

The Nomination and Confirmation of Federal Judges: An Integrated Approach

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Abstract

Despite a voluminous literature on the factors affecting the time to confirmation for judicial nominees, and a smaller but robust literature on the time to nomination, scholars have seldom treated the process of filling a federal court vacancy as an integrated one. Although our understanding of institutional interactions has been advanced by evaluating the factors that influence the time to a President's nomination or the time to Senate confirmation, looking individually at the two steps needed to fill the vacancy necessarily ignores the interconnected and dynamic nature of the process. Here we argue for a new and unified approach to the nomination and confirmation process. One of the advantages of this perspective is the ability to evaluate whether or not the president and Senate fill vacancies on busier courts faster than on courts with smaller caseloads. We find some evidence that caseloads matter for vacancies, suggesting that district court nomination and confirmation battles are more than merely opportunities for political posturing by the executive and legislature.

INTRODUCTION

The issue of vacancies in the federal judiciary has received considerable attention by those internal to the courts and by scholars and practitioners over the past several years. Chief Justice Rehnquist, in several Year-End Reports on the Federal Judiciary (Rehnquist 1998, 2002, 2003), called on Congress to promptly confirm the president's nominees to the district courts and the courts of appeals, and Chief Justice Roberts returned to the theme as part of his 2010 Year-End Report (Roberts 2011). However, particularly in the past 12 years, blame for the vacancy crisis has been most often laid at the foot of the U.S. Senate, which has been criticized for the increasing amount of time it takes to confirm the president's nominees to the lower courts (see, e.g., Lithwick 2010; Tobias 2012). Only recently, however, have scholars and pundits alike begun to realize that at least part of the delay in filling vacancies is the responsibility of the president and his legal advisors, who must identify and vet potential nominees and then forward those names to the Senate for its consideration (Bannon 2013; Wheeler 2013). Defenders of the president and his role in creating or exacerbating the vacancy crisis often rejoin that, particularly at the level of the district courts, the responsibility for the initial identification of candidates for judgeships lies with home-state senators and political figures from within the state (see, for example, Goldman 1997). Although senatorial courtesy institutionalizes a role for home-state senators of the president's party, the Senate blue slip process also gives home-state senators not of the president's party leverage in the process. It forces the president to secure at least the acquiescence of said senators if he hopes to see Senate confirmation of his nominees.

Despite the fact that the process of nominating and confirming nominees to the lower courts is one that involves both the Senate and the executive at every step, scholars have typically focused on the nomination or confirmation process as if one piece of the process is somehow more consequential, or perhaps more kindly, illustrative of the whole. To be sure, one component of the process may stand in for the whole course of filling a vacancy inasmuch as nominees who are difficult to select may also tend

to be difficult to confirm, but it may also be the case that factors that shape delay in the nomination process may not influence the confirmation process or vice versa. Furthermore, from the perspective of the judiciary, the source of delay in filling a vacancy is immaterial; no judge can staff the bench (with the rare exception of a recess appointment) until the president nominates and the Senate confirms. We argue in this paper that certain questions are better addressed by looking at the duration of the entire process of filling the vacancy, rather than looking solely at the nomination or confirmation process. In particular, we ask whether vacancies on courts where the caseload is more onerous than others are filled more promptly.

Put another way, although the time required to fill vacancies has undoubtedly increased over the past 50 years, is it the case that the president and Senate respond more promptly to vacancies where judges are most desperately needed, or do the pleas of those courts fare no better than their less overwhelmed brethren? We find that vacancies that arise on courts where the per-judge workload is higher are indeed filled more quickly. This conclusion offers some hope that despite the general concerns about the impact of the breakdown in president-Senate relations widely observed over the past decade or so, both institutions together are more able to respond more promptly to the judiciary's greatest needs when those needs arise. More generally, our approach to analyzing what factors influence the duration of judicial vacancies resolves several competing claims between the nomination and confirmation literatures, and importantly, it offers a framework for a more thorough analysis of staffing the federal judiciary.

Factors Affecting the Senate Consideration of Nominees

Although there are few studies that have considered the judicial vacancy as the unit of analysis, there is an abundant literature on the two separate components of the vacancy: the selection of a nominee by the president and the consideration of that nominee by the Senate. Of the two, there is far more analysis of the confirmation side than of the nomination side of the process. Scholars have

demonstrated that the factors affecting Senate consideration of nominees to the courts can be broken down into several categories: the attributes of the nominee; the characteristics of the Senate and related, Senate-president relations; and finally, interest group activity. To the extent that the nominees to the district courts are considered as part of quantitative models, they are often included in analyses with court of appeals nominees (Bell 2002; Holmes, Shomade, and Hartley 2012; Martinek, Kemper, and Van Winkle 2002; Primo, Binder, and Maltzman 2008; Stratmann and Garner 2004)² and it may be difficult to determine if, particularly over the last 20 years or so, the confirmation processes have diverged for district and appeals court nominees. Nonetheless, either explicitly or implicitly, scholars argue that the factors affecting the duration of the confirmation process for district court judges are similar to those shaping the time-to-confirmation for appeals court nominees, with the caveat that since the 1980s, the confirmation process typically moves faster for district court nominees than for the courts of appeals (Hartley and Holmes 1997).³

Concerning the first category, attributes of the nominees, researchers have pointed to both the ideological extremism of nominees and their quality as considerations that affect the duration of the confirmation process (Goldman 1997; Martinek, Kemper, and Van Winkle 2002). In the past 30 years especially, candidates with reputations for being ideologues have faced greater scrutiny (see, e.g., Goldman et al. 2001; Goldman, Slotnick, and Schiavoni 2009; Goldman, Schiavoni, and Slotnick 2011). Some work has demonstrated that candidates with higher ABA ratings are more likely to be successful (Holmes, Shomade, and Hartley 2012; Martinek, Kemper, and Van Winkle 2002; Solowiej, Martinek,

² Bell (2002) and Stratmann and Garner (2004) include a variable indicating court type, effectively constraining the coefficients in the models to be the same for district and appeals court nominees (with a varying intercept); Martinek, Kemper, and Van Winkle (2002) and Holmes, Shomade, and Hartley (2012) have different models for appellate and district nominees. Primo, Binder, and Maltzman (2008), who test competing pivot models on district and appeals court nominations, estimate separate models for district and appeals court nominees.

³ See Shomade, Holmes, and Hartley. (n.d.) for a helpful overview of this literature.

Brunell 2005; Stratmann and Garner 2004), although Binder and Maltzman (2009) do not find a statistically significant effect for this measure of quality. The effect of nominees' gender and race on the confirmation process is less clear from the literature (Bell 2002; Hartley 2001; Hendershot 2010; Nixon and Goss 2001; Holmes, Shomade, Hartley 2012; Solowiej, Martinek, and Brunell 2005).⁴

Regarding characteristics of the Senate, scholarly work has pointed to the ideological composition of the chamber, especially the increased polarization of recent decades (McCarty and Razaghian 1999), as a cause for delays in confirmation. Closely related, lower court nominations, particularly those to the courts of appeals, can also be used as an opportunity for senators to make ideological appeals to specific constituencies. Here senators are able to signal to the elites and activists that they are attentive to the activists' concerns and are addressing them (Scherer 2005). Concerning relations between the president and Senate, here work published by Binder and Maltzman (2002, 2009) and Scherer, Bartels, and Steigerwalt 2008 (to name a few) offer evidence of a statistically significant effect for the ideological distance between key members of the Senate and the president on the duration of the confirmation process. Not surprising, such studies also point to an effect for divided

⁴ Binder and Maltzman (2002; 2009) and Nixon and Goss (2001) analyze only nominations to the courts of appeals. Looking at the research that looks at district court nominations (alone or in combination with appeals court nominees), Bell (2002) finds that gender and race both matter in periods of divided government. Martinek, Kemper, and Van Winkle (2002) find that the Senate moves more slowly on minority nominees, while Hartley (2001) finds that the Senate moves slower when the nominee is a woman. Stratmann and Garner (2004) find no effect for race or gender. Martinek, Solowiej, and Brunell (2005), though not specifically separating district and appeals court nominees, look at periods of unified and divided control of the Senate and the presidency and find differential effects for gender and race (women move faster but minorities move more slowly under unified Republican control; both women and minorities move more slowly under a Democratic president and Republican Senate than under unified Democratic control or periods where there is a Democratic Senate and Republican president). Hendershot (2010) finds gender to influence time to confirmation in eras he characterizes as advice-and-consent (as opposed to merely "consent" eras) and that African-American nominees waited longer to be selected between 1943 and 1976 (and advice-and-consent era) and 1977 and 1994 (a consent era), but not in other periods. Holmes, Shomade, and Hartley (2012) find that race and gender matter most for district court nominees nominated after Bork and in the time from committee report to Senate vote. In short, there appears to be mixed evidence for the proposition that race and gender have an effect on the time to confirmation of district court judges.

government.⁵ The literature has also suggested that presidents who share greater partisan ties with home state senators have greater success in moving their nominees through the confirmation process (Bell 2002; Hendershot 2010; Holmes, Shomade, Hartley 2012; Stratmann and Garner 2004). Finally, some studies have shown that nominations during a president's second term can face greater delays (Martinek, Kemper, and Van Winkle 2002; Nixon and Goss 2001).

The third important factor for the confirmation process concerns interest group activity. Scholars have demonstrated both that the amount of advocacy by groups varies greatly depending on the nomination (Caldeira, Hojnacki, and Wright 2000), and that importantly, opposition can delay the process considerably (Bell 2002; Holmes, Schomade, and Hartley 2012; Scherer, Bartels, and Steigerwalt 2008; Steigerwalt 2010). One should note that interest group opposition to nominees to the courts of appeals is much more common than to the district courts.

Factors Affecting Timing of Nominations

There has been significantly less work on the factors that influence the timing of the president's nominations to the lower courts than on the determinants of how long the Senate takes to confirm those nominees. Nonetheless, those factors generally fall into the same categories as those influencing the time to Senate action on the nominee—nominee attributes, the relationship between the president and the home-state senators, and the composition of the Senate.

The factor that has perhaps been most consistently identified as influencing how long it takes for the president to make a nomination to a district court is the composition of the Senate delegation

⁵ Among models that explicitly include district court nominations, Bell (2002) models divided government explicitly and finds nominations move more slowly under divided government; Martinek, Kemper, and Van Winkle do not measure divided government directly, but measure the proportion of the Senate Judiciary Committee seats held by the president's party; Primo, Binder, and Maltzman (2008) find that while divided government is generally significant, better predictors include knowing the location of the majority party median and the filibuster pivot. Holmes, Shomade, and Hartley (2012) find no effect of the distance between the President and the filibuster pivot on the amount of time a nomination spends on the floor of the Senate.

for the state in which the vacancy falls. Massie, Hansford and Songer (2004), as well as Binder and Maltzman (2009) and Hendershot (2010) find that the greater the distance between the president and the home-state senators,⁶ the longer it takes for a vacancy to be filled with a nominee. In addition to ideological distance, nominations are made more promptly to seats in states of Senate delegations with at least one senator of the president's party (Binder and Maltzman 2009; Massie, Hansford and Songer 2004).

The composition of the Senate also influences how long it takes for the president to nominate an individual for a district court judgeship. While divided government appears to have no influence on how long a vacancy stands open before the president submits a nomination (Binder and Maltzman 2009; Massie, Hansford, and Songer 2004), the distance between the president and the chair of the Senate Judiciary Committee does (Binder and Maltzman 2009; Hendershot 2010).

There are several additional factors unrelated to those affecting Senate consideration of nominees that can affect how long it takes the president to make a nomination. Massie, Hansford, and Songer (2004), find, for example, that vacancies created by the death of a judge---as opposed to those created by resignation, retirement, senior status, elevation (and, presumably, impeachment)---take longer for a president to fill.

Why Study Vacancies?

Given the complementary nature of the literature on nomination and confirmation, it may appear superfluous to study judicial vacancies. That is, if the same factors affect both parts of the process, can we not merely assume that those factors also affect the total duration of the vacancy? Such

⁶ For Massie, Hansford, and Songer (2004), the senators are measured as the average of the NOMINATE scores of the two home-state senators; for Binder and Maltzman (2009), it is the NOMINATE score of the most distant of the two senators from the President). For Hendershot (2010), the ideological distance to the furthest senator matters across regimes (1943-76; 1977-94; 1995-2006) when both senators are of the president's party, but only matters when there is one senator of the president's party between 1943 and 1976. Hendershot generally characterizes the 1977-94 era as one where "interbranch influence and senatorial influence is marginalized, and the floor is not, per se, a constraint upon the selecting president" (338).

a conclusion, intuitive as it might seem, may be premature. When evaluating the time to confirmation, scholars invariably pay attention to the role of the senators whose blue slips will determine whether the Judiciary Committee proceeds with consideration of the nomination. But one function of the blue slip is to ensure that the president consults with the home-state senators *prior* to making the nomination. More formally, Binder and Maltzman (2009) argue that the blue slip was institutionalized, and extended to senators of both parties, to give the Senate leadership information about hurdles they could expect when moving forward with confirmation of the president's judicial nominees. The blue slip may best be viewed as a manifestation, on the confirmation side of the process, of the protocol that is expected on the nomination side.

Although looking at the blue slip senators in studies of confirmation may serve as a proxy for the nomination stage, a preferable approach would be to look at the duration of the vacancy. Focusing on the duration of the vacancy could resolve interesting contradictions in the literature. Most notably, analysis of the time to nomination indicates that divided government is not a factor in determining how long it takes the president to make nominations, but divided government does appear to extend the time it takes for the Senate to confirm the president's nominees. To the extent that scholars wish to know if divided government truly affects how long vacancies endure, the relatively straightforward solution we propose is to model the vacancy duration directly.

Using the vacancy as the unit of analysis also offers the advantage of understanding the perspective of the judiciary (and the judiciary's staffing needs), while at the same time respecting the role the president and the Senate play at the center of the process. It is of little use to the judiciary to focus solely on the time to nomination or the time to confirmation, as the seat remains empty for so long as there is no confirmed nominee in place (with the rare exception of a recess appointment). Given scholars' interest in the effect of judicial workload on the speed with which the bench is staffed, it would be incomplete to look only at the nomination or the confirmation when both are necessary to fill a

vacancy. For us, then, the unit of analysis reflects the time from when the vacancy begins---due to a seat being left open by a resignation, death, elevation, retirement or choice of senior status from an exiting judge---until the time that a new judge has been confirmed by the Senate.

There are two exceptions to the literature's focus on the selection and confirmation stages in isolation, although neither use the duration of the vacancy as the unit of analysis in the way that we do. Hendershot (2010) examines what he calls appointment events, "attempt[s] to place a specific nominee to a specific vacancy" (332), but then separates, for his analysis, the "selection" and "confirmation" stages of advice and consent. Further, Hendershot's focus on the evolving role of the president and the Senate leads him to set aside factors other analyses have deemed relevant at both the selection and confirmation stages. Bannon (2013) properly sheds light on the increasing number of vacancies under President Obama, but she does not identify reasons for this trend other than to direct blame to the Senate for their dilatory tactics and to the Administration for its failure to submit nominees for consideration. Her analysis of one only administration does point out that a president must await recommendations from the home state senators before considering possible nominees and that some of the delay in the forwarding of nominations to the Senate may be the responsibility of home-state senators or other home-state political figures.

Hypotheses

We have argued for the advantage of using the vacancy as the unit of analysis, but such an analysis need not start from first principles. The literature has identified factors that influence the time to nomination and the time to confirmation, and these commonalities (with some important modifications) offer a promising starting point for developing hypotheses related to the duration of the vacancies on the district courts. We lay out these hypotheses below. Prior to doing so, however, it is important to note that because we have adopted vacancies as the unit of analysis, attributes of the

nominee should not be modeled, because the nomination is made after the vacancy exists. We can, however, focus on traits of the judge who created the vacancy.

Several characteristics of the judge, including race and gender, are associated with time to confirmation. Given a shared desire to diversify the judiciary (alongside other goals presidents and senators seek to fill while making and confirming judicial appointments) (Asmussen 2011; Goldman 1997), it seems reasonable to expect that filling vacancies left by non-white and female judges may take longer because there may be pressure to retain the diversity on the bench to which the predecessor contributed. As a result, the length of time to replace such nominees may increase.

H1: Seats vacated by female or minority judges will remain vacant longer than those vacated by white male judges.

Scholarship on the factors that shape how long presidential selection of a nominee takes notes the importance of how the seat is vacated. Massie, Hansford, and Songer (2004) find that vacancies created by the death of a judge, which are presumably unexpected, take longer to fill than those created by other means (retirement, resignation, elevation, senior status, new judgeship, the rare impeachment and removal). While they find evidence for their hypothesis, it might be more reasonable to separate more “anticipated” events (retirement, senior status, elevation, and new judgeships) from “unanticipated” events (resignation, removal, and death).

H2: Vacancies created by unanticipated departures will take longer to fill than those created by anticipated departures.

In addition to characteristics of the judge, characteristics of the Senate delegation from the same state as the court undoubtedly influence how long it takes to fill the vacancy. This is likely to be observed in two ways. First, under conditions of senatorial courtesy (at least one of the state’s senators are of the president’s party), nominations are likely to be made more expeditiously (Binder and

Maltzman 2009; Massie, Hansford, and Songer 2004).⁷ Second, and related, if the president is deferential to the home-state senators at the stage of nomination, the confirmation is likely to proceed more quickly (Bell 2002).

H3: Vacancies occurring under senatorial courtesy will be filled more quickly than those do not arise under senatorial courtesy.

Moreover, because both senators' views from the home state of the nominee are considered by the Judiciary Committee and the full Senate in the form of the blue slip, both same-state senators have the opportunity to delay (or kill) a nomination in the Senate. Thus presidents are faced with the task of finding nominees suitable to their own agendas, while also knowing the nominee must be acceptable to the most ideologically distant senator in a state's Senate delegation. Therefore as the distance between the president and the furthest senator increases, so should the difficulty of locating and confirming a nominee expeditiously (Binder and Maltzman 2009; Massie, Hansford, and Songer 2004).

H4: The further the more ideologically distant senator (of the same state as the court on which the vacancy arises) from the president, the longer it will take to fill a vacancy.

Characteristics of the political environment are expected to influence the speed with which judicial vacancies are filled. The degree to which the president and Senate's preferences are aligned, and the degree to which the Senate is able to conduct its business, both likely influence the pace at which judicial vacancies are filled. We raise four hypotheses related to the political environment, based on expectations from the aforementioned literature.

H5: Vacancies will be filled more promptly under unified government than under divided government.

H6: The greater the ideological distance between the president and the Chair of the Senate Judiciary Committee, the longer it will take to fill a vacancy.

H7: The greater the degree of partisan polarization in the Senate, the longer it will take to fill a vacancy.

⁷ Hendershot (2010; 332) cites Chase (1972) for the proposition that "courtesy rights essentially create a bargaining game between the executive and home-state senators, which often involve delay strategies designed to improve each actor's leverage over the nomination" but his results tend to show that, across eras, nominations are made more quickly to courts in states with at least one senator of the President's party than those states where both senators are opposite the President's party.

Our penultimate hypothesis rolls together three expectations about the role of the presidential term. First, new administrations will take some time to get up to speed on vacancies, including organizing the vetting process for potential nominees (Massie, Hansford, and Songer 2004). As a result, vacancies likely take more time to fill early in a president's tenure. Second, as the end of a presidential term nears, senators, particularly those not of the president's party, may slow consideration of nominees in hopes their party wins the upcoming election (Binder and Maltzman 2009). Third, Massie, Hansford, and Songer (2004) argue that nominations will be made more promptly in a president's second term (while Martinek, Kemper, and Van Winkle find confirmations will occur less rapidly in a president's second term). Considering these collectively, vacancies occurring in years 1, 4, and 8 of a two-term president will likely take more time to be filled than those occurring in other years.

H8: Vacancies that arise in the second or third year of a presidential term (or first three years of a second term) will be filled more quickly than those that arise in the first year of a president's term or a presidential election year.

Finally, one important justification for studying vacancies rather than nominations or confirmations is to evaluate the effect of judicial workload on the combined actions of the president and the Senate. Specifically, to the extent that members of the first and second branches are concerned about the ability of the third branch to carry out its constitutional duties, vacancies that arise on courts where the workload is greater should be, all else equal, filled more promptly than those that arise on courts with lighter workload. In this context, workload measures should take into account the work of senior status judges, who can ease the burden of a vacancy.

H9: The busier a court is, the more promptly vacancies which arise on that court should be filled.

DATA AND METHODS

Dependent Variable

To identify every vacancy that arose during our study period of 1963 and 2010, we used the Biographical Directory of Federal Judges maintained by the Federal Judicial Center (FJC).⁸ For every judge who departed a district court judgeship (by any method other than reassignment, which involves creating a new court or judgeship and/or assigning existing judges to a new court or judgeship) after January 1, 1963, and for all new judgeships created after January 1, 1963, we identified the Senate-confirmed successor using the “vice” field in the FJC data. The duration of the vacancy is calculated as the number of days between the date the position became vacant and the date the successor received the commission.⁹ All vacancies created on the district courts between January 1, 1963, and December 31, 2010, were initially included in our analysis.¹⁰ We choose 1963 as the starting point of our analysis as it is the time after which we have sufficient data for the explanatory variables needed to test our hypotheses.

⁸ <http://www.fjc.gov/history/home.nsf/page/export.html>. Accessed July 23, 2013.

⁹ Two judges, Walter Heen and David Rabinovitz, received recess appointments to judgeships in the timeframe of our study but were not confirmed by the Senate. For these two judgeships, Heen and Rabinovitz are not considered to have filled the vacancies because they were not confirmed by the Senate. There are several additional issues related to tracking judicial vacancies and how they are filled. First, the federal judiciary has, for several years, asked Congress to create “temporary” judgeships, which Congress does by creating a new judgeship and specifying some future vacancy go unfilled. For those future vacancies, there is no successor and those vacancies must be excluded from this analysis. Second, over the time period of the study, Congress has created judicial districts or reassigned judgeships from one district to another. When judges are reassigned, they are not considered to have vacated a position. Third, when Congress creates new judgeships, the “vacancy date” is, in our analysis, the effective date of the statute (though occasionally presidents may reach informal understandings that not all vacancies are to be filled immediately). Fourth, judges increasingly notify the president of their intent to leave active status well in advance of their actual departure dates (see, e.g., <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx>). Lacking consistent data on when these notifications occur, we choose to use the actual vacancy date rather than the date judges notify others of their intent to depart active duty. Fifth, in several cases, the successor received her commission *before* the predecessor departed the seat; in those cases, the duration of the vacancy was 0 days and the cases were treated as left-censored (as having failed before entering the dataset). Sixth, for vacancies that occurred because a judge becomes disabled, FJC data do not list a date that can be used to calculate the date the vacancy comes open, so those vacancies are excluded from the analysis. Finally, for vacancies that occurred before December 31, 2010, but are still pending as of August 31, 2013, the vacancy duration is calculated using August 31, 2013, while indicating that the events are right-censored.

¹⁰ In many previous analyses, seats on the district courts in Puerto Rico and the District of Columbia are excluded because there are no home-state senators. We include these courts and set senatorial courtesy to 0 but also set distance between the president and the furthest home-state senator to 0. Puerto Rico data end up being removed from our analysis, though, due to lack of weighted filings data for the 1963-2010 time period.

We make two decisions that while generally consistent with our theoretical approach, merit special attention. First, given that our dependent variable is a duration, a decision needs to be made as to whether to incorporate time-varying covariates (TVCs) in the analysis. A second, and related, decision is to determine if and when a vacancy should reset. We argue that a vacancy that is carried over from one presidential administration to another should be treated differently. In the language of duration analysis, the vacancy should be considered right-censored if it remains unfilled at the end of one presidential administration, but then should reenter the data when a new presidential administration begins. We then allow the baseline hazard to vary based on the iteration of the vacancy-presidential administration. This is common in analyses of time-to-confirmation, though those models typically right-censor if a nomination is not confirmed by the end of a given Congress. This allows for time-varying covariates at the level of presidential administration, but not at the level of Congress or year. There is one other consideration unique to our analysis. There have been instances where the president has made a nomination to fill a vacancy and the Senate has declined to confirm it, what some have termed “failed nominations” (Binder and Maltzman 2009). We eliminate these failed nominations from our analysis, as they do not result in a filled vacancy.

Independent Variables

To test the first two hypotheses related to the attributes of the exiting judges, we develop dichotomous indicators. To test Hypothesis 1, vacancies created by women and non-whites were identified using the race and gender information in the FJC data. We include the variable *Predecessor Female* to denote if it was a woman who created the vacancy, and *Predecessor Racial Minority* to denote whether the exiting judge’s race was African-American, Latino, or Asian-American. For Hypothesis 2, to measure method of departure, we again relied on the FJC data.¹¹ Judges’ methods for

¹¹ Once caveat warrants mention. For judges who took senior status (and then ultimately retired or died or are still in senior status), the FJC data does not list senior status as a form of exit, but rather indicates senior status by using different dates for exit from active status and termination.

departing active status (thereby creating a vacancy) were categorized into “anticipated” (senior status, retirement, elevation, and new judgeships) and “unanticipated” (resignation, removal, and death) according to information available from the FJC. We employ the dummy variable *Anticipated Vacancy* to signify the former set of events.

NOMINATE scores were used to measure attributes of the Senate delegation of the state in which the court is placed (Carroll, Lewis, Lo, McCarty, Poole, and Rosenthal 2013). *Senatorial Courtesy* is equal to 1 if at least one member of the Senate delegation shared the president’s party at the time of the vacancy, and 0 otherwise. The ideological distance between the president and the most-distant senator, *President-Furthest Home State Senator Distance*, is calculated as the absolute value of the distance between the president’s DW-NOMINATE first dimension score and the first dimension DW-NOMINATE score of the most ideologically distant senator serving at the time the vacancy arose.

Variables related to the composition of the Senate were also largely measured using NOMINATE scores. *Divided Government* is coded 1 if the president’s party was the minority in the Senate at the time the vacancy arose, and 0 otherwise. The ideological distance between the president and chair of the Senate Judiciary Committee, *President-Judiciary Chair Distance*, is coded as the absolute value of the difference between the president’s first dimension DW-NOMINATE score and the first dimension DW-NOMINATE score of the chair. Following Binder and Maltzman (2009), we code the variable *Partisan Polarization* as the distance (absolute value of the difference) between the first dimension DW-NOMINATE scores of the median Republican and Democratic senators at the time the vacancy arose. Finally, to test Hypothesis 8, we collect data related to the year in which the vacancy was created. Our dummy variable, *Presidential Good Years*, denotes vacancies created in years other than 1, 4, and 8 of a presidential term.

We are particularly interested in the effect of workload of the court on the duration of the vacancy, as signified by Hypothesis 9. Typically, caseload is measured by counting filings (either

weighted or total) and dividing that number by the number of authorized judgeships. This approach is used by the annual statistical publications of the judiciary, most notably *Judicial Business of the United States Courts* and *Federal Court Management Statistics*. This method is inadequate for our purposes because the denominator, number of authorized judgeships, specifically ignores vacancies and the implications those vacancies have for the workload of the judges sitting on that court. Habel and Scott (n.d.) discuss the various approaches to measuring the workload on a court. After considering the possibilities for the numerator (the number of cases for a given court) and the denominator (the number of judges serving on a court), we argue that a measure of weighted filings per judge serving (which takes into account vacancies and the contributions of judges in senior status) is the best indicator of the workload judges face given the available data. We incorporate that measure into this analysis as our variable, *Caseload*.

We also add two control variables: the number of court vacancies and an indicator of whether the vacancy lasted more than one administration. Regarding the first, we include the number of vacancies on the district courts at the time the vacancy arises, labeled *Number of Court Vacancies*. Concerning the second control, *Previous Administration Vacancies* denotes those vacancies that arose during a previous president's term in office but carried over to the next administration.

RESULTS

Summary Statistics

Though one might expect the story of vacancy duration over the past 50 years to be one of uninterrupted increase, with isolated spikes related to the creation of new judgeships (which may not be filled as quickly due to the number that omnibus judgeship bills simultaneously create) or the beginning of new presidential administrations, our data show the picture to be more complex. Figure 1 plots the median duration of vacancies created in a given year.¹²

¹² The plot is for those vacancies filled as of August 31, 2013.

(Insert Figure 1 Here)

Several interesting inferences can be drawn from the data displayed in Figure 1. To illustrate one, consider that despite the creation of 113 new judgeships in 1978—expanding the district court bench by more than 25%—the median vacancy duration only increased by about 3 months. That is, although Figure 1 shows a three-year moving average of the median vacancy duration, the median vacancy created in 1977 was filled after 263 days and the median vacancy created in 1978 lasted for 350 days.¹³ The 1984 addition of 53 judgeships also did not create a significant increase in the number of days vacancies stood open.

The most important, and surprising, feature of Figure 1 (and one reinforced by Figure 2) is the significant increase in duration of vacancy in the early 1990s, in the second half of the administration of President George H.W. Bush. The median number of days vacancies remained open in the early 1990s exceeded the median in the last two years of the George W. Bush administration and the first two years of the Obama administration—precisely the time at which a renewed concern for the judicial vacancy crisis seems to have emerged. Figure 2 plots the distribution of vacancy durations by decade.

(Insert Figure 2 Here)

Figure 2 reinforces the importance of the 1990s for altering the length of the “typical” vacancy. Though vacancies created in the 1980s took longer to fill than those created in the prior two decades, the change observed in the latter part of the HW Bush and Clinton administrations (all but the years 1993-94 operated under divided government) was far greater, in retrospect, than most analyses seem to indicate. To this extent, our analysis concurs somewhat with Hendershot’s claim that the 1994 election marked a significant change in the nature of bargaining over the filling of judicial vacancies, but our data suggest a change might have occurred earlier, starting with the 102nd Congress in 1991-92.

¹³ If one examines the means for those two years, the difference is even smaller, with the mean vacancy duration lasting 320.5 days in 1977, and 396.4 days in 1978.

We next present summary statistics for the independent variables in Table 1. Concerning the demographic variables, the percentage of departing judges who were women and minorities is small. The diversity of the court increased considerably over our period of analysis. And moreover, the women and minorities appointed during the latter part of the Clinton administration are typically just now approaching senior status eligibility. Concerning whether departures are anticipated, we see that more than 88 percent fall under this category. As previous literature has shown (e.g. Yoon 2005; Yoon 2006), the vast majority of departures from the lower courts are due to judges attaining senior status. Few judges exit prior to that time.

The next set of statistics speaks to attributes of the Senate and president-Senate relations. The president and at least one state senator of the nominee share the same party in over $\frac{3}{4}$ of our vacancies. Moving down the table, the mean of the absolute value of the DW-NOMINATE scores between the president and the furthest same-senator is 0.59 and the mean difference in the NOMINATE scores of the president and Senate Judiciary Chair is 0.55, only slightly smaller than that of the furthest senator, which suggests there have been a number of times when these two leaders have conflicted. Our Senate polarization measure has a mean of 0.65. Moving further down the table, divided government affects over one-half of our observations, and nearly two-thirds of our observations fall during presidential “good years,” years other than 1, 4 and 8 of a presidential term.

We briefly cover the two final summary statistics presented in our table. The mean caseload for the courts was just less than 450. Again our measure here takes into account the weighted case filings and the actual number of judges serving on the courts, including both vacancies and senior status judges. Finally, the mean number of vacancies on the court is 50.4, which if one considers the case dockets judges oversee, the mean number of vacancies is quite startling.

(Insert Table 1 Here)

Event History Analysis

We estimate event history models with the duration of the vacancy as the unit of analysis. We adopt Cox proportional hazards models (see Box-Steffensmeier and Jones 2004), using the efron method for ties. Our analysis includes 1631 vacancies over our period of analysis, 1963 to 2010, although 39 cases were dropped due to not have all explanatory variables for these judges. Of the remaining 1591, 266 crossed two presidential administrations (and four of those crossed three presidential administrations).

In Table 2, we present two models, the first of which includes the explanatory variables previously discussed. The second model takes into consideration the fact that three of our explanatory variables violated the proportional hazards assumption. A common treatment in this situation is to interact the offending variable(s) with the log of time or with time (Box-Steffensmeier and Jones 2004).

(Insert Table 2 Here)

Looking first at the results in Model 1, we find no evidence that seats vacated by women or non-white judges take longer to fill; though both coefficients are negative, implying longer survival times (longer duration of the vacancy), neither is statistically significant. Further, contra Massie, Hansford, and Songer (2004), who argue that vacancies created by death take a longer time to fill with a nomination, we find no relationship between the method of the predecessor's departure and the duration of the vacancy. This result may be partially driven by the fact that our coding of departures left 88 percent of departures as anticipated; a more refined approach (perhaps separating out new judgeships) may produce different results. Turning to characteristics of the Senate delegation for the state where the court is located, our findings are consistent with both the nomination and confirmation literature that vacancies arising under senatorial courtesy are filled more quickly than those that arise in states where neither senator shares the president's party. Vacancies not covered by senatorial courtesy have a 21.7% lower risk of failing at a given time than those covered by senatorial courtesy. Also consistent with both the nomination and confirmation literatures, we find that, as the ideological

distance between the president and the furthest senator increases, vacancies are filled more slowly; an increase of one standard deviation in the ideological distance (from the mean value) decreases the hazard rate by 5.42%.

In the context of inter-institution dynamics, we find that divided government does not influence how long a vacancy stands open. While analyses of time-to-confirmation tend to find that divided government plays a role, scholars who have looked at the time to nomination tend to find no such effect. Our results suggest that, when the processes of nomination and confirmation are considered together, divided government does not play a role. Further, contrary to the literature on confirmation of district court judges, the ideological distance between the president and the chair of the Senate Judiciary Committee does not appear to be related to how long it takes for a district court vacancy to be filled. Consistent with existing literature on confirmation (Primo, Binder, and Maltzman 2008), we find that the more polarized the Senate, the longer it takes for a vacancy to be filled. A one standard-deviation increase in the degree of Senate polarization decreases the hazard rate by 34.61%. Finally, in the context of the workload the president and the Senate face, the more vacancies that exist at a given time, the longer it takes to fill any new vacancy; a one standard deviation increase in the number of district court vacancies translates to a 25.32% decrease in the hazard rate.

Our central question is how responsive the president and the Senate are to the needs of the judiciary. Specifically, we hypothesized that the busier a particular court was, the faster the president and the Senate would act to fill vacancies on that court (*ceteris paribus*). The results of Model 1 indicate that increasing the number of weighted filings per judge serving from its mean of 448.19 filings to 610.63 filings (a one standard deviation increase) results in a 4.76% increase in the hazard rate. While the effect is certainly a modest one, such a finding runs counter to the narrative that judicial nominations are just one more political piece to be used as leverage by the president and senators seeking to advance their own ideological agendas.

As with any proportional hazards model, a key assumption is the proportionality. Diagnostics on Model 1 indicate that whether or not the vacancy was anticipated, the degree of Senate polarization, and the number of court vacancies all violate the assumption of proportional hazards. Accordingly we interact these variables with time (the length of the vacancy) and present the results in Model 2. Our results show several interesting patterns that differ from Model 1. While race and gender remain insignificant, we now find that anticipated vacancies are filled more promptly; senatorial courtesy and the ideological distance between the president and the furthest home-state senator have no effect, divided government and greater distance between the president and the chair of the Senate Judiciary Committee result in longer vacancies while increased Senate polarization leads to shorter vacancies. Also in Model 2, vacancies arising outside of the president's first, fourth, and eight years are filled more quickly, caseload of the courts has no effect on the length a seat remains vacant, and the more vacancies on the court, the faster vacancies are filled. These results are opposed to those presented in Model 1, suggesting they should be interpreted with caution (to say nothing of the implausibly large coefficients on some of the variables, particularly Senate polarization), which may suggest some overcorrection for the violations of the assumption of proportional hazards. Moreover, one must exercise caution when interpreting the constituent terms of any interacted variable (Brambor, Clark, Golder 2006).

DISCUSSION AND CONCLUSION

The results of Model 2 which contrast those in Model 1, should caution against drawing anything more than preliminary conclusions from the analysis presented here. Nonetheless, the results in Model 1 hue more closely to the extant research to the extent that there is agreement among scholars who have analyzed the nomination and confirmation processes of district court judges independently. In particular, the pivotal role of senatorial courtesy and of both senators whose views are solicited in the blue slip process (Bell 2002; Binder and Maltzman 2009; Hendershot 2010; Massie,

Hansford, and Songer 2004) in determining the speed of both the nomination and the confirmation make it relatively straightforward to expect those factors to shape how long a seat remains vacant. While there appears to be consensus that the composition of the Senate vis-à-vis the president also plays a role in determining how long it takes before nominations are submitted to fill vacancies and how long it takes the Senate to confirm them, there may be some dispute as to how, exactly, the dynamics between the first and second branches play out. Our findings suggest that the primary determinant of how quickly vacancies are filled is not divided government, but the degree to which the Senate is polarized between the two parties. To some degree, this finding is self-evident; Senate polarization has increased fairly consistently over the last 50 years,¹⁴ while the same pattern is generally true for the amount of time it takes to fill judicial vacancies (though the 2000s were largely an exception to this general trend).

That the pace at which district court vacancies have been filled over the past 50 years is not a function of divided government or of disagreements between the president and the chair of the Senate Judiciary Committee is a testament to the notion that there are some functions the Senate can fulfill even in an era when the competition between branches is as spirited as the Framers could have hoped. An additional piece of evidence that the Senate and the president are able to set aside policy disagreements can be found in the significance of our caseload variable. Substantial docket demands speed the process of filling vacancies. In such instances it appears that both branches are able to set aside their partisan disagreements and move more quickly to fill vacancies. This suggests that the political theatre that has accompanied court of appeals nominations (Scherer, Bartels, and Steigerwalt 2008; Steigerwalt 2010) has not, to a large degree, extended to district courts.

A recurring theme in the literature on judicial confirmation (and, to a lesser degree, the literature on judicial selection) has been identifying *when* the process changed to become the

¹⁴ http://voteview.com/political_polarization.asp. Accessed August 20, 2013.

contentious process it is today. Martinek, Kemper, and Van Winkle (2002) and Holmes, Shomade, and Hartley (2012) point to the failed nomination of Robert Bork to the Supreme Court in 1987 as the turning point in confirmation politics more generally. Hendershot (2010) finds several markers of change, including 1977 and 1995. Our analysis tentatively points to the 102nd Congress (1991-1992) as marking a significant shift in how long it takes to fill district court vacancies. Given these disagreements, it may prove fruitful to more closely analyze when the process for filling *district* court vacancies took on its current character.

We argue here that, though there are tradeoffs in doing so, looking at the entire process that must be completed to fill a judicial vacancy offers an opportunity for insights that cannot be gained by looking solely at the nomination or confirmation side of the equation. Though we lose the ability to focus on individual characteristics of nominees (their demographic characteristics, qualifications, and the degree to which interest groups might support or oppose their nominations), we gain leverage in understanding how responsive the legislature and executive are to the needs of the judiciary. We find some evidence of such responsiveness, affirming our analytic approach, but that approach is probably best validated by the actors we study. Presidents and senators no doubt view the nomination and confirmation stages as interconnected and our approach allows us a more comprehensive look at the full route that must be traversed for a judicial vacancy to be filled. Doing so allows us to put the current “vacancy crisis” in historical perspective and to develop a more complete understanding of what might be driving the most recent iteration of the concern over an understaffed bench.

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Table 1. Summary Statistics

Predecessor Characteristics

Predecessor Minority	6.8%
Predecessor Female	5.0%
Predecessor Departure Anticipated	88.4%

Senate Delegation Characteristics

Courtesy	75.8%
President-Furthest Home State Senator Distance	$\bar{x} = .59$ s.d.= .32

President/Senate Characteristics

President-Judiciary Chair Distance	$\bar{x} = .55$ s.d. = .41
Partisan Polarization	$\bar{x} = .65$ s.d. = .08
Divided Government	50.2%
“Good Years”	64.7%

Court Characteristics

Caseload	$\bar{x} = 448.19$ s.d. = 162.44
Number of District Court Vacancies	$\bar{x} = 50.44$ s.d. = 34.20

Table 2. Predictors of the Duration of Vacancies in the Federal District Courts, 1964-2010

Variable	Model 1	Model 2
Female	-0.141 (0.118)	-0.055 (0.121)
Racial Minority	-0.095 (0.106)	-0.018 (0.107)
Anticipated Vacancy	0.061 (0.080)	1.763* (0.830)
Senatorial Courtesy	0.197* (0.071)	-0.037 (0.072)
President-Furthest Home State Senator Distance	-0.165* (0.092)	0.008 (0.093)
President-Judiciary Chair Distance	0.050 (0.086)	-0.382* (0.087)
Partisan Polarization	-3.715* (0.402)	41.561* (1.500)
Divided Government	-0.024 (0.067)	-0.209* (0.065)
Presidential Good Years	0.206* (0.061)	0.141* (0.061)
Caseload	0.034* (0.017)	(0.012) (0.016)
Number of Court Vacancies	-0.007* (0.001)	0.096* (.006)
Previous Administration Vacancies	-0.546* (0.090)	-5.176* (0.189)
Anticipated Vacancy*Time	.	-0.293* (0.139)
Partisan Polarization*Time	.	-6.850* (0.244)
Number of Court Vacancies*Time	.	-0.016* (0.001)
N	1862	1862

Model 1 reflects results before corrections for violation of the proportional hazards assumption of the Cox model. Model 2 reflects results post correction for the relevant variables, wherein we interact these variables with the natural log of time. Coefficients with standard errors in parentheses. Asterisks denote p values of less than 0.05.

Figure 1: Median Vacancy Duration by Year, 1963-2010

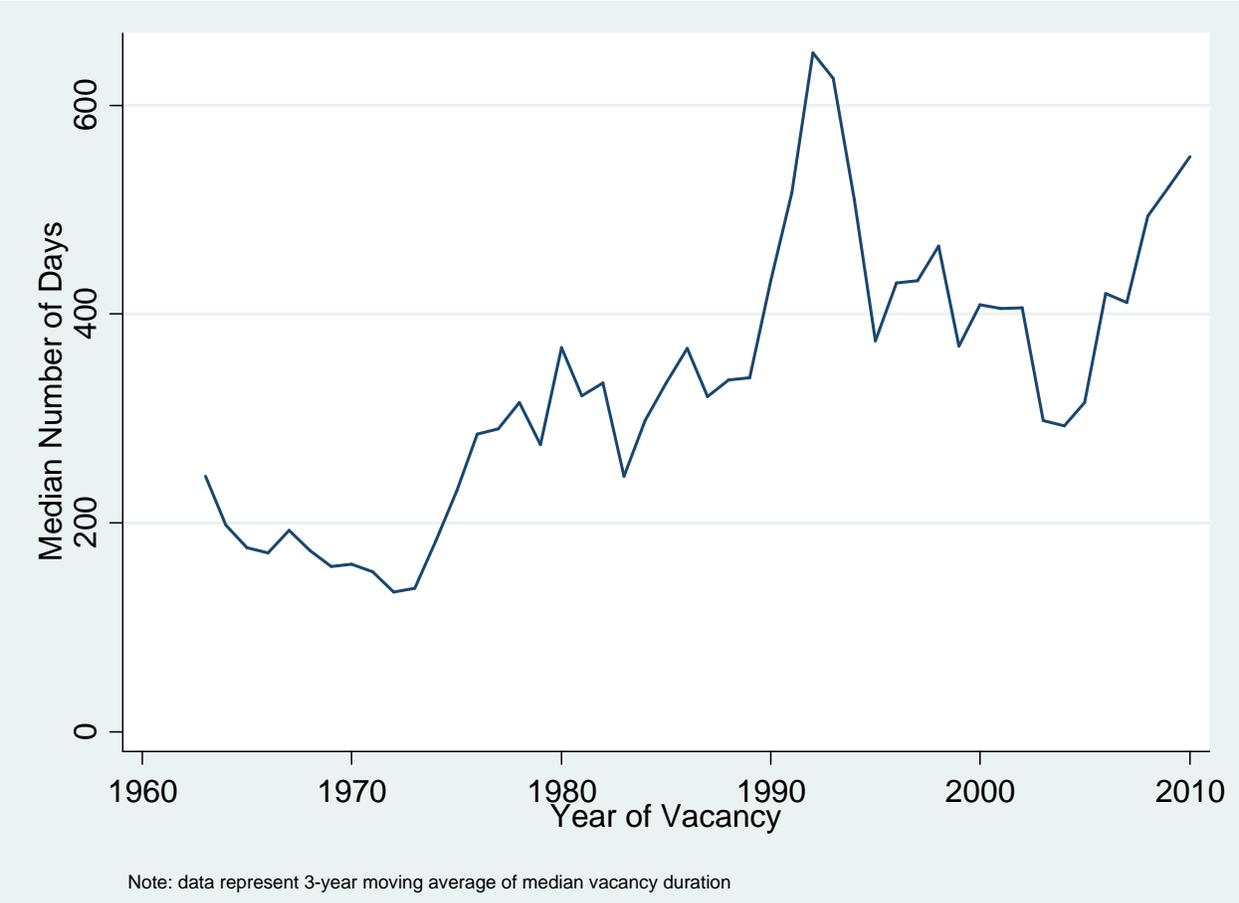


Figure 2: Distribution for Vacancy Duration by Decades, 1960s-2000s

