NOMINATION PROCRASTINATION:

THE PRESIDENT AND THE COURTS OF APPEALS

by

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(Under the Direction of Robert Grafstein)

ABSTRACT

Nomination opportunities for the Courts of Appeals in the United States routinely occur, yet the timing of nominations by the president is anything but routine. Between 1976 and 2004, 344 appeals court nominations were made by the president. Among these nomination opportunities, the president made nominations following vacancy in as as little as a few days and as much as a few years. Why does the president decide to delay some nominations and not others? I argue judicial policy emanating from these courts explains this behavior. More precisely, ideological drift during a vacancy can induce or discourage a nomination. I develop a formal model demonstrating how the president makes a tradeoff between ideological drift in the court and the constraints of confirmation in the Senate. Combining datasets on nominations to the appeals courts, presidential and senatorial ideal points, and judicial ideal points, I empirically test and find support for my theory. The timing of nominations to the federal Courts of Appeals appears to be determined by a complex mix of ideological constraints tempered by an ever shortening window in which to act.

INDEX WORDS: Federal Courts of Appeals, Nominations, President, Senate, Ideological Drift, Formal Model

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B.A., The University of Georgia, 2009

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

MASTER OF ARTS

ATHENS, GEORGIA

2010

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December 2010

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1 Introduction

Executive appointments in American politics present interesting opportunities to examine the institutional dynamics among the branches of government. The president possesses exclusive right prescribed by the Constitution to appoint ambassadors, heads of departments, federal judges, and other executive branch ministers. Notwithstanding the president's monopoly power on appointments, the Senate maintains the right of advice and consent on such appointments. Furthermore, de facto constraints dependent upon the office to which the appointment is made also exist. Although federal court judgeships *prima facie* may not seem to impose constraints, further investigation reveals the underlying institutional structure of the office to which appointment is made constrains both the president and the Senate. Three constraints exert control over any federal appellate court appointment event: the president, the Senate, and the court to which appointment is made.

Early literature using formal models on executive appointments demonstrates the dynamics of the appointment process. At the heart of matter lies policy. While the president enjoys agenda setting power, the Senate enjoys confirmation power, which forces the president to consider the Senate's preferences (Romer and Rosenthal 1979; Calvert, McCubbins, and Weingast 1989; Waller 1992; Hammond and Hill 1993; Snyder and Weingast 2000; Chang 2001). More recently, research on formal models of executive appointments has focused on the Supreme Court and the importance of its collective decision-making nature (Moraski and Shipan 1999; Rhode and Shepsle 2007; Krehbiel 2007; Console-Battilana and Shepsle 2009). Further examination of the policy implications of vacancies on collective choice bodies shows ideological drift becomes possible. There is evidence for the dynamic nature of judicial ideology over time (Steunenberg 1996; Nokken and Sala 2000; Martin and Quinn 2007; Kaheny, Haire, and Benesh 2008). Who in the Senate proves to be pivotal in confirmation votes also has been examined, which has important implications in the president's nomination decision (Jacobi 2005; Johnson and Roberts 2005; Primo, Binder, and Maltzman 2008; Hendershot 2010).

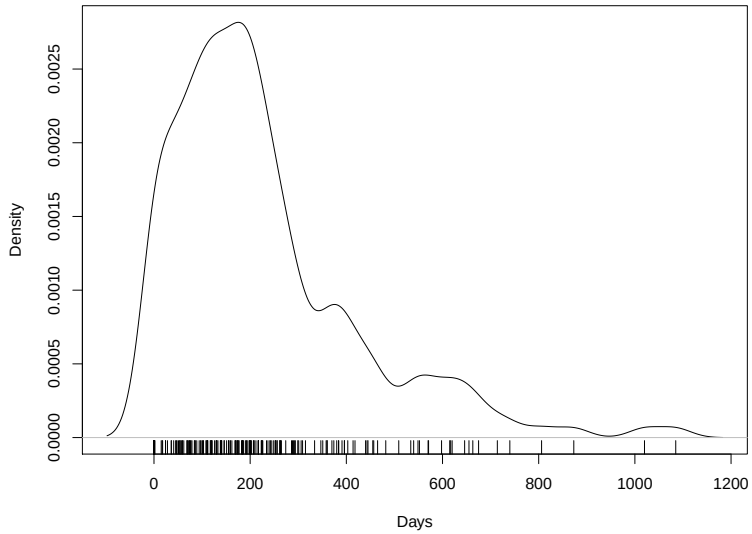

Figure 1: Days of Delay

Nomination opportunities for the Courts of Appeals in the United States routinely occur, yet no apparent pattern exists with repect to the timing of nominations. Between 1976 and 2004, 344 appeals court nominations were made by the president. Among these nomination opportunities, the president made nominations following vacancy in as as little as a few days and as much as a few years.

Why does the president decide to delay some nominations and not others? I argue judicial policy emanating from these courts explains this behavior. More precisely, ideological drift during vacancy can induce or discourage nominations. As the ideological distance between the president and the pivotal senator increases, so does the opportunity for ideological drift (Steunenberg 1996). Sensing the opportunity to take a different ideological direction, appeals court judges can take a path towards or away from the president's ideological preference. Meanwhile, the president observes whether and in which direction ideological drift occurs and decides whether to make a nomination.

I develop a formal model of appointments to the federal appeals courts in which the decision function of the president takes into account the distance between the president and

the pivotal Senator as well as the ideological drift of the court to which appointment is made. While intuition suggests the president would allow ideological drift in his direction to continue until he realizes the maximum utility of drift alone, as time passes the president faces increasingly difficult confirmation constraints in the Senate. As time passes, the president's ability to succeed with federal judicial appointments decreases and the Senate increasingly delays confirmations. Allison not only shows confirmation rates decrease with the president's time in office, but also the amount of delay increases with the president's time in office (1996). Also as time passes, ideological drift affects the president's utility. If ideological drift occurs in the president's favor, he may wish to delay nomination; however, if drift occurs away from the president, he may wish to nominate sooner. My model and the implications derived from it show how the president can make tradeoffs depending on the pivotal Senator, ideological drift, and time.

Empirical tests of my formal model primarily rely on three databases: the Martinek Confirmation Database, Poole and Rosenthal's NOMINATE data, and the Judical Common Space scores for appeals court judges (Poole and Rosenthal 1997; Martinek 2004; Epstein, et al. 2007). The implications of my model generate two testable hypotheses to determine whether my theory of presidential tradeoffs holds any water. First, I hypothesize nominations will occur sooner the further apart the president and the Senate find themselves ideologically. Second, I hypothesize nominations occur sooner when the court ideologically drifts away from the president than when it drifts toward the president. Using a duration model to determine the hazard rate of a nomination conditional on the variables of the model I find support for both of my hypotheses.

My research contributes to the field in a number of ways. First, a formal model of appointments to the federal appeals courts has not been developed. Second, my model takes into account recent research challenging the assumption of stable judicial ideology over time. Finally, only one academic attempt has been made to explain presidential delay in nominations to federal Courts of Appeals and it was met with mixed success. My research

takes another bite at the apple and offers a new and empirically substantiated explanation of this phenomenon.

This paper proceeds as follows. First I provide a review the literature including: nominations in general and Supreme Court nominations in particular, ideological drift, and nominations and the Senate. Next I develop my theory and explicate my formal model of the presidential decision function as it relates to nominations to the Courts of Appeals. Following that I describe that data and methods used to empirically test the implications of my formal model and explain the results. I then discuss the results and conclude with some suggestions for future research.

2 Literature Review

2.1 Formal Models of Executive Appointments

Formal modeling of the appointment process avails political scientists of an appropriate method for analysis of the institutional dynamics. What happens when the president nominates or attempts to nominate someone unpalatable to the Senate? How can the Senate impose its will on the executive branch? Who are the pivotal players within the Senate? How much does policy change from an appointment? How can the relevant players overcome institutional constraints? The formal model literature on the appointment process attempts to answer these questions and predicts the behavior of the relevant players. Generally speaking, the literature falls within two categories: bargaining games and agenda setter models.

Calvert, McCubbins, and Weingast produce a model for appointments to executive agencies. In their model the legislature and executive share the power to appoint an agent, the agent then chooses policy, after which the legislature and executive simultaneously decide whether to exercise a veto. They conclude from their model that the policy choices of the agent are constrained by elected officials. While the agent has some discretion over policy due to uncertainty, the agent cannot stray too far from the prescribed policy. The Calvert,

McCubbins, and Weingast model does not allow for institutional constraints on the agent since the agent is chosen for his/her policy positions (Calvert, McCubbins, and Weingast 1989).

Bargaining in this model occurs during the agent selection process. The legislature and the executive engage in a Nash bargaining process to choose an agent within the negotiation set, the set of agent ideal points Pareto optimal for both the legislature and executive. Since both the legislature and executive prefer some agency action over no agency action, the reversion forecast is the threat point of the bargaining process and equates to zero utility. Additionally, the model includes a negotiation variable, which proves to be the critical variable in their model. Any room for agreement comes from the players' willingness to negotiate. The less amenable to negotiation the players are, the greater the likelihood of realizing the threat point (Calvert, McCubbins, and Weingast 1989).

The players work backwards and consider how potential vetoes will affect the agent's choice of policy. Using backwards induction, the legislature and executive agree on an agent, or more precisely, a policy, since there is an infinite number of candidates representing all possible ideological positions. Variations on the model demonstrate how the agent chosen may be affected by the legislature's control of the agency budget, in which case the legislature gains an advantage, and how exclusive veto right can benefit the holder of that right (Calvert, McCubbins, and Weingast 1989).

Calvert, McCubbins, and Weingast use spatial modeling along with game theory to demonstrate the control the legislature and executive have over policy implemented at executive agencies. They interestingly introduce uncertainty to the model and show how agency discretion can come about. This model, however, over simplifies the reversion forecast by assuming a preference for agency action over inaction. This assumption is unrealistic as policy preferences certainly exist regardless of whether an agent is appointed. The legislature and executive certainly have greater or less than zero utility from the reversion forecast. Nonetheless, the strength of the model lies with its conception of agency discretion.

Waller develops a bargaining model for appointments to the central bank. Waller argues appointments to the central bank are the primary source of partisanship in setting monetary policy and develops a model couched in normative terms of minimizing partisan influence. Waller's model centers on elections and has the winning party gaining appointment power and the losing party gaining confirmation power. Furthermore, the game is two periods–pre-election and post-election–and the schedule of vacancies is known to all players. Since Waller seeks to model an institution with minimal partisan policy, Waller sets strict rules on when elections take place and when vacancies occur (Waller 1992).

Players bargain in a mix between a one-sided bargaining model and an alternating-offer bargaining model over a nomination and decide whether to make an appointment. Players trade partisan policy and time. The appointing party makes a nomination and the confirming party decides whether to consume the benefits of that policy now or wait until after the next election when they might have appointing power. The time left before the next election sets the bounds of acceptable nominees. Appointments immediately following an election realize more partisan policy because no election will occur before the term expires leaving the confirming party no incentive to reject a nominee. However, when an election will occur during the term of the position to which an appointment is made, the confirmation party gains an advantage and can decide whether to consume the benefits of an appointment during the first period or wait until after the election during the second period when the confirming party may become the appointing party. Through backwards induction, the appointing party knows this and makes an appointment that is minimally acceptable to the confirming party (Waller 1992).

As with the Calvert, McCubbins, and Weingast model, Waller's model sets utility equal to zero for not making an appointment. In Waller's model, however, the confirming party can compare the utility of not making an appointment with the expected utility of nomination should the confirming party become the appointing party in the next period. This allows both players to consider the future and demonstrates how each party's discounting of the future

has policy implications. Furthermore, the model seemingly explains the lack of rejection of nominees.

One apparent weakness of the model, in which sense it is similar to Calvert, McCubbins, and Weingast, is the inability of the players to realize disutility from the nomination. Players can realize nothing less than zero utility from a lack of confirmation. Clearly, however, the appointing party can experience disutility if it highly discounts the future and expects the confirming party to become the appointing party. It is unclear what dynamics take place when the appointing party expects to become the confirming party in the next period. Presumably the appointing party takes this into account when making a nomination and may choose to make a nomination that is closer the current confirming party's policy preferences than its own since post-election nominees are more partisan than pre-election nominees. Yet, according to this model, the appointing party would rather not make an appointment since zero utility is more than the disutility the current appointing party would realize should it make a nomination in such a circumstance. Further development of these dynamics would help the model. As such, the reversion and confirmation forecasts are unclear.

An alternative to bargaining games is found with agenda setter models. Romer and Rosenthal develop the agenda setter model in their article on political resource allocation. Based on the median voter theorem, the agenda setter has monopoly power over offering proposals and presents a "take it or leave it" offer to voters (Romer and Rosenthal 1978, 27). Proposal voters must then choose between the proposal and the status quo. This dynamic places emphasis on the relation of the status quo to the median voter and turns out to be the critical factor for voters deciding whether to accept the proposal or maintain the status quo (Romer and Rosenthal 1978). While the model is rather simple, it has a lot of explanatory power and fits well within the context of executive appointments, including those to the federal Courts of Appeals.

Hammond and Hill produce a spatial model in which they explain why nominees are usually approved, why negative votes on confirmation still appear, and how an appointee still

maintains policy discretion. Hammond and Hill use a multidimensional policy space instead of a single dimension typically used in agenda setter models. Three players participate in the appointment process: the president, a Senate committee, and the nominee. This model stresses the importance of the reversion forecast and the confirmation forecast (Hammond and Hill 1993).

Hammond and Hill argue the policy significance of a nomination shapes the dynamics of the appointment process. Policy significance depends on whether the nominee will be able to change policy. The reversion forecast is the current policy status quo and the confirmation forecast depends on the policy significance of the position, the amount of discretion available to the agency, and the preferences of the president, the Senate committee members, and the nominee.

Hammond and Hill assume an appointment feasibility set based upon the intersection of the confirmation win set of the Senate committee and the win set of the president over the status quo. The confirmation win set is the intersection of a majority of Senate committee members preferences and the president's preferences with regard to the status quo. The confirmation forecast is then the intersection of the appointment feasibility set, the nominees preferences, and an area of judicial tolerance, which allows for policy discretion on the part of the nominee. Hammond and Hill also develop a variation on their model to include statutory constraints on policy, which further reduce policy discretion for the nominee (Hammond and Hill 1993).

The model emphasizes the institutional constraints confronted by the players. In this model, the nominee faces many constraints and allows the nominee to have almost any policy preferences. The only requirement is a preference for policy change over the status quo within the appointment feasibility set. The model also explains how the president can have wide discretion over who he nominates since the nominee will ultimately face policy constraints. Furthermore, the president does not face a principal-agent problem with his nominee because of legislative oversight. In all, this model has a lot of explanatory power

and, as one can see, confirmations are possible even in the face of opposition. The model could be extended by adding the full Senate and including filibuster win sets, which would further constrain the policy discretion of the nominee.

In their analysis of the National Labor Relations Board (NLRB) Snyder and Weingast ask the question of why appointees implement the political goals of elected officials. They argue appointees face multiple principals when deciding policy and policy is again restrained by the existing members of the board. The model has three stages in which the president and the Senate bargain over a target policy, then an appointment is made, and finally the board makes policy. Furthermore, a schedule of appointments exists and appointees cannot be fired (Snyder and Weingast 2000).

Although the president and the Senate bargain over a target policy, the threat point in this bargaining game is the reversion forecast instead of zero utility as seen in the bargaining games. The reversion forecast is the policy carried out by the remaining members of the board and the confirmation forecast depends on the position within the schedule of appointments and is the target policy agreed upon during the first stage. The president offers nominees until the Senate agrees and each loses utility when an agreement is not reached. Depending on which seat is available, the target policy can present either a constrained appointment opportunity or a Pareto improving appointment opportunity. Nonetheless, the target policy will always be within the median interval of the remaining members of the board (Snyder and Weingast 2000).

Snyder and Weingast argue path dependency results from the institutional structure of the NLRB. Because of the schedule of appointments and the inability to fire appointees, the median of the board can never be moved more than to an end point of the median interval of the remaining members of the board. However, if the target policy of a unique combination of the president and the Senate is to the left or right of a previous unique combination, then the NLRB's policies will change in a similar manner. Snyder and Weingast argue this is why appointees implement the policy goals of elected officials (Snyder and Weingast 2000).

Snyder and Weingast's model improves upon the bargaining model by including consideration of the board to which appointment is made. They make a compelling argument for the path dependency of policy and demonstrate the implications of scheduled appointments. The model could be improved by taking considerations from Waller with respect to elections and the schedule of appointments. For example, the dynamics of an appointment process occurring with an impending election may vary depending on the actors' perceived electoral prospects. If the president expects his party to make gains in the impending election, the president may be less willing to compromise. Alternatively, if the president expects his party to take losses in the impending election, he may be more willing to compromise. Likewise, these varying dynamics may take place if the president himself expects to win, lose, or is term limited in the impending election.

Chang argues appointments to the FOMC are inherently political and often occur with multiple seats simultaneously vacant. Appointments made to a committee with a single vacancy allows for only marginal change in policy, but multiple vacancies create the opportunity for greater policy change. Multiple vacancies allow the change in the median of the committee to occur over a wider policy space than otherwise. According to Chang, the president and Senate set a target policy for the FOMC with the opportunity for multiple appointments in mind. The model is a two-stage process in which the president and Senate bargain over the target policy through a Rubinstein bargaining game (1982) and then make appointments to achieve the target policy. Since the appointment process in the second stage allows for both the president and Senate to renege on the agreement of the target policy set in stage one, neither party will agree on a target policy which they will reject in stage two (Chang 2001).

The consideration of the FOMC itself allows the players to realize how much policy can change through the appointment process. The players consider payoffs in light of the target policy and the status quo and realize utility or disutility whether an appointment is made or the status quo is maintained. Furthermore, given the two-stage process, players have a

discount rate which imposes costs on not reaching agreement sooner rather than later (Chang 2001).

The reversion forecast in Chang's model is the median of the remaining members of the FOMC. The confirmation forecast is the target policy set by the president and Senate in stage one. The players place constraints on each other in stage two with the option to renege on an appointment and thus will find an agreement on the target policy. Policy implications in Chang's model depend on the location of the target policy compared to the status quo, the location in the policy space of the open seat, and the number of appointments already made by a specific president and Senate. The pivotal players in the game are the president and the Senate Banking Committee (Chang 2001).

Chang's model is an improvement over Waller's model on the same subject of monetary policy. Utility or disutility may be realized in this model whether an appointment is made or not. Bargaining models force the players to realize zero utility should an appointment not be made because the status quo is not considered. These are clearly improvements over Waller's model. Nonetheless, Chang's model could benefit from some considerations of Waller's model. For example, the model could be improved by considering the appointments in light of impending elections and the schedule of appointment opportunities in general. The dynamics of an appointment process occurring with an impending election may vary depending on the actors' perceived electoral prospects. If the president expects his party to make gains in the impending election, the president may be less willing to compromise. Alternatively, if the president expects his party to take losses in the impending election, he may be more willing to compromise. Likewise, these varying dynamics may take place if the president himself expects to win, lose, or is term limited in the impending election.

As demonstrated by a review of the literature on formal models of executive appointments, three institutions impose constraints on the process: the president, the Senate, and the office to which appointment is made. Early models did not consider the constraints imposed by the office to which appointment is made, yet subsequent literature has demon-

strated its importance. One area of formal models of executive appointments focuses heavily on the importance of the office to which appointment is made, formal models of Supreme Court nominations.

2.2 Formal Models of Supreme Court Nominations

Moraski and Shipan are the first to offer a formal model of Supreme Court nominations, which serves as the seminal work upon which future models build. The authors model the contemporaneous effort by scholars to determine what constraints the office to which appointment is made has on the nomination process. The authors define constraints placed upon the president as they relate to the location of the median of the Court and the median of the Senate and argue the president takes note of the constraints and acts accordingly (Moraski and Shipan 1999).

The authors call their model the nomination game and it includes three stages: a vacancy, a nomination, and a confirmation vote. Typical with contemporaneous agenda setter models, the median of the Court constrains the president from moving policy more than to an endpoint of the median interval of the reduced Court following a vacancy. The model's pivotal players are the president and the median of the Senate. Moraski and Shipan argue constraints on the confirmation forecast are found in the relative positions of the president, the median of the Senate, and the median of the Court (Moraski and Shipan 1999).

Moraski and Shipan identify three "regimes" in which nominations take place: the unconstrained president (Figure 1), the semi-constrained president (Figure 2), and the fully constrained president (Figure 3). Without loss of generality, the president is assumed to be left of the median of the court. The president's ideal point is identified by P; the Senate's by S; the Senate's indifference point by I_S; the median of the court during vacancy by J; and the justice immediately to the left of the J by J_4. When the median of the Senate is further to the left than the president, then he is unconstrained. When the median of the Senate is to the left of the median of the Court but not to the same degree as the president, the president

is semi-constrained. Finally, when the median of the Court falls between the president and the median of the Senate, the president is fully constrained (Moraski and Shipan 1999).

Figure 2: The Unconstrained President (Regime 1)

Figure 3: The Semi-constrained President (Regime 2)

Figure 4: The Fully Constrained President (Regime 3)

The reversion forecast is the midpoint of the median interval of the reduced size Court, J. The confirmation forecast depends upon the "regime." For the unconstrained president, the confirmation forecast is the end point of the median interval in the direction of the president, J_4. For the semi-constrained president, the confirmation forecast is the indifference point of the median of the Senate in the president's direction on the median interval, I_S. For the fully constrained president, the confirmation forecast is the reversion forecast, the midpoint of the median interval, J. Anticipating these constraints the president nominates a justice such that repeated attempts to fill the vacancy do not occur (Moraski and Shipan 1999).

The nomination game is the first to model appointments to the Supreme Court and the first to identify a unique set of circumstances in which nominations take place. The simplicity of the model makes it a compelling argument, although Moraski and Shipan note variations are possible. One such variation would make the vacancies endogenous, whereby justices

retire strategically to ensure policy continuity. Expanding further upon that idea, the model could allow for anticipation of future nominations on the part of the president, similar to Chang (2001) and Snyder and Weingast (2000). While Moraksi and Shipan's seminal work set off later scholarly examinations of the importance of the ideological makeup of the Court, later authors demonstrate the constraints in Moraski and Shipans nomination game may be over simplified.

Rohde and Shepsle continue the study of the appointments to the Supreme Court and argue insufficient emphasis has been placed on who the pivotal voter is in the Senate. Prior agenda setter models assume the median of the Senate or the median of a Senate committee is the pivotal voter. Rohde and Shepsle argue the filibuster pivot in the Senate more accurately represents reality. Basing their argument on the growing polarization over the previous 25 years in the Senate, they maintain the gridlock region between the filibuster pivots constrains the president when the reversion forecast falls within it (Rohde and Shepsle 2007).

Rohde and Shepsle develop an exhaustive model of the circumstances in which a nomination can occur and identify 10 situations. All the situations are permutations of the relative positions of the gridlock interval and the median interval of the reduced size Court. The 10 situations fall under three broad categories: disjoint intervals, intersecting intervals, and set-included intervals. The reversion forecast is the median interval of the reduced size court and the authors pointedly note they make no assumptions about the exact point within the interval that the reversion forecast falls. Nonetheless, all players are aware of the reversion forecast. The confirmation forecast is dependent upon the situation in which a nomination takes place (Rohde and Shepsle 2007).

Among the 10 situations in which a nomination may occur, six obtain a median different from the reversion forecast. Among the six able to obtain a new median, the president is only certainly unconstrained under disjoint intervals, where the gridlock interval and median interval of the reduced size Court do not overlap. Intersecting intervals arise when the gridlock interval intersects with the median interval of the reduced size Court. Within

intersecting intervals, the president may only be able to nominate at the reversion forecast, a filibuster pivot, or his ideal point, all dependent upon the relative locations of each. The president faces the same facts with set-included intervals, again dependent upon the relative locations. Set-included intervals arise when either the gridlock interval or the median interval is a subset of the other (Rohde and Shepsle 2007).

Rohde and Shepsle should be commended for their exhaustive consideration of all the circumstances in which a nomination may occur. While certainly robust, the model is cumbersome and a full appreciation can only be found in careful study of their model. Opportunities for expansion certainly exist, for example consideration of anticipated vacancies, but any further complications might make the model incomprehensible.

Krehbiel counters Rohde and Shepsle's model with a simpler version he calls a move the median game. Krehbiel argues Rohde and Shepsle's model over complicates nominations to the Supreme Court. He contends the solution lies in the conception of the reversion forecast. Since prior Court policy cannot change while the Court has an even number of members, the reversion forecast should be inherited from prior nine member Court. Krehbiel then develops his model to demonstrate how policy can change (Krehbiel 2007).

Krehbiel's model has three players, each of whom acts seriatim, and the model is abstract enough to be appropriate for any odd numbered multimember court or agency. The first player is the proposer, the second player is the confirmer, and the third player is the collective choice body. Krehbiel defines vacancies and confirmers as either proximal or distal, according to the vantage point of the proposer. A proximal vacancy or confirmer is defined as one that lies strictly on the proposer's side of the collective choice body's median. Distal is defined as not proximal. The key assumption enabling these definitions is the inheritance of the reversion forecast from the collective choice body prior to vacancy (Krehbiel 2007).

With this simple model, Krehbiel further defines the necessary and sufficient conditions to move the median. First, an opportunity condition must be met in which the vacancy must distal. If the vacancy occurs on the proposer's side of the median, no new median

is attainable. The second condition is the mutual consent condition in which the confirmer must be proximal. Together these conditions are necessary and sufficient to move the median of the collective choice body. However, the median can only move one position relative to the prior collective choice body (Krehbiel 2007).

Krehbiel's simple model gets to the heart of the issue over policy change in collective choice bodies. In many respects it is similar to the model of Moraski and Shipan (1999), which Krehbiel acknowledges early on. Krehbiel's success largely depends on the inheritance of the prior collective body choice's median, without which Rohde and Shepsle's model demonstrates the complexities. However, Krehbiel may over simplify with that assumption. While it may be reasonable to assume prior policy does not change during a vacancy, future policy of the collective choice body with a vacancy does not necessarily follow the same path. Krehbiel's model could be expanded to include future policy considerations.

Most recently, Console-Battilana and Shepsle build upon Rohde and Shepsle's model of Supreme Court nominations and aim to demonstrate how the president can overcome all of the gridlock found in that model. Console-Battilana and Shepsle take a game theoretic approach in which contributions by the president or lobbies can be made to senators, who then vote against their own interests. Although the model uses contributions, the presidential capital argument made by Johnson and Roberts (2005) easily falls within the purview of Console-Battilana and Shepsle (2009).

The game occurs in three stages. The first stage has the president proposing a nominee, in the second stage the president and local lobbies offer contributions to the senators. In the third stage, the senators observe the nomination and the contributions offered and vote according to their highest utility. The authors also establish rules by which contributions can be made. The president can offer contributions to any senator, but the local lobbies can only offer contributions to a single senator, each of whom has a local lobby. Furthermore, Console-Battilana and Shepsle assume coordination among the local lobbies and senators is not possible. Finally, the authors model two types of contributions: contributions conditional

on the entire voting profile of the Senate, and contributions conditional on the vote of a specific senator (Console-Battilana and Shepsle 2009).

For the circumstance in which contributions are conditional on the voting profile of the Senate, the local lobbies are unable to counter the president's offer and the senators find themselves in a prisoner's dilemma. The nature of the contribution precludes any senator from being pivotal, which entails every senator voting in favor of the president. The senators' hands are tied in the hopes of obtaining some contribution from either a local lobby or the president. However, the local lobbies and the president are aware of this and, interestingly, never make a contribution. The president achieves his ideal nomination and the senators receive no contribution. The circumstance in which contributions are conditional on the vote of a specific senator entails different outcomes and multiple equilibria exist. The president may achieve his ideal appointment with no contributions made, the president may achieve an attenuated ideal appointment by way of contributions to a group of senators, or the president receives contributions from local lobbies and achieves an attenuated ideal appointment (Console-Battilana and Shepsle 2009).

Console-Battilana and Shepsle offer a sophisticated model that builds upon both Rohde and Shepsle (2007) and Johnson and Roberts (2005). However, one potential problem with the model is the notion that the offers of contribution are not taken as cheap talk by the senators. It seems the senators would know a contribution would not be made and that they are in a prisoner's dilemma, in which case they would vote in favor of their policy goals. It is unclear why the senators do not take the offer of contributions as cheap talk. The model could be further developed by making the game repeatable so the senators could observe whether they receive a contribution.

The formal literature on nominations to the Supreme Court demonstrates the importance of the collective decision-making nature of the Court. A single vacancy and subsequent nomination and confirmation can at most move the median only one position. Path dependency best describes the short term direction of collective decision-making bodies since changes

in direction are only marginal. Nonetheless, formal research on the opportunities for new ideological directions afforded by vacancy demonstrates ideological drift among the remaining members becomes possible when vacancies occur. Furthermore, evidence of the dynamic nature of judicial ideology over time contradicts the long held notion of stoic judges.

2.3 Ideological Drift

Steunenberg demonstrates the ability of executive agents to have discretion with regard to policy because of institutional contraints. Whereas agent discretion in prior models relies on asymmetrical information, Steunenberg assumes complete and perfect information in his model. Steunenberg shows how institutional constraints created by dual principals having power over each other affords the agent an area of discretion. Steunenberg models several games in which institutional constraints alone create the opportunity for agent discretion. The model directly applicable to federal Courts of Appeals nominations is called the veto game (Steunenberg 1996).

The veto game models a three stage game during which the first stage the agent chooses a policy, the second stage the principal with proposal power decides whether to accept the agent's proposal or propose a new policy, and the third stage the principal with veto power decides whether to accept the other principal's proposal in light of the agent's proposal. Based on executive agency discretion and legislative oversight, Steunenberg shows that a "set of politically feasible bills" exists at the intersection of the preferences of the two principals (Steunenberg 1996).

The goal of the agent is to propose a policy that yields an empty set of politically feasible bills so that no proposal would be made and no proposal would be vetoed. The agent's descretion lies between the ideological divide created by the extremes of the set of politically feasible bills. So long as the agent choses a policy within that interval, the institutional contraints imposed by both principals prevents the agent's proposal from being overturned (Steunenberg 1996).

Although Steunenberg's model applies to executive agency discretion, the veto game can also be applied to presidential nominations to lower federal courts. The agent in this case is the court to which appointment is made, the president is principal with proposal power, and the Senate is the principal with veto power. A vacancy creates the opportunity for ideological drift on the court as it triggers the opportunity for proposal (nomination). Further application of Steunenberg's model to presidential nominations to federal Courts of Appeals is developed in the Theory section.

Another formal model describing how institutional constraints create an opportunity for ideological drift is found with Nokken and Sala. Nokken and Sala build upon the "regime" ideas of Moraski and Shipan (1999) and develop a model in which bureaucratic drift can change the reversion forecast and allow the president to "capture" policy. Nokken and Sala argue the median interval of the policy board allows lower level bureaucrats to change policy during the interim between vacancy and appointment. The authors seek to identify when policy stabilizes given the institutional nature of the policy making process (Nokken and Sala 2000).

Nokken and Sala first consider a situation in which no bureaucratic drift occurs and demonstrate that the president is never able to "capture" policy when fully constrained. In this situation, policy never stabilizes because the median will always shift after a new appointment. A partially constrained president reverts to a fully constrained president after one nomination and again, policy never stabilizes. Any constraint on the president serves to minimize the median interval in which appointments can be made and policy never stabilizes (Nokken and Sala 2000).

Bureaucratic drift is possible, Nokken and Sala argue, when a position is vacant because lower level bureaucrats can implement policy for which the board has insufficient votes to overrule. However, bureaucratic drift is bounded by the median interval. Additionally, bureaucratic drift changes the reversion forecast and allows the president to "capture" policy and policy can stabilize rapidly. When bureaucratic drift is in the president's favor, the

reversion forecast becomes the endpoint of the median interval on the president's side. In such a circumstance, the president "captures" policy by making a nomination anywhere between his ideal point and the reversion forecast. Additionally, policy stabilizes rapidly since the confirmation forecast equals the reversion forecast. Adverse bureaucratic drift also benefits the president because the reversion forecast stabilizes and causes the president to become fully constrained (Nokken and Sala 2000).

Nokken and Sala offer a unique model that considers bureaucratic drift. However, their model may be solely dependent upon sincere actions on the part of the president and the Senate. A strategic Senate may disregard bureaucratic drift and a strategic president may encourage it, depending on the direction drift takes. The idea of bureaucratic drift within executive agencies can also be applied to ideological drift within the courts. With delay in nominations and confirmations to the lower federal courts, how might judicial policy drift play a role?

Although the opportunity for ideological drift has been formally modeled, one might argue stolid judges care little about the opportunity to take new ideological directions. In fact, research in judicial politics often assumes stable judicial ideology. Yet, recent research indicates judicial ideology may not be stable over time. Research on the vicissitude of Supreme Court justices over their tenure documents the reality of changing ideology. It does not seem much of a stretch to extrapolate ideological perturbations to the lower federal courts as well. In fact, empirical work on appeals court judicial ideology over time indicates ideology may not be stable over time.

Epstein, et al. ask whether preferences on the Court change over time. The authors note that prior research indicates changes in preferences, but the changes were attributable to either issue changes in the case stimuli or changes in the membership of the Court. Epstein, et al. examine 16 justices who completed 10 or more terms between 1937 and 1993. While Epstein, et al. pointedly note that their research is atheoretical, the authors also indicate they only intend to identify whether such changes occur (Epstein, et al. 1998).

Controlling for case stimuli is important in determining whether ideology changes over time. To do so, Epstein, et al. use Baum-corrected ideology scores (1988). Since the authors are merely looking for evidence of change over time, their independent variable is time and the dependent variable is vote choice. Epstein, et al. find voting behavior changed in linear and nonlinear ways for some justices and not at all for others (Epstein, et al. 1998).

Almost a decade after Epstein, et al. question the validity of the stability assumption about judicial ideology, evolution in methodology allows Martin and Quinn to properly examine the same question. Similar to Epstein, et al., Martin and Quinn only seek to identify whether judicial ideology changes over time. Using Bayesian statistical methods, the authors are better able to control for changes in case stimuli (Martin and Quinn 2007).

The authors use Bayesian dynamic ideal point estimation, which they argue better controls for changes in case stimuli. Martin and Quinn argue that despite the use of the Baum-corrected ideology scores, the Epstein, et al. method still does not separate changes in case stimuli from changes in preferences. Martin and Quinn examine the same justices as Epstein, et al. and find the prior research underestimated the change in judicial ideology. In fact, Martin and Quinn find change in ideology over time for some justices Epstein, et al. said exhibited no change. Furthermore, preference change, according to Martin and Quinn, is a phenomenon occurring often in the Court. The authors appeal to future researchers to develop theory explaining change in judicial ideology (Martin and Quinn 2007).

Kaheny, Haire, and Benesh offer a theoretical examination of judicial ideology change over the course of an appellate court judge's career. The authors argue that by examining the accuracy of vote prediction over the career of a judge, one can assess whether preferences change. The authors employ the U.S. Courts of Appeals Database (Songer) and examine opinions among the appellate courts from 1968 to 1996 (Kaheny, Haire, and Benesh 2008).

Career stage, the authors argue, likely best explains the predictability of votes. Early in a judge's career, a judge should exhibit highly predictable votes as the political process of appointment colors their career early on. Late in a judge's career, a judge should exhibit

highly predictable votes as the judge has become accustomed to the norms of the court and has settled on her ideology. The middle stage of the career should exhibit the highest variability in vote choice as the judge becomes acclimated to the norms of the court and adjusts her method of decision making. Kaheny, Haire, and Benesh also argue prior experience, degree of ideology, institutional characteristics, and case characteristics all influence the predictability of votes and make sound arguments for each (Kaheny, Haire, and Benesh 2008).

Kaheny, Haire, and Benesh find support for their primary hypothesis that ideology is less predictable toward the middle of a judge's career and more so at the beginning and end. They also find some support for institutional effects and case characteristics. However, the authors do not find support for prior experience nor degree of ideology. Nonetheless, the research indicates judicial preferences are not stable over time and further calls into question the stability assumption often made in judicial politics research (Kaheny, Haire, and Benesh 2008).

The juxtaposition of formal modeling indicating institutional factors create opportunity for ideological drift and empirical models demonstrating the invalidity of the stability assumption creates an interesting dynamic for nominations to the Courts of Appeals. All of the relevant factors for a formal model of nominations to the Courts of Appeals has been reviewed, save the pivotal voters in the Senate. Who are the pivotal players in the Senate with respect to nominees? Home-state senators? Party leaders? The median of the Senate? The median of the majority party?

2.4 Judicial Nominations and Pivotal Senators

Senatorial courtesy, a norm followed in the Senate by which deference is paid to a home state senator(s) whose constituency exclusively falls under the jurisdiction of the office of appointment, is a norm often taken for granted in the literature. Jacobi provides a game theoretic answer to why this norm is followed. Jacobi argues the critical factor allowing the

norm to continue is the intensity of preferences a senator has about her own opportunity to benefit from the norm compared to intensity of preferences about the current nomination. When a nomination event occurs, a simultaneous game ensues in which all non home state senators evaluate the intensity of their preference over the current nomination against their expected utility of becoming a home state senator in a future nomination event. Since the game is repeated, home state senators have the option of employing a grim-trigger strategy or a tit-for-tat strategy to ensure continuance of the norm. Senators vote according to their highest preference and end up voting to continue the norm. Jacobi posits that the future benefits of being a home state senator in an appointment event must be highly, and almost unrealistically, discounted for a senator to not to follow the norm (Jacobi 2005).

Given this norm, the president can be either advantaged or disadvantaged. The president finds it advantageous to seek a home state senator in line with his preferences when the office of appointment is not limited by state. When the jurisdiction of the office is limited by state, the president may be disadvantaged. Jacobi takes a simplistic approach to the reversion forecast and models it as the midpoint of the median interval of the remaining members of the board to which appointment is made. Because of this, the confirmation forecast is dependent upon the ideological positions of the president, the home state senator, and the status quo. Jacobi's model demonstrates how the role of senatorial courtesy can have a far different impact on policy than if the median of the Senate were the pivotal actor. In some circumstances the policy can be more extreme and in others the policy may be attenuated (Jacobi 2005).

Jacobi's bargaining model is the only attempt to formalize the norm of senatorial courtesy and in that respect advances our knowledge. However, Jacobi's model takes a simplistic view of the status quo by not taking much consideration of the board to which appointment is made. In any circumstance, the most a policy may be changed by an appointment is to an endpoint of the median interval of the remaining members of the board. This model's confirmation forecast does not take that into consideration and instead uses the actors' ideal

points. Given that prior literature indicates the institutional constraints imposed by the board to which appointment is made, it is unclear why Jacobi's model does not take such a consideration. In this regard, the model could be improved.

Binder and Maltzman challenge the role scholars typically believe senatorial courtesy plays in the judicial selection process. They argue institutional and political factors require the president to consult more than just the home state senator(s) from the president's party when applicable. Binder and Maltzman cite as evidence home state senators from the president's opposing party asserting their blue slip power, an obstreperous Judiciary Committee chair, and the agenda privileges associated with majority control of the Senate. The authors conduct an empirical analysis on the time until the announcement of a nomination for federal district courts and find nuanced answers to their challenge of the generally assumed deferential role senatorial courtesy requires of the president (Binder and Maltzman 2004).

Binder and Maltzman find the presence of a home state senator from the president's party results in faster nominations, but find divided government giving considerable power to ideologically distant home state senators not from the president's party. An ideologically distant Judiciary Committee chair during divided government further slows the process. The authors also find "easy" selections result in quick nominations, but as the vacancy drags on the influence of senatorial courtesy wanes (Binder and Maltzman 2004).

As noted earlier, Krehbiel calls into question the assumption made by Moraski and Shipan about the median of the Senate being the pivotal voter in Supreme Court nomination events (Moraski and Shipan 1999; Krehbiel 2007). Another variation on the Moraski and Shipan model is found with Johnson and Robert's article on presidential capital and Supreme Court nominations. Although they do not offer a formal model in the strict sense of the term, they aim to demonstrate the criticality of the filibuster pivot in the Senate. Johnson and Roberts demonstrate the "regimes" in which Supreme Court nominations have taken place are vastly different when the filibuster pivot is used instead of the median of the Senate as in Moraski and Shipan (1999). The authors then answer the question of how the president

is able to achieve success with nominations despite confronting more situations in which he is constrained. Johnson and Roberts argue presidential capital increases senators' costs of voting against his preferred nominees. Presidential capital comes from the support he enjoys from the public and senators' costs of voting against his preferred nominee come from appearing extreme to the public. Thus, a popular president making his preferred nomination can induce senators to vote in an otherwise unpreferred manner (Johnson and Roberts 2005).

Johnson and Roberts' article takes a semi-formal approach and with respect to their idea that presidential capital can overcome obstacles faced by the president they advance the field. Furthermore, they demonstrate the need to properly consider the pivotal voter in the senate. Johnson and Roberts argue the filibuster pivot offers a better theoretical and empirical argument than the median of the Senate in nomination events (Johnson and Roberts 2005).

Primo, Binder, and Maltzman empirically test various models of pivotal voters in the Senate with respect to the lower federal courts. The authors argue the multitude of models on appointments confuse the issue of who exactly the pivotal voter is. Some models use the committee median, some the median of the Senate, and others the filibuster pivot, not to mention the home state senator. Primo, Binder, and Maltzman test 16 models using the gridlock interval of each to find the best predictors of the rejection patterns (Primo, Binder, and Maltzman 2008).

Primo, Binder, and Maltzman start by explaining five types of models: the median voter model, the majority party model, the filibuster model, the blue slip model, and the committee model. The median voter model has the president satisfying the median of the Senate. The majority party model is the median voter model with the addition of a veto capability from the median of the majority party of the Senate. The filibuster model has the president satisfying the filibuster pivot of the Senate. The blue slip model, named after the blue slip a home state senator can give a committee chair to effectively veto a nomination, has the president satisfying the home state senators. The committee model has the president

satisfying the median of the Senate committee with jurisdiction over the nomination. Primo, Binder, and Maltzman then devise 11 combinations of the five basic models, totaling 16 models for empirical tests. The authors argue intuition suggests policy cannot change if the reversion forecast falls within the gridlock interval created by the models. As such, rejections should be higher for models with the appropriate gridlock interval. The authors do not attempt to find the reversion forecast for each nomination and rely on the intuition of their argument. Primo, Binder, and Maltzman test the outcomes of all nominations to the lower federal courts from 1975 to 2006 (Primo, Binder, and Maltzman 2008).

Primo, Binder, and Maltzman find the combination of the majority party median model and the filibuster model to be the best predictor of failures of confirmation. Since the majority party model is simply the median voter model with the addition of veto capability for the majority party, according to the authors, four senators turn out to be pivotal: the median of the Senate, the median of the majority party, and the filibuster pivots. Intuitively this makes sense as it likely creates the largest gridlock interval. The model performing the weakest is the blue slip model, although it enjoys greater success with respect to district court nominations than appeals court nominations. According to Primo, Binder, and Maltzman, the home-state senators only become critical as they become more extreme. Additionally, they argue home state senators may provide an advisory and informational role more than anything else.

Most recently, Hendershot examined the vacillating nature of the relationship between the president and the Senate with respect to nominations to federal district courts. Hendershot argues different periods of time, or "regimes," exhibit different contraints on both the nomination and confirmation process. Hendershot supports his argument by relying on existing literature pointing to the constraining factors of the period under study. Additionally, Hendershot uses an original database of district court nominations during the total period of examination from 1901 to 2006. Using a duration model to determine what contraints cause delay during both the nomination and confirmation process and in which regime, Hen-

dershot finds a nuanced answer where prior research, given the abbreviated periods under study, does not (Hendershot 2010).

Although not strictly formal, Hendershot bases his research on separation of powers literature in judicial politics and employs three sets of theoretical variables: constraints associated with home state senators, constraints associated with judiciary committee members, and constraints associated with floor procedures and party control. Hendershot finds by examining the residuals of his regression over the period of time under examination, sets of non-random errors identify the different "regimes" during which nominations took place. Hendershot identifies four regimes (Hendershot 2010).

Regime 1 occurs from 1901 to 1942 and exhibits behavior consistent with patronage acting as a constraint. According to Hendershot, since constraints appear to only have an effect in the confirmation phase of judicial appointment, little interbranch negotiation took place during selection. Regime 2 occurs from 1943 to 1976 and exhibits behavior consistent with significant interbranch negotiation during the selection process and quick confirmation processes. Hendershot attributes dramatic difference between regimes 1 and 2 to the increased focus on civil rights and its effect on the composition of the parties. Regime 3 occurs from 1977 to 1994 and exhibits behavior consistent with the first regime, where little interbranch negotiation occurs in the selection process and delay in the judicial appointment process results primarily from the confirmation process. According to Hendershot, refocus by the executive on nomination procedures threatened senatorial power and resulted in senatorial acquiescence. Regime 4 occurs from 1995 to 2006 and exhibits behavior consistent with a Senate averring its prerogative. Hendershot points out, however, that interbranch negotiation now occurs between the president and the most distant pivotal senators, not necessarily the home state senator (Hendershot 2010).

Hendershot offers a new look at a subject for which varrying results have been found. Furthermore, he argues the varying results on the subject are likely due to the different time periods the studies examined. Hendershot's work should be commended for identifying

a new phenomenon. However, the work falls short on the theoretical side. Hendershot's explanations for the changes in regimes are merely descriptive and lack theoretical causal factors. The described reasons for change from Regime 1 to 2, 2 to 3, and 3 to 4, are, respectively: a focus in American politics on civil rights, Jimmy Carter setting up merit selection panels, and the Republican takeover of the Senate in 1995. While Hendershot's work is no doubt important, future research could delve into theoretical explanations for the changes in regimes. Perhaps the regimes are vacillations about an equilibrium and Hendershot's results are the symptoms (Hendershot 2010).

Because of the division of powers on nomination and confirmation between the president and the Senate, respectively, any formal model on nominations by the president must include considerations of the Senate. Furthermore, who in the Senate is ultimately pivotal can change the dynamics of the model. Theoretical arguments about senatorial courtesy, the median of the Senate, and the filibuster pivots have been made; however, Primo, Binder, and Maltzman provide the best empirical tests of these models. Their conclusion on which senators are pivotal provides safe ground upon which to build a formal model of presidential nominations to the Courts of Appeals.

3 Theory

Goldman argues presidential motivations in selection of nominees for the federal courts include patronage, politics, and policy (1997). Lyndon Johnson's nominations of his long-time friend to associate, and later chief, justice of the Supreme Court exemplify the patronage motivation (Murphy, et al. 2006, 145). Goldman reasons that presidents will use nominations to lower federal courts to shore up support within a state and argues that policy motivations were not a concern for presidents until the Reagan administration (1997). However, in their innovative work, Giles, Hettinger, and Peppers demonstrate that among Courts of Appeals justices, policy appears to be the primary motivation behind selection (2001).

Presidential delay in nominations to the federal Courts of Appeals has not been formally modeled. The only attempt at explaining presidential delay in nominations to federal Courts of Appeals is found with Massie, Hansford, and Songer (2004). Using a duration model and observing the hazard rate, they find presidents make nominations earlier under divided government and later under unified government. Additionally they find presidents making nominations sooner rather than later as their second term reaches the end. Arguing that presidents anticipate delay during divided government, Massie, Hansford, and Songer provide a reasonable argument. However, from a rational choice perspective, if the average delay in the Senate is 41 to 80 days, why would the president delay nomination on average almost one year (Massie, Hansford, Songer 2004, 146)?

Massie, Hansford, and Songer also tested for ideological preferences of home state senators and the president with respect to federal Courts of Appeals nominations but were unable to reject the null hypothesis. Given that result, one can devise an alternative model that disregards senatorial courtesy. I develop a formal model that takes into consideration the pivotal players in the Senate, time, and the opportunity for ideological drift during vacancy. If the president is faced with a situation in which a pivotal senator is ideologically distant from him yet ideological drift in the court moves toward him, what tradeoffs does he make? Does the president choose to delay so that he may gain utility from policy emanating from the court?

The opportunity for ideological drift within an appellate court is best exemplified by Steunenberg's veto game. In the veto game, the agent chooses a policy a. The principal with proposal power then proposes policy p if he prefers it to policy a. Finally, the principal with veto power observes policies a and p and decides whether to veto policy p so that it may gain utility from policy a. Applied to nominations on the federal appellate courts, the appeals court is the agent choosing policy a, the president is the principal with proposal power to nominate a judge with ideology p, and the Senate is the principal with the power to veto a nominee with ideology p (Steunenberg 1996).

To make the argument more formal, first I make a set of assumptions. As with Steunenberg, players have perfect and complete information with regard to the form of the game and the policies in question. Additionally, I assume the only method by which either the president or the Senate may change court policy is by nominations resulting from a vacancy. In other words, the president and the Senate may not change the size of the court to change policy. Allowing the size of the court to change inherently changes the decision functions of the president and Senate by forcing the consideration of multiple nominations, further complicating the model. Although the president may anticipate future nominations, such a model is beyond the scope of this research. Accordingly, I assume the president does not anticipate future nominations. Furthermore, the president does not wish to make a nomination that will be rejected by the Senate and pivotal senators are also assumed to be decisive. Finally, players have single-peaked, symmetric utility functions. The following development of the opportunity for ideological drift on an appeals court is an adaptation of Steunenberg's veto game and closely follows his method. Following the development of the opportunity for ideological drift, I develop my own model of the presidential decision function with regard to the timing of a nomination.

The three sets of players may be formally described as follows: 1. v pivotal members of the Senate, S = {1,2,...,v}, S $\subseteq$ M $\subset$ N, where N is the set of all players, 2. the president $p \in$ N, S $\cup$ $\{p\}$ = M, and 3. a members of the appellate court in which a vacancy occurs, A = {1,2,...,a}, $a \in$ N, and $\forall a$, $a \notin$ M. The appellate court A makes policy x and the president p and Senate S nominate and confirm, respectively, judges with ideology on a one-dimensional policy space X = $\Re$, and $\forall x$, $x \in$ X. Preferences for player i over policy space X is represented by a utility function $U_i = U_i(x)$. Players may have a strong or weak preferred-to set, respectively: $P_i(x) = \{y|\ U_i(y) > U_i(x),\ y \in X\}$ and $R_i(x) = \{y|\ U_i(y) \geq U_i(x),\ y \in X,\ y \neq x\}$.

In the Steunenberg veto game, the principal with proposal power, in this application the president, only makes a proposal y when y is preferred to x. Since the president will not

make a nomination any senators with veto power find unpalatable, the proposal $y \in \mathrm{R}_v(x) \cap \mathrm{P}_p(x)$, $\forall v \in \mathrm{S}$. $\mathrm{R}_v(x) \cap \mathrm{P}_p(x)$, $\forall v \in \mathrm{S}$ represents the set of politically feasible nominations. Since the agent, in this application the appeals court, knows the actions of the president and Senate, the agent seeks a policy such that $\mathrm{R}_v(x) \cap \mathrm{P}_p(x) = \emptyset$, $\forall v \in \mathrm{S}$. The appeals court sets policy such that no proposal can be made by the president that the pivotal senators find acceptable. Furthermore, the power of nomination being held by the president and the power of confirmation being held by the Senate creates a conflict between the pivotal senators and the president. An empty set of politically feasible nominations can result from the appeals court choosing a policy at the endpoints, or anywhere between, the most extreme players. Steunenberg formalizes the extreme ideal points as follows: $\mathrm{x}_l^* = \min\{\mathrm{x}_i^*\}$ and $\mathrm{x}_r^* = \max\{\mathrm{x}_i^*\}$, $\forall i \in \{p\} \cap \mathrm{S}$. This creates an area of discretion, or opportunity for ideological drift, in which the appellate court may choose policy within the interval $[x_l^* , \mathrm{x}_r^*]$.

Now that a framework has been developed, I can explicate the president's decision function as it relates to the timing of a nomination. First, some definitions. A player's ideal point is represented by θ_i, $\theta_i \in \mathrm{X}$. The president's discount rate is represented by λ and $0 < \lambda < 1$. As the days pass seriatim after a vacancy, the president decides whether to make a nomination or allow ideological drift to continue. The discount rate is used capture the president's evaluation of future ideological drift. Time is represented by t and is simply a count of the number of days since the president took office. The appellate court, A, drifts ideologically along interval $\underline{x} \in [x_l^* , \mathrm{x}_r^*]$. Furthermore, an assumption for the purpose of simplification can made made without loss of generality: the president's ideal point, θ_p, equals 0. Finally, I make the assumption that $\theta_s = \max\{|\theta_p - \theta_v|, \forall v \in \mathrm{S}\}$. The purpose of this assumption is to have the senator most likely to block a confirmation, the senator ideologically farthest from the president, be the pivotal vote in the Senate. These assumptions allow me to model the president's decision function as it relates to his need to deal with the Senate on a nomination and any utility gained or lost with respect to ideological drift on the court. As time moves forward, what tradeoffs does the president make?

The president's decision function is defined as follows:

$$U_p(x) = -t\theta_s^2 - \lambda^t x^2 \tag{1}$$

In words, the president's decision function says that θ_s (the ideological distance between the president and the Senate) decreases the president's utility and x (the ideological distance between the president and the court) also decreases the president's utility. Time, t, factors into both as well. The president's decision function says that time makes more difficult the president's ability to acheive his confirmation goals in the Senate. Furthermore, time also devalues ideological drift as the president's discount factor, λ, increasingly lessens the utility gained or lost. If the president wants to perfectly time nomination such that he gains maximum utility from ideological drift while still being able to acheive his confirmation goals in the Senate, he faces the following optimization:

$$\max_t U_p(x) = -t\theta_s^2 - \lambda^t x^2 \tag{2}$$

Solving for t:

$$\begin{aligned}
\frac{\partial U}{\partial t} &= -\theta_s^2 - x^2\lambda^t \ln\lambda = 0 \\
\theta_s^2 &= -x^2\lambda^t \ln\lambda \\
\lambda^t &= -\frac{\theta_s^2}{x^2 \ln\lambda} \\
t\ln\lambda &= \ln\left(-\frac{\theta_s^2}{x^2\ln\lambda}\right) \\
t &= \frac{\ln\left(-\frac{\theta_s^2}{x^2\ln\lambda}\right)}{\ln\lambda}
\end{aligned} \tag{3}$$

Equation 3 explains how the president can optimally time his nominations. At first glance one notices the sign of parameter of which the natural log is taken is negative, which could be

problematic. Yet, upon closer inspection one notices the natural log of λ in the denominator of that parameter. By definition, $0 < \lambda < 1$. Since the natural log of a number between 0 and 1 is negative, the sign of parameter of which the natural log is taken is positive. To find out how the parameters θ_s and x affect the optimal timing of the nomination, I simply need to take the partial derivative of t, time, with respect to θ_s, the ideological distance between the president and the Senate, and the partial derivative of t, time, with respect to x, the ideological distance between the president and drift in the court. These partial derivatives yield comparative statics, with which I can derive testable hypotheses.

The ideological distance between the president and the Senate, θ_s, affects the optimal timing of nominations as follows:

$$\begin{aligned}
\frac{\partial t}{\partial \theta_s} &= \frac{1}{\ln \lambda} \times \frac{\partial ln(z)}{\partial t} \times \frac{\partial t}{\partial \theta_s} \\
z &= -\frac{\theta_s^2}{x^2 \ln \lambda} \\
\frac{\partial ln(z)}{\partial t} &= \frac{1}{z} \\
\frac{\partial t}{\partial \theta_s} &= -\frac{2\theta_s}{x^2 \ln \lambda} \\
\frac{1}{\ln \lambda} \times \frac{\partial ln(z)}{\partial t} \times \frac{\partial t}{\partial \theta_s} &= \frac{1}{\ln \lambda} \times -\frac{x^2 \ln \lambda}{\theta_s^2} \times -\frac{2\theta_s}{x^2 \ln \lambda} \\
\frac{\partial t}{\partial \theta_s} &= \frac{2}{\theta_s \ln \lambda} \qquad (4)
\end{aligned}$$

As with equation 3, one must pay attention to the natural log of λ to determine the proper sign of the equation. At first glance the sign of equation 4 is positive; however, $\ln \lambda$ is negative, so the sign of equation 4 is actually negative. Equation 4 states that as the distance between the president and Senate decreases (where θ_s is negative), time until nomination increases. A hypothetical example fleshes this out. In the hypothetical example, let θ_i and θ_j be the ideal points of two hypothetical senators where $\theta_i < \theta_j$. Then $\theta_p - \theta_i < \theta_p - \theta_j$. Thus, the distance between the president and the Senate where senator i is pivotal can be said to

have decreased relative to senator j being pivotal, making θ_s negative. Alternatively, as the distance between the president and the Senate increases (where θ_s is positive), time until nomination decreases. A similar hypothetical example fleshes this out. Let θ_i and θ_j be the ideal points of two hypothetical senators where $\theta_i > \theta_j$. Then $\theta_p - \theta_i > \theta_p - \theta_j$. Thus, the distance between the president and the Senate where senator i is pivotal can be said to have increased relative to senator j being pivotal, making θ_s positive. A hypothesis that can be derived from this comparative static is:

$$\begin{aligned} \mathrm{H}_1 \quad = \quad & \text{Nominations will occur sooner the farther the president} \\ & \text{and Senate find themselves ideologically.} \end{aligned}$$

The ideological distance between the president and drift in the court, x, affects the optimal timing of nominations as follows:

$$\begin{aligned} \frac{\partial t}{\partial x} &= \frac{1}{\ln \lambda} \times \frac{\partial ln(z)}{\partial t} \times \frac{\partial t}{\partial x} \\ z &= -\frac{\theta_s^2}{x^2 \ln \lambda} \\ \frac{\partial ln(z)}{\partial t} &= \frac{1}{z} \\ \frac{\partial t}{\partial x} &= -\frac{2\theta^2}{x^3 \ln \lambda} \\ \frac{1}{\ln \lambda} \times \frac{\partial ln(z)}{\partial t} \times \frac{\partial t}{\partial x} &= \frac{1}{\ln \lambda} \times -\frac{x^2 \ln \lambda}{\theta^2} \times -\frac{2\theta^2}{x^3 \ln \lambda} \\ \frac{\partial t}{\partial x} &= \frac{2}{x \ln \lambda} \end{aligned} \tag{5}$$

As with equation 4, the natural log of λ switches the sign of the equation. Equation 5 can be interpreted as saying as the court drifts ideologically towards the president (i.e. the distance between the president and court decreases, making x negative), time until nomination inceases. Alternatively, as the court drifts ideologically away from the president (i.e. the distance between the president and the court increases, making x positive time until nomination decreases. These arguments are congruent with to those made about equation

4 and similar hypothetical examples could be made. A hypothesis that can be derived from this comparitive static is:

H_2 = Nominations will occur sooner when the court drifts away from the president than when it drifts toward the president.

4 Data and Methods

Empirical investigation of my theory and hypotheses requires data on ideological drift and data on nominations to the lower federal courts. While data are available on the votes appellate court judges make, a proper research design on changing ideology requires Bayesian dynamic ideal point estimation similar to that used by Martin and Quinn (2007). Given the level of sophistication of that methodology, it is beyond the scope of this research. However, a proxy for ideological drift can be used by way of Judicial Common Space (JCS) data (Epstein, et al. 2007). As for data on nominations to the lower federal courts, the Martinek database contains the required data to conduct my research (2004). Additionally, ideal points for the president and senators are available via NOMINATE scores (Poole and Rosenthal 1997). In terms of an empirical model specification, I use Cox proportional hazards model to estimate the hazard rate of a nomination occuring on any particular day conditional on the relevant variables (Cox 1972).

4.1 Data

Giles, Hettinger, and Peppers' seminal work laid the groundwork for the JCS designed by Epstein, et al. Also based on Keith Poole's seminal work on ideology measurement, the JCS allows federal judges, including Supreme Court justices, to be placed in the same policy space as congressmen and the president. Using Giles, Hettinger, and Peppers' methodology, lower federal judges are assigned NOMINATE scores as proxies of their ideologies. When senatorial courtesy is in play, the judge is assigned the home state senator's NOMINATE score (or

average of two if both home state senators are from the president's party). When senatorial courtesy is not in play, the president's NOMINATE score is assigned to the judge. For Supreme Court justices, Epstein, el al. perform an algorithm on the Martin and Quinn scores of Supreme Court justices' ideologies to conform with the bounds of Poole's NOMINATE scores (Epstein, et al. 2007). I use JCS scores as a proxy for the ideology of judges on the Courts of Appeals. Furthermore, the JCS scores allow me to determine a court's median immediately following a vacancy, so that a proxy of ideological drift can be used.

The Martinek database on nominations to the lower federal courts has been used in a number of studies on the subject (Binder and Maltzman 2002; Massie, Hansford, and Songer 2004; Swenson 2006; Killian 2008; Basinger and Mak 2010; Hendershot 2010). The database contains information on nominations from 1977 to 2004 and includes: incumbents causing vacancies, nominees, dates, and the number of days after vacancy the president makes a nomination.

NOMINATE scores are well established in the political science arena and is one of the most cited research in political science. I use NOMINATE scores to measure the ideology of the pivotal senators and the president (Poole and Rosenthal 1997).

4.2 Methods

The units of analysis for my empirical investigation are nominations to the federal Courts of Appeals from 1977 to 2004. I also pare down in three ways the total number of observations. First, I exclude nominations resulting from increases in the size of the court. Four laws increased the number of judges on the appellate courts between 1977 and 2004 resulting in 88 nominations. Many of the increases involved more than one judgeship addded to the circuit. Since my model assumes the president does not anticipate future nominations, excluding these nominations is appropriate. Second, I exclude renominations for a single vacancy. Renominations occur when the president withdraws a previous nomination or the previous nomination was rejected by the Senate. Third, I exclude recess appointments since

these do not require action on the part of the Senate. Since my model has the president anticipating delay in the Senate, the absense Senate action changes the decision function an is outside the scope of this research. This leaves a total of 201 appellate court nominations (N = 201) for my analysis.

Testing my theory requires an assumtion about the president's discount rate, λ, which is an empirical question. Is the president a purely political animal who cares only about what he can acheive while in office? Political agency literature argues politicians facing term limits discount the future entirely because they no longer have an electoral accountability (Besley and Case 1995; Smart and Sturm 2004; Müller 2007). Or, does the president care about policy after he leaves office? Light argues presidents have three goals while in office: policy, reelection, and legacy (1999), which would maintain the president does not discount the future entirely. While I do not attempt to provide any theoretical insight into this matter, the duration model I develop drives at the heart of the idea of discounting by including variables accounting for time.

Duration models are most familiar in medical research and biostatistics, yet they are increasingly used in political science. In fact, the lone article on the timing of nominations to the federal Courts of Appeals uses such a model (Massie, Hansford, and Songer 2004). Duration models, also known as survival models, examine the relationship of the distribution of survival times and any survival predictors (Fox 2002). Relating a survival model to the study at hand yields an examination of the survival of vacancies without a nomination. In the data, a nomination "kills" a vacancy. One type of duration model, the Cox proportional hazards model is a commonly used duration model in political science. The hazard rate is the instantaneous risk that the event in question will occur given that it has not occured prior to the moment in question. The Cox model is appealing because it does not require any assumptions about the baseline form of the hazard function.

One potential problem with the Cox model lies with what are known as ties, in which sets of observations have the same duration time. My data exhibits such a situation, for which

accommodation must be found. While exact calculation of all the partial likelihoods is ideal, it is computationally intense and prohibitive with more than a few ties. Approximations of the exact partial likelihoods are found with the Breslow (1974) and Efron (1977) methods. The Efron approximation is generally preferred to the Breslow and is used in this data analysis. Furthermore, all results presented are derived from using the Efron approximation.

The number of days after a vacancy the president makes a nomination serves as the observed response variable. This variable serves as the basis upon which the Cox model derives a hazard rate, which is the model's response variable. The independent variables and a set of control variables serve as the predictor variables in the Cox model. My independent variables are: θ_s, the distance between the president and the pivotal voter in the Senate; x, the distance between the president and the median of the court immediately following vacancy; *days*, the number of days remaining in the president's term; *term*, a dummy variable indicating whether the president is in his second term; and an interaction term of $days \times term$.

I also include a number of control variables Massie, Hansford, and Songer used in their article on the same subject. First, I control for fixed effects due to which president makes a nomination. Each president may have a different discount rate and by controlling for such fixed effects the model properly considers this notion. President Reagan serves as the baseline. I also control for divided government. While my theory only considers ideology, arguments about the importance of political parties abound in political science. If the Senate is held by the opposite party than that of the president, he may face additional constraints. Massie, Hansford, and Songer also argue that a vacancy occuring because of death may cause delay due to the unexpected nature of the nomination opportunity. As such, I also control for whether the vacancy occurred because of death. Finally, Massie, Hansford, and Songer argue a new president may need time get set up his selection process and control for this by including a variable indicating whether the vacancy occured during the first six months of his first term. I also include that variable. Each control variable is a dummy variable for which 0 indicates false and 1 indicates true (Massie, Hansford, and Songer 2004).

Measurement of my variables comes from the Martinek database of lower federal court nominations (2004), Poole and Rosenthal's NOMINATE scores (1997), and the JCS scores developed by Epstein, et al. (2007). θ_s is the distance between the president and the pivotal voter in the Senate and uses NOMINATE scores for the president and the pivotal senator. The pivotal senator is chosen as the ideologically farthest from the president in the set of pivotal senators described by Primo, Binder and Maltzman (2008). According to the authors, four senators turn out to be pivotal: the median of the Senate, the median of the majority party, and the filibuster pivots.

Methodological and measurement difficulties preclude an ideal measurement of ideological drift in the court after a vacancy. Although a more sophisticated measure of ideological drift could be used by performing a Bayesian dynamic ideal point estimation, such a method is beyond the scope of this research. Furthermore, measuring the change in the court median proves troublesome because of the method of assigning JCS scores to appeals court judges. Many times judges on the same court will receive the same score, which leads to situations in which the median does not change after a vacancy. Nonetheless, I am able to use a proxy for what effect ideological drift would have on the timing of nomination. The ideological distance between the president and the court after vacancy, x, serves as such a proxy. Assuming drift occurs in a constant direction, either toward or away from the president, courts ideologically close to the president approximate ideological drift toward the president and courts ideologically distant from the president approximate ideological drift away from the president. While empirical measurement will only evaluate the actual distance between the president and the court after vacancy, postestimation can demonstrate how ideological drift in a particular court would affect the timing of a nomination.

Although I do not make an explicit assumption about the president's discount rate in my empirical model, including the variables *days*, *term*, and the interaction $days \times term$ allows for time to have an effect on the overall empirical model. *Days* is simply the number of days remaining in the president's term and *term* is a dummy variable indicating whether

the president is in his second term. The interaction of the two allows the consideration of the president discounting the future more in his second term.

I construct the following empirical specification for my model, where i represents an individual observation:

$$\begin{aligned} h_i(t) &= \exp(\beta_0 + \beta_1\theta_{is} + \beta_2 x_i + \beta_3 days_i + \beta_4 term_i + \\ &\quad \beta_5(days_i \times term_i) + \beta[controls_i] + \epsilon) \end{aligned} \tag{6}$$

In making predictions about the hazard rate, one must keep in mind that the hazard rate indicates the likelihood that the event in question will occur at any particular moment given the event has yet to occur. With that consideration, a predictor that increases the hazard rate indicates a decrease in the amount of delay and vice versa. Put another way, if a similar model specified for an OLS regression had a prediction of a negative coefficient, the hazard model would need to display a positive coefficient. Based on my hypotheses, I expect β_1 and β_2 to both be positive. The signs for the terms specified regarding the president's discount rate require careful attention to the full conditional coefficient. For a first term president, a simple expectation of the sign of β_3 suffices. I expect the sign of β_3 to be negative. As the president nears the end of his term he should be more likely to make a nomination as he increasingly discounts the future. The variable *days* decreases as time passes, so a negative coefficient would mean the likelihood of a nomination is less early in the president's term than it is later. For a second term president, I expect the full conditional coefficient to increase in magnitude as the number of days remaining decreases. Furthermore, I expect the magnitude of the full conditional coefficient for a second term president to be greater than β_3, meaning a second term president discounts the future more than a first term president. A president in his second term and being term limited and having knowledge of that fact, should discount the future even more than a first term president, who at least has a chance at another term. As for the control variables, I expect divided government to increase the

hazard rate, vacancy caused by death to decrease the hazard rate, and a vacancy occuring withing the first six months of a president's first term to decrease the hazard rate. I have no expectations with regard to the fixed effects controls set up for the president making a nomination.

5 Results

Table 1 shows the descriptive statistics for the data. Inspection of the table shows the president waited on average about seven months after a vacancy occured to make a nomination. However, the standard deviation is quite high and demonstrates the basis upon which the research question is asked. Mainly, what explains such a wide variation in delay? The ideological distance between the president and the Senate is also interesting. Although the range is quite high given the method of measurement (see above), the interquartile range is only 0.09. On the other hand, the distance between the president and the median of the court following vacancy shows much more variability. The interquartile range for this measure is 0.396. The days remaining measure also exhibits a good degree of variability as well as the divided government measure with about half the observations falling into either catagory. Interestingly, it appears a dispropotionate number of nomination opportunities occur within the first six months in a president's first term. Assuming just a one term presidency and equal chance on any day for a nomination opportunity to occur, one would expect the mean to be 0.125. Considering the data include both terms for Reagan and Clinton, the fact that the mean is 0.164 suggests nomination opportunities occurring in the president's first six months of his first term may not necessarily occur by chance alone and may be strategic.

The distribution of the variable measuring the distance between the president and the Senate is the only one that could prove problematic. The distribution is both multimodal and negatively skewed. Although one way to deal with this would be transform the variable into an interval variable with categories approximating the three modes, the loss of information

Table 1: Empirical Model Descriptive Statistics

Variable	Min	Max	Mean	Std. Dev.
Delay	0	1085	227	197.82
Pres-Sen Distance	0.386	1.024	0.798	0.181
Pres-Court Distance	0.021	1.218	0.614	0.278
Days Remaining	5	1461	818	431.9
Second Term	0	1	0.279	0.449
Divided Gov't	0	1	0.537	0.500
First Six Mos.	0	1	0.164	0.371
Death	0	1	0.090	0.286

associated with transforming a continuous variable into a discrete variable is undesirable. Another way of dealing with the issue is with the *Box-Cox family* of transformations (Box and Cox 1964). Performing a *Box-Cox* transformation diagnostic yields a suggested cubic transformation of the variable. Cubing the variable corrects the skewness of the data and makes it closer to normal, however, multimodality persists.

Table 2 presents the results of the Cox proportional hazards regression. All variables, save one, are significant at the .05 level, and some are significant at the .01 level. The variable indicating George W. Bush as the nominating president is significant at the .10 level. All p-values reflect a two-tailed significance test. Furthermore, most of the signs of the coefficients behave as expected, save the coefficients for the variables indicating the nominating president, for which no predictions were made. According to the regression results, the only coefficients not behaving as expected apply to the days remaining variable, which has a positive sign where a negative sign was predicted, and to the divided government variable, which has a negative sign where a positive sign was predicted. However, the results pertaining to the variables included to approximate the president's discount function are only preliminary until the full conditional coefficient is considered.

My first hypothesis (H_1: Nominations will occur sooner the farther the president and Senate and themselves ideologically) is accepted by rejecting the null hypothesis with the results from the variable for *Pres-Sen Distance* (θ_s). The coefficient's sign is positive and significant, meaning that as the distance between the president and the most distant pivotal

Table 2: Cox Proportional Hazards Model Regression

Variable	Coef.	Robust SE	Pr(>|z|)
Pres-Sen Distance	13.450	4.7050	0.004 **
Pres-Court Distance	0.8205	0.3948	0.038 *
Days Remaining	0.0009	0.0004	0.018 *
Second Term	1.3350	0.5198	0.010 *
Days Remaining × Second Term	-0.0016	0.0005	0.002 **
Divided Gov't	-4.692	1.7210	0.006 **
Death	-0.6419	0.2463	0.009 **
First Six Mos.	-0.7260	0.3034	0.017 *
Carter	8.0410	2.5320	0.002 **
Bush, G.H.W.	3.3750	1.3150	0.010 *
Clinton	5.4830	2.1330	0.010 *
Bush, G.W.	-1.4530	0.7673	0.058 .
Test	Result	Deg. Fr.	P
R^2	0.213		
Likelihood ratio test	48.04	12 df	3.076e-06
Wald test	62.31	12 df	8.537e-09
Score (logrank) test	51.57	12 df	7.395e-07
Score (logrank) test Robust	54.21	12 df	2.505e-07

The model is estimated with robust standard errors and P score values are for a two-tailed test.

Significance indicators: ** = $p < 0.01$, * = $p < 0.05$, . = $p < 0.1$

senator increases the likelihood of a nomination occurring on any given day also increases. The fact that the results are for a two tailed test when a one tailed test could be considered appropriate given the predictions of the formal model further substantiates my theory.

My second hypothesis (H_2: Nominations will occur sooner when the court drifts away from the president than when it drifts toward the president) is accepted by rejecting the null hypothesis with the results from the variable for *Pres-Court Distance* (x). The coefficient's sign is positive and significant, meaning that as the ideological distance between the president and the court increases, so does the likelihood of a nomination occurring on any given day. As with the previous hypothesis, the fact that the results are for a two tailed test when a one tailed test could be considered appropriate given the predictions of the formal model further substantiates my theory.

As for the signs of the variables included in the empirical model to approximate discounting by the president, two behave as predicted and one does not. The variable not behaving as expected is the easiest to interpret since it does not involve consideration of the interaction. The coefficient for the variable *days* behaves opposite as expected, with a positive sign where a negative sign was predicted. For a president in his first term, behavior is opposite of what was predicted. As the number of days remaining decreases, so does his likelihood of making a nomination. For a second term president, however, behavior is as expected conditional on the president being in his final 30 months in office. According to Hosmer, Lemeshow, and May, the full conditional coefficient can be derived by the following formula (2008):

$$\mathrm{g}(t, term = 1, days, \beta) = \beta_4 + (\beta_3 + \beta_5)days \tag{7}$$

And the standard error can be derived by:

$$\mathrm{SE} = \sqrt{\mathrm{Var}(\beta_4) + days^2\mathrm{Var}(\beta_5) + 2days\mathrm{Cov}(\beta_4, \beta_5)} \tag{8}$$

Analysis of the full conditional coefficient using these two formulas shows behavior as expected when the number of days remaining in the president's second term is less than 935. For nominations occuring between the president's first day in office of his second term and 935 days remaining, no statistically significant relationship exists. For a president in his second term and in his final 30 months in office, nominations occur at a faster rate than otherwise. The data contain observations for which 60.7% have a statistically significant relationship.

Two control variables for which predictions were made behave as expected. The variables *Death* and *First Six* both show negative and significant coefficients, meaning that when a vacancy occurs becuase the incumbent died or the vacancy occurs within the first six months of the president's first term, the president will be less likely to make a nomination on any given day than otherwise. One of the control variables for which predictions were made

does not behave as expected. The variable *Divided Gov't* shows a negative and significant coefficient, meaning the president is less likely to make a nomination on any given day under divided government than when the same party controls both the executive branch and the Senate.

With regard to the fixed effects found in the controls for the president making nomination, no predictions were made, but the results are nonetheless interesting. President Reagan was the baseline established for these controls and the coefficients for each variable indicating the nominating president compare that president to Reagan. These fixed effects can be interpretted as the baseline hazard rate for each president and arguably capture each president's inherent discount rate. Viewing the results one sees Carter exhibits the highest baseline hazard rate, meaning, *ceteris paribus*, Carter moved more quickly than any other president in the sample to make nominations. On the opposite end of the spectrum, George W. Bush exhibits the lowest baseline hazard rate, meaning, *ceteris paribus*, the second Bush waited longer than any other president in the sample to make nominations.

Although the Cox proportional hazards model makes relatively few assumptions compared to other duration models, the major underlying assumption is that the hazard rates are proportional. The assumption of proportional hazards means that the effect of a predictor is multiplicative on the hazard rate. Put another way, changes in values of predictors yield new hazard functions. A test on the assumption of proportional hazards in my model are unable to reject the null for any predictor or the model as whole, meaning the assumption of proportional hazards holds (Fox 2002).

Additional diagnostics check for influential observations and nonlinearity among the predictors. Performing dfbeta diagnostics on each predictor shows no individual observation exerts a great deal of influence on the coefficients. Although a few observations for each predictor display a larger influence than the others, none of the most influential observations come close to having a large effect on the coefficient in the regression. Finally, nonlinearity diagnostics check whether the functional form of the parametric part of the model is correct.

Analysis of the martingale residuals plotted against the values of the predictors including a lowess smoother show nonlinearity to be practically nonexistant (Fox 2002).

Running various empirical specifications checking for robustness finds consistency among the signs for the variables, but statistical significance for most variables depends on the specification. Only the variables *term* and the interaction *days* $\times$ *term* perform well under different specifications. Interestingly, a model for which no control variables are included results in statistically significant findings consistent with the fully specified model. Although the results of the fully specified model may be tenuous, the signs for each differently specified model exhibit behavior as expected.

6 Discussion

As my theory proposes and the empirical results suggest, policy implications play an important role in the timing of nominations to the Courts of Appeals. Furthermore, the president appears to make tradeoffs with respect to battles in the Senate over confirmation and policy eminating from the courts. The president makes nominations sooner when faced with an ideologically distant pivotal senator, but is willing to delay when the court is ideologically proximate. Comparatively speaking, the ideological distance between the president and the most distant pivotal senator has the largest effect of the theoretical variables on the hazard rate. An ideologically proximate court serves to attenuate the president's desire to quickly make a nomination compared to one that is ideologically distant. Table 3 shows the effect on the rate of nomination for each variable in the model.

Battles in the Senate over nominations to the Courts of Appeals appear to be taken seriously by the president. Nominations for which the the most distant pivotal senator is in the upper quartile occur at a rate of at least 12 times that of nominations for which the most distant pivotal senator is in the lower quartile. Alternatively, lower quartile senate distance nominations occur at a rate of at least 92% slower than nominations with upper

Table 3: Relative Changes in Rate of Nomination

Variable	Change in Rate
Pres-Sen Distance*	12.32 (0.08)†
Pres-Court Distance*	1.38 (0.72)†
Divided Gov't	0.01
Death	0.53
First Six Mos.	0.48
Carter	3105.72
Bush, G.H.W.	29.22
Clinton	240.57
Bush, G.W.	0.23
Presidential Discount Factor Hazard Ratios	
First Term 900 Days Remaining	2.18
First Term 365 Days Remaining	1.37
Second Term 900 Days Remaining	1.96
Second Term 365 Days Remaining	2.92

The variables show the relative change in the rate of nomination with an increase from the minimum to the maximum.

† The numbers is parentheses show the relative change in the rate of nomination when the change is from the maximum to the minimum.

* These estimates were made using the interquartile range.

quartile senate distances. In fact, the mean number of days until nomination when the most distant pivotal senator is in the upper quartile is approximately 163 days. The mean number of days until nomination when the most distant pivotal senator is in the lower quartile is approximately 288 days. The president makes a nomination approximately four months sooner on average when the nomination opportuninty occurs with an upper quartile distant senator opposed to a lower quartile distant senator. Figure 5 plots the survival functions of nominations for which the most distant pivotal senator is in either the upper or lower quartile.

One factor that can attenuate the president's rate of nomination, which as just shown is largely affected by ideology in the Senate, is the ideology of the court to which a nomination is made. Nominations to courts in the upper distance quartile occur at a 38% faster rate than those in the lower quartile. Alternatively, nominations to courts in the lower distance quartile occur at a 28% slower rate than those in the upper quartile. In fact, the mean number of days

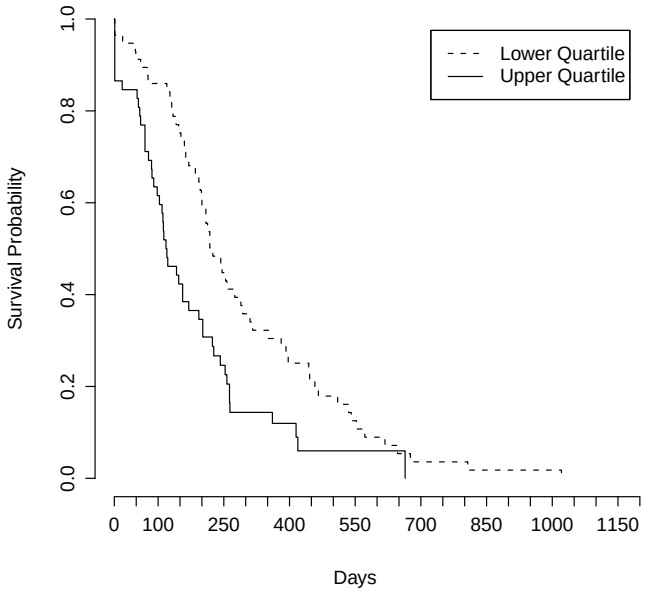

Figure 5: Vacancy without Nomination Survival:
Senate Distance Quartile Comparison

until nomination when the court is in the upper distance quartile is approximately 209 days. The mean number of days until nomination when the court is in the lower distance quartile is approximately 239 days. The president makes a nomination approximately one month later on average when the court to which appointment is made is in the lower distance quartile opposed to the upper distance quartile. Figure 6 plots the survival functions of nominations for which the court was in either the upper distance quartile or lower distance quartile.

Consider an example that demonstrates the tradeoffs the president makes when faced with a hostile senate. Take two nominations where the distance between the president and the senate is held constant at the upper quartile value but the distance between the president and the court varies between the upper quartile and lower quartile. The rate of nomination with a pivotal senator in the upper distance quartile is at least 12 times that of a senator in the lower distance quartile. However, the rate of nomination can be attenuated by a proximal court. A court in the lower distance quartile attenuates the rate of nomination

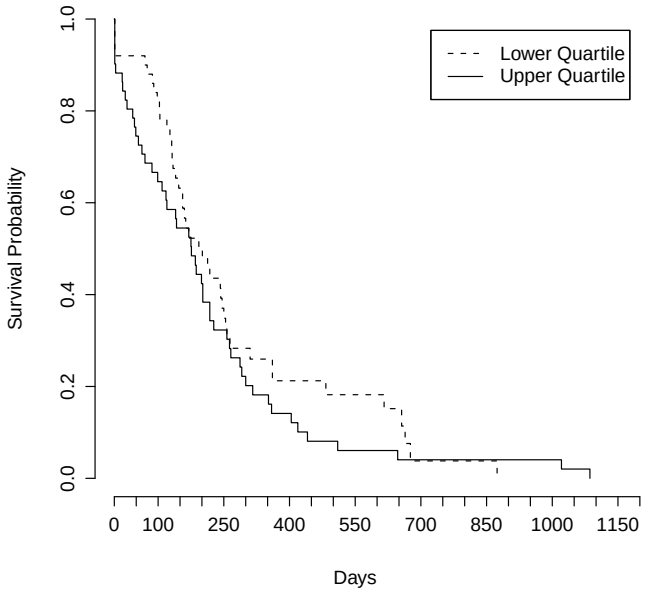

Figure 6: Vacancy without Nomination Survival:
Court Distance Quartile Comparison

by at least 28%. Figure 7 plots survival functions where the pivotal senator is in the upper distance quartile and the court varies between the upper distance quartile ("Distal Court") and the lower distance quartile ("Proximal Court"). Inspection of the graph shows proximal courts serve to delay nominations to the courts.

The example shown in Figure 7 drives at the heart of the theory developed in the formal model. The president takes into consideration both the ideology of the most distant pivotal senator and the ideology of the court to which appointment is made. Although the rate at which the president makes nominations occurs much quicker with an ideologically distant pivotal senator than otherwise, a proximal court will delay nominations under such circumstances. In fact, with a pivotal senator in the upper distance quartile and a court in an upper distance quartile has a mean delay of approximately 125 days. When the pivotal senator is in the upper distance quartile and the court is in the lower distance quartile, the mean delay is approximately 245 days. A president facing a hostile Senate will wait about

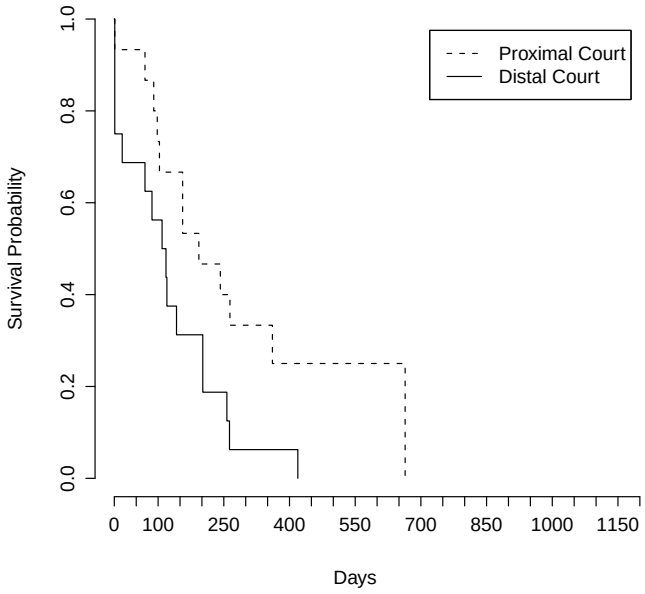

Figure 7: Vacancy without Nomination Survival:
Distal Senate Court Distance Comparison

four months longer to make a nomination when the ideology of the court is closer to him than when it is further away. Substantively, this is an important finding as it demonstrates the sophistication involved in the nomination process.

My theory rests on an unproven assumption that ideological drift does in fact occur. Yet the empirical results demonstrate that if the assumption holds, then a court drifting in the president's direction will cause him to delay. Furthermore, the empirical results demonstrate a court drifting away from the president will hasten a nomination by the president. By induction, one can conclude that ideological drift toward the president will delay a nomination and ideological drift away from the president will induce a nomination. Even if ideological drift does not occur, the president can still be said to take the ideology of the court into consideration in his decision on when to make a nomination. Unfortunately, data currently available does not allow testing of the ideological drift assumption. The best resource currently available, the U.S. Appeals Court Database, only samples 30 opinions for each

circuit-year (Songer 2007). Hardly enough data exists in the database to study changes in judicial policy within courts that could have as many 28 judges, even less so considering a mean delay of approximately seven months.

The JCS scores used to approximate ideological drift in the courts certainly makes my empirical study possible, and while I do not intend to undercut my results with criticism of a measure I use, such a discussion is worthy. The method of assignment of JCS scores for Courts of Appeals judges is a rather crude measure of a judge's ideology. In many circumstances, the measure applies the same score to different judges on the same court, which leaves the measure wanting for face validity. When measuring the change in the median of the court following vacancy, over a third of the observations in my data set show no change at all. Ideologically identical judges likely occurs far less often than the JCS scores posit.

Further bringing into question the validity of the JCS scores for appeals court judges are the numerous studies on court appointment dynamics, including my own. The JCS scores for appeals court judges rely on Giles, Hettinger, and Peppers' work in which they argue the role of senatorial courtesy confounds the president's ideological desires with respect to appeals court appointments (2001). As such, when senatorial courtesy is in play, a judge is assigned the home state senator's NOMINATE score (or average of two if both home state senators are from the president's party), otherwise a judge is assigned the president's NOMINATE score. Formal models of court appointment dynamics demonstrate the importance of the pivotal senator in the nomination process (Moraski and Shipan 1999; Krehbiel 2007; Rohde and Shepsle 2007; Console-Battilana and Shepsle 2009). Additionally, empirical work shows home state senators may not be pivotal (Primo, Binder, and Maltzman 2008) and that presidential capital may have a persuasive effect on pivotal senators (Johnson and Roberts 2005). My own study uses the model found by Primo, Binder, and Maltzman to be most effective at explaining lower federal court confirmation failures. Taken together, these studies call into question whether attaching the home state senator's NOMINATE score to an appeal's court

judge is appropriate. Future research with the goal of a finer measure of appeals court judges' ideology should be undertaken, albeit an admittedly daunting task.

Ideologies are not the only thing affecting the timing of nominations to the Courts of Appeals. The control variables drawn from the only previous study on the timing of nominations to the federal Courts of Appeals also have an effect. The results from my study confirm the results of Massie, Hansford, and Songer (MHS) for the *First Six Mos.*, *Death*, and the *Divided Gov't* variables. MHS argue a president in the first six months of his first term needs time to set up the judicial selection process, which they argue should cause delay. My results show the mean delay in nominations for a president in his first six months of his first term is 261 days and approximately 220 days otherwise, consistent with MHS. MHS also argue the unexpected nature of the death of a judge will cause delay in nomination and base their argument on previous research (Nixon and Gray 2001). My results show the mean delay in nominations where the vacancy occured because of death is approximately 266 days and approximately 223 days otherwise, consistent with MHS. Finally, the *Divided Gov't* variable, albeit a different specification, finds support consistent with MHS. The mean delay in nominations during divided government is approximately 230 days and approximately 223 days otherwise. Substantively this is not significant and may be due to the alternative specifications in the model. Statistically, however, the *Divided Gov't* variable is significant.

Each president also exhibited his own rate of nominations, which can be interpretted as an effect of each president's discount rate with respect to nominations to the federal Courts of Appeals. The baseline to which each president is compared is Reagan. In order of quickest rate of nomination to slowest, the president's are ranked: Carter, Clinton, G.H.W. Bush, Reagan, and G.W. Bush. What is most interesting are the substantively significant different rates at which each president made nominations. Carter far and away made nominations quicker than any other president, *ceteris paribus*. Presidents in their second term also exhibited a different rate of nomination. Reagan and Clinton are the only presidents in the data set for which data is available for their second term and both exhibit quicker rates of

nomination during their second term than during their first. Figure 8 displays the survival functions for Reagan's and Clinton's first and second terms. Examination of both shows second term nominations occur at a quicker rate than first term nominations.

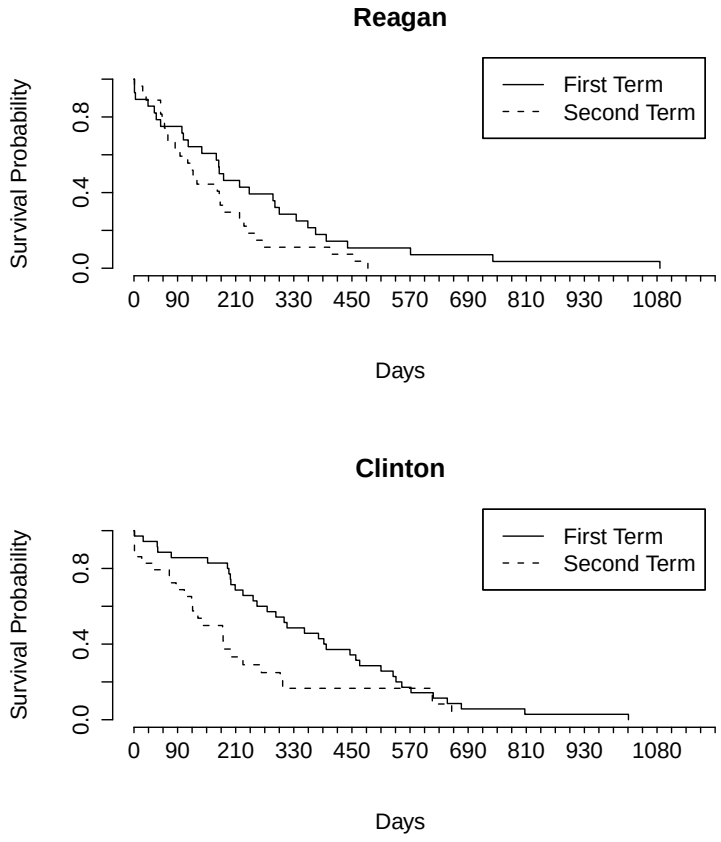

Figure 8: Vacancy without Nomination Survival:
Second Term Presidents

A number of factors appear to affect the rate at which nominations are made to the federal Courts of Appeals and three variables from the formal model in particular seem to have valid support. The ideological distance between the president and the Senate shows strong statistical and substantive significance consistent with the predictions of the formal model. Additionally, the ideological distance between the president and the court shows strong statistical and substantive significance consistent with the predictions of the formal model. Finally, although not explicitly tested in the empirical model, the inclusion of the

president's discount rate in the formal model finds support by way of the empirical model's measures of the number of days remaining in the president's term and whether the president is in his second term.

7 Conclusion

My study corroborates some of the findings of previous studies on court appointments. First, being an agenda setter model, my model expands the argument for such models in studies on court appointments. Moraski and Shipan (1999) initiated the argument with their work on Supreme Court nominations and others have followed in the same vein (Krehbiel 2007; Rohde and Shepsle 2007; Console-Battilana and Shepsle 2009). My work is the first to apply such a model to nominations at the federal Courts of Appeals and I find empirical support. My study also supports Primo, Binder, and Maltzman's work on which senators prove to be pivotal in judicial confirmation processes (2008). The variable in my model measuring the degree of constraint found in the Senate conforms to the model the authors find best explains failure of confirmations in the Senate. Finally, my work supports that of Massie, Hansford, and Songer and makes further improvements. Both their and my work find support for the ideas of increased delay in nominations because of vacancies occurring in the first six months of a president's first term and vacancies occuring becuase of death. Both works also find support for decreased delay when such opportunities occur during divided government. My work improves upon their's by demonstrating the critical constraints the president faces are the most distant pivotal senator and the court for which a nomination is made. Massie, Hansford, and Songer believed the home state senator to be constraining, for which they found no support at the Courts of Appeals level, and never considered the ideology of the court for which a nomination was made.

My research contributes to the field in a number of ways. While several formal models of nominations to the Supreme Court have been developed, to date no formal model of nomi-

nations to the lower federal courts has been made. Scholarly endeavors into the workings of the Supreme Court are no doubt important; however, appeals courts have the final say in most disputes on the meaning of federal law, leaving appellate policy no less important than Supreme Court policy. The formal model I develop imposes structure on the presidential nomination process for lower federal courts. Other work, most notably Massie, Hansford, and Songer (2004), has examined nominations to the federal Courts of Appeals, but not with the theoretical rigor a formal model offers. My work also demonstrates strategic behavior on the part of the president with respect to nominations to the federal Courts of Appeals. Furthermore, it suggests strategic behavior is possible on the part of appellate court judges in a previously unexamined area. Studies of strategic judicial behavior is increasingly found in the literature and suggest the attitudinal model may not be appropriate in all circumstances (Songer, Segal, and Cameron 1994; Cross and Tiller 1998; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). Future research into the strategic behavior of those involved in court policy is certainly warranted.

One area into which strategic behavior research can further delve is the timing of retirements in the federal Courts of Appeals. A dispropotionate number of nomination opportunities occur within the first six months in a president's first term. Assuming just a one term presidency and equal chance on any day for a nomination opportunity to occur, one would expect the proportion of opportunities to be 0.125. Considering the data include both terms for Reagan and Clinton, the fact that the proportion is 0.164 suggests nomination opportunities occurring in the president's first six months of his first term may not necessarily occur by chance alone. Existing literature shows a variety of results dependent upon political and non-political factors with respect to strategic retirement among appellate court judges (Barrow and Zuk 1990; Spriggs and Wahlbeck 1995; Nixon and Haskin 2000; Vining 2009). The data suggest the first six months of a president's first term may be of some import.

Better measures of judicial ideology also warrant future research, particularly for the lower federal court judges. Segal and Cover (1989) and Martin and Quinn (2007) have both

devised measures of ideology for the justices of the Supreme Court. Epstein et al. devised a method for placing federal judges, legislators, and the president in the same policy space to facilitate interbranch studies (2007). But the JCS scores fall short, as previously described, with respect to lower federal court judges. Based purely on speculation, one can ponder the possiblity of a method similar to that used by Poole and Rosenthal in their seminal work on legislative ideologies. If roll call votes can be used determine the ideological position of legislators, why not use judges' votes and the precedents cited to locate their ideological positions? Of course, data collection might be prohibitively burdensome with such a task, but some type of exploratory work ought to find out.

The timing of nominations to the federal Courts of Appeals appears to be determined by a complex mix of ideological constraints tempered by an ever shortening window in which to act. With the judicial politics field seemingly attempting to combine three disparate models, the strategic model approach seems best suited to capture arguments of the other two (the attitudinal and legal models). Although the model presented here is strictly strategic, the method's ability to deal with complexity demonstrates its utility. Scholars of judicial politics should heed the complexities.

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