

POLITICS AND NOMINATIONS OF MINORITIES
TO THE UNITED STATES DISTRICT COURTS

by

JAMES ARTHUR KALLERMAN

(Under the Direction of SCOTT AINSWORTH)

ABSTRACT

This study demonstrates how politics affect the racial composition of the United States district courts. I theorize that presidents and senators nominate minority judges to reduce electoral uncertainty. My analytical framework hinges on one idea: minority nominations are more politically useful in some situations than they are in others. State-level demographics, minority underrepresentation on district benches, and presidential election cycles are among the factors employed to capture the political utility of a minority nomination to a given district court vacancy. Results indicate that when conditions suggest minority votes are highly valued, minorities are appointed. When the payoff of a minority nomination is negligible, the probability that a given seat will be filled with a minority is negligible.

INDEX WORDS: Nominations; federal; district; court; minority judges

POLITICS AND NOMINATIONS OF MINORITIES
TO THE UNITED STATES DISTRICT COURTS

by

JAMES ARTHUR KALLERMAN

BA, University Georgia, 1993

MA, University of Georgia, 2003

A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial

Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2013

© 2013

JAMES ARTHUR KALLERMAN

All Rights Reserved

POLITICS AND NOMINATIONS OF MINORITIES
TO THE UNITED STATES DISTRICT COURTS

by

JAMES ARTHUR KALLERMAN

Major Professor: SCOTT AINSWORTH

Committee: SCOTT AINSWORTH
RICHARD VINING
SUSAN HAIRE
RYAN BAKKER

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
MAY 2013

DEDICATION

To my family

ACKNOWLEDGEMENTS

Thank you Scott Ainsworth, Richard Vining, Susan Haire, Ryan Bakker, Audrey Haynes, and John Maltese. Special thanks to my family.

TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS	v
LIST OF TABLES	vii
LIST OF FIGURES	viii
CHAPTER	
1 INTRODUCTION.....	1
2 NOMINATIONS OF AFRICAN-AMERICANS.....	35
3 NOMINATIONS OF HISPANICS.....	63
4 BARACK OBAMA AND MINORITY REPRESENTATION	89
REFERENCES	108
APPENDIX.....	113

LIST OF TABLES

	Page
Table 2.1 Logit Estimates of the Probability that a Vacancy will be Targeted With an African-American.....	57
Table 2.2: Logit Estimates of the Probability that a Vacancy will be Targeted With an African-American Part 2.....	61
Table 3.1: GOP Senatorial Regimes and Support for Pro-Hispanic Legislation.....	79
Table 3.2: Logit Estimation of the Probability a Vacancy Will Receive a Hispanic Nominee: Democratic Senators.....	81
Table 3.3: OLS Regression Predicting National Hispanic Leadership Agenda Scores for GOP Senatorial Regimes	83
Table 3.4: Logit Estimation of the Probability that a Vacancy Will Receive a Hispanic Nominee: GOP Senators.....	83
Table 4.1: African-American Underrepresentation on the Federal District Courts.....	90
Table 4.2: African-American Underrepresentation on the Federal District Courts (cont.)	91

LIST OF FIGURES

	Page
Figure 1.1: Net Change White Appointees by Administration: White Appointees Replacing Black Judges Minus the Opposite Trend	10
Figure 2.1: Probability of a Black Nominee: Unit of Analysis is a Vacancy	39
Figure 2.2: GOP Use of African-American Nominees: Probabilities that Vacancies will be Filled with African-American Nominees	40
Figure 2.3: Vacancies Receiving Nominees from Two Presidents: 45 Vacancies Addressed by Both GHW Bush and Clinton	42
Figure 2.4: Delayed Nominations 1987-97: Dark Bars are UREP Districts.....	46
Figure 2.5: Delayed Nominations 1997-2008: Dark Bars are UREP Districts	47
Figure 2.6: Political Conditions and Nominations of African-Americans	52

CHAPTER 1

INTRODUCTION

This study demonstrates how politics affect the racial composition of the United States district courts. I theorize that presidents and senators nominate minority judges to reduce electoral uncertainty. My analytical framework hinges on one idea: minority nominations are more politically useful in some situations than they are in others. State-level demographics, minority underrepresentation on district benches, and presidential election cycles are among the factors used to capture the political utility of a minority nomination to a given district court vacancy. Results indicate that when conditions suggest minority votes are highly valued, minorities are appointed. When the payoff of a minority nomination is negligible, the probability that a given seat will be filled with a minority is negligible. These strategies result in minority underrepresentation across the board.

This study analyzes nominations, leaving confirmations for another day. The nomination process begins when a district court seat is vacated, and my unit of analysis is a vacancy. I analyze 1164 vacancies that arose between 1985 and 2012. Nominations of African-Americans are analyzed in Chapter 2, while nominations of Hispanics are analyzed in Chapter 3. The analyses are separate because the competition for Hispanic votes is different from the competition for African-American votes; electoral gestures to African-American voters are almost always Democratic, while the rivalry for Hispanic votes is an all-in affair.

Descriptive Race Representation: Normative Issues

In “descriptive” representation, representatives personally and experientially are typical of the larger class of persons whom they represent. The term “descriptive” can denote visible characteristics, such as color of skin, or shared experiences. A representative with experience as a farmer is to that degree a descriptive representative of his or her farmer constituents, while Hispanic legislators represent Hispanic constituents, and so on. Most normative democratic theorists summarily reject descriptive representation, frequently invoking Pennock’s comment, “No one would argue that morons should be represented by morons” (Pennock 1979, 314; see also Griffiths and Woldheim 1960, 190, and Pitkin 1967, chap. 4). Iris Marion Young of the University of Chicago was an advocate of group representation who nonetheless did not support the ideal of descriptive representation, stating that “[h]aving such a relation of identity or similarity with constituents says nothing about what the representative does” (1997, 354). Empirical political scientists have had similar negative assessments. Carol Swain, the first empirical political scientist to explore in depth the actions of black members of Congress, stated that “[m]ore black faces in political office (that is, more descriptive representation for African-Americans) will not necessarily lead to more representation of the tangible interests of blacks” (1993, 5).

There are three major arguments underlying the rationale for descriptive representation: 1) the justice argument; 2) more thorough deliberation; and 3) legitimacy. The first argument acknowledges the recurring betrayals of historically disadvantaged groups by relatively privileged groups. Virginia Sapiro (1981) showed that it was foolhardy to trust some groups to protect another group’s interests, arguing that traditional mechanisms of accountability have shown to be insufficient and concluding that accountability sometimes requires descriptive

representation. Anne Phillips (1998) maintains that descriptive representatives are needed to compensate for past and continued injustices toward certain groups. A history of betrayals creates a belief that trust can be given only to descriptive representatives.

The second argument, more thorough deliberation, focuses on “overlooked interests.” (see Dovi 1996) In support of the ideal of descriptive representation, theorist Jane Mansbridge (1999) addresses the “quality” of legislative deliberation, arguing that descriptive representatives’ better communication and experiential knowledge enhance substantive representation when bodies are characterized by group mistrust and uncrystallized interests. Mansbridge cites Fenno (1978), who interviewed a black legislator who said, “When I vote my conscience as a black man, I necessarily represent the black community. I don’t have any trouble knowing what the black community thinks or wants.” Scherer and Curry (2010), echoing Mansbridge’s “quality of deliberation” argument, aver that a minority judge evinces substantive representation if she reaches a decision that draws upon her life experiences as a minority, dispensing justice with an eye toward society’s inequities and articulating her view to other judges and to anyone who notices her opinion (see also Scherer 2004). Scherer (2004) quotes Judge A. Leon Higginbotham, a former black federal appeals court judge, who said that “lacking such [minority] outsiders, a court will be left only with its own self-perpetuating views, preferences, and prejudices to inform its decisions.” Undoubtedly, in a judicial context, Mansbridge’s deliberation argument has greater relevance for appellate courts than for trial courts. Longtime appellate court judge Sonia Sotomayor gave the quality of deliberation line of thinking a thorough airing in 2009, when the prospective Supreme Court Justice, who is of Puerto Rican descent, had her speeches and writings subjected to close scrutiny. In a speech at Berkeley University, in 2001, Sotomayor said,

"I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."¹

The third argument underlying the rationale for descriptive representation is legitimacy. Among government institutions, legitimacy arguably is most crucial for the proper functioning of the third branch. Scherer and Curry (2010) note that the federal courts cannot enforce their decisions, making legitimacy crucial if unpopular court orders will be obeyed. Ifill (2000) argues descriptive representation in the judicial branch is even more critical than in the elected branches. Ifill (2000) states that, "[j]udges have a more direct and irrevocable impact in the lives of many Americans than local or even national legislators. This is particularly true for African-Americans, who are disproportionately involved with the judicial system."

The question here is, "Do aggregate levels of minority representation within a judicial body increase support for that body among minorities?" Overby et al. (2005) theorize that increasing aggregate levels of black judges within a judicial institution increases support for that institution among African-Americans. The authors took a random sample of Mississippi citizens and asked them if they have higher levels of confidence in the fairness of the state's judicial system given the state's fairly sizable ratio (29 percent) of elected black judges. They find no support for their hypothesis, and they acknowledge that their nonfinding likely stems from citizens' lack of information about the relatively high level of racial diversity on the state bench. Scherer and Curry (2010), using an experimental research design wherein respondents were shown mock newspaper articles reporting differing percentages of African-American judges on the federal bench, detect a strong and causal relationship between judicial descriptive race representation

¹ Whether or not DRR actually brings substantive representation to a given court presents a thorny empirical issue. For instance, there are mixed answers to the question, "Do black judges, more so than white judges, rule in favor of criminal defendants?" Scholars who answer "No," include Segal (2000), Walker and Barrow (1985), and Welch, Combs, and Gruhl (1988). Scherer (2004) finds evidence that black judges are more likely than white judges to rule that a governmental search violated a criminal defendant's Fourth Amendment rights.

(hereafter DRR) and institutional legitimacy among African-Americans. Yet DRR comes at a price.² Scherer and Curry (2010) demonstrate that white citizens' estimation of a court's legitimacy decreased as DRR increased. To explain, the authors (2010) fall back on literature declaring intergroup conflict paradigms:

[W]hites (the ingroup) focus on their relationship to blacks (the outgroup), and how whites are faring in competition between the races, including competition for political power (Blalock 1967; Leighley and Vedlitz 1999). When whites perceive that blacks are being given an unfair advantage over whites, race relations become hostile (Conover 1988). These feelings of intergroup conflict and hostility are most pronounced when the government engages in efforts to improve the social and economic status of blacks (for example, through affirmative action programs; e.g., Bobo 1983; Sears, Hensler, and Speer 1979). Whites' feelings of hostility towards blacks may derive from either a perceived threat that scarce resources are being given, undeservedly, to blacks over whites, or from feelings of racial prejudice (Conover 1988).

² The idea that DRR can be unpopular is important to this study. While there do not appear to be informal ceilings on the percentages of minorities who will be *nominated* to a given bench, something appears to be afoot in the confirmation processes of African-American nominees. From 1987 to 2008 there were 57 black nominees to districts with one or less sitting African-American judge. Eight (14%) of the nominees were obstructed in the Senate. Nineteen black nominees were to districts with two sitting black judges, and five (26%) of them were obstructed. Of the thirteen black nominees to districts with three sitting African-American judges, five (38%) were obstructed. This presents a puzzle. One possible solution relies on the idea that someone in the Senate, or in a position to leverage senators, is counting African-American judges and moving to obstruct African-American nominees when *whites* are in peril of losing descriptive representation. This is absurd, so it is dismissed. A more likely explanation involves senators using black nominees for electoral purposes, letting their nominees fail, and "double-dipping" by nominating an African-American to the same vacancy later.

All benches with two or more sitting black judges are in states with sizeable, and electorally useful, African-American populations. In 1996, Arlen Specter, the Senate Judiciary Committee stalwart and famously moderate Republican from Pennsylvania, joined in Clinton's nomination of Frederica Massiah-Jackson, a Philadelphia judge and an African-American. Specter vocally supported Massiah-Jackson to the Eastern District of Pennsylvania, which includes Philadelphia's large black population (Michael Matza and Tom Infeild "Despite Judge Choice, Hopes of Diversity Live" *The Philadelphia Inquirer* April 25, 1998 pg. A 01). Massiah-Jackson was controversial, presumably because she was "soft on crime." (Michael Matza and Tom Infeild "Despite Judge Choice, Hopes of Diversity Live" *The Philadelphia Inquirer* April 25, 1998 pg. A 01). When Senate Judiciary Chairman Orrin Hatch (R-UT) refused to schedule a hearing for Massiah-Jackson, Specter made headlines by calling his own hearing in Philadelphia. A line of judges, lawyers and elected officials praised Massiah-Jackson. Said Specter: "It's like they say in the marriage ceremony - speak now or forever hold your peace." (Tom Infeild "Rebuff of Massiah-Jackson Drives DA Race" *The Philadelphia Inquirer* May 6, 2001 pg. B01) Massiah-Jackson eventually withdrew her own nomination, and Specter used the vacancy to nominate African-American judge Petrese Tucker in January of 1999, giving himself another chance to reinforce his popularity with black voters. Specter went through the same routine with African-American PA-E nominee Jerome Davis, whom Specter championed twice for the same seat.

The Northern District of Illinois contains Chicago's sizable black population, and Democratic Senators Carol Moseley-Braun and Dick Durbin participated in Clinton's nomination of African-American William Hibbler in September of 1998. It was late in the Congress, typically a fatal blow for a nominee's confirmation chances, but the nomination was in time for Moseley-Braun to claim credit with Chicago's black voters as she sought re-election that November. Hibbler was obstructed in the Senate, only to be renominated by Clinton and Dick Durbin in January of 1999, after Moseley-Braun's election defeat.

Scherer and Curry (2010) explore the role of ideology in whites' decreasing estimations of courts exhibiting descriptive representation, theorizing that white citizens will perceive a bench with more black judges as more substantively liberal than a less racially diverse bench. The authors' find that estimations of courts' legitimacy fall fastest, in relation to increased bench diversity, among conservative whites, who presumably equate diversity with substantive liberalism. The same interactive relationship is evident among black respondents, although it is less pronounced, reinforcing the conclusion that people view DRR not in isolation but rather filtered through an ideological lens. Diversity on the courts may jeopardize aggregate levels of legitimacy for the judiciary. Scherer and Curry (2010) suggest that scholars reassess the normative implications of DRR in light of the authors' findings.

Substantively pleasing outcomes enhance the stature of the third branch, but a political system geared to produce a particular range of judicial conclusions violates the constitutional ideal of separation of powers. This study does not speculate about alternative political systems and how they could change the racial composition of the federal bench. Working within the current appointment system, our government should focus on procedural justice, which leads to satisfaction and trust in the legal system (Tyler and Rasinski 1991). Also, our system *should* feature DRR, even if the reasoning behind descriptive representation cannot be nailed down. Jimmy Carter's Attorney General Griffin Bell's explanation of Carter's appointments of minorities to the federal bench hints at a normative baseline. "[I]t is assumed that a national judiciary should resemble its national demographic constituency. Therefore, large groups which have been denied extensive representation in government should now be given a greater degree of representation. These values cannot be tested or confirmed or refuted. One can only accept or reject them." (Bell 2000).

Presidents and Minority Judicial Nominations

In the line of research focusing on presidential motivations to nominate minorities, it is clear that Democratic presidents have taken the lead in such matters. Lyndon Johnson was happy to publicize his record of appointing minorities; he once instructed an assistant “[f]ind out how many Negro judges I have named. Have a planted question [at press conferences] each time one is announced” (quoted in Goldman 1997, 185. See also Asmussen 2011). Carter explicitly encouraged his nominating commission “to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees” (quoted in Goldman, 1997, 239). Indeed, Carter was the first serious bench diversifier. Carter received the largest omnibus judgeship bill in history in 1978, and 27 of 114 of the new district court seats went to African-Americans (Goldman 1997). Twelve percent his appointees were African-American, compared to a U.S. African-American population of twelve percent. Six percent of Carter’s appointees were Hispanic, and the country was six percent Hispanic (Goldman 1997). Carter appointed African-Americans to the federal bench beginning early in his term and then right through his presidential election year. Unlike Clinton, Carter diversified the bench both early and late in his term. According to Slotnick (1983), Carter opted for women and minorities when presented the option by his nominating commission, even when more qualified white male nominees were available (see also Asmussen 2011).

While Carter had had the advantage of nearly a score of new seats to fill, Bill Clinton only had nineteen new district seats to work with, and he used seven of those seats to add African-Americans to the district bench. Clinton replaced forty-two outgoing white district judges with blacks, and of nineteen seats vacated by African Americans, four went to blacks, for a total of

fifty-three black district court judges confirmed in eight years (Goldman, *et alia* 2000).³ Yet to lump Clinton and Carter together as persistent diversifiers is wrong. An examination of Clinton's district court nominations indicates that Clinton was not nearly the diversifier Carter was, and Clinton's commitment to diversity waned when electoral politics intervened (for more on Clinton's strategic employment of diversity, see Scherer 2005, pgs. 85, 103-104).

Clinton's had a tepid record assigning black judges to the South—where the discrepancy between the black population and the black presence on the federal bench is most glaring. One also should note the temporal pattern of Clinton's nominations. Clinton's nominations of black judges dropped as his terms progressed. In the pre-midterm years the president nominated black judges at a 20 percent clip (38 of 193). After midterms the rate dropped to eleven percent (17 of 149). Clinton established himself as an agent of diversity, burnishing his legacy, where and when it benefitted *him*, early in his terms.¹ After midterms, Clinton scaled back his pursuit of federal bench diversity.

³ Does a vacancy for a seat that had been held by an African-American put greater pressure on the selection actors to identify another African-American nominee? From 1987 to 2012, there were 64 vacancies created by the departures of African-American district court judges. An analysis of four different partisan scenarios delivered mostly inconclusive, if counterintuitive, results. Fifteen times Republican president/in-party senator combinations made nominations to seats vacated by blacks, and they chose fourteen whites and one Hispanic. None of the fifteen seats was in the South. When a GOP president with no in-party home state senator faces a vacant seat previously held by an African-American, which happened eleven times, two nominations went to blacks, Sandra Townes to ED-NY and Brian Stacy Miller to ED-AR. Two of the eleven nominations went to Hispanics, as George H.W. Bush nominated Frederico Moreno to SD-FL, and George W. Bush nominated Phillip Gutierrez to CD-CA. The diversity records of Democratic president/in-party senators suggest that black incumbency is at best a minor factor in identifying nominees. Democratic president/in-party senator regimes addressed 32 vacancies with black incumbents, and in only five instances did they nominate African-Americans. When he was sharing the nomination with a Democratic home-state senator, Obama only nominated two blacks to eighteen district court seats vacated by African-Americans. Six times Democratic presidents faced black-incumbent vacancies in districts in states with no Democratic home-state senator. In five of the six instances, the presidents nominated African-Americans. To sum up, there is no evidence that black incumbency matters when Democratic presidents are aligned with Democratic home-state senators. Under such scenarios, Democrats nominated African-Americans 16 percent (five of 32) of the time, while without black incumbency as a factor Democratic presidents with Democratic home-state senators nominated blacks at a fourteen percent (57 of 404) clip. At any rate, black incumbency makes a clear difference when Democratic presidents face black-incumbent vacancies in states with two Republican senators, as five of six nominees under such circumstances were African-American.

Clinton's strategy is indicated by his "replacement" pattern, replacing a white judge with a black nominee or vice-versa.⁴ Unlike Carter, Bill Clinton was very strategic in his replacement nominations, behaving more like the Republican presidents of the last 30 years than like the dogged diversifier Carter. Clinton replaced outgoing black judges with white nominees twice as quickly after midterm elections. Clinton's post-midterm record of diversification looks like the diversification patterns of the last three GOP presidents (see Figure 1.1 below).

⁴ It is probable that when an African-American is nominated for a vacancy in a district, there is less pressure on the selecting actors to have the next nominee also be an African-American. The nomination and eventual confirmation of an African-American to a given district court acts like a "blown gasket," relieving pressure to diversify a given court. Researchers have proposed ideas that are similar to what I call blown gasket theory. Existing diversity on the high courts of the states affects the likelihood that a woman will be selected to that court; women are much more likely to be appointed to otherwise all-male courts than to courts with some gender diversity (Bratton and Spill, 2002). Exploring a similar idea, Solberg and Bratton (2005) find that existing racial diversity, measured as the number of African-Americans currently serving in the district when the vacancy was filled, has a fairly consistent and significant effect on the likelihood that a given district court confirmation will feature an African-American. The number of black judges on a court is significantly and negatively related to the likelihood of selection of an African-American judge. The authors conclude that if a particular court is bereft of black judges, political pressure to diversify the court increases, leading the president to appoint an African-American. Statistics bear this idea out. Nominations within three years of a nomination of an (eventually confirmed) black nominee are filled with black nominees at a six percent (eleven of 162) rate. A vacancy which has not had a (confirmed) African-American nominee in more than three years has a nine percent (24 of 253) chance of receiving an African-American nominee. Vacancies that have gone at least ten years without a vacancy (but have had at least one in the history of the district) have a nineteen percent (36 of 192) chance of receiving an African-American nominee. Analysis of vacancies that have never had a (confirmed) black nominee (347 vacancies over 68 districts) is complicated by the fact that these are the districts with the lowest number of seats. Averaging the number of seats on the all-white district benches over the 347 vacancies puts the mean number of seats per bench at just over five. The average bench size of the benches that have at least one African-American is fourteen seats.

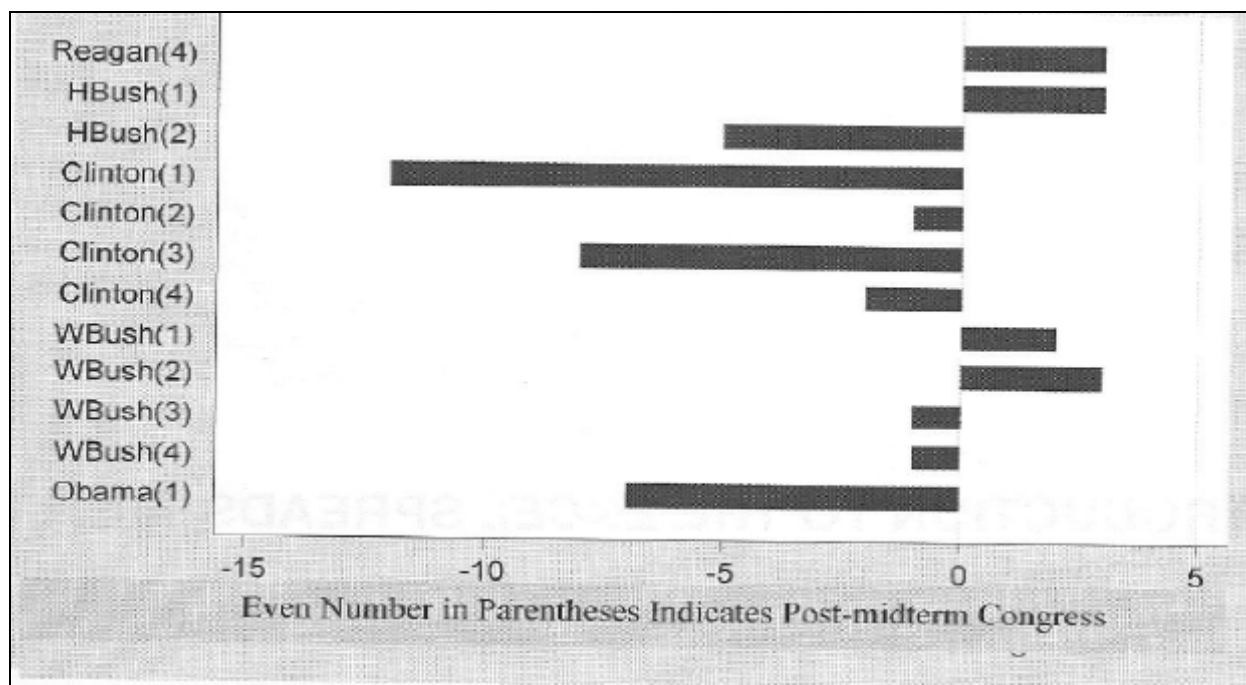


Figure 1.1: Net Change White Appointees by Administration: White Appointees Replacing Black Judges Minus the Opposite Trend

Looking at just the South, Bill Clinton appointed 48 persons to the region *before* midterm elections, and in thirteen pre-midterm instances (34 percent) a black nominee was set to replace a white judge. Yet *after* midterm elections under Clinton, just two (10 percent) of twenty of the nominees were African-Americans replacing whites. Clinton's record appointing Latinos to the district courts demonstrates electoral responsiveness to the drumbeat of demand for Hispanic judges. Of Clinton's 16 Latino district court nominees, 11 were to California, Texas, or Arizona, states featuring Hispanic populations of 17 percent, 18 percent, and 13 percent, respectively.

The literature also shows that Republican presidents have pursued diversity, albeit as a subordinate goal to placing conservatives on the courts. Asmussen (2011) points out that Reagan did not let diversity come at the expense of ideology, a dilemma that must be considered in light of the size and the overall ideology of the pool of potential minority judges in the 1980s. A

member of Reagan's Legal Policy staff commented on criticisms of the administration's lack of diverse nominees:

Nothing would please us more to find more qualified black and minority candidates in this process...[T]here is just not even a respectably small pool of black lawyers of suitable age, in suitable career positions, with any kind of Republican background, with some affinity for the President's philosophy. (quoted in Goldman 1997, 335)

Republicans since Reagan have encountered a deeper and more ideologically diverse pool of potential minority judges, and the existing literature has characterized GOP presidents as strategic and ideological in their minority nominations. By nominating conservative Clarence Thomas, for instance, GHW Bush put pressure on Democratic senators who relied on African-American votes, thereby pushing Thomas through to the bench (Overby et al. 1992; Rohde and Shepsle 2007; Baxter 1991).

Gryski, Zuk, and Barrow (1994) examine socioeconomic and demographic factors' role in the diversification of 90 districts (at three different time points), using the districts as their units of analysis. They predict the percentages of minority judges in each district (including circuit judges who reside in the districts) using percentages of Hispanic and African-American voting age populations, indices of the two minorities' socioeconomic power, and the presences of minority House members representing House districts within the judicial districts. Having controlled for such factors, the authors provide analysis of the DRR records of three different presidential regimes. The Nixon/Ford combination did not feature affirmative action anywhere in its selection policy, and their collective DRR record was weak. Carter's DRR record was strong on all counts, while Reagan/Bush indicated the growing awareness of Hispanic political power by presiding over a slight increase in Hispanic confirmations. African-Americans actually lost representation on the federal bench between 1981 and 1993. The authors effectively capture

some of the electoral forces behind DRR, but they do not study appointments *per se*, just confirmations.

The bulk of the literature concerning nominations of minorities to the federal bench is focused on the costs and benefits *to the presidents* of pursuing such nominations. A minority nomination could be disadvantageous to a president if the nominee either fails to get confirmed by the Senate or gets confirmed only after a lengthy confirmation battle. If minority nominees arrive in the Senate with a lower probability of confirmation, and shorter/smoothier confirmations are beneficial to the president, presidents should avoid nominating minorities, all else being equal. Yet there is evidence that minority nominees are useful for presidents of both parties, as the chief executives seek to place ideological fellow travelers on the federal courts. “By nominating candidates from the demographic core of the opposing party, presidents stand to gain regardless of the outcome: opposing senators are forced either to incur political damage, or to support nominees they might otherwise reject on ideological grounds” (Law 2004, 512). Asmussen (2011, p. 594) notes that “[t]aken together, these observations suggest that presidents—regardless of party—do no worse by nominating female or minority judges, all else (ideology and qualifications) equal.”⁵

In the spring of 2000, Texas senators Phil Gramm and Kay Bailey Hutchison, both Republicans, had taken a hand in blocking Clinton’s Hispanic nominee, Enrique Moreno, an El Paso personal injury and product liability lawyer, to the Fifth Circuit Court of Appeals. The senators said that Moreno was unqualified, but otherwise were reticent about the reasons for their

⁵ Asmussen (2011), focusing on appellate courts, argues that Republican presidents know that senators face political costs for obstructing minorities, so GOP chief executives exploit the situation by nominating minorities who are especially close to the president (i.e. more extreme) ideologically. Asmussen (2011) concludes that it is therefore ideology, rather than race *per se*, which accounts for the delays and lack of success of minority nominations. Notice that in Asmussen’s framework the possibility that a given minority nominee might be obstructed in the Senate is of no concern to the president; he can always blame the obstruction on the other party. Democrats are eager to make liberal gestures, and perhaps court minority votes, with minority nominees, and Democratic politicians have plenty of ammunition if GOP senators obstruct minorities of any ideological stripe.

obstruction.⁶ At any rate, the obstruction of Moreno became a lightning rod for criticism of Republicans as the 2000 Election intensified. Clinton claimed that Senate opposition to his judicial nominations reflected GOP bias against minorities. "Why don't they want to give these people a hearing and a vote?" the president said during an appearance before the NAACP that July. "Because they don't want [Moreno] on the court, but they don't want you to know they don't want him on the court."⁷ In a letter to the National Hispanic Leadership Assembly, Vice President Al Gore reaffirmed his support for Moreno and challenged George W. Bush to rally behind the nominee. Bush demurred, confirming his fealty to the custom of senatorial courtesy. For his part, Phil Gramm fired back at the Democrats, accusing Clinton of "trading on judicial nominations as a device to generate money for Democratic political campaigns." Also, Gramm wrote to the president, "[y]our strategy of mixing judicial nominations with partisan hectoring in order to extract contributions is odious, and I urge you to stop."⁸ Minority nominees may or may not be more difficult to get past the Senate to the bench. Nevertheless, presidents can use nominations of minorities to put pressure on senators from the opposing party.

Among all the studies about the president's roles in diversifying the federal bench, there is little about the role of the home-state senator as a "first-mover" in the district court nomination process. The nomination process actually begins when the vacancy emerges, not when the nomination reaches the Senate (Massie, Hansford, and Songer 2002). Considering senators' outsized roles in filling vacancies to the district courts, the senator and his staff almost certainly are the first nomination actors to consider the political possibilities of a given vacancy (for the primacy of senators' roles, see Giles, Hettinger, and Peppers 2001, and Primo, Binder, and

⁶ Tort-reform, one of GW Bush's pet issues both as governor and president, may have been behind the GOP's problems with Moreno.

⁷ Michelle Mittelstadt. "Senators Lend Support to Judicial Nominee; Critics Suggest Timing Politically Motivated." *Dallas Morning News* July 29, 2000. Page 31A

⁸ Mittelstadt. "Senators Lend Support." *Dallas Morning News* July 29, 2000. Page 31A

Maltzman 2008). I argue that the home-state senator sets the stage for negotiations for a district court nomination. It is the senator who suggests that a minority would be useful filling a particular vacancy, and it is the senator who locates and promotes an African-American or Hispanic would-be judge.

Senators in the Lead: The Institutional Set-up of District Court Nominations

Senatorial courtesy is a long-standing custom, dating back to the 1790s. The “courtesy” is extended between senators; if a district court nominee is objectionable to a senator from the district’s state, other senators, by custom, will refuse to vote to confirm the nominee. Perhaps as an informal institutional power play, the custom was entrenched in the nineteenth century, during the heyday of federal government patronage, as senators were eager to control the staffing of their states’ valuable district court seats, which could be traded for political favors. Senatorial courtesy withstood the waning of the patronage system. In the latter half of the twentieth century, the custom endured as the federal courts became less dependent on patronage and more important ideologically. The selection of the judges thereafter was contended on partisan terms. In particular, in-party (the president’s party) senators customarily have the most leverage “In our day,” writes scholar Harold Chase (1972), “senatorial courtesy has come to mean that senators will give serious consideration to and be favorably disposed to support an individual senator *of the president’s party* [italics mine] who opposes a nominee to an office in his state.” Chase wrote forty years ago, but the arrangement has not changed; senatorial courtesy provides the foundation for a special role in the nomination and confirmation process for a senator of the president’s party (Rutkus 2008). The president is very unlikely to challenge a senator by nominating a judge to a district in the senator’s state that the senator may find objectionable.

Beyond the machinations of senatorial courtesy, which are transitory in themselves, there are no rules about how senators and presidents come to agree on a particular court nominee. The systems are idiosyncratic. For instance, Texas settled on a unique and effective arrangement during the Reagan Administration. A group of lawyers, a bipartisan panel, examines applications for the federal bench. The panel then arranges interviews with the most promising applicants. During the half-hour interviews, the 39-member committee tries to get a handle on a candidate's temperament to make sure that a loose cannon does not get a lifetime appointment to the bench. According former Committee Chairman Dan Hedges, Texas' unique process is the reason why so many picks from the state have done well when put through the nomination process in the Senate. "Honestly, we don't really look at the political affiliations, we just want people who can handle the job," said Hedges. "We've recommended both Republicans and Democrats." The bipartisan spirit extends to the involvement of Texas' two senators, regardless of their partisan affiliation. The senators together forward their choice to the president.⁹

Over the last decade, Texas Senators John Cornyn and Kay Bailey Hutchison, both Republicans, made sure they followed an informal script when they got behind district court nominees. The senators chose would-be judges who could help them with an electoral constituency, they vetted them very carefully, knowing that any nominee can become politicized,

⁹ Joe Black "Federal Judges Nominated." *The Houston Chronicle*. April 16 2007. Page A25. Texas' otherwise chummy selection system broke down during 1993, and Texas' otherwise durable bipartisan committee arrangement was abandoned by Bill Clinton for the rest of his presidency. In May of 1993, interim Democratic Senator Bob Krueger chose to recommend twenty-one U.S. attorneys, marshals, and federal judges to Clinton without consulting with Texas GOP Senator Phil Gramm. Krueger would face Kay Bailey Hutchison in a run-off election on June 5, and diversity clearly was part of Krueger's strategy, as ten of the 21 recommendations were of minorities. Upon announcing the recommendations in Austin on May 23, Krueger foresaw "the Texas of diversity, the Texas of change, the Texas of challenge, the Texas of the future." (see Steve McGonigle "Gramm Assails Krueger over Federal Appointments; Senator's aide Defends Timing of Appointments," *The Dallas Morning News* May 22, 1992 Page A3). After Hutchison's victory, with two GOP senators in the state, Clinton, looking to fill a district court seat, typically consulted with Rep. Martin Frost, the House Democrat with the most seniority from that state. This did not stop Hutchison, Phil Gramm, or John Cornyn from claiming credit for minority district court nominees, even if the nominee was produced by a Democratic team. (see Vanita Gowda "Logjam Over Judicial Approval Steers Clear of Florida." *The St. Petersburg Times* August 29, 1999. Page 6A; see note 10, below)

then they took credit for the nominations. George W. Bush's nomination of Xavier Rodriguez in 2003, to the Western District of Texas, generated glowing quotes from Cornyn, who called Rodriguez "exceptional." Hutchison assured everyone that the new judge possessed "integrity."¹⁰ The American Bar Association's standing committee rewarded Cornyn and Hutchison's diligence, granting Rodriguez a unanimous "Well Qualified," the highest rating possible. Hispanic nominee Kathleen Cardone, also nominated by George W. Bush, to the Western District of Texas in 2003, was introduced the Senate Judiciary Committee jointly by Cornyn and Hutchison.

Attempts to control the choices of district court nominees are intra-party struggles. Ronald Reagan, upon taking office, signaled that his administration would be taking an activist stance on federal judicial selection at all levels (Goldman 1997). Reagan negotiated with the then GOP leadership to have Republican senators submit five names for each vacancy from which the president might choose. After a period of initial cooperation, according to Jonathan C. Rose, Reagan's assistant attorney general for legal policy, some Republican senators began to rebel at the new procedures (Law 2004). The senators began to insist on a return to an earlier practice, under which a senator would suggest a single candidate who would receive the nomination unless deemed unqualified (Goldman 1997). As Rose lamented, "[t]he total result of all this is that [Reagan and his staff] haven't had a lot of flexibility at the district court level" (Goldman 1997).

Despite Reagan's campaign rhetoric promising an activist stance on the part of his administration as it made nominations to the federal judiciary, district court nominees—the bottom-rung judges—were in large part chosen by home-state senators. The story of the nomination of John Bissell to the statewide District of New Jersey is a good example of a senator

¹⁰ "Four Federal Judges Confirmed" *Metropolitan News Enterprise*. August 4, 2003. Page 5.

getting his preferred nominee, even under adverse (for the senator) circumstances. Senator Nicholas F. Brady (R) was appointed by GOP Senator Thomas Kean to complete the Senate term of Democratic Senator Harrison Williams, who had been convicted of taking bribes in the Abscam scandal of the late seventies and early eighties. Though he only served from April 27 1982 to December 27, 1982, Brady, who did not seek election to a full term, recommended Bissell. Secretary of Labor Raymond J. Donovan had previously been the patronage link with the New Jersey Republicans, and he reportedly asked Reagan to hold off on nominating Bissell “until he could do further checking” (Goldman 1997, 295). Presumably, Donovan and other New Jersey Republicans had their own candidates for the judgeship, but the president refused to delay the Bissell nomination. It seems that Brady, a senator from the president’s party, got his favorite, Bissell, to the bench.

If Nicholas Brady could get Bissell nominated, it follows that more established senators would exercise even more control over the identities of district court nominees. Two examples demonstrate the leverage in-party senators possess, even when the president’s influence is waxing. In 1981, while senators were submitting lists of names, rather than single names, of prospective district court nominees, some senators were submitting lists that nevertheless indicated strong preferences for individual candidates. Attorney General William French Smith was a key player in Reagan’s judicial nominations early in the president’s first term. Smith’s Deputy, Edward C. Schmults, wrote to the attorney general, “[S]enator [Strom] Thurmond [(R-NC)] sent the department nine candidates, but expressed a strong preference for Mr. [William W.] Wilkins [Jr.]” (Goldman 1997, 308) Schmults also wrote that Senator Slade Gorton (R-WA) “[r]ecommended four nominees for the vacancy, and voiced unequivocal preference for Mr. [John] Coughenor, whose legal credentials are unexceptional” (Goldman 1997, 308). Both

Wilkins and the “unexceptional” Coughenor were nominated by Reagan and then confirmed to district court seats by the Senate.

Another example of the power of home-state senators to direct district court nominations is more subtle. The Reagan Administration had decided that of two vacant district judgeships in Ohio, one should go to a woman. Moderate Republicans in Ohio recommended Lizabeth A Moody, a partner in a Cleveland law firm. Some more conservative members of Ohio’s Republican congressional delegation mounted a campaign against Moody, charging her with being pro-abortion (a charge she denied). The more conservative group prevailed, and Reagan passed over Moody, instead appointing Alice Batchelder, the wife of his Ohio campaign chairman in 1980 (Goldman 1997). Such an expansion of the relevant players in a district court nomination comes about only when there is no home-state senator of the president’s party. This was the case in Ohio when Batchelder was nominated, as Democrats John Glenn and Howard Metzenbaum were the Ohio senators.

Senators value the privilege of choosing district court nominees enough to defy the president by only submitting one name when the president asks for five, as New York Senator Alfonse D’Amato did to Ronald Reagan on several occasions, or daring to make an “unequivocal” pitch for a particular candidate, as Slade Gorton did (Goldman 1997, 308). Senators’ willingness to defy the president on district court vacancies indicates that they certainly would defy other senators, if such boldness was necessary, in their own parties.

The Importance of Minority Nominees to Senators

Senators’ reelection prospects can be enhanced by the nominations of minorities to district courts in four ways. First, senators seek reelection from a “down-ballot” position (or during a non-presidential election), and thus can gain electoral traction targeting the better-informed

voters who can be swayed on their down-ballot choice. Better-informed voters are more likely to take notice of a district court nomination, and a senator can claim credit if the nominee is a minority. Second, senators, particularly Democratic senators, can gain *primary* votes by appealing to minority voters with a minority district court nomination.¹¹ This ties into the idea that senatorial reelection constituencies, especially primary constituencies, are better informed and more likely than other citizens to read a newspaper and see a photo of a newly nominated federal judge. Third, senators can “work” their states, using their intimate knowledge of a state’s varying political tastes to drop the president’s name, and extol the virtues of a district court nominee, to a targeted audience who will remember the senator on Election Day. Fourth, district court seats present attractive targets to civil rights interest groups promoting diversity on the federal bench. Senators, with their outsized roles in the district court selection process, are in positions to benefit from voter mobilization efforts by groups grateful for a senator’s diversity gesture.

The idea that senators in the president’s party are the main actors in the choices of nominees to judicial districts in their states is central to this thesis. A district court nomination is the business of the home-state senator (when she is in the same party as the president), and she can use her prerogative for patronage, to gratify the president with an ideologically pleasing nominee, or to garner political support among minority constituents. Considering the flexibility and rewards associated with district court nominations, it follows that members jealously guard the prerogative.

¹¹ The fast-growing Hispanic population is an electoral target for senators of both parties. Thus, a GOP senator can target Hispanic voters by playing up his (the senator’s) role in the nomination of an Hispanic district court judge.

An Early Bid for Hispanic Support: The Reynaldo Garza Nomination

Born to Mexican immigrants in Brownsville, Texas, in 1915, Reynaldo Garza graduated from the University of Texas' law school, where he made connections among a group of men who would dominate Texas politics for decades. Garza fought in World War Two before returning to his private practice in Brownsville, where he became a key player in the political campaigns of Lloyd Bentsen and Lyndon Johnson. When Garza's friend and mentor James Allred, a SD-TX district judge, died in 1959, Garza eyed the vacancy, but Eisenhower was known to only appoint long-standing members of his own party to the federal bench (Fisch 1996).

The new Kennedy Administration was determined to appoint a Mexican-American to the federal bench. According to Louse Fisch (1967), Kennedy's resolve undoubtedly came from Kennedy's desire to support the civil rights movement by rewarding the Viva Kennedy clubs in the Southwest with appointments of Hispanics to government posts. Kennedy worked to balance his considerable support among minority voters and his Anglo Southern constituency. Kennedy's Attorney General Robert Kennedy and Vice-President Johnson were enthusiastic about putting Garza into the SD-TX vacancy, and they soon had the President on board.

Garza was hardly an ideal Democrat. During the 1950s, he had supported Eisenhower and also Democratic Governor Allan Shivers, a conservative who had made enemies within the national Democratic Party, including Texas' Democratic senator, Ralph Yarborough. Yarborough had been the leader of the state's liberal movement in the 1950s, and the senator was well aware of the influence of Mexican-American votes in the political process (Fisch 1967). To this end, Yarborough backed a different Hispanic for Allred's vacancy, E.D. Salinas. In short, if the Kennedys and Johnson were to get Garza to the bench, it would seem they were going to have to placate Yarborough (Fisch 1996).

There is no evidence that Kennedy made any kind of deal to mollify Yarborough, and Garza's nomination proceeded. There was considerable fanfare generated over the United States' first Mexican federal judge. Garza received congratulatory phone calls and telegrams by the hundreds. Many Texans voiced their approval of Garza's nomination by sending letters to the president. The loudest accolade occurred in Brownsville, where Garza was the first federal judicial nominee to have an official residence in the city. One reporter observed, "[i]t was almost as if the president was appointing a part of Brownsville itself." (Fisch 1996) Yarborough came around and supported Garza openly, perhaps recognizing that reticence on the part of the nomination was a wasted opportunity. To give a sense of how much attention a district judgeship can garner, I here quote at length from Louise Fisch's biography of Garza.

While Garza readied himself for the federal bench, the Cameron County Bar Association arranged Garza's installation and luncheon. The events took place on April 29, 1961, at the Fort Brown Auditorium, just two blocks from Garza's birth home. More than five hundred people attended the opening installation ceremonies. Major Texas newspapers covered the event, reporting it was the largest turnout ever accorded a federal judge in Texas. State judges, members of the Cameron County Bar, and various civic and political leaders from Texas and Mexico were also present (Fisch 1996, 86).

How Interest Groups Affect Descriptive Race Representation

Interest groups play an increasingly important role bringing electoral pressure to the district court nomination milieu, especially when minority nominations are afoot. Electoral costs are imposed on senators by interest groups, and senators' positions on district court nominees are on the groups' radars. The groups inform voters when a legislator votes against the group's agenda. The advent of the Internet has provided interest groups with a monitoring system they can use to punish senators who approve of disagreeable (to the groups) nominees.¹² "Scorecards" of

¹² Until the mid-1990s it was a rare event for the Senate even to hold a roll-call vote for a district court nomination; these nominations were instead confirmed by unanimous consent or voice vote (SBS 2008).

senators' voting records find grassroots members' "eyeballs" at very low cost to the groups. Because of increased roll-call votes, which arguably are the product of interest group influence (for more on this see Bell 2002, p. 108-10; Scherer 2005, p. 134-35), scorecards are more influential than ever. Senators who are contacted by interest groups about disagreeable district court nominees have every reason to believe that they could be held accountable to the group. Rhett DeHart, formerly counsel to Senator Jeff Sessions (R-AL), says that interest groups' compilations of legislative records (scorecards) are an effective way to provide senators an electoral context to their confirmation decisions. DeHart says: "I've noticed for certain controversial nominees [some interest groups] send out letters saying 'We're gonna score your vote on this person's nomination.' That's kind of a new angle and I think that absolutely has an effect [on senators' voting behaviors]." (Bell 2002)

Case Studies: Politics and Minority Underrepresentation

Bill Clinton framed DRR in explicitly descriptive (rather than substantive) terms. Days before his election in 1992, Clinton delivered a position paper to the *National Law Journal* in which he stated:

A most troubling aspect of judicial appointments during the Reagan-Bush era has been the sharp decline in the selection of women and minority judges, at the very time when more and more qualified women and minority candidates were reaching the time of their lives where they could serve as judges. While there are many fine women and minority attorneys all over the country who would potentially be superb federal judges, Mr. Bush's appointments fail to reflect the breadth and diversity of the bar, much less that of our nation.

The narrow judicial appointments of George Bush have resulted in the emergence of a judiciary that is less reflective of our diverse society than at any other time in recent memory. I strongly believe that the judiciary thus runs the risk of losing its legitimacy in the eyes of many Americans (Clinton 1992; quoted in Scherer 2005).

Despite Clinton's pro-diversity rhetoric, politics were foremost on his mind when he made district court nominations. When political conditions are not conducive to a minority nomination, diversification often is ignored.

Consider the vacancy created by Justice L.T. Senter, Jr., in the Northern District of Mississippi. Senter assumed senior status in July of 1998. Northern Mississippi, having never had an African-American federal judge, seemed a sure target for diversity. The district includes heavily African-American counties including Coahoma (76 percent African-American population), Tallahatchie (54 percent), Quitman (70 percent), and Bolivar (64 percent). The Senter vacancy was filled, by Clinton, with Cleveland Mississippi attorney Allen Pepper, Jr., a white man. The political circumstances surrounding the vacancy inhibited DRR. In his attempt to fill the Senter vacancy, Clinton was faced with two GOP home-state senators, Thad Cochran and Trent Lott. Lott was the Senate Majority Leader. So the institutional arrangement of the Senter vacancy worked against DRR in a direct way: home-state senators are best positioned to use minority district court nominations politically, but the two Mississippi GOP senators were not in the running for black political support. There was no political imperative to diversify.

The nomination of an African-American to fill Senter's seat—whether there had been a confirmation or not—could have been useful in the larger fight to achieve nationwide DRR. Clinton could have nominated an African-American to the MS-N bench, daring the Senate GOP leadership to obstruct her. Such a maneuver might have energized Democratic Party activists and civil rights-oriented interest groups, who would mobilize African-American voters on Election Day. Further, such a maneuver could bring the DRR plight of ND-MS to statewide—if not national—prominence. What keeps a president from using a minority district court nomination to shed light on the meager civil rights records of his political opponents? Probably Senter's seat

was at the wrong level, in the wrong state, and at the wrong time in the electoral cycle for such a presidential maneuver. Presidents prefer to provoke their ideological opponents with minority nominations at the appellate level, as in the appointments of Enrique Moreno to the Fifth Circuit and Clarence Thomas to the Supreme Court. As I will demonstrate below, in some situations a *district court* nomination could be useful in the same way, getting out the minority vote in a given state, but Mississippi was not going to be in play in the 2000 Election (the state went for George W. Bush by a 16 percent margin). So, the story of DRR in ND-MS in the late 1990s was driven by the partisanship of the state's senators and a lack of commitment to DRR from the Oval Office.

The tale of the two separate nominations of African-American Ronnie White to the Eastern District of Missouri provides the clearest example of a minority district court nomination as a presidential political gambit. Reagan appointee Judge George Gunn assumed senior status on December 1, 1996, just after Clinton won reelection. The vacancy seemed unlikely to receive a black judge; the nine-seat bench already featured two African-American judges, and Missouri's home state senators, Kit Bond and John Ashcroft, were both Republicans. Bill Clay, the Democratic Party congressman from St. Louis, recommended White for a federal judgeship.¹³ Bond vocally approved of White's June 1997 nomination, describing the Missouri Supreme Court judge as "a man of the highest integrity and honor."¹⁴ Ashcroft, a member of the Senate Judiciary Committee (SJC), was still considering a long-shot bid for the presidency, and he was criticizing his fellow Republicans on the Judiciary Committee for rubber-stamping too many

¹³ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

¹⁴ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

liberal judges.¹⁵ White received a hearing before the SJC in May of 1998. Ashcroft, a member of the Committee, asked White about gay rights, abortion and the role of the judiciary. Ashcroft voted against White's nomination in committee, but he did not draw attention to his vote, and the nomination easily passed to the Senate floor.¹⁶ "There was bipartisan support for Ronnie White," recalled Sen. Patrick J. Leahy (Vt.), the ranking Democrat on the Judiciary Committee.¹⁷ Yet the nomination never received a vote on the floor of the Senate, an unusual instance wherein a successful hearing is followed by failure on the Senate floor. This unsuccessful first pass at putting Ronnie White on the federal bench was barely noticed; it was only a district court nomination, and the Monica Lewinsky scandal dominated headlines all summer.

Why did Clinton nominate an African-American to the Missouri vacancy? Like the Mississippi vacancy, it was only a district court seat, and there were no Democratic Party senators to take credit for a minority nomination. On the other hand, unlike Mississippi, Missouri was an electoral battleground state. With Ashcroft grumbling about the ideologies of Clinton's judicial nominees, and looming as a possible presidential candidate, the Clinton team may have planned to box in Ashcroft. It was evident that Ashcroft was going to use a predictable (for him) "law and order" theme in his platform. Were Ashcroft to portray Clinton and his minority nominee as "soft on crime," he would risk a fracas focused on racial politics. This is in fact what happened.

It was the second nomination of Ronnie White, in January of 1999, that demonstrated the potential of a minority district court nomination to spark rhetoric, invite scrutiny, and even to mobilize minority voters. In 1999, Senator Ashcroft was in a reelection fight with Democratic

¹⁵ Michael Grunwald "Effort Against Judge May Return to Haunt Ashcroft" *Washington Post* January 2001 Page A14.

¹⁶ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

¹⁷ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

Governor Mel Carnahan. When Carnahan commuted convicted murderer Darrell Mease's death sentence after a personal entreaty from the Pope, who was visiting St. Louis in January of 1999, Ashcroft declared Carnahan to be "soft on crime."¹⁸ Ashcroft embarked on a "victims' rights" tour of Missouri, even inviting relatives of those murdered by Mease to attest. Simultaneously, White's judicial record came under new scrutiny from Ashcroft, who warned that the Carnahan appointee (to the Missouri Supreme Court, in 1995) would use the federal bench to "push the law in a pro-criminal direction, rather than defer to the legislative will of the people and interpret the law as written."¹⁹

In the summer of 1999, as White's nomination was nearing a committee vote, Ashcroft's aides put together a list of cases in which the judge had dissented from a ruling upholding a death sentence.²⁰ His chief of staff noticed that one White's dissents involved the case of a man who had killed three law enforcement officers and a sheriff's wife. Jimmy Johnson had entered an insanity plea, saying he had no memory of the killings and that they had been triggered by post-traumatic stress disorder dating from his service in Vietnam. His lawyer told the jury that Johnson had strung up a "perimeter" of rope and tin cans around his garage because he thought he was back in combat. But police witnesses revealed in court that they had strung up the rope and tin cans while staking out his house after the killings. Judge White's dissent characterized the defense attorney's statement about the "perimeter" as a disastrous instance of incompetence, which destroyed the credibility of Johnson's insanity plea.²¹ The other judges on the court

¹⁸ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

¹⁹ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

²⁰ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

²¹ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

believed the jury would have found Johnson guilty anyway, and denied his request for a new trial.²²

Ashcroft used White's dissent to rally political support. Ashcroft accused White of "reaching for loopholes to benefit criminals," and denounced White's "very serious bias against the death penalty."²³ Ashcroft's aides spread the word about White to law enforcement groups.²⁴ The Missouri Federation of Police Chiefs came out against White, citing the Johnson dissent. And the National Sheriffs Association proclaimed that "this opinion alone disqualifies Judge White from service in the federal courts."²⁵ Yet other law enforcement groups were not impressed with Ashcroft's cause; two police groups, the Missouri Fraternal Order of Police and the Missouri Police Chiefs Association, declined to oppose White's nomination, even after they were lobbied directly by Ashcroft's office.²⁶ Further, Ashcroft's efforts against White were playing poorly with Missouri's African-American voters.²⁷

White was reported favorably out of the SJC in July of 1999. On October 1, the Senate made a rare decision (for a district court nominee), scheduling a Senate-floor debate for Ronnie White that would take place on October 4 and 5. On the first day of debate, Ashcroft labeled the Democratic judge "pro-criminal," and cautioned colleagues that White would substitute "personal politics" for the law, and "improperly exercise his will" if confirmed.²⁸ Perhaps the key to White's defeat was Kit Bond's withdrawal of support for the nominee. On October 5,

²² Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

²³ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

²⁴ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

²⁵ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

²⁶ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

²⁷ Typically GOP senatorial candidates discount support among African-American voters, who vote overwhelmingly for Democratic nominees. Missouri is somewhat different in this respect; African-American voters vote for GOP candidates in Missouri in unusually high numbers. In 1998, for instance, GOP candidate Kit Bond won reelection handily, thanks in part to winning roughly 30 percent of the black vote.

²⁸ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

Bond addressed members of the Republican caucus during its weekly meeting. There, behind closed doors, he announced he was now opposed to White's nomination.²⁹ Two hours later White was defeated 54-45, hard along party lines. White became the first district court nominee voted down by the full Senate in nearly half a century. One congressional aide who dealt with the White nomination explained, "[T]o back up a Republican in a close Senate race, they all rallied behind Ashcroft."³⁰

After the Senate rejected White's nomination, many critics attributed racial motivations to Ashcroft and his GOP allies. Bill Clay, the Democratic politician who had suggested White for the vacancy in the first place, and Rep. Maxine Waters (D-CA) flatly called Ashcroft a racist.³¹ Citing statistics about delayed nominations, Clinton called the vote "strong evidence for those who believe the Senate treats minority and women judiciary nominees unequally."³² At a speaking engagement, White said he thought the ruling would have a "chilling effect" on blacks seeking judgeships.

In Missouri, Ashcroft absorbed sharp criticism from his political opponents. Carnahan said White's defeat had "racial overtones."³³ "I suspect Ashcroft underestimated what the importance was," said David Bositis, senior policy analyst with the Joint Center for Political and Economic Studies in Washington, a think tank focusing on issues important to African-Americans. "He'd been able to win elections as governor and senator with just a handful of votes from blacks so he

²⁹ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

³⁰ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

³¹ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

³² Audrey Hudson "Minority Eyed as Federal Judge; Seat was Object of Racial Dispute" *The Washington Times* June 11, 2001 Page A4.

³³ Michael Grunwald "Effort Against Judge" *Washington Post* January 2001 Page A14.

probably thought it wasn't going to be that big a deal."³⁴ Scuttling White's nomination may have cost Ashcroft the 2000 election; Governor Carnahan prevailed posthumously.³⁵ African-American assemblies, such as the Mount Zion Baptist Church in St. Louis, were mobilized. "Our efforts to defeat the senator began on the day Ronnie White's nomination was denied," said Rev. Sammie Jones, the pastor of Mount Zion. "Across the state we began making phones calls and to make plans to let Senator Ashcroft know come election time our voices would be heard. The Ronnie White situation is kind of our Alamo. We will remember that every time we hear Ashcroft's name."³⁶

Perhaps the idea that the Clinton Administration nominated White to set up Ashcroft is a stretch. It seems plausible, however, if one considers the White story in two parts. The first nomination, which probably benefited Kit Bond more than any other political actor, stands out as solid presidential policy in a perennial swing state with a politically powerful African-American community. That the nomination would help the Republican Bond, who cruised to reelection in 1998 winning 30 percent of the black vote (see note 24, above), surely was figured as the cost of doing business in a presidential battleground state. My point is that impending Senate elections do not keep presidents up nights, and with no Democratic senator to claim the nomination prerogative, Clinton could pursue diversification and politics as it suited him. During White's second nomination endeavor, Ashcroft, a presumed national up-and-comer who nevertheless would be vulnerable in 2000's senatorial election, tipped his hand as to the tone of his imminent campaign. Ashcroft almost certainly would lose ground if he opposed a black nominee to ED-MO, and the senator played right into the Democrats' hands.

³⁴ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

³⁵ Carnahan was killed in a plane crash on October 16, 2000.

³⁶ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

So far in this section we have seen that some vacancies have virtually no chance of receiving DRR, even if the district badly needs a minority judge. For instance, ND-MS had political conditions that militated against a minority nomination. The ED-MO vacancy not only was *not* in need of DRR, but it had a partisan senatorial arrangement that was stacked against a minority nomination. Yet the Missouri vacancy presented a political opportunity, and Democrats successfully cornered John Ashcroft with the Ronnie White nomination.

When political conditions are conducive to a minority nomination, DRR typically is achieved. In 1992 Judge William L. Beatty, of the four-seat Southern District of Illinois, transferred to senior status, suggesting a move on a minority nominee. The Southern District bench had never included a black judge. Politically, SD-IL is a target for Democratic politicians hoping to increase turnout among African-American voters: the state and its 21 Electoral College votes are a prize no matter the direction of political winds, and the Southern District's St. Clair County (which holds East St. Louis) has 80,000 African-American residents. For reasons that are unclear, Clinton did not act on the vacancy in the 103rd Congress. In the first month of the 104th Congress, Clinton, supported by Democratic home-state Senators Paul Simon (who sat on the SJC) and Carol Moseley Braun, nominated African-American Wenona Whitfield, a law professor at Southern Illinois University-Carbondale.

The senators used Whitfield's nomination aggressively, taking advantage of a national political atmosphere that featured some heated judicial-selection rhetoric. In April of 1995, Senate Majority leader and probable GOP presidential candidate Bob Dole (KS) was open about thwarting Clinton's attempts to shift the federal judiciary ideologically. In a fund-raising letter he put out for the Judicial Selection Monitoring Project, a conservative court watchdog organization, Dole asked, "Do you want 340 of Bill Clinton's close friends making decisions

about what's good for you and your family?"³⁷ Dole predicted "there are probably 200 more Clinton nominations to review and process over the next 18 months."³⁸ If Clinton's "handpicked liberal activists slip through our screening process it could subvert the will of the voters," Dole warned. "I cannot let this happen."³⁹ Whitfield's nomination stalled; Orrin Hatch (R-UT) still had not scheduled a hearing for Whitfield a year after her nomination had reached the Committee. Referring to Whitfield's lack of progress, Simon said of Dole's implied slowdown, "I have to believe he will have to back off. He knows there's reciprocity around here."⁴⁰ Simon, who was not seeking a 1996 reelection, said Democrats could retaliate if Dole won the White House and Democrats regained control of the Senate in the November general election.⁴¹ Whitfield received a hearing on July 31, 1996, but the SJC never made an official evaluation of the nominee. Whitfield never reached the federal bench.

The three case studies analyzed above exemplify three themes of this study. Under the overarching idea that the diversification of the federal district courts is politically driven, each case study exemplifies a different point. The Senter vacancy in ND-MS was filled by a white man, as none of the nomination players—the president and the two senators—were in positions to benefit from a nomination of a minority. In the Missouri vacancy, on Senator Ashcroft's watch, a president used a minority nomination as he pleased, targeting a battleground state with a minority at the expense of out-party home-state senators. The Illinois vacancy under Carole Mosely Braun was an example of intra-party, inter-branch cooperation, pursuing minority political support by nominating a minority. The fact that Clinton and Braun's nominee was not

³⁷ Al Kamen "Window Closing on Judicial Openings" *The Washington Post* June 2, 1995 Page A17/

³⁸ Al Kamen "Window Closing on Judicial Openings" *The Washington Post*

³⁹ Al Kamen "Window Closing on Judicial Openings" *The Washington Post*

⁴⁰ Bob Copley "Two Illinois Appointments Affected by Dole Threat" *The State Journal-Register (Springfield, IL)* March 20, 1996 page A 14.

⁴¹ Bob Copley "Two Illinois Appointments Affected by Dole Threat" *The State Journal-Register (Springfield, IL)*.

confirmed is irrelevant; Clinton's rival Bob Dole's obstructionist behavior—explicitly a strategy undertaken to maintain an ideologically balanced federal bench—could always be spun by Democrats as racial intolerance.

Plan for this Study

The dispositions and powers of interest groups, the timing within the electoral cycle, the racial composition of a given district bench, and the demographic makeup of the district's state define the political conditions of a given vacancy. Considering these conditions, the president and the home-state senators agree on a nominee, making the nominee the most passive of players in the appointment game. This study will run more than a dozen tests, but they will be variations on one idea: the probability that a given vacancy will receive an African-American, Hispanic, or white nominee depends on the political utility, or lack thereof, of a minority nominee, given the vacancy's political conditions. Sometimes minority nominees are useful to presidents, sometimes to senators, but I argue that the political angle always is there.

The competition for Hispanic support is different from the competition for African-American support; political gestures to African-Americans are almost always Democratic, while the rivalry for Hispanic support is an all-in affair. Because of this difference, my analyses of African-American and Hispanic nominations are divided into three different chapters. Further, the difference helps shape this study's analytical framework, as cooperating teams of presidents and senators promote minority nominees when such moves will pay off, especially at the ballot box. For instance, in the African-American analysis, when presidents and home-state senators have no reasons to cooperate (or indeed if they are rivals), nominations of blacks may be used aggressively, as in the Ronnie White affair. Rivalries between presidents and home-state senators

alternatively may result in African-American DRR being ignored, as in Clinton's disregard of diversification in the Senter vacancy in ND-MS in 1998.

Chapter Two uses a conceptualization of the most efficient path to DRR that puts each vacancy into the context of the overall effort to make our courts look like America. To rank district court vacancies by their appropriateness for African-American DRR, I create a formula for judicial racial underrepresentation: statewide African-American population minus the percentage of a given district's bench that is African-American. Presumably, if DRR is pursued, a higher quantity of African-American underrepresentation will increase the probability of a vacancy being filled with a black nominee. Indeed this is the case, yet the interesting vacancies are those which receive white nominees despite seeming ripe for African-American DRR. It seems that minority nominations are more politically useful in some situations than they are in others. Specifically, partisanship, the dispositions of interest groups, and the rhythms of electoral cycles are factors that affect the probability that a given vacancy will receive a minority nominee.

Chapter Three answers the question, "How does the political use, by senators, of Hispanic district court nominations differ from senators' efforts to attract political support by taking stances on legislation?" By contrasting politics that drive Hispanic district court nominations with politics that drive other pro-Hispanic senatorial activity, I underscore how Hispanic clout at the ballot box impels Hispanic descriptive race representation on the federal district courts. Large statewide percentages of Hispanic constituents, and thus potential Hispanic votes, cause the nominations of Hispanic district court nominees. Regular pro-Hispanic regulation, on the other hand, results from factors that fit with the "party as a substantive representative" model of

minority representation, wherein senatorial Democratic Party membership drives both pro-Hispanic legislation and pro-African-American legislation.

Chapter Four answers the question, “How has Barack Obama tackled the need for DRR on the federal district courts?” This chapter first examines the task Obama undertook in 2009, detailing the reasons behind the scarcity of African-American DRR in the South. Republican politicians were, and are, dominant in the South, and they have had little political incentive to nominate African-American judges. Obama’s minority nominations to districts in conservative states are less surprising than the results generated by his efforts. I theorize that the politics of judicial nominations in the South are changing, and that Obama has benefitted from the new paradigm. Overall, Obama has used minority nominations strategically, garnering political support among minorities and liberals.

As Barack Obama embarks on his second term, the continued advances of Hispanics to the federal district court bench seems assured. The demographics are too powerful to keep Latinos off the bench, no matter what sort of ideological disputes may arise. With the nation’s African-American population shrinking as a percentage of the overall demographic pie, the political imperatives to put blacks on the bench are likely to decrease, rather than increase. With African-American federal judicial representation already lacking, a re-engineering of the judicial appointment process may be necessary if the nation is to achieve descriptive race representation.

CHAPTER 2

NOMINATIONS OF AFRICAN-AMERICANS

Puzzle: There are relatively few African-American judges on the United States district courts.

These conditions persist even though in recent decades law schools are producing thousands of minority graduates of all ideological stripes who could be federal judges.

Theory: Democratic Party senators spearhead nominations of African-Americans to reduce electoral uncertainty. To increase turnout among black voters, Democratic senators promote potential African-American judges much as they support affirmative action policies, for instance, legislating in ways that are consistent with electoral rationales. Of course, such policies generally are not useful to Republican politicians, nor are they worthwhile for Democratic politicians under some circumstances. When political conditions do not militate minority district court nominations, appointments go to white nominees in almost all cases. So politics, shaped by the institutional arrangement of federal judicial nominations, are responsible for the lack of African-American representation on the federal bench.

H1: When the politicians involved in a nomination are Democratic, a higher level of African-American judicial underrepresentation in a district increases the probability that an African-American will be nominated to a vacancy in that district.

H2: When the president is Democratic and there is no in-party home-state senator, there will be no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy in the district will be black.

H3: When the politicians involved in a nomination are Republican, there will be no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy in the district will be black.

H4: When the president is Republican and there is no in-party home-state senator, there will be no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy will be black.

Method: I use 1164 district court vacancies from 1987 to 2012 as units of analysis. Using maximum likelihood estimation, I predict minority nominations using a formula for judicial racial underrepresentation: i.e. statewide African-American population minus the percentage of a given district's bench that is African-American. So a higher quantity of African-American underrepresentation will increase the probability of a black nominee.

Results: The theory works, explaining African-American underrepresentation on the district courts. Hypotheses One through Four bear out, leading to the conclusion that a vacancy that does not arise during a figurative sweet spot—a Democratic president and at least one Democratic senator—has little chance of being targeted with an African-American nominee no matter what the demographic circumstances.

Nominations of African-Americans to the United States district courts have increased over the last generation, yet the gains have been modest. As of January 1, 2009, there were 599 sitting district court judges.⁴² Fifty-eight (9.6 percent) of the judges were African-American, compared to a United States population that was 12.2 percent black. From 2009 to 2011, Barack Obama made a push to diversify the court, but the net results of Obama's diversification have been

⁴² This study excludes judgeships in districts that cannot be associated with a particular senatorial regime. So I do not count seats in the United States District Court for the District of Columbia, the districts of Puerto Rico, Guam, the Virgin Islands, or the Northern Mariana Islands.

negligible.⁴³ As of February 2012, there are some notably unrepresentative judicial districts. Kentucky is nearly 8percent black, yet there is not one African-American district court judge in the state. Other districts that have no black district court representation include the Eastern District of North Carolina, where Raleigh alone has 118,000 African-American residents, and the District of Rhode Island, containing 130,000 African-Americans.

This study explains how politics affect the racial diversification of the district courts. Democratic politicians fill district court vacancies with African-Americans where minority nominations are useful politically. Republicans concede the African-American vote to Democrats.⁴⁴ In modeling these politically-driven approaches, I demonstrate that these stratagems result not only in sparse descriptive race representation across the board, as politicians eschew minority nominations when they feature a negligible electoral payoff, but in more than a few acutely racially underrepresented districts.

Minority Nominations and the Electoral/Partisan Model

To provide support for the idea that politics interfere with descriptive race representation (hereafter DRR), I start by examining vacancies materializing under GOP nomination regimes (GOP presidents with at least one home-state GOP senator). I want to see if a vacancy would be targeted with a black nominee when such an action would promote DRR. I generate a quantity that increases as black underrepresentation on the bench becomes more severe; I subtract the percentage of the vacancy's district's bench that was African-American from the percentage of the state's population that was African-American. So, if the quantity "underrepresentation" is a

⁴³ Obama made the most strides appointing Asians to the federal bench, while the net increases of African-Americans and Hispanics have been negligible, mostly because Obama has been dealing with vacancies created by the departures of Bill Clinton's minority appointees (see Goldman, Slotnick and Sciavoni 2011).

⁴⁴ Note that GOP politicians have nominated African-Americans at a rate of less than six percent since 1987. Clinton and Obama, on the other hand, have nominated blacks to the district courts at a 17 percent clip. Republican presidents have nominated Hispanics at a six percent rate, while Democrats have nominated Hispanics at a five percent rate.

high number, that district would exhibit a notable lack of African-American representation. A low number, indeed a negative number, would mean that there is a greater percentage of African-Americans on the district's bench than in the state. Do GOP regimes respond to African-American underrepresentation with African-American nominees?

To test GOP responsiveness to underrepresentation (hereafter UREP), I examine 318 vacancies between 1987 and 2012. The vacancies arose under GOP regimes and were targeted with nominations by GOP regimes.⁴⁵ The idea is to predict nominations of African-Americans using the independent variable UREP. The dependent variable is binary, coded "1" in the case of an African-American nominee and "zero" if the nominee is not black. I use maximum likelihood estimation, specifically a logit. Where the African-American population was tiny and there was one African-American on a six-judge court, like a vacancy in Oregon in the 104th Congress (Clinton's second), the probability that the vacancy would be targeted by Democrats with a black nominee was just over 5 percent. Where the discrepancy between bench representation and black population was substantial, like the Eastern District of New York, (black population 15.9 percent, one black judge on a 15-judge bench) in the 104th Congress, the probability of a black nominee for the vacancy rose to 15 percent (see Figure 2.1 below).

⁴⁵ Vacancies that arose under a GOP regime and were given nominees by a later Democratic regime are not included in this test.

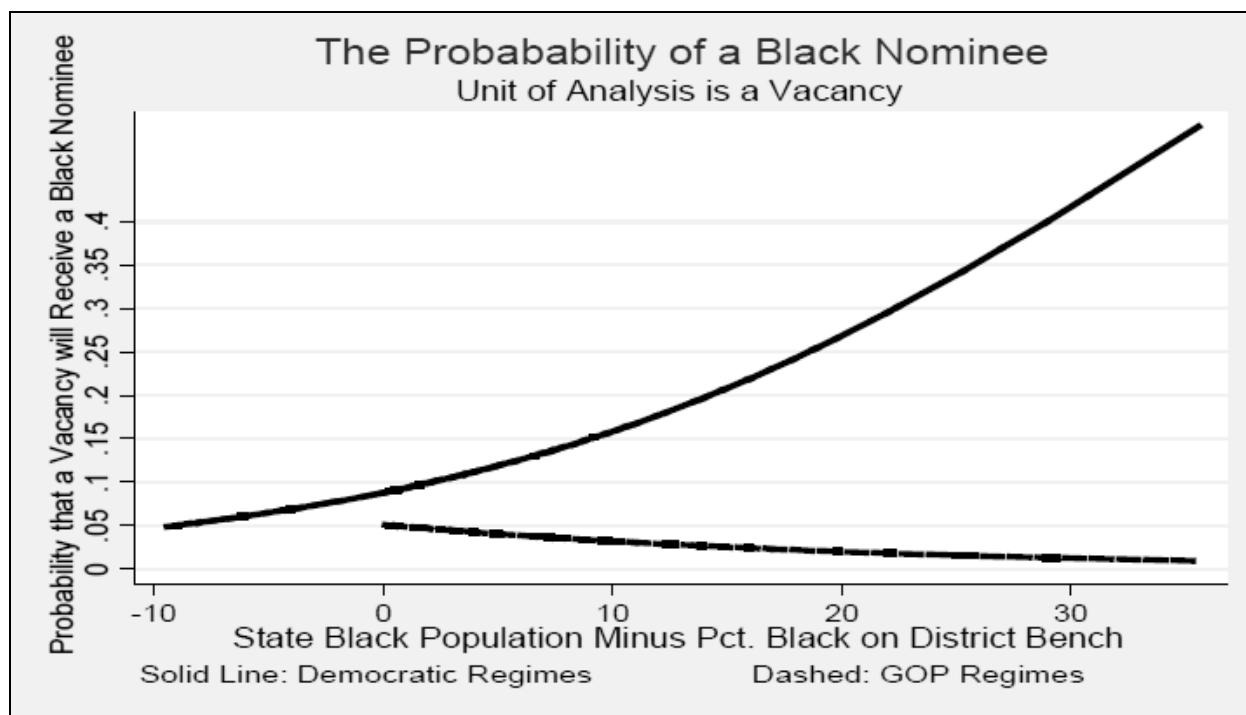


Figure 2.1: The Probability of a Black Nominee: Unit of Analysis is a Vacancy

These statistics support the idea that African-Americans are nominated where such gestures are politically useful; Democratic regimes are mindful of African-American demographics and African-American political outlooks, and their minority nomination patterns show it. Republican politicians know there is no electoral support for them among black voters, and the electoral ramifications of African-American nominees are ignored. These patterns also are apparent when looking at minority populations as raw percentages, rather than as components of statistics to indicate insufficient levels of DRR (see Figure 2.2 below).

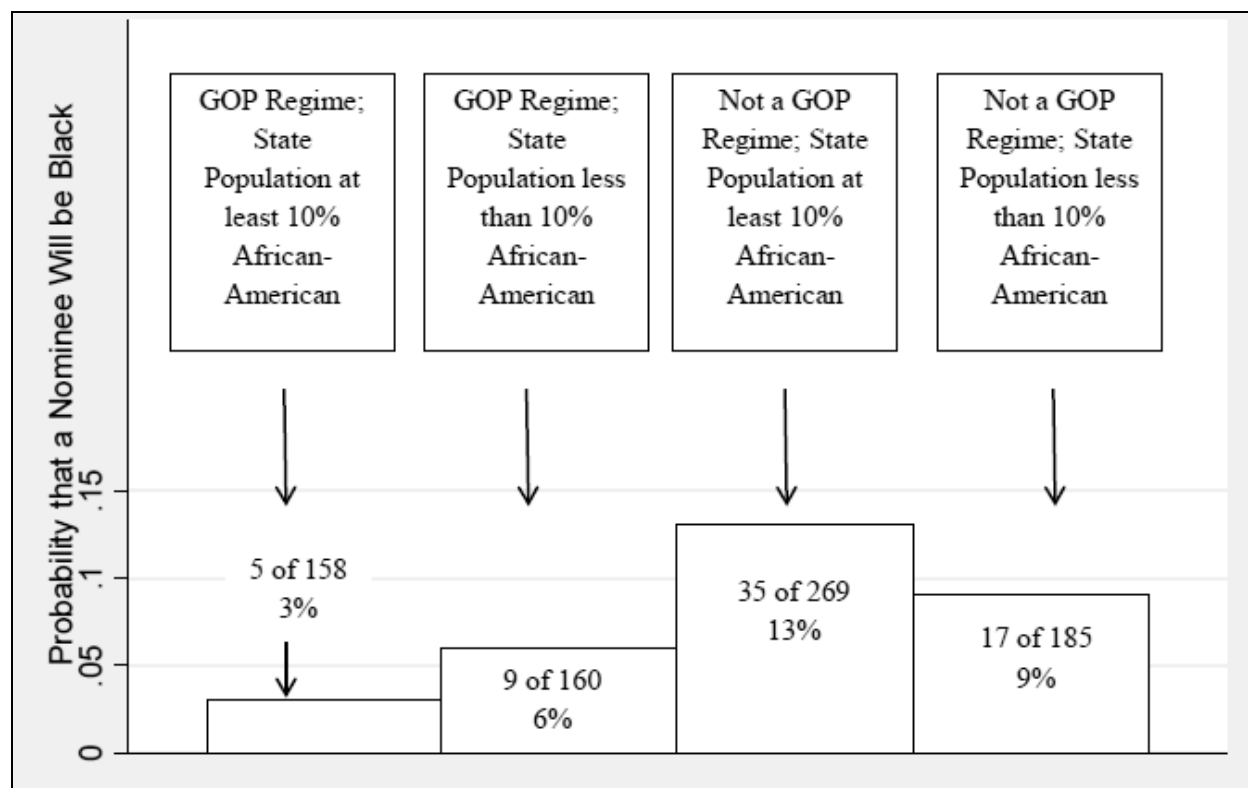


Figure 2.2: GOP Use of African-American Nominees: Probabilities that Vacancies will be filled with African-American Nominees

Other tests support the idea that Democratic regimes seek black support when they nominate blacks to district court judgeships, while Republicans make their few African-American nominations without regard for electoral politics. From 1987 to 2012, there are 285 vacancies that can be described as very much in need of an African-American judge. I coded a vacancy as “underrepresented” if the African-American population is more than ten percent greater than the percentage of black judges on the district’s bench. From the 285 UREP vacancies, I first looked at only those vacancies wherein the partisan regime of the vacancy matched the partisan regime that filled the vacancy, leaving me with 182 UREP vacancy/nominations wherein the analysis is not confused by partisan change. Eighty-one UREP vacancies/nominations occurred under GOP regimes, and one (1%) African-American was nominated. Fifty-three UREP

vacancies/nominations emerged under Democratic regimes, and thirteen (25%) of them received black nominees. Note that eighty-one GOP-regime UREP vacancies plus fifty three such vacancies under Democratic regimes equals 134 overall. The other 48, bringing the total to 182, were regimes wherein the president encountered a vacancy in a state where there was no home-state senator in the president's party.

It also is useful to examine outcomes of vacancies that undergo partisan change. George HW Bush had 238 district court vacancies to fill, a record number for one presidential term.⁴⁶ Did a given vacancy receive a boost in its diversity chances if Bush was unable to fill it, leaving the vacancy to be handled by Clinton? The answer is yes. Bush made 173 nominations to vacancies⁴⁷, eleven (6%) of which were black persons. Bush did not fill 111 vacancies⁴⁸ and Bill Clinton inherited them. Clinton nominated 23 (21%) African-Americans to those 111 vacancies. This is not so surprising, but it leads to a more interesting question. What of vacancies that received nominees from *both* GHW Bush and Clinton? These vacancies present natural experiments; a president from each party was given a chance to diversify the same seat. There were 45 such vacancies, and in all cases the vacancy occurred twice because the Senate failed to confirm Bush's nominee, and the vacancy was left for Clinton. Three of Bush's "unconfirmed 45" were African-American: Percy Anderson of the Central District of California, Walter Prince of Massachusetts, and William Quarles of Maryland. The vacancy perpetuated by Quarles' failed nomination was filled by Clinton with Debra Chasanow, a white woman. The seat that would have been Prince's also was filled by Clinton with a white person, in this case William Stearns.

⁴⁶ Eighty nine district court vacancies went active on December 1, 1990. These were new seats created by 104 Stat. 5089.

⁴⁷ Technically, Bush made 176 nominations to vacancies, but three of the nominations were re-nominations to seats Bush himself already had tried to fill.

⁴⁸ Bush had 45 of his nominees obstructed by the Senate. He declined to nominate anyone for 66 vacancies, leaving them for Clinton.

Of Bush's unconfirmed black nominees, the only one that Clinton followed with an African-American was Percy Anderson, who after his failed nomination was succeeded by Audrey Collins. So, to recap, Bush had 45 nominees that were not confirmed: three were African-American, one was Hispanic (Manuel Quintana to NY-S), and forty-one were white. Bill Clinton replaced the three black failed nominees with two whites and one black. To replace Bush's failed nomination of Quintana to SD-NY, Clinton nominated Hong Kong-born Denny Chin. Of the forty-one failed Bush nominees that were white, Bill Clinton nominated eight African-Americans and one Hispanic (see Figure 2.3 below).

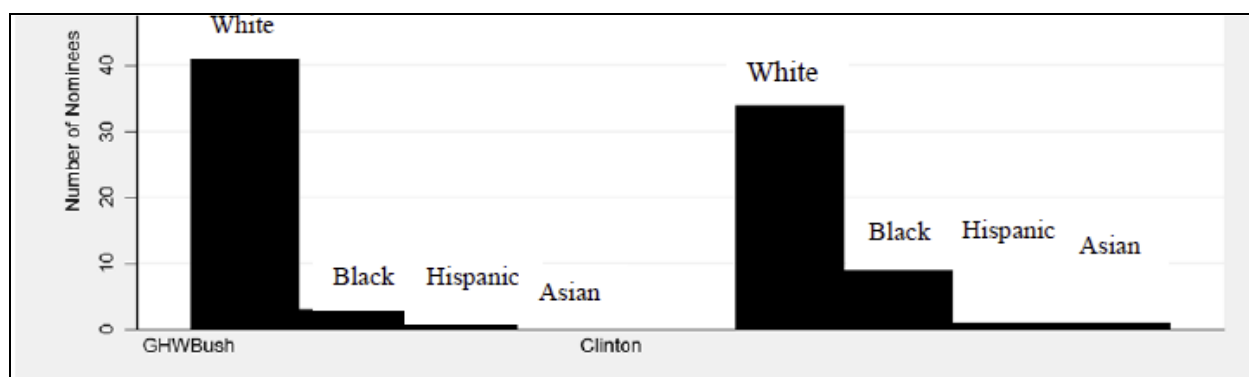


Figure 2.3: Vacancies Receiving Nominees from Two Presidents: 45 Vacancies Addressed by both GHW Bush and Clinton

Vacancies that received nominees by presidents of two different parties deliver glimpses of diverging attitudes toward DRR. Clearly Clinton, especially early in his presidency, saw opportunities to cash in politically by nominating minorities to seats where GHW Bush ignored diversity. For instance, David Nelson retired on September 9, 1991, leaving a vacancy in the District of Massachusetts. Facing a “Blue” state with a presidential election on the line, GHW Bush nominated George O’Toole, a white man, in September of 1992. Not surprisingly, considering the timing of the nomination, O’Toole never received an SJC hearing, and Clinton

inherited the vacancy. In October of 1993 Clinton nominated African-American lawyer and Harvard graduate Reginald Lindsay to the vacancy, thereby burnishing his DRR bona fides and playing to Boston's African-American population of 130,000. Six other vacancies shared by the two presidents show GHW Bush ignoring DRR and Bill Clinton embracing diversity as a political strategy.

Vacancies shared by two presidents are subject to situations wherein initial attempts at DRR are then abandoned, although an examination of the Clinton/GW Bush vacancies reveals a partially counterintuitive picture. The 14 vacancies addressed by both Clinton and GW Bush indicate an identical commitment to African-American DRR, for what such a small sample is worth. Specifically, in January of 1999, Clinton appointed an African-American Common Pleas Judge, Legrome Davis, to the Eastern District of Pennsylvania, which includes Philadelphia. Pennsylvania's two senators were Rick Santorum and Arlen Specter, both Republicans who vocally endorsed the president's nomination of Davis.⁴⁹ The Chair of the SJC was Republican Orrin Hatch (UT), and despite Davis' nomination at the beginning of the 106th Congress, the judge languished without a hearing for 22 months, failing as Clinton's presidency ended. When Bush appointed Davis to the same vacancy in February of 2002, Specter took the chance to decry Davis' earlier treatment at the hands of the SJC, and to condemn the politicization of the federal judicial nomination process. "There is, regrettably, a background and a tradition in the Judicial Committee when one party controls the committee and one party controls the White House not to move as quickly as it should. That is a practice that I have opposed," Specter said. "My view is that partisanship has no place in the nomination process for federal judges."⁵⁰ Bush's nomination

⁴⁹ Wire Report "Judge Davis Tapped for U.S. Bench; was named earlier but not confirmed" *The Philadelphia Daily News* January 24, 2002. Page A6.

⁵⁰ Jacqueline Soteropoulos "Bush Names Three for Federal Bench" *The Philadelphia Enquirer* February 3, 2002. Page B03.

of Davis resulted in Davis' confirmation. The Davis story makes sense, while strictly it is at odds with my narrative concerning differing presidential commitments to DRR. In this case, the senators by far were the most important players. Specter and Santorum presumably had been embarrassed by their initial inability to get a confirmation hearing for Davis. At the time, Specter was a venerated and celebrated member of the Senate, yet his favored nominee failed. Specter, like Kit Bond of Missouri, is a Republican that counts on African-American votes, and he was facing reelection in 2002.

Clinton and GW Bush shared 14 vacancies, as I mentioned, and the Davis nominations aside, the 14 show varying commitments to DRR that are in line with this paper's narrative. The failed nomination of Dolly Gee, an Asian-American, to the Northern District of California stands out because of bitter politics surrounding her appointment. As of 1999, Asians comprised four percent of the U. S. population, while making up less than one percent of the federal judiciary. Clinton nominated Gee in May of 1999, and California Senator Barbara Boxer (Dem) provided enthusiastic support for the appointment. Gee had a non-controversial record.⁵¹ For reasons that remain unclear, Hatch's SJC did not schedule a hearing for Gee, and the nomination failed in December of 2000. While Gee waited, her plight attracted a relatively large amount of criticism, considering it was merely a district court nomination.⁵² Clinton urged action by the Senate Judiciary Committee, as did Boxer and Dianne Feinstein (D-CA), as did U.S.Rep. Xavier

⁵¹ Nancy L. Choy "Asian American Nominees are Still on Hold" *The Record (Bergen County, NJ)* July 21, 2000. Pg. L9.

⁵² Asian political influence is strong in northern California, and the Asian population's relationship with the federal courts there is controversial. Crucial cases in Asian American legal history--including an 1886 Supreme Court ruling overturning an anti-Chinese ordinance in San Francisco, thousands of challenges to an 1882 law barring Chinese immigration, and suits over World War II internment--began in San Francisco federal courts. In 1983 Fred Korematsu won a reversal of his conviction for refusing to report to a camp for the internment of Japanese Americans in 1942. The Supreme Court ruled against Korematsu in 1944, saying that the internment was justified by military reports that Japanese Americans were aiding Japan's armed forces. Nearly 40 years later, U.S. District Judge Patel of CA-N exonerated Korematsu, arguing that the military had known at the time that no such evidence existed.

Becerra, (D-CA). Typically, such actions result in movement by the committee. Gee's support was not limited to Democrats. Among others, Rep. James E. Rogan (R-CA), one of the House impeachment managers, wrote in support of her nomination.⁵³ Marilyn Patel, the chief judge of CA-N, wrote urging the SJC to take action. President GW Bush later successfully nominated John F. Walter, a white man, to the seat to which Gee had been nominated.

The transition from Bush to Obama resulted in vacancies targeted with minorities under the latter president. A case in point involves the two nominations to the vacancy made by the retirement of Mark Filip of the Northern District of Illinois. Filip, a GW Bush appointee, served only five years on ND-IL, resigning in March of 2008 to become Deputy Attorney General of the United States. GW Bush's team seemingly regarded this vacancy without enthusiasm, which is not surprising under the political circumstances. Illinois' senators at the time were Democrats Dick Durbin and Obama. Not only did Bush did not have any in-party senators to cooperate with, the Electoral College was not in play in 2008 in Illinois. The president, on July 31, nominated John Tharp, a white man. A nomination so late in a Congress has very little chance of succeeding, and Tharp never got a hearing. In February of 2010 Obama nominated Sharon Coleman, an African-American and an Illinois Appellate Court judge. The home-state senators were Durbin and the Democrat Roland Burris, who had been named to serve out Obama's Senate tenure by Governor Rod Blagojevich.

There is one other way in which partisanship and electoral politics interfere with DRR. Notice that GHW Bush failed to make any nominations to sixty-six vacancies. One wonders if such a non-move, a stall, perhaps, is actually strategic and political, rather than merely a case of administrative postponement. It is possible that GOP presidents delay nominations when the

⁵³ Nancy L. Choy "Asian American Nominees" *The Record (Bergen County, NJ)* July 21, 2000. Pg. L9.
Nancy L. Choy "Asian American Nominees" *The Record (Bergen County, NJ)* July 21, 2000. Pg. L9.

apparent need for an African-American nominee is acute. Such a delay could be short-term political strategy; typically the only politicians that can benefit from the nomination of an African-American are Democrats. So GOP presidents can either nominate a non-black, thereby resisting DRR, or they can reward Democrats with an African-American nominee, or they can delay, bypassing the situation. A snapshot of the vacancies that Bush chose to delay shows that 33 of 66 (50 percent) of them were UREP vacancies. On the other hand, Bush made 173 nominations, choosing 173 times to align himself and the GOP with a nominee, and of those 173 nominations only 67 (38percent) were to UREP vacancies. As for the larger picture, Reagan and the two Bushes declined to address vacancies at a 43 percent clip (76 stalls of 176 vacancies) when the vacancies were UREP, and at a 29 percent rate (116 stalls of 390 vacancies) when vacancies were non-UREP (see Figures 2.4 and 2.5 below).

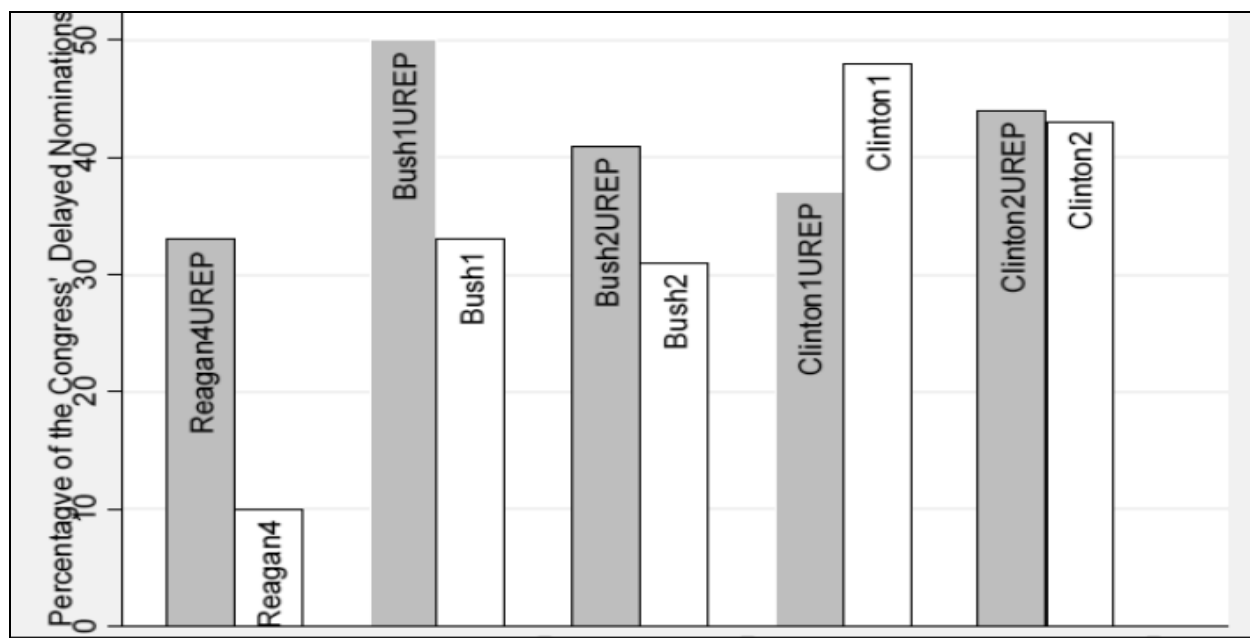


Figure 2.4: Delayed Nominations 1987-97: Dark Bars are UREP Districts
389 Vacancies Filled at Least One Congress After They Emerged

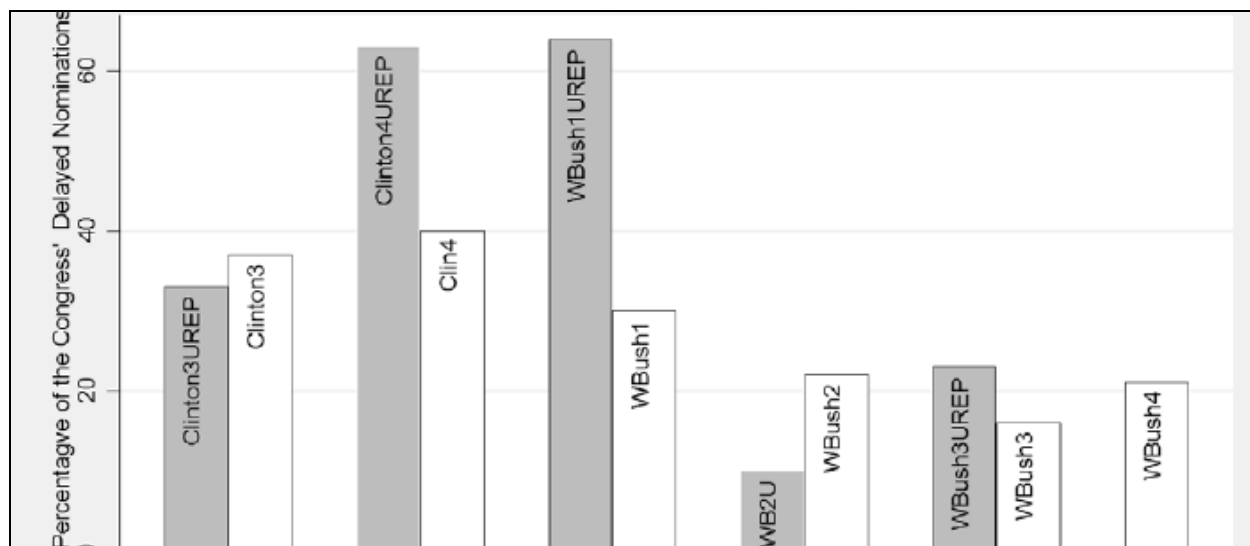


Figure 2.5: Delayed Nominations 1997-2008: Dark Bars UREP Districts
359 Vacancies Filled at Least One Congress After They Emerged

Indeed, the durations between vacancy openings and nominations tell a story of delay for GOP presidents. UREP vacancies (there were 129 of them) that emerge during a GOP presidency on average will sit for 310 days before getting a nomination, counting only those vacancies/nominations wherein the partisan regimes remain unchanged. There were 333 non-UREP vacancies/nominations that emerged during GOP presidencies, and they averaged 253 days between vacancies and nominations.⁵⁴

The point is that Republican politicians may be prone to stall and ignore UREP districts, while Democrats are vying for African-American support by providing descriptive race

⁵⁴ At first glance the connection between UREP districts and vacancy durations seems compromised by GHW Bush's unusually large number of vacancies, along with the fact that there were many more UREP districts in 1992, say, than there were when GHW Bush's son took office nine years later. In 1992 there were more vacancies, which for administrative reasons probably increased the durations between the vacancies and their subsequent nominations, and these long durations occurred when incidences of UREP were relatively high. Indeed this is the case, as 100 of 238 (42%) of the vacancies during the GHW Bush Administration were UREP, while 51 of 248 (20%) vacancies during GW Bush's two terms were UREP. Nevertheless, GW Bush also delayed when districts were UREP: he delayed 18 of 51 (35%) of UREP vacancies and 46 of 197 (23%) non-UREP vacancies.

representation. On the whole, Republican politicians know there is virtually no support for them in the African-American population, so for the GOP African-American descriptive race representation is an afterthought at best. In sum, politics, shaped by the institutional arrangement of federal judicial nominations, ultimately is responsible for the lack of African-American DRR on the federal bench.

Examples of the Electoral/Partisan Model Interfering with DRR

The electoral/partisan model gives us districts like those in Kentucky, Louisiana, and Michigan, where the legitimacy of the district courts is threatened by minority underrepresentation. Consider the Eastern District of North Carolina, where Raleigh alone has 118,000 African-American residents. ED-NC has no black judges on its district bench. This is a case of partisanship interfering with DRR. When Clinton took office in 1993, the all-white ED-NC bench was a natural target for diversity. An opportunity came for Clinton when William Earl Britt, a Carter nominee, assumed senior status in December of 1997, creating a vacancy in ED-NC. Structural matters were stacked against diversification in this instance; North Carolina was occupied by two GOP senators at the time of the vacancy, Jesse Helms and Lauch Faircloth.⁵⁵ At any rate, the emergence of the NC-E vacancy in 1997 seemed a good time for diversification, yet partisan politics interfered.

⁵⁵ By itself, this structural impediment did not make diversification impossible. Barack Obama, in 2010, nominated African-Americans Michelle Childs and Richard Gergel to South Carolina's singular district, aided by GOP Senators Jim DeMint and Lindsay Graham. Clinton had some success diversifying with GOP senators, including districts in the South. William Haynes and Bernice Donald, both African-Americans, were nominated by Clinton to Tennessee districts with the assistance of GOP Senators Bill Frist and Fred Thompson. African-Americans Legrome Davis, Frederica Massiah-Jackson, and Petrese Tucker all were nominated by Clinton to Pennsylvania seats aided by the Rick Santorum/Arlen Specter regime. In all, counting only vacancies that emerged and were filled under Democratic presidents, there have been ten Democratic president/double GOP senator nominations of African-Americans between 1987 and 2011, seven of which were confirmed by the Senate. This brings up the question, "Do solid GOP regimes nominate African-Americans?" Republican presidents working with double GOP senate regimes have nominated five blacks to the federal district courts. Two were to Pennsylvania and two were to Missouri, all of the four were by GHW Bush. GW Bush nominated one African-American under such circumstances, Julie Robinson, to Kansas' all-white bench in 2001. Kansas' GOP senators, Sam Brownback and Pat Roberts, both praised Robinson in speeches at her swearing-in ceremony.

The story of the failure to secure an African-American to fill W.E. Britt's former seat in 1997 stretches at least back to the Clarence Thomas confirmation battle of 1991. Senator Helms, in October of 1991, had a favorite for a vacancy on the 4th Circuit, the appellate court for federal cases in Maryland, Virginia, West Virginia and the Carolinas. Helms' choice, and GHW Bush's October 1991 nominee, was ED-NC judge Terrence Boyle, a Reagan district court nominee with a reputation for conservatism.⁵⁶ The stumbling block in 1991, however, was not Boyle's ideology. Rather, Boyle got caught up in the ill will generated by the Senate's just-concluded battle over Bush's nomination of Clarence Thomas to the Supreme Court. Joe Biden, the Senate Judiciary Chairman, obstructed Boyle's nomination. Helms blamed Biden for Boyle's defeat.⁵⁷ Using senatorial courtesy, Helms had the power to block any nominee from his home state. Publicly declaring his intention to respond to what he called the "mistreatment of [Boyle] by the Democrats," Helms prevented four Clinton nominees from North Carolina---James A. Beaty Jr., Rich Leonard, James A. Wynn Jr., and Elizabeth Gibson---from receiving hearings. Beaty and Wynn are black, and Beaty, Wynn, Gibson and Leonard all were nominated to the 4th Circuit.⁵⁸ Leonard was denied a hearing on his circuit court nomination in 1995, as Helms obstructed in retaliation for Boyle's "mistreatment."⁵⁹

The fallout from the Clarence Thomas confirmation battle lingered for over a decade in North Carolina. Meanwhile, the district court vacancy created by William Britt's taking senior status in December of 1997 became another point of partisan contention. Lauch Faircloth lost his

⁵⁶ Charles Lane "N.C. Judge has Spent 15 Years as a Judicial Nominee" *The Washington Post* May, 12, 2005 pg. A1.

⁵⁷ Charles Lane "N.C. Judge" *The Washington Post* May, 12, 2005 pg. A1.

⁵⁸ Charles Lane "N.C. Judge" *The Washington Post* May, 12, 2005 pg. A1.

⁵⁹ Associated Press "Helms wants to eliminate 2 federal N.C. judgeships; Senator still steamed after nominee blocked 8 years ago" *The Herald-Sun* (Durham NC) March 14, 1999 pg. A1.

reelection bid in 1998, and Democrat John Edwards took the seat in January of 1999. With Clinton and Edwards now sharing the responsibility to fill Britt's seat, the chances of diversification presumably would go up. Yet Edwards apparently used the nomination for patronage, convincing Clinton to nominate Edwards' longtime friend Leonard, a white man and a bankruptcy judge.⁶⁰ Leonard never received a hearing, and his failure as a nominee unambiguously can be attributed to Helms.⁶¹ The story of the lack of diversification of ED-NC under Clinton ends here. Note that the failure ostensibly was about partisanship, rather than race. Clinton not only could not get an African-American on the court—he could not get any person to the ED-NC bench. The ED-NC diversification tale points up the disruption and imbalance inherent in the partisan/electoral model.

Consider Kentucky. There were eleven district court judges confirmed to seats in Kentucky between 1987 and 2012, and all of them were white. This occurred despite Kentucky's African-American population, which approaches eight percent. The most direct explanation for the states' districts' UREP involves the partisanship of the nomination regimes; nine of the eleven vacancies occurred under GOP presidents. Also, the two vacancies emerging during the Clinton Administration were filled with white men. The two nominations under Clinton are puzzling, considering the presence in Kentucky of four-term Democratic Senator Wendell Ford. Ford was a consistent supporter of affirmative action during his career. The former governor Ford was very popular and won four senate elections easily before declining to run in 1998. This study is unable to account for Clinton and Ford's decisions on these nominations.

⁶⁰ Charles Lane "N.C. Judge" *The Washington Post* May, 12, 2005 pg. A1.

⁶¹ In an unusual move, Helms, just days before Leonard's nomination to NC-E, filed a bill to have Britt's vacancy shifted to another district, NC-W, ostensibly to handle the growing case load in Charlotte. Helms' gambit only added uncertainty to the chaotic judicial nomination situation in North Carolina, and presumably was a factor in Leonard's denial of a Senate Judiciary hearing. (Associated Press "Helms wants to eliminate 2 federal N.C. judgeships; Senator still steamed after nominee blocked 8 years ago" *The Herald-Sun* (Durham NC) March 14, 1999 pg. A1.)

Quantitative Analysis

Theory and Hypotheses

I theorize that Democratic politicians use minority nominations to district court vacancies to court minorities' support. Republicans, with a few exceptions, use only Hispanic nominations politically, conceding African-American support to Democrats. When minority judicial underrepresentation (the statewide minority population minus the percentage of a given district's judges that are minorities) on a bench rises, it is the senator who can and does benefit from the opportunity. To point up the primacy of the roles of senators, I expect that the relationships between UREP and the probabilities of vacancies receiving minority nominees will disappear when there is no in-party, home-state senator to act as a first mover (Figure 2.6. below).

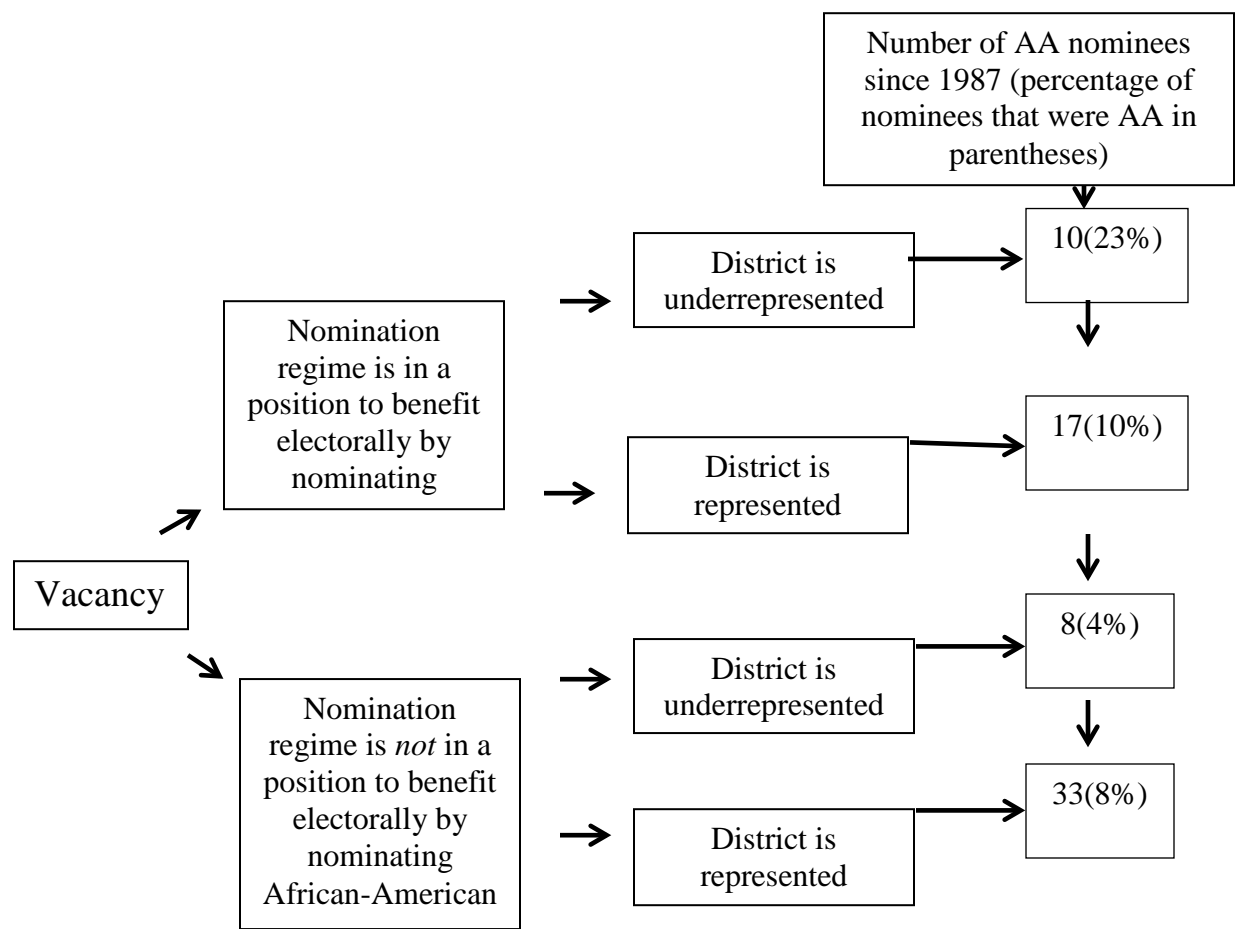


Figure 2.6: Political Conditions and Nominations of African-Americans*†

*The only nomination regimes that can benefit from African-American nominees have a Democratic president and at least one Democratic senator (n=213)
†Underrepresented districts are those wherein the African-American population of the state is more than 10% greater than the African-American presence on the district bench. Perhaps one could call "represented" districts "reasonably represented districts."

If senators' policy goals are the most important factors in the nominations of minorities to the federal district courts, the following hypotheses will be true.

H1: When a nomination regime is Democratic, a higher level of African-American judicial underrepresentation in a district increases the probability that an African-American will be nominated to a vacancy in that district.

H2: When the president is Democratic and there is no in-party home-state senator, there will be no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy in the district will be black.

H3: When a nomination regime is Republican, there is no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy in the district will be black.

H4: When the president is Republican and there is no in-party home-state senator, there will be no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy will be black.

Data

My data include 1043 district court vacancies arising between 1987 and 2012. Vacancies that occur after the November elections in even-numbered years are coded into the partisan regimes that will take office on the following January 3. The appropriate unit of analysis is a vacancy, rather than a nomination, because the story of each appointment is best told with the job opening as its starting point. The emergence of the vacancy presents the nomination actors with an opportunity to diversify, or not, or to fast track, or stall, as political imperatives dictate. Since political circumstances change when partisan regimes change, vacancies wherein the partisan regime changes between the emergence of the vacancy and the nomination are excluded. The

Lower Federal Court Confirmation Database (Martinek 2006) was used for information on district court judges from 1987 to 2004. Martinek's data were used to find the date of the vacancy, the vacancy's eventual nomination date, and whether the nominee was confirmed. Information on the judicial nominees from 2005 to 2011 was obtained from the Office of Legal Policy in the Department of Justice.⁶² This information was cross-checked using the Congressional Research Service reports of Rutkus, Bearden and Scott (2009). Biographies on federal judges from the Federal Judicial Center provided information on race, including the race of the outgoing judge and the racial composition of a given district bench at the time of a given vacancy.⁶³ ABA ratings for judges are from the American Bar Association.⁶⁴ Lexis-Nexis⁶⁵ searches were used to obtain journalistic descriptions of nominations, along with filling in missing information on the races of nominees who were not confirmed by the Senate.

The Models

There are four models, each one corresponding to a hypothesis. Model 1 tests *H1*, and so forth. The dependent variables are whether an African-American is chosen to fill a vacancy instead of a white person. This chapter contrasts efforts to provide African-American diversity to courts with an acknowledged disregard of diversity, even where it is most appropriate. In order to capture indifference to diversity imperatives in its clearest form, exemplified by nominations of whites, vacancies that eventually were filled with Hispanics or Asians are deleted.⁶⁶ Maximum likelihood estimations, specifically logits, are used in each model (for an explanation of logit, see Long 1997).

⁶² Available at <<http://www.usdoj.gov/olp/judicialnominations.htm>>.

⁶³ Available at <<http://www.fjc.gov/>>.

⁶⁴ Available at <<http://abanet.org/scfedjud/home.html>>.

⁶⁵ Available at <<http://www.lexisnexis.com/hottopics/lnacademic/>>.

⁶⁶ There are virtually no differences in the results if I leave nominations of Hispanics and nominations of Asians in the datasets before running the tests in Models One through Eight.

The independent variables are African-American underrepresentation (UREP). These are created by subtracting the percentages of African-American judges on a district's bench from the state's African-American population. A possible drawback to this approach involves negative quantities. In some instances, African-American representation on a given bench is far greater than the state's African-American population. For instance, this almost always is the situation in the Northern District of California. California's black population was 7.4 percent in the 1990s, yet there were three African-American judges on the 15-seat bench for decades: Carter nominee Thelton Henderson and GHW Bush nominees Sandra Armstrong and James Ware. So for the 1990s the underrepresentation in the district was calculated as 7.4 percent (California's black population) minus 20 percent (3 of 15), the black presence on the bench. The resulting number, negative 12.6, when used as a quantity in an interval-level independent variable, could be derailing the results. I run alternative models to attempt to correct for this, as I demonstrate in the "Results and Discussion" section, by predicting the probability of a vacancy being targeted with a minority nominee using state African-American population percentages, rather than the underrepresentation formula.

Before running the estimations, it will be helpful to expand on the descriptive analysis offered on pages 15-21 above. If theory holds, in-party Democratic senators should spearhead the nominations of African-Americans when such nominations will have the most political impact. In other words, senators should be using their power to make African-American district court nominations when black populations in the state outstrip black representations on the vacancies' district benches. First, let us look at the most obvious partisan scenarios, those wherein there is a Democratic president and at least one Democratic home-state senator (Model 1). Fifty-three African-American UREP vacancies/nominations emerged under Democratic regimes, and

thirteen (25%) of them received black nominees. If the district was not acutely underrepresented, Democratic regimes appointed blacks at a rate of 11% (17 of 147). Democratic presidents' enthusiasm, encouraged by Democratic home-state senators, for nominating minority judges where they will have the largest impact on DRR, is established. Do presidents respond in this fashion without the impetus provided by a Democratic home-state senator seeking minority votes? Model 2 addresses this question. There were 17 nominations to vacancies in UREP districts when a Democratic president addressed a district wherein there was no Democratic home-state senator, and of those seventeen nominations three (17%) were African-Americans.⁶⁷ Under the same partisan circumstances, in non-UREP districts Democratic presidents nominated 35 persons, seven (20%) of whom were black. Without the influence of a home-state senator, Democratic African-American district court nominations are not in line with political imperatives.

There is no expectation that GOP senators will seek support among sizable African-American populations, or where UREP is acute; Model 3 tests these expectations. Republican nomination

⁶⁷ The three black nominees made by Democratic presidents to GOP-senator-regime states with African-American UREP are worth mentioning. On December 7, 1995 Clinton nominated bankruptcy judge Bernice Donald, an African-American woman, to the all-white bench of the Western District of Tennessee. The GOP senators were Fred Thompson and Bill Frist. Donald was confirmed by the Senate on December 22, 1995, making for a remarkably fast confirmation. In May of 1999 Clinton nominated magistrate judge William Haynes, Jr. to the all-white Middle District of Tennessee bench, again under the regime of Thompson and Frist. Haynes was confirmed in November of 1999. Abdul Kallon was nominated to the all-white bench of the Northern District of Alabama while GOP senators Jeff Sessions and Richard Shelby were the state's Senate members. The timing of the Kallon nomination/confirmation is notable. Kallon was nominated on July 31, 2009 and confirmed on November 21 of the same year. Sonia Sotomayor, President Obama's nominee to succeed retiring Justice David Souter, was nominated on June 6, 2009 and confirmed two months later on August 6. Alabama Senator Sessions, while serving as the ranking member on the Judiciary Committee in the 110th Congress, questioned Sotomayor. Sessions focused on Sotomayor's views on empathy as a quality for a judge, arguing that "empathy for one party is always prejudice against another." (Robert Barnes, Amy Goldstein, Paul Kane, "Nominee Sotomayor at center stage in Senate" *The San Francisco Chronicle* July 14, 2009.) Sessions also questioned the nominee about her views on the use of foreign law in deciding cases, as well as her role in the Puerto Rican Legal Defense Fund (PRLDEF). (Steve Padilla "Sotomayor Hearings: Judge is Adamant, Sessions is Unconvinced" *Los Angeles Times* July 28, 2009) On July 28, 2009, Sessions joined five Republican colleagues in voting against Sotomayor's nomination in the Judiciary Committee. The committee approved Sotomayor by a vote of 13-6. Sessions also voted against Sotomayor when her nomination came before the full Senate. He was one of 31 senators (all Republicans) to do so, while 68 voted to confirm the Sotomayor.

regimes faced UREP vacancies 81 times and nominated one (1%) African-American, Johnson Sterling, a GHW Bush nominee to the Eastern District of New York. Johnson was confirmed. Republican regimes made 212 nominations to non-UREP vacancies, and 13 (6%) were African-Americans. There is no expectation that GOP presidents will respond to UREP when a district is associated with two Democratic home-state senators. Model 4 tests this scenario. There were 45 UREP vacancies under such circumstances and GOP presidents nominated three (7%) blacks. There were 120 non-UREP nominations, and GOP presidents nominated 12 (10%) African-Americans. There is no evidence that GOP senators seek African-American support utilizing minority district court nominations.

In the next section I will use continuous-variable versions of UREP, along with raw black population percentages, to predict the probability that a given vacancy will be targeted with a district court nominee.

Results and Discussion

Please see Table 2.1 below.

Table 2.1

Logit Estimates of the Probability that a Vacancy will Be Targeted With an African-American				
	Model 1: Democratic Pres and at Least 1 Dem Senator	Model 2: Democratic Pres and no Dem Senator	Model 3: GOP Pres and at Least 1 GOP Senator	Model 4: GOP Pres and no GOP Senator
Underrepresentation	.05** (.02)	.00 (.03)	-.04* (.02)	-.01 (.02)
Constant	-8.53*** (.19)	-3.66*** (.51)	-10.14** (3.01)	-7.68*** (.81)
Pseudo R ²	.06	0	.02	0
Waldχ ²	9.23	0	4.56	.55
PRE	.5%	0%	0%	.6%
Observations	200	52	294	165
Robust Standard Errors in Parentheses * <i>p</i> <.05, ** <i>p</i> <.01, *** <i>p</i> <.001				

Hypothesis 1 is tested in Model One.

H1: When a nomination regime is Democratic, a higher level of African-American judicial underrepresentation in a district increases the probability that an African-American will be nominated to a vacancy in that district.

The estimation for UREP in Model 1 is strong and in the expected direction. With an “N” of 200, the model is not strong overall, with a negligible proportional reduction of error (PRE) of .5%.

At any rate, Democratic senators, with the cooperation of in-party presidents, address UREP.

The probability that a Democratic regime will nominate an African-American to a seat in Northern California’s district, for instance, with its UREP of -12.6, is five percent. Eastern Louisiana’s district’s UREP is 30.1, and the probability of a Democratic regime putting an African-American into a vacancy there is 39%. At the heart of my theory is the idea that nomination regimes that do not include in-party home-state senators will not be characterized by responsiveness to underrepresentation. This leads to Model Two, which tests Hypothesis 2:

H2: When the president is Democratic and there is no in-party home-state senator, there will be no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy in the district will be black.

As the null results in Model Two demonstrate, without the influence of a home-state senator, Democratic African-American district court nominations are not in line with electoral imperatives. Of the 52 nominations made by Democratic presidents to states with two GOP senators, ten were African-Americans, and there was no discernible relationship between underrepresentation and the probability that a vacancy would be targeted with an African-American. An alternative perspective on the null results for Model Two posits that presidents are

not interested in district-level minority representation. The lack of diversity of a given district does not increase the pressure on the Oval Office to nominate a minority. If a president is pressed on the matter of a given district's paucity of diversity, he can always blame the district's current condition on other actors in the appointment and confirmation procedures, such as other government branches, other political parties, or previous presidents. The nomination of a white person to a seat in such a district always can be "spun" as the best choice, despite the nomination's failure to diversify. Further, presidents, unlike senators, are playing on a "national" platform, with a national minority audience, and their measure of diversification success is their administration's ongoing tally of African-American nominees. So the president distributes African-American district court nominees indiscriminately, concerning himself with his administration's larger diversity picture. This perspective brings to mind conclusions of Solberg and Bratton (2005), who conclude that if a particular court is bereft of black judges, political pressure to diversify the court increases, leading the president to appoint an African-American. The results for Models One and Two considered together bolster my theory: when it comes to district court nominations of African-Americans, *senators* seek votes (see Model One) and presidents, untethered by the electoral goals of senators, seek to burnish their diversification legacies, to reward supporters, and to realize policy goals on the federal bench (see Model Two).

Models Three and Four test the Hypotheses:

H3: When a nomination regime is Republican, there is no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy in the district will be black.

H4: When the president is Republican and there is no in-party home-state senator, there will be no correlation between African-American judicial underrepresentation in a given district and the probability that the nominee to a vacancy will be black.

These hypotheses serve as contrasts in two ways. First, by demonstrating *no* relationships between GOP politicians, UREP, and the probability that a given vacancy will be targeted with an African-American nominee, Models Three and Four accentuate the well-understood relationship between Democratic senators and the black segments of their reelection constituencies. In other words, GOP senators' and presidents' apparent lack of interest in using district court vacancies to court African-American support suggests a vacuum of political possibility, and Democratic senators, as Models One and Two indicate, step up to vie for potential black political support.

I ran the four models again using a raw percentage of each state's minority population instead of the underrepresentation numbers. The results are in Table 2.3, below, presenting Models Five through Eight. The models perform about the same as did models One through Four, and support my theoretical expectations. See Table 2.2 below.

Table 2.2

Logit Estimates of the Probability that a Vacancy will Be Targeted With an African-American Pt. 2				
	Model 5 Democratic Pres and at Least 1 Dem Senator	Model 6 Democratic Pres and no Dem Senator	Model 7 GOP Pres and at Least 1 GOP Senator	Model 8 GOP Pres and no GOP Senator
Perc. Black Pop.	.05* (.02)	.08 (.05)	-.04* (.01)	-.01 (.02)
Constant	-6.13*** (.66)	-3.35*** (.51)	-10.14** (3.08)	-3.84*** (.81)
Pseudo R ²	.02	.08	.01	0
Wald χ^2	4.09	3.26	6.18	.18
PRE	.5%	10.0%	0%	.6%
Observations	200	52	294	165
Robust Standard Errors in Parentheses	* $p < .05$, ** $p < .01$, *** $p < .001$			

This study explains why minority judicial representation on the federal district courts is lagging. I theorize that senators see minority district court nominations as political opportunities, and that when senators see no electoral gain in a minority nomination, racial diversification becomes an afterthought. The results from Models One through Four express a strong relationship between black underrepresentation on a given bench and first mover Democratic senators' promotion of African-American nominees. When senators are no longer first movers, as in Model Two, or senators are unlikely to gain any black support, as in Models Three and Four, there are no relationships UREP and black nominations. How does this contribute to underrepresentation? Kentucky provides a good example. The state is nearly 8% black, yet there is not one African-American district court judge in the state's three judicial districts. The state simply has had few opportunities to put blacks onto its bench. Specifically, since 1987 Kentucky only has had two vacancies that were addressed by a Democratic senator and a Democratic president, and for reasons that are not clear both of the Clinton nominees were white. The

Eastern District of North Carolina has a similar story. GOP Senators Jesse Helms and Lauch Faircloth had little incentive to diversify the all-white bench, and when John Edwards got his one chance at a vacancy in NC-E, patronage carried the day as Edwards nominated a friend of his. To sum up, African-American vacancies that do not emerge during a figurative sweet spot—a Democratic regime—have low probabilities of receiving black nominees no matter what else is afoot politically, legally, or demographically. With the probabilities of vacancies constrained in this manner, African-American descriptive race representation is thin across the board, and spotty. This solves half of this study's original puzzle, explaining why there are shortages of African-American judges on the United States district courts.

CHAPTER 3

NOMINATIONS OF HISPANICS

Theory: Appointing Hispanics gives senators chances to send strong messages to Hispanic constituents that the senators share Hispanic voters' values. Democratic senators regularly support pro-Hispanic regulation; such legislation is part of the liberal orthodoxy. Yet I theorize that the orthodoxy does not extend to judicial nominations, as the Democrats do not support Hispanic court diversity unless their state has a large number of Hispanic constituents. Conservative senators, including those who often vote against pro-Hispanic legislation, court Hispanic constituents directly by nominating Hispanics to district court seats. Unlike passing pro-Hispanic legislation, appointing Hispanic would-be judges does not cause senators to incur costs for evading conservative canon.

H1: As a Democratic senator's liberalism increases the probability that she will nominate a Hispanic does not increase.

H2: Larger Hispanic populations increase Democratic lawmakers' propensities to promote Hispanic district court judges.

H3: Larger Hispanic populations increase Republican lawmakers' propensities to promote Hispanic district court judges.

H4: Larger Hispanic populations do not increase Republican lawmakers' propensities to vote in favor of Hispanic interests.

Method: Using scores from the National Hispanic Leadership Agenda as a dependent variable, I employ standard OLS regression to support the idea that the percentage of a state's population that is Hispanic is not correlated with a given Senate Republican's support for pro-Hispanic legislation. I use MLE, with vacancies as the units of analysis, to demonstrate that even Republican senators who rarely support pro-Hispanic legislation, when encountering district court vacancies, will court Hispanic constituents by promoting Hispanic would-be judges. I also use MLE to predict Hispanic nominations, providing evidence that Democratic senators chiefly seek Hispanic support when they nominate Hispanics.

This chapter provides corroboration for the idea that politicians use federal district court nominations to secure political support from minority constituents. Specifically, by contrasting politics that drive Hispanic district court nominations with politics that drive other pro-Hispanic senatorial activity, I underscore how Hispanic clout at the ballot box impels Hispanic descriptive race representation on the federal district courts. Large statewide percentages of Hispanic constituents cause the nominations of Hispanic district court nominees. Regular pro-Hispanic regulation, on the other hand, results from factors that fit with the "party as a substantive representative" model of minority representation, wherein senatorial Democratic Party membership drives both pro-Hispanic legislation and pro-African-American legislation. These results have implications regarding the relationships between minority populations and descriptive race representation (hereafter DRR) on the federal bench: when Hispanic populations grow, representation of Hispanics on the federal bench is inevitable.

Presidents and Hispanic District Court Nominations

Hispanic voters cannot be ignored; according to the U.S. Census Bureau, Latinos officially overtook African-Americans in 2003 to become the largest minority ethnic group in the United States. George W. Bush sought Hispanic votes in election years. Five months before the 2004 Election, Bush tightened travel restrictions to Cuba, a nod to the exile community of Florida.⁶⁸ According to Asmussen (2011), members of the Bush Administration “scour[ed] the directories of federal and state judges, and even the rosters of major law firms, in the quest for qualified minorities they might have overlooked.”⁶⁹ Diversifying the federal courts is a simple way for a president to demonstrate his allegiance to minority voters. Reportedly, in 2004, gains among Hispanic voters influenced Bush’s reelection, along with a strong showing from evangelical “values” voters (see Barreto, Collingwood and Manzano 2009; Leal *et alia* 2005; Guth *et alia* 2006). Latino support for Hillary Clinton in 2008 led many to speculate that Obama’s thin Hispanic support would doom him in the general election (see Barreto, Collingwood, and Manzano 2009). Indeed, Arturo Vargas, head of the prominent National Association of Latino Elected and Appointed Officials, in 2008 proclaimed, “Latino voters will decide the 2008 election. The Latino vote is positioned as the power punch that may deliver the knockout blow in 2008.” (quoted in Barreto, Collingwood, and Manzano 2009) On the other hand, political scientist Rodolfo de la Garza of Columbia University argues, “The Latino vote is completely irrelevant. The myth was created by Latino leaders who wanted to convince politicians nationally about how important Latinos were.”(Yanez 2008) The peculiarities of the Electoral College also are part of the debate. Latino voters are heavily concentrated in uncompetitive states such as

⁶⁸ Mike Dorning “Obama’s New Campaign Weapon” *Bloomberg Businessweek* March 12, 2012. Page 33.

⁶⁹ Mike Allen and Helen Dewar “Second Judicial Nominee Targeted: Senate Democrats Plan Filibuster to Stop Selection of Owen” *Washington Post* April 30, 2003. Page A1. Quoted from Asmussen (2011).

New York, Texas, and California. Latino voters arguably are too small in number to matter in contested states (de la Garza and DeSipio 2005).

In the 2008 presidential Election, Barack Obama won the battleground states of Nevada, New Mexico, Colorado and Florida on his way to winning 365 total Electoral College votes. The four states, all of which have large Hispanic populations, garnered Obama 46 electors. These four states and their 49 Electoral College votes have demonstrated growth for two straight reapportionments – they had 42 combined votes in the 2000 election, grew to 46 for 2004-2008, and now hold 49 votes. Not only are they growing, but they are highly competitive.⁷⁰ In 2012, targeting Hispanic voters with appropriate gestures clearly was a component of Obama's reelection strategy. The president tweaked federal immigration policy, curtailing deportations of illegal immigrants who arrived as children and those who served in the armed forces. Many of Obama's directives were aimed at voters in states where he most needed votes. During an October, 2011 trip to Nevada, an epicenter of the housing bust and a state with a Hispanic population approaching 20 percent, he announced rules easing mortgage refinancing for homeowners who owe more than their property is worth.⁷¹ Nominating Hispanics to the federal courts is a simple way for a president to demonstrate his allegiance to minority voters, and presidents use Hispanic lower federal court nominees in a positive way in states with extensive Hispanic voting populations.

The Hispanic vote has more than tripled its share of the national electorate over the past quarter century. According to exit polls ten percent of 2012 votes came from self-identified

⁷⁰ Matt Barreto "Hispanic Battleground States Crucial for Electoral College Votes in 2012" *Hispanic News* January 25, 2012. http://hispanic.cc/hispanic_battleground_states_crucial_for_electoral_college_votes_in_2012.htm. Accessed March 12, 2012.

⁷¹ Mike Dorning "Obama's New Campaign Weapon: His Pen" *Bloomberg Businessweek* March 12, 2012. Page 33.

Hispanics, and 71 percent of them voted for Obama.⁷² Perhaps Democrats attract Hispanic votes in such large numbers because Hispanics are a liberal voting bloc. Just twelve percent of Latinos support a cuts-only approach to deficit reduction, and only 25 percent want to repeal Obamacare. Only 31 percent of Hispanics say they'd be more likely to vote for a Republican who supports the DREAM Act.⁷³ According to another view, the GOP, hamstrung by internal divisions, is unwilling or unable to attract Hispanic votes, or Asian or African-American votes for that matter. Republicans use targeted outreach to increase their share of the white vote, and as a result too many voters believe that the Party's economic agenda helps nobody except rich people and big business.⁷⁴ In January of 2013 analyst Charlie Cook addressed a gathering of GOP House members. Cook gave a sober presentation about current demographic trends, demonstrating that the party was doomed unless it started winning over minority voters and younger voters. Cook also noted that forty percent of the electorate is moderate—and Republicans lost that constituency by fifteen points in 2012.⁷⁵

Indeed, for the GOP moving toward 2014, demographics drive some disturbing trends. In 1980, white voters comprised 88 percent of the presidential electorate, compared with 73 percent in 2012.⁷⁶ Just one in ten Republican voters in 2012 were not white. Hispanics more and more identify with the Democratic Party; 58 percent of Hispanics did so in 1999, and 70 percent did so

⁷² Matthew Yglesias. "The GOP's Hispanic Nightmare" *Slate*
http://www.slate.com/articles/business/moneybox/2012/11/latino_vote_2012_opposition_to_immigration_doesn_t_e_xplain_romney_s_crushing.2.html. Updated February 12, 2013. Accessed April 13, 2013.

⁷³ Matthew Yglesias. "The GOP's Hispanic Nightmare" *Slate*
http://www.slate.com/articles/business/moneybox/2012/11/latino_vote_2012_opposition_to_immigration_doesn_t_e_xplain_romney_s_crushing.2.html. Updated February 12, 2012. Accessed April 13, 2013.

⁷⁴ Ryan Lizza "The House of Pain" *The New Yorker* March 4, 2013

⁷⁵ Ryan Lizza "The House of Pain" *The New Yorker* March 4, 2013

⁷⁶ Chris Cillizza "The Republican Problem with Hispanic Voters—in 7 Charts" *The Washington Post*
<http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/the-republican-problem-with-hispanic-voters-in-7-charts/> Updated January 11, 2013. Accessed April 13, 2013.

in 2012.⁷⁷ Republicans have had very limited success in winning over Hispanic voters in presidential elections. By far the best showing was George W. Bush in 2004 when he won 44 percent of the Latino vote. John McCain, after trumpeting a failed immigration reform in 2007, took 31 percent of the Hispanic vote in 2008, and in 2012, Mitt Romney won just 27 percent of Hispanics. In 2012, sixty-one percent of Hispanic voters said the Democratic Party had more concern for Hispanics than did the Republican Party.⁷⁸ In 2002, only 45 percent of Hispanics felt the Democratic Party had more concern than the GOP. Immigration was only the fifth most important issue for Latinos in the 2012 Pew survey of Hispanics, behind education, jobs and the economy, health care, and the federal deficit.⁷⁹

On March 18, Republican leaders offered a self-critique of their party, saying that it was in an “ideological cul-de-sac” and needed better outreach and a new brand of conservatism to appeal to younger voters, ethnic minorities, and women.⁸⁰ Conducted by the Republican National Committee after the 2012 election defeat, the 100-page report urged all members of the party to “smartly change course” in a presumed marketing campaign to persuade voters that Republicans are not narrow-minded and out-of-touch.⁸¹ The report said that the “federal wing” of the party, unlike the nation’s Republican governors, is increasingly marginalizing itself. “We have become expert in how to provide ideological reinforcement to like-minded people,” the

⁷⁷ Pew Hispanic Center 2002-2012. National Surveys of Latinos; *Washington Post*/Kasier Family Foundation/Harvard University. 1999 National Survey on Latinos in America.

⁷⁸ Pew Hispanic Center 2002-2012. National Surveys of Latinos; *Washington Post*/Kasier Family Foundation/Harvard University. 1999 National Survey on Latinos in America.

⁷⁹ Pew Hispanic Center 2002-2012. National Surveys of Latinos; *Washington Post*/Kasier Family Foundation/Harvard University. 1999 National Survey on Latinos in America.

⁸⁰ Sarah Wheaton and Michael D. Shear “Blunt Report Says G.O.P. needs to Regroup for 2016” *The New York Times* March 19, 2013. Page A13.

⁸¹ Sarah Wheaton and Michael D. Shear “Blunt Report Says G.O.P. needs to Regroup for 2016” *The New York Times* March 19, 2013. Page A13.

report said.⁸² “But devastatingly, we have lost the ability to be persuasive with, or welcoming to, those who do not agree with us on every issue.” The report acknowledged a new willingness to overhaul the nation’s immigration system, saying that the alternative is a party whose appeal continues to shrink to its core constituencies only.⁸³

In February of 2013 a group of GOP senators unveiled the “Bipartisan Plan for Immigration Reform.” The plan sets up a system under which immigrants illegally residing in the United States can register with the government, pay a fine, and be given probationary legal residency including the right to work. Republicans Marco Rubio (FL), John McCain and Jeff Flake (AZ), Lindsey Graham (SC), and Democrats Michael Bennett (CO), Dick Durbin (IL), Robert Menendez (NJ), and Charles Schumer (NY), have signed on, proposing a framework wherein illegal residents would be given “end of the line” status for permanent citizenship.⁸⁴ The plan has attracted criticism within the GOP. Some Republicans have referred to any plan that allows undocumented immigrants to gain citizenship as an “amnesty,” a charge Rubio rebutted. “We can’t round up millions of people and deport them,” Rubio said. “But we also can’t fix our broken immigration system if we provide incentives for people to come here illegally — precisely the signal a blanket amnesty would send.”⁸⁵ The most conservative faction of the GOP remains opposed to the plan, especially to provisions that would lead to citizenship or legal residency for illegal immigrants. In April of 2013 House Member Dana Rohrabacker (R-CA)

⁸² Sarah Wheaton and Michael D. Shear “Blunt Report Says G.O.P. needs to Regroup for 2016” *The New York Times* March 19, 2013. Page A13.

⁸³ Sarah Wheaton and Michael D. Shear “Blunt Report Says G.O.P. needs to Regroup for 2016” *The New York Times* March 19, 2013. Page A13.

⁸⁴ Tom McKay “”2013 Immigration Reform: Democrats and Republicans Both want a Path to Citizenship” *Policymic* <http://www.policymic.com/articles/24317/2013-immigration-reform-republicans-and-democrats-both-want-a-path-to-citizenship> Updated February 19, 2013. Accessed April 13, 2013.

⁸⁵ Tom McKay “”2013 Immigration Reform: Democrats and Republicans Both want a Path to Citizenship” *Policymic* <http://www.policymic.com/articles/24317/2013-immigration-reform-republicans-and-democrats-both-want-a-path-to-citizenship> Updated February 19, 2013. Accessed April 13, 2013.

said “You make sure that people who are here illegally do not get jobs, and they don’t get benefits and they will go home. It’s called attrition. I don’t happen to believe in deportation. If you make sure they don’t get jobs and they don’t get benefits, I mean Mitt [Romney] called it self-deportation, but it’s not; it’s just attrition. They’ll go home on their own.”⁸⁶

Senators and Nominations of Hispanics

For members of Congress seeking reelection, the importance of the burgeoning Hispanic vote is self-evident. Texas, New Mexico, California, Arizona, and Florida are awarded Hispanic nominees at a sixteen percent clip, while the rest of the nation receives Hispanic nominees at a two percent rate. Put another way, Texas and the other four states hold 29 percent of the U.S. population, and between 1987 and 2012, 64 percent (49 of 76) of all of the United States’ Hispanic district court nominees were to the five extensively Hispanic states. The electoral circumstances in these five states mean that nominations of Hispanic judges there have different implications there than they do in other states where presidential election votes are precious, such as Missouri (zero Hispanics, 21 nominees), Ohio (zero Hispanics, 31 nominees), or Pennsylvania (five Hispanics, 81 nominees). Indeed, senators of both parties evince reluctance to nominate Hispanics even when their states have considerable Hispanic populations. Republican senators working with GOP presidents have made 284 nominations to states with Hispanic populations of less than fifteen percent, and seven (2.4 percent) of the nominees have been Hispanic. The story is much the same for Democrats working with in-party presidents; of 322 nominations to states with Hispanic populations of less than fifteen percent, eleven (two percent) of them have been Hispanics.

⁸⁶ Van Le “Opponents of Immigration Reform in House Still Believe in Self-Departation” *America’s Voice* <http://americasvoiceonline.org/blog/opponents-of-immigration-reform-in-house-still-believe-in-self-deportation/>. Updated April 4, 2013. Accessed April 13, 2013.

The apparent reluctance of senators to nominate Hispanics to districts in states without large Hispanic populations has led to marked underrepresentation. The Northern District of Illinois, for instance, is a large bench comprised of twenty-two seats. The last Hispanic to be nominated to ND-IL was Clinton nominee Ronald Guzman who, in 1999, joined Reuben Castillo, who had joined ND-IL in 1994. With Chicago's Hispanic population at 28 percent, the confirmations of Castillo and Guzman left the bench underrepresented at the turn of the century. Since 1999, seventeen nominations have been made to ND-IL, and none of them have been of Hispanics. The combination of Barack Obama and Democratic Senators Roland Burris and Richard Durbin have nominated six persons to ND-IL, five of them white and one of them, Sharon Coleman, African-American.

The idea that Democratic senators usually will not nominate a Hispanic unless there is considerable potential Hispanic support in the senators' states brings us to a puzzle. Support for Hispanic issues is an important component of the liberal canon, as liberalism and NHLA scores, which measure support for pro-Hispanic legislation, are highly correlated.⁸⁷ Support for a district court nominee is a political act—a legislative act—which seemingly should be part of a Democratic senator's legislative activity. Yet Democratic senators do not nominate Hispanics unless there is considerable potential political support within the senators' states.

H1: As a Democratic senator's liberalism increases the probability that she will nominate a Hispanic does not increase.

H2: Larger Hispanic populations increase Democratic lawmakers' propensities to promote Hispanic district court judges.

⁸⁷ DW-Nominate scores and NHLA scores over 64 Senate Regimes have a Pearson's R of -.27.

Does Support for pro-Hispanic Legislation Impose Costs on Conservative Senators?

According to Barreto *et alia* (2009), Republican politicians played offense (to counteract the Democrat's "defense" of the Latino vote in 2000 and 2004, actively investing resources to chip away at the established Democratic advantage among Hispanic voters. Yet recruitment of Hispanic voters by the GOP seems an uphill battle. In the 2010 midterm elections, sixty percent of Latino voters supported Democratic candidates in House races, while 38 percent supported Republican candidates, according to the Pew Hispanic Center. In 2008, Latinos voted for Barack Obama by more than 2 to 1 (67 to 31 percent) over John McCain. Over the past decade, the issue of immigration has muddied the waters considerably for GOP members seeking Hispanic votes, and the rhetoric accompanying state-level politics has made immigration the most important issue for Hispanic citizens. Seventy-seven percent of Latinos say most illegal immigrants should be given "a path to citizenship" compared to just 11 percent who believe such immigrants should be "forced to leave the country," according to a poll conducted for the immigrants' rights group America's Voice. "[The immigration issue is] a huge problem not only in 2012, but an even bigger problem in 2016 and 2020," says political scientist Mark Barreto. "By then, it's devastating to the Republican Party."⁸⁸ Yet GOP members believe they can make inroads with Hispanic voters. One way is to take the middle road in the immigration debate. "Among Latino voters, the elephant in the Republican living room is immigration," says Marty Wilson, a Republican strategist. "If a Republican candidate campaigns on immigration in a negative context – say, like [former Colorado Rep.] Tom Tancredo– then they destroy any possibility of getting a significant percentage of Latino voters." But, Wilson continues, if a Republican takes a position on immigration that is both tough on border security but also "realistic" in providing a

⁸⁸ Jeff Sandy "Reid's Unlikely Victory in U.S. Senate Race," *policymic.com*
<http://www.policymic.com/articles/reid-s-unlikely-victory-in-nevada-s-u-s-senate-race>. Accessed August 6, 2011.

pathway to citizenship, “then you have the ability to pivot away from immigration and talk about other issues that are important to Latinos – like the economy and education.”⁸⁹ Further, gay marriage and abortion rights generally play poorly among Hispanic voters, providing avenues through which socially conservative politicians can garner Hispanic support. Republican senators all face the same dilemma: how can the senator court the burgeoning Hispanic vote without running afoul of the GOP? As the analyses of Knoll (2009) and Hero and Tolbert (1996) make clear, pro-Hispanic voting more often than not will necessitate voting the same as Democratic members. Knoll (2009) uses a source that had not been previously available to measure congressional action on legislation concerning Hispanic interests. Starting in 1999, the National Hispanic Leadership Agenda (NHLA) has biannually released a scorecard for members of Congress based on how they voted on issues deemed to be especially important to Latinos living in the United States. Their congressional scorecard is a “rating [of] members of Congress on votes taken in the House and Senate, which affect the social, economic, and political advancement and quality of life of Hispanic Americans” (NHLA, 2005: iii; quoted in Knoll 2009: 183). Each member of Congress is given a score from 0-100 percent that indicates how amenable they are to Hispanic interests.⁹⁰ The author finds that Hispanics are substantively represented by Democrats, overwhelmingly. The average Republican NHLA score is 28.8, while the average Democratic score is 88.3. To support Hispanic interests, GOP members must vote with Democrats.

When senators “cross the aisle” on votes, they incur costs on several fronts. First, legislators can incur electoral costs from constituents who come to expect a certain kind of behavior from a

⁸⁹Brad Knickerbocker “Census Data Show Hispanic Boom; How it Could Impact U.S. Politics,” *Christian Science Monitor Online* <http://www.csmonitor.com/USA/Society/2011/0324/Census-data-show-Hispanic-boom.-How-it-could-impact-US-politics>. Accessed August 4, 2011.

⁹⁰The NHLA scorecard measure for Senators has a mean score of 64.2 with a 33.4 percent standard deviation.

member of a particular party. Legislators who vote with the opposition party may alienate their constituencies, thereby inviting a strong primary challenge (Nokken 2000; Brady and Schwartz 1990). Alienating constituencies is ever more hazardous since the advent of the Internet, as interest groups such as the National Hispanic Leadership Agenda (NHLA), La Raza, and the anti-immigration group Federation for American Immigration Reform (FAIR) are recording votes and punishing defectors by publishing legislative records online (Bell 2002). Also, within the Senate chamber, the two major political parties have institutionalized penalties for defecting from party lines on votes. Penalties include exclusion from plum committee assignments as well as rejection for chamber leadership positions (Cox and McCubbins 1995). Supporting pro-Hispanic legislation is politically costly for GOP senators.

H3: Larger Hispanic populations do not increase Republican lawmakers' propensities to vote in favor of Hispanic interests.

Do Increased Hispanic Populations Lead Republicans Across the Aisle?

Republicans do not cross the aisle to vote in favor of Hispanic interests very often. The average NHLA for GOP Senators does not move as senators' home states get more Hispanic. There are fifteen GOP senator/NHLA dyads wherein the Hispanic population of the state is below four percent. The average NHLA score in the fifteen dyads is 28.8. The average scores are 27.1 for states where the Hispanic populations are between four and ten percent, and the scores average to 29 percent where the Hispanic populations are over ten percent.

What is afoot regarding GOP senators and NHLA scores in states with especially large Hispanic populations? It is clear that Republican senators incur costs for joining Democrats in support of pro-Hispanic legislation, but how is it senators in New Mexico and Texas, for

instance, can afford *not to* support pro-Hispanic legislation.⁹¹ Part of the answer may be located in states' percentages of undocumented migrants. The correlation between the noncitizen Hispanic and total Hispanic populations runs close to $r=.9$ (Knoll 2009). So, undocumented immigrants exist in high numbers alongside Hispanic citizens. Large numbers of undocumented migrants in a state cause declines in white citizens' opinions concerning Hispanics (Hood and Morris 1998). For Republican senators seeking to reinforce their electoral bases (white voters), it follows that as the population of Hispanics—both documented and undocumented—in a GOP senator's state increases, the less likely he or she will be to support Hispanic interests.⁹² If this is the case, one would expect GOP senators in very Hispanic states to court their bases with clearly anti-immigration legislation. To test this, I accessed The Federation for American Immigration Reform (FAIR), a public interest group with an anti-immigration agenda, which scores senators on relevant legislation.⁹³ I checked 33 GOP senator/FAIR score dyads in the 109th and 110th Congresses, and there was virtually no correlation between a given state's Hispanic percentage of population and the state's GOP senator's FAIR score. There is no evidence that GOP senators pander to white voters' anti-immigration sentiments where such sentiments are easily roused by the presences of large undocumented populations.

The best explanation for the lack of a relationship between GOP senators' NHLA scores and the Hispanic populations of their states as percentages of their states' overall populations is that GOP senators in states with large Hispanic populations are conservative, rather than anti-Hispanic per se. To test this, I correlated 338 GOP senatorial regimes' DW-Nominate (Poole and

⁹¹ In the 107th Congress, for instance, the combination of John Cornyn and Kay Bailey Hutchison of Texas scored an NHLA of 15, while Pete Domenici of New Mexico scored a 25.

⁹² Knoll (2009) predicts NHLA scores in the Senate of the 108th Congress, using independent variables accounting for both non-citizen and citizen Hispanics, noting the multicollinearity in the estimation. Knoll's (2009) model provides no evidence that larger Hispanic populations—citizen or non-citizen—increase senatorial NHLA scores. As mentioned above, Knoll's results show that membership in the Democratic Party is by far the most important determinant of NHLA scores.

⁹³ <http://www.fairus.org/>. Accessed June 13, 2012.

Rosenthal 1997) scores with their states' percentage Hispanic populations. The correlation was .27. Further, conservatism among GOP senatorial regimes, as measured by DW-Nominate scores, is strongly and negatively correlated (-.59) with NHLA scores.⁹⁴ To sum up, NHLA scores among Republican senators are not higher in states with large percentages of Hispanic voters because senators in such states are unusually conservative, and thus are especially averse to crossing the aisle.

GOP Senators Nominating Hispanics to District Court Seats

Two senators who vote against pro-Hispanic legislation while using Hispanic district court nominees to garner Hispanic political support are Phil Gramm and Kay Bailey Hutchison, onetime co-senators of Texas. In the 106th Congress, the two senators' NHLA scores were zeros, scores that the *San Antonio Express* featured in an article entitled "Hispanics Flunk GOP Lawmakers."⁹⁵ The senators did not comment for the article, but the low scores incited an argument, played out through the press, pitting the GOP against the leaders of the NHLA. "This so-called scorecard could have been written by the Democratic National Committee," said Jim Nicholson, chairman of the Republican National Committee. Republican House member Henry Bonilla (TX-San Antonio), who also received a zero, dismissed the report card as a partisan device that perpetuates an inaccurate racial stereotype of Republican lawmakers. "This voting score is accurate only in that it evaluates whether someone is a Democrat,"⁹⁶ Bonilla said. "Millions of Americans have gotten beyond stereotypes," he said. "The National Hispanic Leadership Agenda would do well to follow their example."⁹⁷ The creators of the NHLA responded, "[T]he scorecard provides an objective tool for assessing the performance of

⁹⁴ Ideology as measured by DW-Nominate scores is highly correlated ($r=.52$) with FAIR scores, as the legislation creating FAIR scores is a subset of DW-Nominate's legislative units.

⁹⁵ Gary Martin "Hispanics Flunk GOP Lawmakers" *The San Antonio Express* February 10, 2000 Page 1A.

⁹⁶ Gary Martin "Hispanics Flunk GOP Lawmakers" *The San Antonio Express* February 10, 2000 Page 1A.

⁹⁷ Gary Martin "Hispanics Flunk GOP Lawmakers" *The San Antonio Express* February 10, 2000 Page 1A.

Congress on key Latino issues," said Manny Mirabal, NHLA board chairman and president of the National Puerto Rican Coalition.⁹⁸ Hutchison and Gramm did not markedly improve their NHLA scores in the 107th Congress, each of them scoring a 16, well below the GOP average of 25. Yet the two senators endorsed three Hispanics for six district court vacancies in the 107th Congress, trumpeting the nominees' credentials and implicitly sanctioning pro-Hispanic interests in Texas.

H3: Larger Hispanic populations do not increase Republican lawmakers' propensities to vote in favor of Hispanic interests.

H4: Larger Hispanic populations increase Republican senators' propensities to promote Hispanic district court judges.

Quantitative Analysis

Research Questions and Research Design

This study answers two questions. The first question is, "Among Democratic senators, are nominations of Hispanics to district court seats part of the senators' liberal orthodoxies, or are nominations of Hispanics bids to garner political support among Hispanic constituents?" Second, "Do conservative senators who vote against pro-Hispanic legislation nevertheless court Hispanic political support by promoting the nominations of Hispanic district court judges?"

To answer the first question, "Among Democratic senators, are nominations of Hispanics to district court seats part of the senators' liberal orthodoxies, or are nominations of Hispanics bids to garner political support among Hispanic constituents?", I propose two hypotheses.

H1: As a Democratic senator's liberalism increases the probability that she will nominate a Hispanic does not increase.

⁹⁸ Gary Martin "Hispanics Flunk GOP Lawmakers" *The San Antonio Express* February 10, 2000 Page 1A.

H2: Larger Hispanic populations increase Democratic lawmakers' tendencies to promote Hispanic district court judges.

If the answer to the first question is "Yes," I will find support for **H1** and **H2** with one MLE. The MLE will predict the probability that a given nominee will be Hispanic with two independent variables. The first independent variable is each senator's liberalism quantified by DW-Nominate scores (Poole and Rosenthal 1997).⁹⁹ The second independent variable is the senators' states' percentage of population that is Hispanic. I examine 434 Democratic president/Democratic senator nominations from 1993 to 2012.

I must answer two smaller questions to answer the second question, "Do conservative senators who vote against pro-Hispanic legislation nevertheless court Hispanic political support by promoting the nominations of Hispanic district court judges?" The first of the smaller questions is question "Do conservative senators respond to Hispanic constituents' interests by promoting pro-Hispanic legislation?" I answer this question by examining 36 GOP senatorial regimes. See Table 3.1 below.

⁹⁹ Ideally, liberalism would be quantified with NHLA scores, but the scores are unavailable after the 108 Congress, which would limit my analysis of Democratic senators to the Clinton Administration. DW-Nominate scores and NHLA scores are highly, and negatively, correlated ($r=-.33$, $N=112$).

Table 3.1
 GOP Senatorial Regimes and Support for Pro-Hispanic Legislation

Congress	GOP Senator(s)—State	NHLA	DW-Nom	Vacancies	Hispanic_Noms
107	Brownback/Roberts—KS	13	.43	1	0
107	Bunning/McConnell—KY	19	.46	6	0
107	Chafee—RI	44	.04	1	0
107	Thurmond—SC	19	.46	1	0
107	Murkowski/Stevens—AK	16	.29	1	0
107	Sessions/Shelby—AL	13	.4	4	0
107	Kyl/McCain—AZ	22	.47	2	0
107	Allard/Campbell—CO	25	.41	1	0
107	Grassley—IA	19	.32	2	0
107	Fitzgerald—IL	31	.30	1	0
107	Burns—MT	13	.37	2	0
107	Helms—NC	0	.69	3	0
107	Domenici—NM	25	.26	3	2
107	Ensign—NV	13	.52	3	0
107	DeWine/Voinovich—OH	28	.29	3	0
107	Inhofe/Nickles—OK	3	.54	2	0
107	Santorum/Specter—PA	28	.20	7	0
107	Frist/Thompson—TN	16	.4	6	0
107	Gramm/Hutchison—TX	15	.46	11	5
107	Warner/Allen—VA	27	.34	2	0
108	Graham—SC	33	.45	2	0
108	Sessions/Shelby—AL	26	.45	2	0
108	Kyl/McCain—AZ	42	.47	1	0
108	Allard/Campbell—CO	26	.41	1	0
108	Chambliss—GA	17	.43	1	0
108	Lugar—IN	50	.33	2	0
108	Collins/Snowe—ME	50	.10	1	0
108	Cochran/Lott—MS	42	.35	3	1
108	Domenici—NM	60	.26	2	1
108	Ensign—NV	17	.52	2	1
108	DeWine/Voinovich—OH	50	.29	1	0
108	Inhofe/Nickles—OK	18	.54	1	0
108	Santorum/Specter—PA	33	.20	5	1
108	Cornyn/Hutchison—TX	34	.42	4	1
108	Warner/Allen—VA	34	.34	1	0
<i>AVG/Total</i>		<i>24.8</i>	<i>.37</i>	<i>89</i>	<i>12</i>

These particular regimes are used because they are all associated with district court nominations, are all under a GOP president (which means the GOP regimes were able to realize their choices for the spots on the benches), and because NHLA scores are available for them. I subject the

regimes to two different tests. First, using scorecards from the National Hispanic Leadership Agenda as a dependent variable, I employ standard OLS regression to indicate that the percentage of a state's population that is Hispanic is not correlated with a given Senate Republican's support for pro-Hispanic legislation. Second, with vacancies as the units of analysis, I use MLE to predict Hispanic nominations, providing evidence that the same senatorial regimes will court Hispanic constituents by promoting Hispanic would-be judges.

The second test answers the question "Do conservative senators respond to Hispanic constituents' interests by promoting pro-Hispanic legislation?"

H3: Larger Hispanic populations do not increase Republican lawmakers' propensities to vote in favor of Hispanic interests.

The dependent variable is the regime's NHLA score. If there are two GOP senators in a regime, I averaged their NHLA scores. The independent variable is the regime's state's Hispanic population as a percentage of the state's total population.

The third test answers the second of the smaller questions "Do conservative senators use district court nominations to attract Hispanic constituents' political support?"

H4: Larger Hispanic populations increase Republican senators' propensities to promote Hispanic district court judges.

The units of analyses are 89 district court nominations occurring under the same 36 senatorial regimes used in the first test. The dependent variable is dichotomous: a "one" if a vacancy receives a Hispanic nominee, a "zero" otherwise, so a maximum likelihood estimation, specifically a logit, is employed. The independent variable is the state's Hispanic population as a percentage of the state's total population.

Results and Discussion

The results of the first test answer the question “Among Democratic senators, are nominations of Hispanics to district court seats part of the senators’ liberal orthodoxies, or are nominations of Hispanics bids to garner political support among Hispanic constituents?” The results do not allow me to endorse the null hypothesis for the **H1**.

H1: As a Democratic senator’s liberalism increases the probability that she will nominate a Hispanic does not increase.

See Table 3.2, below.

Table 3.2

Logit Estimation of the Probability that a Vacancy Will Receive a Hispanic Nominee: Democratic Senators	
Conservatism	-3.98* (1.99)
Percent State Population Hispanic	.08*** (.01)
Constant	-5.29*** (.82)
Pseudo R ²	.12
LR χ^2	26.15
PRE	8%
Observations	434
Robust Standard Errors in Parentheses * $p < .05$, ** $p < .01$, *** $p < .001$	

As the MLE for “conservatism” is statistically significant and in the expected direction. I cannot endorse **H1**. It seems that as Democratic senators become more liberal, the probability that they will nominate a Hispanic does indeed increase. This indicates that to some degree nominations of Hispanics to district court seats are parts of the senators’ liberal orthodoxies. To see if nominations of Hispanics by Democratic senators are bids to garner political support among Hispanic constituents, I proposed **H2**.

H2: Larger Hispanic populations increase Democratic lawmakers' tendencies to promote Hispanic district court judges.

I can reject the null hypothesis associated with **H2** with confidence, as the MLE for State Population % Hispanic is statistically significant and in the expected direction. Comparing the MLEs for the two independent variables, it seems as if the most important factor in a Democratic senator's endorsement of a Hispanic nominee is the senators' states' Hispanic population. So the answer to the question, "Among Democratic senators, are nominations of Hispanics to district court seats part of the senators' liberal orthodoxies, or are nominations of Hispanics bids to garner political support among Hispanic constituents?" is, Yes, nominations of Hispanics are partially components of liberal orthodoxies, but they seem to be largely driven by the wish to garner political support among Hispanic constituents.

The results of the second test answer "no" to the question "Do conservative senators respond to Hispanic constituents' interests by promoting pro-Hispanic legislation?"

H3: Larger Hispanic populations do not increase Republican lawmakers' propensities to vote in favor of Hispanic interests.

So, **H3** is borne out, as the coefficient of the independent variable "percentage population Hispanic" does not approach statistical significance. See Table 3.3 below.

Table 3.3

OLS Regression Predicting National Hispanic Leadership Agenda Scores for GOP Senatorial Regimes	
Percent State Population Hispanic	.10 (.18)
Constant	27.81 *** (3.08)
Adjusted R ²	.02
Root MSE	13.38
Observations	36
Robust Standard Errors in Parentheses * <i>p</i> <.05, ** <i>p</i> <.01, *** <i>p</i> <.001	

These results are evidence that conservative senators—vying for Hispanic political support but unable to do so freely—cannot endanger their conservative bona fides by crossing the aisle on legislation relating to Hispanics.

The results of the third test answer “yes” to the question, “Do conservative senators use district court nominations to attract Hispanic constituents’ political support?” See Table 3.4, below.

Table 3.4

Logit Estimation of the Probability that a Vacancy Will Receive a Hispanic Nominee: GOP Senators	
Conservatism	-.53 (1.70)
Percent State Population Hispanic	.09 *** (.01)
Constant	-3.88 *** (.70)
Pseudo R ²	.17
LR χ^2	30.40
PRE	4.20%
Observations	378
Robust Standard Errors in Parentheses * <i>p</i> <.05, ** <i>p</i> <.01, *** <i>p</i> <.001	

The MLE for the independent variable State Population % Hispanic is statistically significant and in the expected direction, so I can reject the null hypothesis implied by *H4*.

H4: Larger Hispanic populations increase Republican senators' propensities to promote Hispanic district court judges.

By rejecting the null hypothesis suggested by *H4*, I find evidence that GOP senators promote Hispanics to district court seats to attract Hispanic political support.

Using STATA's postestimation commands to generate predicted probabilities, I ran some tests of conservative senatorial regimes' probabilities of promoting Hispanic nominees based on the senators' states Hispanic populations as percentages of total state populations. For instance, Senators Jim Inhofe and Donald Nickles of Oklahoma both are rather conservative legislators (their DW-Nominate scores averaged to .54), and Oklahoma's Hispanic population runs at 5.2 percent as of the 2000 Census. Five-point-two percent is a relatively small Hispanic population, and indeed the probability that a GOP senator or senators would promote a Hispanic nominee runs at just over three percent in Oklahoma in 2001. New Mexico Senator Pete Domenici (DW-Nominate=.26) is not as conservative as the Oklahoma senators, and Domenici's NHLA score (25) is average for a GOP senator. The 2000 Census tallied New Mexico's population as 42 percent Hispanic. Under these circumstances, a GOP senator will promote a Hispanic nominee 60 percent of the time, and indeed Domenici, encountering two vacancies (yet three nominations) during the 107th Congress, nominated a Hispanic on two occasions.

Conclusions

Why Do Senators who Legislate Against Hispanic Interests Nominate Hispanic Judges?

Conservative senators do not support pro-Hispanic legislation—indeed they often support distinctly anti-Hispanic legislation—even when they preside over states with large Hispanic populations. Yet district court nominations of Hispanics are used by conservative senators to gain political support among Hispanic constituents, and such minority district court nominations become more probable as they become more electorally valuable (i.e. as a given state’s Hispanic population increases). The contradiction between tepid GOP pro-Hispanic legislative support and enthusiastic GOP uses of Hispanic district court nominations is puzzling because district court nominations seem to be normal political activity. District court nominations—relatively visible pieces of senatorial policy—are expressions of ideas about things courts handle, such as law and order, racial equality, redistributive politics, and the line between individual liberty and government power. A senator’s legislative record is an expression of ideas about the same things. Though Hispanic district court nominations and pro-Hispanic legislation may send similar messages to Hispanic constituents, the two activities clearly are different to conservative senators. What are the differences between minority district court nominations and regular pro-minority legislation? I theorize that promotions of district court nominations of Hispanics have none of the downsides that are part of supporting pro-Hispanic legislation, or even the costs that come with just voting to approve a minority federal appellate court nominee.

Promoting a Hispanic nominee is relatively costless, unlike pro-Hispanic legislation, because legislation and nominations are different types of political activities featuring different risks, rewards, and implications. Legislation is defined by actors pursuing agendas. Senators must come down one way or another on most pieces of legislation, and their votes typically come with

costs no matter how the members vote. Alternatively, district court nominations give senators an opportunity to express support for certain values without having to actually tally support. For instance, a senator promoting the nomination of a Hispanic nominee indicates sympathy for Hispanic positions on issues relating to civil rights, civil liberties, and immigration. The nomination indicates pro-Hispanic sensibilities on the issues, but the senator actually says nothing relating to such topics.¹⁰⁰ Senators spin district court nominations however they please, and when senators take credit for district court nominations, rhetoric that might spark controversy is rare. A nomination of a Hispanic is enough to register responsiveness to Hispanic constituents, and a senator need not stir the pot by detailing how a Hispanic nominee will improve the lives of a state's Hispanic residents. As an example, when George Bush nominated Texas Supreme Court Justice Xavier Rodriguez to a district court vacancy, Senator John Cornyn (R-TX) spoke approvingly of Rodriguez while revealing nothing of the nominee's possible dispensations towards issues. "I am confident [Rodriguez] will exercise restraint and interpret the law in a manner that is honest, capable and fair to all who come before his court," Cornyn said.¹⁰¹ "Judge Rodriguez brings the qualifications and integrity to the bench that Texas and our nation needs now," Kay Bailey Hutchison (R-TX) said. "He is an exemplary civic and judicial leader and I am pleased to recommend his nomination to President Bush."¹⁰² Charles Schumer, of New York, introduced district court nominee Dora Irizarry to the Senate Judiciary Committee

¹⁰⁰ In fact, the Constitution itself provides cover for senators who decline to label (i.e. ideologically) a judicial nominee. The tenure and salary protections provided by Article III promote decisional independence, presumably omitting from federal jurisprudence public passions and pressures from other branches. Paradoxically, the political act of nominating a person to a district court judgeship is supposed to be apolitical.

¹⁰¹ Gary Martin "Bush to Name Texas Judicial Picks" *San Antonio Express News* May 1, 2003 pg. 1B.

¹⁰² Gary Martin "Bush to Name Texas Judicial Picks" *San Antonio Express News* May 1, 2003 pg. 1B.

personally. "Her nomination is an example of what happens when the process works properly," he said. "She's had an excellent record. I am impressed by her background."¹⁰³

Do Democrats Use Hispanic Nominations in a Particularly Calculated Way?

Democrats appear to nominate Hispanics to district court seats as part of their generally liberal politics, but they rarely nominate Hispanics to seats in states without substantial Hispanic populations. Is the same thing true when Democratic senators promote African-Americans to the federal bench? Running an MLE exactly the same as the one shown in Table 3.2 but predicting African-American nominees with African-American state populations instead of the Hispanic side of the ledger delivers somewhat surprising results. The coefficient for "Conservatism" among Democratic senators, expected to be negative and significant as it is in the Hispanic estimation, shows no relationship between Democratic ideology and the likelihood that the Democrat will promote an African-American nominee. This goes against the idea that nominations of African-Americans are part of the liberal orthodoxy, and portrays nominations as blacks as bids for support among black constituents. If anything, nominations of Hispanics appear to be less calculated and slightly more the results of Democratic senators liberal orthodoxy.

Implications for Descriptive Race Representation

District court nominations of Hispanics pay off politically for senators of either major party, be they conservative, liberal, or moderate. Since judicial nominations are supposed to be apolitical, senators can promote nominees without tallying for or against stances on issues. Conservative senators can hope to generate political support from some of their rather liberal Hispanic constituents, perhaps deciding a very close election. This theory relies on two ideas: 1)

¹⁰³ Charles Hurt "Senators Praise Nominee Highly; ABA Deems 'Unqualified,'" *The Washington Times* October 2, 2003 Page A6

minority constituents, in this case Hispanics, will perceive a nominee who shares their ethnicity favorably, and 2) senators can claim credit for promoting Hispanic nominations without articulating a stance on any issue. In the coming decades, the competition for Hispanic political support will result in Hispanic DRR. The progress should be steady, even if it lags.

CHAPTER 4

BARACK OBAMA AND MINORITY REPRESENTATION

Nationwide, federal district court benches feature African-American and Hispanic descriptive underrepresentation. In other words, Latino and African-American federal judgeships have not kept pace with minority demographics. Notably, underrepresentation for African-Americans in the South is acute. In an increasingly assimilated society, what keeps African-Americans from federal district judgeships in the South? The dominance, in the South, of Republican political regimes over the last 25 years has depressed nominations of African-Americans. Republican politicians only rarely nominate African-Americans to federal judgeships, and they almost never do so in the South. It seems descriptive race representation in the region must be put off until Democrats control the nominating process. This chapter surveys Barack Obama's efforts to diversify the federal district courts, in particular his efforts to bring African-American judges to the South. The President's efforts are remarkable in that he nominated black judges to southern seats even when two GOP Senators presided over a given state. Many such nominations resulted in confirmations. I argue that the politics of judicial nominations in the South are changing, and that Obama has benefitted from the new paradigm. As for his overall diversity record, Obama has used minority nominations strategically, garnering political support among minorities and liberals.

GOP Political Regimes and Nominations of African-Americans

There are 88 judicial districts in the United States. As of January 1, 2009, 18 of the districts did not feature descriptive representation of their black citizens. In other words, 18 of the 88

districts clearly did not have allotments of black judges which reflect black demographics in the districts. See Tables 4.1 and 4.2, below.

Table 4.1: African-American Underrepresentation on the Federal District Courts

<i>Districts in the South in Bold</i>				
<i>District</i>	<i>Sitting Black Judges</i>	<i>Seats on District Bench</i>	<i>State Percentage Black Population</i>	<i>Level of Underrepresentation</i>
AK	0	3	4.1	4.1
AL-M	1	3	25.3	-8.0
AL-N	0	7	25.3	25.3
AL-S	0	3	25.3	25.3
AR-E	0	3	15.9	15.9
AR-W	0	3	15.9	15.9
AZ	1	11	3	-6.0
CA-C	2	27	7.4	0
CA-E	2	7	7.4	-21.0
CA-N	3	15	7.4	-12.6
CA-S	1	8	7.4	-5.1
CO	1	7	4	-10.2
CT	1	8	8.3	-4.2
DE	1	4	16.9	-8.1
FL-M	2	15	13.6	.26
FL-N	1	4	13.6	-11.4
FL-S	2	16	13.6	1.1
GA-M	1	4	27	2
GA-N	2	11	27	8.8
HI	0	4	2.5	2.5
IA-N	0	2	1.7	1.7
IA-S	0	3	1.7	1.7
ID	0	2	.3	.3
IL-C	0	4	14.8	14.8
IL-N	2	22	14.8	5.7
IL-S	0	4	14.8	14.8
IN-N	0	5	7.8	7.8
IN-S	0	5	7.8	7.8
KS	1	6	5.8	-10.6
KY-E	0	7	7.1	7.1
KY-W	0	5	7.1	7.1
LA-E	2	12	30.8	14.1
LA-M	1	3	30.8	-2.5
LA-W	0	7	30.8	30.8
MA	0	14	5	5
MD	3	10	24.9	4.9
ME	0	3	.4	.4
MI-E	2	15	13.9	.5
MI-W	0	4	13.9	13.9
MN	1	7	2.2	-12.1
MO-E	2	9	10.7	-11.5

Table 5.2: African-American Underrepresentation on the Federal District Courts (cont.)

<i>Districts in the South in Bold</i>				
<i>District</i>	<i>Sitting Black Judges</i>	<i>Seats on District Bench</i>	<i>State Percentage Black Population</i>	<i>Level of Underrepresentation</i>
MS-N	0	3	35.6	35.6
MS-S	1	6	35.6	18.9
MT	0	3	.3	.3
NC-E	0	4	22	22
NC-M	1	4	22	-3
NC-W	0	5	22	22
ND	0	2	.6	.6
NE	0	4	2.6	2.6
NH	0	3	.6	.6
NJ	1	17	13.4	7.5
NM	0	6	2	2
NV	0	6	6.6	6.6
NY-E	1	15	15.9	9.2
NY-N	0	5	15.9	15.9
NY-S	3	28	15.9	5.8
NY-W	0	4	15.9	15.9
OH-N	1	12	10.6	2.2
OH-S	1	8	10.6	-1.9
OK-E	0	2	7.4	7.4
OK-N	0	4	7.4	7.4
OK-W	1	7	7.4	-6.8
OR	1	6	1.6	-15.0
PA-E	4	22	9.2	-8.9
PA-M	0	6	9.2	9.2
PA-W	1	10	9.2	-8
RI	0	3	3.9	3.9
SC	2	10	29.8	9.7
SD	0	3	.5	.5
TN-E	1	5	16	-4
TN-M	1	4	16	-9
TN-W	1	5	16	-4
TX-E	0	7	11.9	11.9
TX-N	1	12	11.9	3.5
TX-S	1	19	11.9	6.6
TX-W	0	11	11.9	11.9
UT	0	5	.7	.7
VA-E	3	11	18.8	-8.1
VA-W	0	4	18.8	18.8
VT	0	2	.3	.3
WA-E	0	4	3.1	3.1
WA-W	1	8	3.1	-9.4
WI-E	0	5	5	5
WI-W	0	2	5	5
WV-N	0	3	3.1	3.1
WV-S	0	5	3.1	3.1
WY	0	3	.8	.8

For instance, the Southern District of Mississippi (MS-S) featured one (18%) black judge, Henry Travillion Wingate, of six judges on the bench.¹⁰⁴ With Mississippi's black population sitting at 36 percent, descriptive representation in the district lags at 18 percent. While districts in the

¹⁰⁴ In 2010, the compliment of black judges on MS-S was raised to two when Carlton Reeves, a black man and an Obama appointee, ascended to the bench.

South accounted for only 22 (25%) of the 88 districts, 11 (61%) of the 18 underrepresented districts were in the South.¹⁰⁵

George W. Bush' district court appointment record is remarkable for its lack of diversity, especially in the South (Goldman, Slotnick, Gyski, Zuk, Schiavoni 2003; Goldman, Schiavoni, Slotnick 2009). To be clear, G.W. Bush would not have had to diversify much to improve the records of his father and Reagan, as the GOP's record of African-American appointments is remarkably weak. Between 1987 and 2009 Presidents Reagan, Bush (41) and Bush (43) nominated 122 district court judges to seats in the South. Of the 122 only one—Arkansas judge Brian Stacy Miller, nominated to the Eastern District of Arkansas in 2007—was black. And the trend is similar, if less dramatic, outside of the South. Diascro and Solberg (2009) point out that, if anything, the GOP's commitment to diversity has actually deteriorated over the last twenty years. "Among nontraditional appointments, G.W. Bush's record on African-Americans is particularly bleak and exemplifies the roles of politics and expediency over a commitment to a principle of diversity. [T]he proportion of African-American males Bush put on the bench is lower than any other president in a generation, short of Reagan; the picture is less stark, but similar, for African-American females." So the GOPs poor record on court diversity is clear, but what about the cartoonishly low rate (.8%, 1/122) of African-American appointments to southern district courts?

Consider a GOP political regime—a GOP senator and a GOP president—and imagine a scenario that would cause them to choose to nominate an African-American district court judge. I argue that such scenarios are rare, and they are unheard of in the South. A rare example of a GOP Senator nominating an African-American to a district court seat involves Republican

¹⁰⁵ The South is Arkansas, Alabama, Georgia, Louisiana, Kentucky, Mississippi, Tennessee, North Carolina, South Carolina or Virginia.

Senator Kit Bond of Missouri, and the example does not take place in the South. Bond, a Republican senator in Missouri, is one of the very few Republican senators who seek black votes. Missouri is notable in this respect; African-American voters choose GOP candidates in Missouri in unusually high numbers.¹⁰⁶ In 1998, Bond openly endorsed an African-American district court nominee in Ronnie White. Bond vocally approved of White's June 1997 nomination, describing the Missouri Supreme Court judge as "a man of the highest integrity and honor."¹⁰⁷ The Bond story would be a glowing example of GOP inclusiveness if a Republican were in the White House, but of course Ronnie White was nominated by Bill Clinton. The point is that Missouri is a place where a GOP political regime could conceivably nominate an African-American district court judge.

What characteristics make Republicans who have participated in the nominations of African-Americans different from those in the South? Since 1987, there have been 17 African-American nominees who came from GOP regimes. I wondered if the GOP senators involved with the 17 nominations were more moderate than other GOP senators. Because no GOP regime nominations occur in the South, I removed the region from the analysis. The mean DW-Nominate score, a measure of ideology, for a GOP regime nominating a senator of any race between 1987 and 2010 is .328, compared to .05 overall, counting Democratic and Republican regimes (see Poole and Rosenthal 1997). For the seventeen GOP senators who nominated African-Americans in the same time frame, the mean ideology score is .306, again excluding the South. If GOP regimes picking nominees of any race have a mean ideology of .328 and the seventeen GOP senators who nominated African-Americans have a mean ideology of .306, it is clear that non-South Republican senators who nominated African-Americans are more moderate

¹⁰⁶ In 1998, Senator Bond won reelection handily, thanks in part to winning roughly 30 percent of the black vote.

¹⁰⁷ Eric Boehlert "John Ashcroft's Big Mistake" *Salon* http://www.salon.com/2001/01/09/ashcroft_5/. Accessed April 26, 2011.

than non-South Republican senators who did not nominate an African-American. This brings up another question. Did the non-South GOP senators nominate African-Americans because they were moderate Republicans, or because they sought political support among their states' black communities, or both?

The mean African-American population for states represented by the seventeen GOP senators who nominated blacks to district judgeships is 9.80 percent, while the mean African-American population for states represented by the 274 GOP senators who did not nominate an African-American to a district judgeship is 8.35. Outside the South, GOP senators who nominate African-Americans (i.e. Mel Martinez of Florida, 110th Congress; Alfonse D'Amato of New York, 102nd; Arlen Specter of Pennsylvania, 107th) tend to inhabit states wherein black votes are worth pursuing, even for Republicans. So, moderate Republicans outside the South can find it useful to nominate an African-American when the state's demographics make such a gesture a politically good move.

What would make *southern* GOP politicians nominate African-Americans? Southern GOP senators have large black populations in their states, but they are considerably more conservative (DW-Nominate .342 to .306) than non-South Republicans who have nominated an African-American. The record in the region so far suggests that even if half our presidents are Democrats, the South is unlikely to realize African-American DRR within the next five decades. But Obama's record in the South shows that the diversification paradigm in the region may be changing, as it would seem a Democratic president willing to push for diversity can be very effective. Just the nomination of an African-American, even to a state with two GOP senators, puts forces into play which make a confirmation possible.

Southern Diversification Under Obama

Obama made 205 district court nominations between 2009 and 2013. Twenty-nine (14 percent) of the nominees were African-Americans, 25 (12 percent) were Hispanics, and 13 (six percent) were Asian. Overall, Obama nominated minorities at a 33 percent clip, with the nation's minority population at 27.6 percent as of the 2010 Census. Clinton nominated minorities (54 blacks, 16 Hispanics, seven Asians) at a 23 percent rate over his two terms. George H.W. Bush nominated minorities at a ten percent rate (12 blacks, seven Hispanics and no Asians). George W. Bush nominated minorities at a 16 percent clip (21 blacks, 28 Hispanics, four Asians).

Obama has made a distinct change in the racial composition of the bench in the South. Specifically, Obama nominated an African-American to district court seats in the region twelve times, with nine of the nominations to states represented by two GOP senators. By March of 2009, the president faced a judicial emergency in Georgia's Northern District, based in Atlanta. The ND-GA bench sits eleven judges, but it was down to seven early in Obama's first term, as three judges took senior status within a month of one another while another judge was promoted by Obama to the 11th U.S. Circuit Court of Appeals. Further, the seven ND-GA sitting judges were all white, presiding over the country's fourth largest black-majority city. Referring to a seven-judge bench handling a caseload appropriate for an eleven-judge district, Carl Tobias, a University of Richmond law professor who tracks judicial nominations, said "[t]he Northern District of Georgia is one of the worst-case scenarios in the country."¹⁰⁸ The lack of diversity on ND-GA also generated controversy. Stephen Bright, senior counsel for the Southern Center for

¹⁰⁸ "Senate fills two seats on bench; Georgia's two GOP senators applaud choices." Bill Rankin *Atlanta Journal Constitution* March 1, 2011. Page 1B.

Human Rights in Atlanta, said “[t]here is simply no excuse for the lack of diversity on the federal court in Atlanta.”¹⁰⁹

Democrats in Georgia worked with the Administration through familiar channels to fill the vacancies on ND-GA. In March of 2009, Georgia's Democratic congressional delegation appointed a committee to screen applications for judicial vacancies. The panel, led by Atlanta lawyer George "Buddy" Darden, sent a short list of names to the delegation.¹¹⁰ The short list included Atlanta lawyer Amy Totenberg, who is white, and Judge Steve Jones from Athens, who is black. The panel forwarded its recommendations to the White House, in May of 2009, but Obama was slow to act on the potential judges, as Totenberg's nomination reached the Senate in March of 2010, and Jones' nomination was received by the Senate in July of 2010. It is unclear why the Administration seemingly delayed the nominations. Tobias said the process was taking longer than it should, arguing that “[t]he nominees were well-qualified and noncontroversial...and the [Atlanta court] desperately needed to have the vacancies filled so that it could deliver justice.”¹¹¹ Buddy Darden pointed to partisan politics. Darden said that because Georgia had no senators who are members of the same political party as the president, the two nominees “have been assigned a lower degree of importance [by the Administration].”¹¹² Darden's comments suggesting structural delay dovetail with this paper's theory; Georgia had no senator who could claim direct credit for the nominations, so half of the traditional district court nominating team—the senatorial half—was absent. With the process receiving perhaps 50 percent of the drive afforded a traditional “in-party” nomination, it is no surprise that the

¹⁰⁹ “Senate Fills two Seats.” Bill Rankin *Atlanta Journal Constitution* March 1, 2011. Page B1.

¹¹⁰ “Georgia Positions Slow to be Filled; Some Say Obama Administration Missing Opportunities” Bill Rankin *Atlanta Journal Constitution* September 8, 2010. Page B1.

¹¹¹ ¹¹¹ “Senate fills two seats on bench” Bill Rankin *Atlanta Journal Constitution* March 1, 2011. Page B1.

¹¹² “Georgia Positions Slow to be Filled” Bill Rankin *Atlanta Journal Constitution* September 8, 2010. Page B1.

nominations moved slowly. Further, Georgia clearly would not be in play in the 2012 presidential Election, making any credit Obama could take for diversifying the bench with Steve Jones' nomination low on the president's list of priorities. For their parts, Republican Senators Saxby Chambliss and Johnny Isakson issued a joint statement defending their roles in the efforts to complete ND-GA, saying their own screening committee vetted Totenberg and Jones and recommended that they should receive confirmation hearings.¹¹³

Totenberg received a hearing before the Senate Judiciary Committee on September 15, six months after the Senate received her nomination. Jones' hearing was on November 17, four months after the chamber started the clock on his nomination. While both were reported favorably and unanimously out of the SJC, they did not clear this hurdle until early December, and their nominations failed when Congress adjourned without voting for their confirmations. Successful hearings that do not lead to floor votes are unusual, especially at the district court level.¹¹⁴ The failures of the Totenberg and Jones nominations caused consternation, especially considering the conditions on the bench in Atlanta. Before Totenberg and Jones' were successfully confirmed on their second nominations, in March 2011, Senator Chuck Grassley (R-IA) publicly laid the blame for the long Atlanta vacancies on the White House, citing the Administration's sluggish response to the Darden recommendations they received in early 2009.¹¹⁵

As the second Jones and Totenberg nominations were moving toward successful conclusions in January of 2011, Obama continued his push to diversify ND-GA, despite the structural

¹¹³ "Senate Fills two Seats." Bill Rankin *Atlanta Journal Constitution* March 1, 2011. Page B1.

¹¹⁴ From 1987 to 2010, 790 district court nominees were heard by the SJC. Only 33 of the nominees failed to reach the bench, as 18 were heard by the SJC but were never reported out of committee, 13 were never addressed by the Senate floor, and one (Reginald White, ED-MO, 106th Congress) was rejected in a floor vote.

¹¹⁵ "Senate fills two seats on bench" Bill Rankin *Atlanta Journal Constitution* March 1, 2011. Page B1.

impediments. On January 26 Obama sent two ND-GA nominees to the Senate, both of them African-American women: federal public defender Natasha Perdue Silas and U.S. Magistrate Linda Walker, a former county attorney for Fulton County, which holds Atlanta. The two nominations bogged down in an apparent conflict between Isakson and Chambliss on one side and the White House on the other. The GOP senators had endorsed the Walker nomination, yet they refused to submit blue slips, de facto endorsements, for Silas.¹¹⁶ The senators declined to explain why they objected to Silas, with Chambliss saying, "I don't discuss judges." Isakson said, "I'm not going to get into details."¹¹⁷ For reasons that are unclear, the White House insisted that the SJC, chaired by Democrat Patrick Leahy (VT), consider the Walker and Silas nominations as a "package of nominees," meaning both must go through the confirmation process together.¹¹⁸ If the Administration was using the Silas nomination aggressively, as a way to box the Senators in, the strategy was at least partly successful, as Chambliss and Isakson received some negative press over the Silas affair. Daniel Malloy and Bill Rankin, of the *Atlanta Journal Constitution*, portrayed Chambliss and Isakson as intransigent in October of 2011, as it became clear the Silas and Walker nominations would fail.

Chabot noted the committee has received a number of letters of support for Silas.

Larry Thompson, the former deputy U.S. Attorney General under called her "smart, diligent and fair." State House Majority Whip Edward Lindsey, R-Atlanta; Fulton District Attorney Paul Howard; and former U.S. Attorneys Richard Deane and Kent Alexander also wrote letters of support for Silas' nomination.

¹¹⁶ "Federal Judge Vacancies Declared 'Emergencies'" Daniel Malloy, Bill Rankin *Atlanta Journal Constitution* October 13, 2011. Page A4.

¹¹⁷ ¹¹⁷ "Federal Judge Vacancies Declared 'Emergencies'" Daniel Malloy, Bill Rankin *Atlanta Journal Constitution* October 13, 2011. Page A4.

¹¹⁸ According to SJC spokeswoman Erica Chabot, the White House considered Silas and Walker "a package of nominees." It is a practice the committee had employed several times with multiple nominees from the same state. ("Senate fills two seats on bench" Bill Rankin *Atlanta Journal Constitution* March 1, 2011. Page B1.)

By not giving a blue slip for Silas, Georgia's two senators are effectively blocking the Senate from being able to vote on her nomination. If the committee continues to view Silas and Walker as a "package," it could also block a vote on Walker as well.

Chambliss and Isakson wrote a joint op-ed in the *Atlanta Journal-Constitution* in May 2005 in which they argued for swift consideration for Bush's nominees. Republicans were then in the midst of a push to change Senate rules that ended when Democrats agreed to limit their filibusters of nominees.

"Not only does the Constitution require an up-or-down vote, denial of an up-or-down vote goes against basic principles of fairness," they wrote. "... the Senate must give each nominee a fair, up-or-down vote to fulfill its constitutional duty."

Glenn Sugameli, who closely tracks judicial nominations for the environmental group Defenders of Wildlife, cited the op-ed in charging the senators with hypocrisy.

"They've said that [nominees deserve a vote] over and over again," Sugameli said of Georgia's two senators. "Well, to my knowledge, the Constitution hasn't changed. It seems what's happening is a change of their position that's all about partisan politics and a Democratic president."¹¹⁹

In his first term Obama nominated three African-Americans to the wholly unrepresented ND-GA, and one, Steve Jones, had actually received an SJC hearing. It seems likely that Obama would have sat two of his three black nominees if his Administration had not declared Silas and Walker a "package." The packaging of the two nominees perhaps was an instance of form over substance; Obama made a gesture to black supporters in Georgia with the nominations, and controversy was generated when the GOP senators effectively blocked both African-Americans, when actually Chambliss and Isakson only objected to Silas. As of March 2013, the White House has not moved to fill the seats targeted by the Silas and Walker nominations.

Obama tried to do the same thing in South Carolina when he nominated Michelle Childs, a state Circuit Court judge, and Richard Gergel, a Columbia attorney, to the state's singular district

¹¹⁹ ¹¹⁹ "Federal Judge Vacancies Declared 'Emergencies'" Daniel Malloy, Bill Rankin *Atlanta Journal Constitution* October 13, 2011. Page A4.

bench. Obama nominated Childs and Gergel, who are both black, on December 22, 2009, almost certainly intending that the two go through the Senate as a package deal. Indeed the dates of Gergel's and Childs' progressions toward confirmation have identical dates for hearings and floor votes, as both were confirmed on August 5, 2010 by voice votes. The successful nominations of Childs and Gergel are puzzling considering the uphill battle the Administration faced in Georgia.

In Obama's first term, South Carolina was targeted with five federal judicial nominations, an unusually large amount. Gergel and Childs were only two of four district judges, and two of five federal judges overall, appointed to South Carolina during Obama's first term. A trio of white nominees got the nod from Obama on the heels of Gergel's and Childs' confirmations. Mary Lewis was working as an attorney in Columbia when she was recommended to the Obama Administration by Representative Jim Clyburn (D-SC), the House Majority Whip and longtime African-American legislator. It is likely that Lewis, having been recommended by the African-American Democrat Clyburn, was the most vulnerable of the three South Carolina nominees put forth by Obama in 2011. Timothy Cain, a district court nominee, was a South Carolina family law judge and was personal friends with and a former colleague of Senator Lindsay Graham (R-SC), a member of the Senate judiciary Committee. Graham had thrown his full support behind Cain, saying, "I hope to get Tim into the mix. He's a fine man of great character and wonderful disposition, the kind of person we need as a judge."¹²⁰ When Fourth Circuit Court of Appeals Judge Blane Michael died in March of 2011, Obama nominated Stephanie Thacker, a former U.S. Attorney. While Cain and Thacker's nominations proceeded toward confirmations without

¹²⁰ "Graham to push federal judgeship for Oconee family law judge Tim Cain" Ray Chandler *Independent Mail.com* August 28, 2010 <http://www.independentmail.com/news/2010/aug/28/graham-push-federal-judgeship-oconee-family-court/?print=1> . Retrieved February 26, 2013.

incident, Lewis' nomination stalled, and she did not receive a hearing until February of 2012, eleven months after Obama had nominated her.

Although Lewis was approved by the Democratic-controlled SJC with a 10-6 vote (Lindsay Graham was the only Republican on the Committee to vote for her), Senator Jim DeMint (R-SC) vowed to oppose Lewis in retaliation for Obama's January 2012 recess appointments to the National Labor Relations Board. DeMint, who had voted for Childs and Gergel eighteen months earlier, said he was rejecting all of the president's nominees to protest Obama's winter recess appointments. "President Obama has shown a complete disdain for the people's elected representatives and our duty to advise and consent on nominations," DeMint said.¹²¹ "Unless he revokes his unprecedented recess appointments that defied the constitutional role of Congress, I don't intend to support any of his judicial nominees this year."¹²² While Graham voted for Lewis on the Senate floor in June of 2012, DeMint voted against her, and Lewis was confirmed by a vote of 64-27, a remarkably close vote for a district court nominee.

It is possible that Obama's attempts to diversify the South Carolina bench with the Gergel and Childs nominations were successful because at least four, and eventually five, federal seats were available in the state. The powerful senator Lindsay Graham got his friend Cain to the bench in the wake of the Gergel's and Childs' confirmations. Obama may be expected to comply with Graham and DeMint should any more federal judgeships open up in the state in 2013. Georgia, by contrast, had both an acute need for diversity and a tight framework—four vacancies, but the GOP Senators seemed inclined to fill only two—which left little room for compromise.

¹²¹ "DeMint to Oppose Columbia, S.C., Lawyer as Federal Judge" James Rosen *The Miami Herald* March 8, 2012 Page A4.

¹²² "DeMint to Oppose Columbia, S.C., Lawyer as Federal Judge" James Rosen *The Miami Herald* March 8, 2012 Page A4.

In December 2010, Obama nominated WD-TN Judge Bernice Donald for a judgeship on the United States Court of Appeals for the Sixth Circuit. Bill Clinton had nominated Donald to the seat in 1995, with the approval of GOP Senators Bill Frist and Fred Thompson. Donald's 2010 ascent was smooth, and both Senator Bob Corker (R-TN) and Lamar Alexander (R-TN) praised her on the Senate floor. After Donald was approved by the SJC, only Senators David Vitter (R-LA) and Jim DeMint (R-SC), voted against the nomination. The move left WD-TN without a black judge, and in December of 2011 Obama tapped Assistant U.S. Attorney John Fowlkes, an African-American, to replace Donald. Again with Corker's and Alexander's endorsements, Fowlkes was confirmed by the Senate. Only two senators voted against confirming Fowlkes, Senator Mike Lee, (R-UT) who had at that point voted against every one of Obama's judicial nominations, and DeMint. Fowlkes' confirmation, despite a regime including two GOP Senators, was an easy diversification score for Obama. Among the states wherein Obama was at least partially successful while encountering a structural disadvantage, Georgia was the hardest southern state to diversify, with South Carolina offering enough opportunities for the president to make deals.

Obama achieved racial diversity on the Mississippi district courts. Bill Clinton chose to nominate Claude Pepper, a white man, to the all-white Northern District of Mississippi bench, opting not to box in GOP senators Thad Cochran and Trent Lott. Obama, facing a similar situation in the Southern District of Mississippi, placed former U.S. Attorney Carlton Reeves, an African-American, on the SD-MS bench. Reeves was endorsed on the Senate floor by Senators Thad Cochran (R) and Roger Wicker (R). So Clinton nominated a white man and Obama nominated a black man; by itself this means little, but had Clinton been more aggressive he very likely could have achieved even rather unlikely confirmations. When Clinton did actually

nominate African-Americans to district court seats in the South, even when both Senators were Republicans, he had a perfect record, getting all four nominees confirmed. In three such instances the Senators were Bill Frist and Fred Thompson of Tennessee, making the state a true outlier in the story of African-American diversification of the region's bench. Clinton's other successful nomination of an African-American when structural conditions were unfavorable was his appointment of James Beatty to the Middle District of South Carolina. South Carolina's Senators were Republican's Jesse Helms and Lauch Faircloth.

Mississippi's politics suggest that Clinton may have passed up an excellent opportunity to achieve diversity even with Cochran and Lott presiding, an opportunity Obama did not miss fifteen years later. Whites, who make up 63 percent of Mississippi's population, typically vote heavily for Republican candidates in federal races, often upwards of 80 percent. Conversely, blacks, who make up 37 percent of the state, overwhelmingly support Democrats, many times with over 90 percent of the vote. For a Democrat to win in Mississippi, therefore, he or she needs to win the black vote overwhelmingly, but find a way to win a quarter or more of the white vote. So GOP senators in Mississippi understandably may want to try to slice off some African-American votes to keep Democratic challengers at bay. Perhaps the politics were different in Mississippi in the 1990s. Admittedly, a scenario wherein a GOP Senator becomes aggressive about courting black votes may be more operative when an incumbent Senator running for reelection must contend with Obama's coattails, as Roger Wicker did in 2012. Nevertheless, Carlton Reeves received Wicker's full endorsement before the Senate Judiciary Committee. "Mr. Reeves has an impressive resume, and will bring a diverse background of service to the federal

bench” said Wicker. “Qualified, impartial judges are critical to continuing our nation’s legal traditions.”¹²³

The easy confirmations of John Fowlkes, in Tennessee with Bob Corker’s endorsement, and Reeves, with Wicker’s endorsement, may or may not presage a sustainable path for diversity on the South’s district courts. The Obama Administration has a unique advantage concerning diversification in that attempts to thwart black nominees are also attempts to thwart the goals of a black president. Future Democratic presidents may not be able to diversify as well as Obama has. For instance Bill Clinton, with his high-profile scandals, was an easier target for his political foes. Further, the fact that black election turnout was historically, and predictably, high in the 2008 and 2012 Elections cannot be discounted. With a white man on the Democratic ticket in 2016, will GOP politicians who have little or nothing to gain by endorsing black nominees be as reluctant to obstruct them? The Senators in Tennessee and Mississippi could have acted as Georgia Senators Chambliss and Isakson acted toward ND-GA nominee Natasha Perdeu Silas, effectively stalling her nomination not because she is black, per se, but because they could have gotten a better deal as in-party senators if a GOP presidential candidate wins in 2012. Having endorsed Steve Jones for the ND-GA seat, the Georgia senators defied Obama and endured criticism for it. Corker and Wicker, up for reelection in 2012, decided to endorse black Obama nominees.

¹²³ “U.S. Senate Confirms Reeves for Southern District of Mississippi” Wally Northway *Mississippi Business Journal* December 20, 2010.

Strategic Diversification Under Obama

Obama's diversification efforts have been both more aggressive and more successful than Bill Clinton's efforts. Obama, of course, has an important advantage over Clinton, as there now is a much bigger pool of qualified minority candidates. Very much like Clinton's diversification efforts, Obama's nominations of minorities seemingly are designed to garner support among minorities and liberals. In fact political opponents of the President have painted Obama's diversification of the federal courts as a political strategy. Speaking on National Public Radio in August of 2011, Ed Whelan, a prominent conservative who used to work in the George W. Bush Justice Department, said, "[t]he Obama administration doesn't have a coherent judicial philosophy so it's not surprising that it's falling back on diversity, which I think it sees among other things as appealing to its various political constituencies."¹²⁴

With no in-party senator to share the rewards of nominating, Obama went right after the South, nominating African-Americans four times to Georgia, once to Alabama, twice to South Carolina, once to Mississippi and once to Tennessee. Overall, Obama concentrated his African-American nominations to states with considerable African-American populations.¹²⁵ This is not evidence of strategy, strictly, but note that Obama declined to diversify benches in California, Nevada, Texas, or Rhode Island, despite acute needs for African-American diversity on the states' district benches. Perhaps he thought that Rhode Island's black population of 3.7 percent was not worth a black nominee, and nominations in California, Nevada, and Texas were best used to garner Hispanic support.

¹²⁴ "Obama Gets High Marks for Diversifying Bench" Carrie Johnson *National Public Radio* Aired August 4 2011. <http://www.npr.org/2011/08/04/138903866/obama-gets-high-marks-for-diversifying-the-bench>. Web article retrieved February 28 2013.

¹²⁵ Only four African-American nominations were to states with black populations of less than ten percent. In three of the four states the President was dealing with two Democratic senators, including, remarkably, West Virginia (percentage African-American population is at 3.1), where state judge Irene Berger, an African-American, was shepherded to the bench by Senators Robert Byrd and Jay Rockefeller.

The best evidence of Obama's strategy is provided by Obama's record nominating Hispanics.¹²⁶ Outside of the South, Obama sought Hispanic political support, even cooperating with GOP senators to obtain it. Obama made sixteen non-South appointments wherein he had to deal with two GOP senators, and six of the sixteen such nominees were Hispanic. Obama had a particularly productive relationship with Texas Senators Kay Bailey Hutchison and John Cornyn, nominating four Hispanics (Diana Saldana was nominated twice.). Otherwise, five Hispanic nominees went to California, three went to New York, and two went to Pennsylvania.

Obama's numbers become more dramatic if one considers his appointments of women. "What's happening so far with nominations is extraordinary," said Sheldon Goldman, a political science professor at the University of Massachusetts-Amherst, who has tracked the confirmation process since the 1960s. "Seven out of ten Obama nominees are non-traditional," meaning they have not been white men.¹²⁷ If Obama can maintain his pace into his second term, he will have made important inroads diversifying the federal bench. Yet some things have to go right for the President. For one thing, the President cannot do it alone. During Obama's first term, district court nominees have been stalled more than such nominees of past presidents, according to Goldman.¹²⁸ Goldman said the confirmation rate for appeals court judges is significantly low, too. Goldman chalks up the slow pace of confirmations to an increasingly polarized Washington, rather than any targeting of minorities. Even liberal activists who follow judicial politics, such as Nan Aron, president of the Alliance for Justice, say the delays are more the result of partisanship than of issues related to race or sex.¹²⁹ There is evidence that partisanship, as a hurdle to

¹²⁶ Interestingly, Obama did not nominate even one Hispanic to the South (0 for 37), despite the growing Hispanic population of Georgia (5.4 percent at the 2010 Census) in particular. Perhaps Obama thought African-American diversification was a more pressing need in the region.

¹²⁷ "Obama's push to diversify courts hits a snag" Joan Biskupic *USA Today* June 18, 2010.

¹²⁸ Obama's push to diversify courts hits a snag" Joan Biskupic *USA Today* June 18, 2010.

¹²⁹ Joan Biskupic Obama's push to diversify courts hits a snag" Joan Biskupic *USA Today* June 18, 2010.

diversification efforts at the nomination stage, can be overcome. It would seem that partisanship at the confirmation stage could provide the greatest challenge to court diversity in Obama's second term.

REFERENCES

- Asmussen, Nicole. 2011. Female and Minority Judicial Nominees: President's Delight and Senators' Dismay? *Legislative Studies Quarterly* 36 (4).
- Barreto, M., Loren Collingwood, and Sylvia Manzano (2010). A New Measure of Group Influence in Presidential Elections: Assessing the Latino Influence in 2008. *Political Research Quarterly* XX(X): 1021.
- Bell, Lauren Cohen. 2002. *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation*. Columbus: Ohio State University Press.
- Blalock, Hubert M. Jr. 1968. *Toward a Theory of Minority Group Relations*. New York: Wiley & Sons.
- Bobo, Lawrence D. 1983. White's Opposition to Busing: Symbolic Racism or Realistic Group Conflict? *Journal of Personality and Social Psychology* 45 (6): 1196-1219.
- Chase, Harold W. 1972. *Federal Judges; The Appointing Process*. Minneapolis: University of Minnesota Press.
- Conover, Pamela Johnson. 1988. The Role of Social Groups in Political Thinking. *British Journal of Political Science* 18 (1): 51-76.
- Cox, Gary W., and Matthew D. McCubbins. 1993. *Legislative Leviathan: Party Government in the House*. Berkeley: University of California Press.
- De la Garza, R., and Louis Desipio (1999). *Muted Voices: Latinos and the 2000 Elections*. Boulder, CO: Roman and Littlefield.
- Dovi, Suzanne. 2002. Preferable Descriptive Representatives: Will Just Any Woman, Black, or Latino Do? *The American Political Science Review* 96: 729-42
- Fenno, Richard F. 1978. *Home Style: House Members and Their Districts*. Boston: Little Brown.
- Fisch, Louise Ann. 1996. *All Rise: Reynaldo Garza, the First Mexican American Federal Judge*. College Station: Texas A&M Press

- Giles, Michael, Virginia Hettinger, Todd Peppers. 2001. Picking Federal Judges: A Note on Policy and Partisan Selection Agendas. *Political Research Quarterly* (September): 623-642.
- Goldman, S., Elliot Slotnick, Gerard Gryski, Gary Zuk, Sara Schiavon. 2000. Clinton's Judges: Summing Up the Legacy. *Judicature* 84: 228-255.
- Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan*. New Haven: Yale University Press.
- Griffiths, A. Phillips, and Richard Woldheim. 1960. How Can One Person Represent Another? *Aristotelian Society* Suppl. 34L 182-208.
- Gryski, Gerald S., Gary Zuk, and Deborah J. Barow 1994. A Bench that Looks Like America? Representaion of African-Americans and Latinos on the Federal Courts. *Journal of Politics* 56 (4): 1076-86.
- Guth, James, Lyman Kellstedt, Corwin Smidt, and John Green. 2006. Religious Influences in the 2004 Presidential Election. *Presidential Studies Quarterly* 36: 223-42.
- Hero, Rodney E., and Caroline J. Tolbert. 1995. Latinos and Substantive Representation in the U.S. House of Representatives: Direct, Indirect, or Nonexistent. *American Journal of Political Science* 39 (3): 640-52.
- Ifill, Shrrilyn S. 2000. Racial Diversity on the Bench: Beyond Role Models and Public Confidence. *Washington and Lee Law Review* 57 (2): 405-95.
- Knoll, Benjamin. 2009. Amigo De la Raza? Reexamining Determinants of Latino Support in the U.S. Congress. *Social Science Quarterly* 90 (1): 175-98.
- Law, David S. . 2004. Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma. *Cardozo Law Review* 26 (2): 479-423.
- Leal, D., Matt Barreto, Jongho Lee, and Rodolfo de la Garza (2005). The Latino Vote in the 2005 Election. *PS: Political Science and Politics* 38: 41-49.
- Leighely, Jan E., and Arnold Vedlitz. 1999. Race, Ethnicity, and Political Participation: competing Models and Contrasting Explanations. *Journal of Politics* 61 (4): 1092-1114.
- Long, J. Scott. 1997. *Regression Models for Categorical and Limited Dependent Variables*. Thousand Oaks, California: Sage.
- Lott, John R. 2005. The Judicial Confirmation Process: The Difficulty with Being Smart. *Journal of Empirical Legal Studies* 2 (3): 407-47.
- Maisel, Sandy. 2009. "Rating United States Senators: The Strength of Maine's Delegation since

1955." Presented at the United States Senators from Maine: 50 years of Leading the Nation, Colby College.

Mansbridge, Jane. 1999. Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes" *Journal of Politics* 61: 627-47.

Martinek, Wendy L. 2006. Lower Federal Court Confirmation Database. Accessed October 11, 2008.

Martinek, Wendy L., Mark Kemper, and Stephen R. Van Winkle. 2002. To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998 *Journal of Politics* 64 (2): 337-61.

McCarty, Nolan, Keith Poole and Howard Rosenthal. 2001. The Hunt for Party Discipline in Congress. *American Political Science Review* 67: 673-88.

Neff, Allen. 1981. *The United States District Judge Nominating CommissionsL Their Members, Procedures and Candidates.* . Chicago: American Judicature Society.

Nixon, David C. and David L. Goss. 2001. Confirmation Delay for Vacancies on the Circuit Courts of Appeals. *American Politics Research* 29 (3): 246-74.

Nokken, Timothy P. 2000. Dynamics of Congressional Loyalty: Party Defection and Roll-Call Behavior, 1947-97. *Legislative Studies Quarterly* 25 (3): 417-444.

Overby, L. Marvin, Beth M. Henschen, Micahel H. Walsh, and Julie Strauss. 1992. Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas. *American Political Science Review* 86 (4): 997-1003.

Pennock, J. Roland. 1979. *Democratic Political Theory.* Princeton: Princeton University Press.

Phillips, Anne. 1998. Democracy and Representation: Or, Why Should it Matter Who Our Representatives Are? *Feminism and Politics* Oxford: Oxford University, 224-40.

Pitkin, Hanna Fenichel. [1967] 1972. *The Concept of Representation.* Berkely: University of California Press

Poole, Keith, Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting.* New York: Oxford University Press.

Primo, David M., Sarah A. Binder, and Forrest Maltzman. 2008. Who Consents? Competing Pivots in Federal Judicial Selection. *American Journal of Political Science* 52 (3): 471-89.

- Rohde, David W. and Kenneth A. Shepsle. 2007. Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court." *Journal of Politics* 69 (3): 664-77.
- Rutkus, Denis Stephen. 2008. *Role of Home State Senators in the Selection of Lower Federal Court Judges*. RL34405.
- Rutkus, Steven, Maureen Bearden, and Kevin M. Scott. 2009. *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*. RL31868.
- Sapiro, Virginia. 1981. When Are Interests Interesting? *American Political Science Review* 75:701-21.
- Scherer, Nancy. 2004. Blacks on the Bench. *Political Science Quarterly* 119 (4): 655-75.
- . 2005. *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process*. Stanford: Stanford University Press.
- Scherer, Nancy. 2005. *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process*. Stanford: Stanford University Press.
- Scherer, Nancy and Brett Curry. 2010. Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts. *The Journal of Politics* 72 (1): 90-104.
- Scherer, Nancy, Brandon L. Bartels, Amy Steigerwalt. 2008. "Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process. *Journal of Politics* (4): 191-208.
- Segal, Jennifer A. . 2000. Representative Decision Making on the Federal Bench: Clinton's District Court Appointees. *Political Research Quarterly* 53: 137-50.
- Slotnick, Elliot E. 1980. Norms in Judicial Selection: Will they affect the Senate's Role? Part II. *Judicature* 64: 114.
- Stratmann, Thomas and Jared Garner. 2004. Judicial Selection: Politics, Biases, and Constituency Demands. *Public Choice* 118 (3): 251-70.
- Swain, Carol M. 1993. Black Faces, Black Interests. *The Representation of African-Americans in Congress*. Cambridge: Harvard University Press.
- Tyler, Tom. 1990. *Why People Obey the Law*. New Haven, CT: Yale University Press.
- Walker, Thomas G., and Deborah J. Barrow. 1985. The Diversification of the Federal Bench: Policy and Process Ramification. *Journal of Politics* 47: 596-615.

Welch, Susan, Michael Combs, and John Gruhl. 1988. Do Black Judges Make a Difference? *American Journal of Political Science* 32: 126-36.

Yanez, A. (2008). Myth of the Latino Vote. *Hispanic Link News*.
http://news.newamericamedia.org/news/view_article.html/.

APPENDIX

This dissertation argues that senators nominate minorities to the federal bench to reduce electoral uncertainty. How is this reduction in uncertainty realized? To answer, a quantification of minority support is needed. Senatorial election exit polls indicating what percentage of Hispanics support the incumbent could be used. The unit of analysis would be a senator's single term. The right-hand-side would feature a dummy variable indicating a senator's nomination of a Hispanic. To isolate the increased support generated by a minority nomination, on the left-hand-side I would subtract the incumbent's percentage support among Hispanics in her election victory six years earlier from her percentage support among Hispanics. If she lost support among Hispanics over the last six years, the dependent variable will be a negative quantity. This DV would keep the right-hand-side of the model simple, as the raw number of Hispanics in the state—a number that will change over six years—is irrelevant.

The above approach is unlikely to work. As measures of Hispanic support, exit polls will be rough. Even if we could count the actual votes of Hispanics—a fantastical notion—election results are very “noisy,” and I don't think they could help isolate something as subtle as support generated by a district court nomination. A better solution is to follow the money. The power of minorities has grown and so have their lobbying efforts. The League of United Latin American Citizens (LULAC) and the Mexican American Legal Defense and Educational Fund (MALDEF) are powerful groups representing Hispanic interests. The contributions of these groups to senatorial campaigns are matters of public record, and therein could lay the dependent variable that could capture Hispanic support. Individual campaign contributions also would be an

excellent proxy for Hispanic support for a senator. I could start by matching lists of Hispanic surnames provided by the U.S. Census Bureau with files from the Federal Election Commission and individual senatorial candidates. Hispanic support should stand out using the “follow the money” approach because Hispanic financial support for candidates is both growing and sensitive to stimulus. In 1998, Hispanics, who made up almost 12 percent of the overall population, accounted for less than 2 percent of individual campaign contributions to federal candidates and political committees during the 1998 elections. That amounted to less than \$10 million out of the more than \$640 million given by individuals to federal candidates and other political committees in 1997-98.¹³⁰ Depending on what source I checked, Hispanic contributions either tripled or quadrupled between the 2000 Election and the 2012 Election.

In the follow the money model, the unit of analysis again would be a senator’s single term. Hispanic support would be measured by dividing the amount of Hispanic money collected by a senator by her state’s raw number of Hispanic residents. This will give us a “dollars per Hispanic constituent” figure. We could subtract the “dollars per” figure from the incumbent’s previous campaign, so in some units of analysis the DV could be a negative figure.

Extra leverage can be gained by breaking down Census figures to assess how Hispanic populations are changing during senators’ terms. A fine grained dependent variable is attainable by comparing the rate of Hispanic-population growth with the rate of Hispanic-contribution growth. A senator whose rate of contributions lags behind population may do well to align himself with the Hispanic community, perhaps with a Hispanic district court nomination.

¹³⁰ Rafael Lorente “Political Candidates covet Hispanic vote, money” http://www.campaignfinance.org/federalhtml/political_candidates_covet.html. Accessed April 21, 2013.