questions about the general effectiveness of government as it is currently constituted. But while understanding the causes and short term implications of the current vacancy crisis is important, the critical question is the long-term impact a contentious confirmation process has on the identification of the men and women who staff the lower federal courts. The jurists who emerge from this process will shape the law for decades, so the incentives created by the current system are of critical importance. The partisan wrangling and maneuvering is the most visible aspect of the heated confirmation process, but the far more important

consequence is the set of judges it produces.

We have had some sense of how a president strategically responds to constraint when nominating Supreme Court justices, but that understanding does not necessarily translate to lower court appointments. The theory of strategic presidential response to confirmation constraints provides an answer to how presidents are likely to adapt a presidential strategy to the more complicated bargaining environment surrounding lower court nominations. As the process is currently configured, an individual president is likely to face high constraints surrounding some vacancies, especially those that occur in states where the opposite political party predominates. But a president should also find some vacancies are relatively unconstrained. The level of constraint, of course, depends on the configuration of the Senate and the power and status quo of the court in question.

While the increasingly contentious confirmation process is usually criticized as an example of gridlock and partisanship, a reinvigorated bargaining process may ultimately be beneficial for the judiciary. Almost any form of compromise that a president might make can be construed as a positive development for the judiciary. If presidents decide to make concessions over the ideology of their nominees in the face of moderate or high constraints, the result will likely be a more moderate judiciary in the long run. A court system staffed by such moderates will have high legitimacy, produce a relatively stable system of law, and protect the integrity of the judiciary from the dangers of polarized debate. If presidents instead use age as a bargaining tool and appoint older judges, the length of judicial terms will be effectively shortened. The indirect consequence of such a shortening will likely be to lower the stakes of judicial appointments in the manner proposed by those in favor of judicial term limits. The appointment of older judges will also create more turnover on the bench, potentially making the judiciary more "democratic" and less distant from the people. The consequence of "packaging" may be more concerning in that maintaining a balance through appointing multiple extreme judges; in this cases polarization may be the likely result rather than moderation. But even this strategy of breaking a standoff allows

for multiple vacancies to be filled and the courts to function.

On the other hand, if the tensions between the Senate and the president are resolved through rules changes in the Senate stripping the minority power of prerogatives instead of good faith bargaining, the problems may get worse before they get better. The effect of rules changes that have already been put in place and those that are being considered are to further empower the majority party and to further diminish the minority party. Such steps certainly present a solution to the problems of gridlock and stalled nominations under unified government, but the contention here is that the focus should really be less on the Senate and more on the president. By eroding the various constraints that a nominee must overcome, the Senate moves to streamline the confirmation process for lower courts, but it really just empowers the president and makes itself less relevant in the shared authority over judicial nominations. The theory of strategic response to appointment constraints also suggests the implications when the president faces few restrictions: complete presidential autonomy. By reducing the process to a struggle fought primarily between the parties, the Senate undermines the extent to which it should properly be a struggle between the branches.

While it is true that the staffing of the lower courts has been largely a pasttime for the political elite, the results of that struggle are critically important. The composition of the lower courts is consequential for the future development of American jurisprudence and ultimately the lives of everyday Americans. Understanding the manner in which presidents have adapted to the new realities of Senate confirmation is a critical first step in examining the impact of lower court staffing and ultimately on the impact of those changes in the law.

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