

From Consent to Advice and Consent: Cyclical Constraints within the District Court Appointment Process¹

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This study seeks to understand longstanding structural changes in the executive-senate relationships that govern the judicial appointment process. Utilizing a new source of data that comprises District Court appointments from 1901 through 2006, the analysis models the duration of selection and confirmation events to find evidence of inter-branch constraint or influence. Temporal variance and heteroskedasticity in these measures suggests that the last century of appointment activity can be divided into separate four regimes that reflect a repeating cycle of executive independence and senatorial constraint, which in turn provides new insight on recent controversies and conflict over the appointment of federal judges.

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The recent history of American appointment politics suggests that the Article II power of Advice and Consent now engenders a growing ideological conflict between the executive and legislative branches. The consideration of nominations associated with life tenure reveals increasing numbers of failures (Figure 1) that provide systematic support for the premise that the current appointment process is much different than that of the past. Unsuccessful appointments have grown considerably in the two previous administrations, with failure to appoint a nominee to an intended vacancy occurring 52 times in George H.W. Bush's single term and 70 times during Clinton's consecutive terms. Although these unsuccessful attempts constitute relatively low failure rates (22% and 16% respectively), they remain greater than those of previous administrations and indicate that modern presidents are generally less able to secure their preferred outcome when approaching the appointment process.

[INSERT FIGURE 1 ABOUT HERE]

Another means of assessing this discord over judicial appointments can be found in the escalating delay within the process (Figure 2). Throughout the last century, the amount of time required to secure a typical judicial appointment has grown from just over 3 months to as much as 16 months, and currently stands at 14 months. These aggregate periods can be divided into a selection process of bargaining over potential nominees and a confirmation process of securing senatorial consent. While negotiations over vacancies have always consumed the greater proportion of time necessary to complete appointments, both periods have been growing and confirmation currently requires almost as much time as selection. These simple plots provide rich context for disputes, such as the so-called "Nuclear Option" (Beth 2005), which threatened to shut down the day-to-day business of the senate over what many suggest is a broken process in need of reform.

[INSERT FIGURE 2 ABOUT HERE]

The origin of this decline into appointment gridlock has thus become a topic of consideration, with a prominent hypothesis being that a divergence took place after the highly politicized committee hearings and eventual failure of the Bork nomination (e.g., Martinek, Kemper and Van Winkle 2002). Yet, other empirical evidence suggests that singular focus upon this one-time event may overlook underlying and earlier changes within the process. Epstein, Lindstadt, Segal and Westerland (2006) conclude that heightened scrutiny of nominee ideology within the Supreme Court process is not specific to the post-Bork era, but rather took place much earlier in the 1950s.

The intermittent nature of Supreme Court appointments makes it difficult to pinpoint changes in the executive-senate relationship, but studies specific to the more continuous lower court process also seek to understand this temporal change. Scherer (2005) focuses on party politics and elite mobilization strategies, suggesting that a transition (again in the 1950s) from patronage to policy considerations provides a catalyst for current appointment difficulties. Goldman (1997) points to the more independent nomination strategies of Presidents Carter and Reagan which altered the balance of power between the two branches. Bell (2002a) addresses increased interest group participation that coincides with greater levels of senate obstruction. Each of these analyses offers insight into the current contentiousness of the judicial appointment process. However, it remains unclear *when* and *how* executive-senate relationships have become altered.

The primary goal of this analysis is to gain leverage on structural changes in the judicial appointment process that might explain recent levels of conflict versus what appears to be an earlier mechanistic process. It invokes a simple theoretical framework that seeks to determine whether the appointment process takes a detached *Consent* form, or a more fully engaged *Advice*

and Consent construct that results in successful or unsuccessful bargaining outcomes. Utilizing a lengthy series of U.S. District Court nominations (1901-2006), inter-branch constraint hypotheses are tested within sequential appointment regimes, with model results revealing that executive-senate relationships take periodic forms and repeat over time. I find that ideological considerations do become more pronounced after World War II, but these effects were found in the negotiations over the nominees within the selection process. The lack of strong relationships at the confirmation stage at this same time suggests that executive-senator bargaining resulted in consensus nominees that helped to thwart modern levels of gridlock. I argue that this working equilibrium between the two branches was interrupted by attempts at merit selection and independent executive selection strategies. Thereafter, confirmation becomes a significant source of constraint within the process, though the transition to Republican control of the senate in the 104th Congress helped to reestablish senatorial influence during the selection of District Court nominees in the most recent period.

KNOWLEDGE OF CHANGE WITHIN THE JUDICIAL APPOINTMENT PROCESS

The extant research on judicial appointments has made a transition from qualitative to quantitative analysis. Seminal qualitative studies (e.g., Harris 1953; Chase 1972) have been reinforced by studies relying upon mixtures of qualitative and empirical data (e.g., Goldman 1997; Bell 2002a; Scherer 2005), and quantitative modeling strategies have become more pervasive. These quantitative analyses vary with respect to research designs (i.e., the adoption of dependent variables and time periods) and level of analysis (i.e., Supreme Court versus U.S. Courts of Appeals and District Court levels), but also offer conflicting evidence when it comes to questions about temporal change and the emergence of conflict. In many ways, research that combines qualitative and empirical evidence does a better job of explaining how the process has become altered,

even though these changes should be evident within the dependent variables of quantitative studies.

At the Supreme Court level, Cameron, Cover, and Segal's (1990) analysis of senators' roll call votes for nominees is a prominent example of this strain of quantitative research. It clearly shows the effects of inter-branch ideological differences, partisan organization, and nominee qualifications upon the likelihood of senator support. Other quantitative studies, such as Morkaski and Shipan (1999), associate variance in justice ideology (Segal and Cover, 1989) with changes in inter-branch constraint regimes. Epstein, Lindstadt, Segal, and Westerland's (2006) analysis of senators' votes suggests that parameter effects related to ideological preferences show considerable variance over time and therefore ideological considerations are not specific to recent conflict. However, these studies look at a relatively small number of intermittent appointment events² that make it difficult to draw conclusions about the conduct of the broader appointment process.

The more constant flow of appointments to lower courts offers an alternative means of evaluating temporal differences, but the study of these events brings new challenges. Lower court confirmations are rarely subject to recorded roll call votes and independent measures of nominee ideology (e.g., editorial content scores) are not available. Appointments to lower courts also comprise a unique set of institutions, such as the longstanding norm of senatorial courtesy (Harris 1953, 43) that grants individual senators greater levels of influence over vacancies associated

² Studies of roll call votes in the Supreme Court appointment process inherently introduce a multiplier effect that counters the infrequent nature of appointments to the Supreme Court. The Epstein, Lindstadt, Segal, and Westerland (2006) study comprises some 3,700 senators' votes, but only 40 actual confirmation events for the period between 1937 and 2006.

with their home states. The difference in available measures and institutional constraints have therefore led to alternative research designs that model the duration of the lower court appointment process.

Binder and Maltzman (2002) and Martinek, Kemper, and Van Winkle (2002) offer two such analyses³ of the study of delay within the confirmation process of lower court nominations, with tested hypotheses and substantive conclusions diverging between the two analyses. Binder and Maltzman primarily focus on ideological explanations, finding that observed increases in the delay of confirmation events can be related to greater distances between the nominating president and the opposing party median in the senate, as well as with inter-branch distances associated with ideologically distant home state senators (during divided government situations). Martinek, Kemper, and Van Winkle investigate the effects of nominee characteristics, finding quicker confirmation events related to higher levels of nominee quality, greater delay associated with minority nominees, and a Post-Bork structural change at the Courts of Appeals level. Both studies, however, draw similar conclusions about greater duration coinciding with divided government situations and the progression of the executive term.

Although these studies add to our knowledge of the lower court appointment process, some concerns may be raised with the isolated study of senatorial consent. For instance, a study spe-

³ Bell (2002b), offers a similar study of the delay of confirmation that finds significant relationships related to majority coalition size, interest group participation, and judiciary committee members associated with the home state of vacancy. The level of court and length of period varies within these three studies. Binder and Maltzman (2002) cover the U.S. Courts of Appeals from 1947 to 1998. Martinek, Kemper and Van Winkle (2002) and Bell (2002b) include both the U.S. District Courts and Courts of Appeals from 1977 to 1998.

cific to the confirmation process offers no differentiation in selection outcomes. Consensus nominations that result from an ongoing bargaining process between presidents and senators are equivalent to those of unilateral nominations where presidents merely select their preferred candidate, and consequently, one might expect greater delay. To more fully understand resistance during the confirmation stage some knowledge of the outcomes of the selection process is necessary and scholars have looked to measures of delay for this stage as well.

Binder and Maltzman (2004) have presented duration results for the selection process of the U.S. District Courts, which indicate systematic relationships are also present within the bargaining process between presidents and senators. In particular, selection events are more quickly consummated when at least one of the home state senators is from the president's party. Longer selection events, on the other hand, can be related to measures of ideological distance between the president and committee chairman, and to some ideologically distant home state senators. These results generally correspond with their early analysis of Courts of Appeals confirmation events, with one notable exception – the instability of the process. Responding to methodological critiques (Box-Steffensmeier and Jones 1997; Box-Steffensmeier and Zorn 2001) of the susceptibility of duration estimates to the violation of the proportional hazards assumption (i.e., parameters violate the underlying assumption of stability over time), Binder and Maltzman incorporate natural log interactions with time that provide robust evidence of temporal change.

Massie, Hansford, and Songer (2004) offer a separate analysis of the lower court selection period that includes both U.S. District Courts and Courts of Appeals nominations. Model results provide evidence of ideological resistance from senators (of both parties) for District Court nominations and not the Courts of Appeals. However, evidence of temporal instability does not appear in their smaller sample of nominations between 1977 and 1999. The absence of this in-

stability may point to a broader transition that takes place in the appointment process and provides some evidence of structural transformation within the longer Binder and Maltzman (2004) analysis.

The current state of the judicial appointment literature, therefore, provides a somewhat irregular mixture of conclusions about the structure of Advice and Consent power. Studies of the infrequent Supreme Court confirmation process identify ideological constraints related to nominee – senate differences, partisan resistance related to divided government, and obstruction associated with nominee quality. Analyses of the more constant lower court confirmation process have reached some consensus on the negative effects of divided government and the elapsing executive term, but also differ in tested hypotheses and time period. Depending upon hypothesis construction, either nominee characteristics or the ideological constraints of the opposing party and outlier senators prolong the confirmation process. The selection process, on the other hand, appears to be a function of committee chairmen preferences and outlier senators with courtesies, and offers evidence of a broader norm of senatorial courtesy in shorter samples. Each level, however, finds some indication that the appointment process is in flux, whether it be greater scrutiny of nominee ideology at the Supreme Court level, the increasing post-Bork resistance to confirmation at the Courts of Appeals level, or an exponentially increasing delay of selection at the District Courts level.

Of available conclusions, the theme of change, or temporal variance, may in fact be the most substantive finding. We know that conflict in the recent appointment process generally is different (see Figures 1 and 2 above), but the altered structure of inter-branch relationships remains unclear. It could be that the varying levels of analysis and irregular periods of study have impaired our ability to draw reasonable conclusions about how the process operates.

CONSTRUCTING A LOWER COURT APPOINTMENT FRAMEWORK

The study of judicial appointments requires a working theoretical foundation that guides research design and allows individual results to contribute to greater knowledge of the process. From a Neo-Institutional perspective, the extent that the rules of the game – in this case the Article II power of Advice and Consent – affect the outcomes of the process is the primary concern. A useful way to think about this is Moraski and Shipan's (1999) conception of presidential constraint. Simply stated, either the requirement of senate confirmation constrains presidents' choices of nominees or it does not. This premise fits quite well with Hamilton's (Federalist No. 66) anticipation that the appointment process would be a separate system of checks and balances, with the senate exerting no influence over the selection of nominees. Since then, however, numerous institutions have been defined that potentially grant senators substantial influence over choice. Informal norms, such as senatorial courtesy, provide home state senators with means to obstruct the placement of nominees and thereby constrain presidents. Formal institutions, such as committee and floor votes, empower committee members and party coalitions that may likewise act to constrain executive actions.

By identifying systematic relationships associated with these various institutions, it becomes possible to draw conclusions related to the prevailing structure of the appointment process. In the views of Hamilton, or a so-called *Consent* process, these systematic relationships tend to be found at the confirmation stage, with senators responding to independent executive choices. In a more complete view of the process, or an *Advice and Consent* process, these relationships would always be found during the selection of nominees, but the occurrence of these relationships during the confirmation stage would be predicated on bargaining outcomes. For example, a selection process marked by successful bargaining may not yield constraint relationships during con-

firmation, since nominees are generally consistent with senate preferences. On the other hand, an *Advice and Consent* process, where bargaining typically is unsuccessful, would produce systematic constraint relationships both during the selection and confirmation of nominees.

A simple theoretical approach to understanding the appointment process, then, is to determine whether the process exhibits constraint during confirmation, selection, or at both stages. With such information, it is possible to adopt one of three competing heuristic devices as a parsimonious view of the appointment process (i.e., a *Consent* process, an *Advice and Consent* process with successful bargaining, or an *Advice and Consent* process with unsuccessful bargaining). This classification scheme may be useful, but it remains unlikely that a single classification can explain the appointment process at every point in time. And, recent conflict within the process suggests that the underlying structure has taken different forms over time.

Constraint within the judicial appointment process should congregate around existing veto points, with the initial point of interest being the norm of senatorial courtesy. Courtesy rights essentially create a bargaining game between the executive and home state senators that often involves delay strategies designed to improve each actor's leverage over the nomination (Chase 1972, 40). In addition to consultation during the selection of nominees, senatorial courtesy also comprises enforcement mechanisms at the confirmation stage such as the declaration of "personally obnoxious" nominees (Palmer 2003) and the less visible *blue slip* procedure (Binder 2004). Senatorial courtesy therefore acts as the initial source of constraint within the judicial appointment process, both in selection and confirmation, and can be formally stated by the following constraint hypothesis:

H_{SC}: Constraint within the judicial appointment process is related to the norm of senatorial courtesy and is associated with home state senators.

The Judiciary Committee provides a formal review of nominee qualifications and represents

the second significant hurdle within the judicial appointment process. The committee stage incorporates several different actions, including the blue slip procedure, public hearing with testimony, and formal recommendation to the floor. Although senators from both parties sit on the committee, the chairman acts as the primary agenda setter and key gatekeeper to the floor. The right of explicit consultation for the committee chairmen is not as clearly defined as that of a home state senator, but the chairman does possess tools of leverage, such as the enforcement of blue slips and tabling strategies, that may enter into the decision making calculus of presidents. This implicit gatekeeper influence during selection and an unqualified potential for resistance during confirmation, can make for a second constraint hypothesis in the appointment process:

H_{JC}: Constraint within the judicial appointment process is related to committee consideration and is associated with the judiciary chairman.

Because the rejection of nominations on the floor is very rare, the final veto point within the appointment process has been the achievement of an up or down vote by the senate. The progression to a floor vote traditionally has been a simple process – the nomination was considered in the next executive session. More recently, the application of legislative holds (Palmer 2003; Steigerwalt 2004), and in some cases the use of the filibuster (Beth 2005), has impeded progression to a floor vote. The floor has also become increasingly important due to informal interest group participation strategies that build opposition to nominees (Bell 2002a, 123). Therefore, it is now necessary to consider the floor stage as an active source of constraint within the appointment process.

The primary actors at the floor stage are party coalitions and their influence corresponds with partisan control of the committee. During divided government, the president faces a chairman from the opposing party who should act as a source of constraint. In this situation, resistance at the floor stage should be trivial or absent, since an active veto point exists earlier in the process.

When previous veto points are inactive or weak, the potential for holds, filibusters, and grass roots lobbying increases as members of the opposing party obstruct nominations and prevent votes. In unified government situations, nominations will have an easier time reaching the floor and opponents may invoke holds or the filibuster as the last tools of obstruction within the process.

H_{FL}: Constraint in the judicial appointment process is related to floor procedures and is associated with party coalitions in unified government situations.

RESEARCH DESIGN

To provide tests of these elaborated constraint hypotheses and to gain information on the prevailing structure of the appointment process, this analysis uses a new database of judicial appointment events that covers the period from 1901 to 2006. This database was created with information available from existing databases⁴ and an examination of the Congressional Record.⁵ The database comprises 3191 appointment events (i.e., an attempt to place a specific nominee to a specific vacancy) for the U.S. Supreme Court, Courts of Appeals, and District Courts (excluding courts of special jurisdiction). Because this analysis evaluates a constraint hypothesis related to senatorial courtesy, it adopts observations from the U.S. District Courts where these rights to consultation are more distinct. Senatorial courtesy ties also required the exclusion of the U.S. District Court of Puerto Rico and the District of Columbia, which lack home state senators. A

⁴ Primary sources include Martinek's (2000) *Lower Federal Court Confirmation Database*, the *History of the Federal Judiciary* (2006) database, and the Library of Congress's *Thomas Legislative Information Center*.

⁵ This research effort was made possible by a supplemental grant from the National Science Foundation – SES-0135855.

small number of atypical appointment events are also excluded – lame duck appointment events that took place after a November election when there was a forthcoming change in control of the Whitehouse.⁶ This analysis thus includes typical appointment attempts to the U.S. District Courts for more than 100 years.

Dependent Variables

The selection period measure is calculated by subtracting the date of nomination from the date of the vacancy. For cases of vacancies created by death, retirement, resignation, or the assumption of senior status, this calculation is straightforward. Vacancies created by new legislation, the elevation of sitting judges, second nominations,⁷ and those vacancies carried over to new administrations require a modified calculation. The starting point for new positions is the date of the enacting legislation. Elevations are calculated from the date the sitting judge was nominated to a higher court. Second nominations are calculated from the date of withdrawal, or the end of the previous session of Congress. Those vacancies that were unfilled at the expiration of a president's term were calculated from the date of the inauguration of the incoming president. A smaller number of vacancies were created by the assumption of senior status with prior notice and the nomination occurred before the judge stepped down. These cases were assigned a value of 1 day and are treated as censored in the model.

The confirmation period is calculated by subtracting the date of nomination from the date of

⁶ A dichotomous control variable identifying lame duck events yielded abnormally large and significant parameters suggesting that they were in fact unique events. Instead of reporting these results, the events were excluded – 23 selection events / 36 confirmation events.

⁷ Second nominations occur when a nomination is withdrawn, or was returned at the end of a session of Congress, and an alternate candidate was nominated

confirmation, or the last day of the session, if confirmation did not occur. This is in accordance with *Senate Rule 31, paragraph 6*, which requires nominations be returned to the president at the end of each session of Congress. This analysis creates a new entry for each session of Congress and those nominations that failed to be confirmed during a single session are treated as censored in the model.

These dependent variables are modeled through Maximum Likelihood estimates of the Cox Proportional Hazards Model (Box-Steffensmeier and Jones 2004). This modeling strategy associates variance in the duration of selection and confirmation events and the corresponding dichotomous identifiers of censored events, with a host of independent variables. Negative and significant parameter estimates provide evidence of constraint in the selection and confirmation of nominees that will be used to evaluate the above elaborated hypotheses. In these cases, the occurrence of the selection or confirmation event is significantly less likely – the amount of bargaining in the selection of nominees or resistance to their confirmation is significantly greater – with respect to variance in the independent variable.

Independent Variables

Constraint hypotheses related to senatorial courtesy, committee consideration, and floor procedure are evaluated with independent variables associated both with ideological preferences⁸ and partisan affiliations. Ideological variables represent the absolute difference between the lo-

⁸ Poole and Rosenthal's (1997) DW NOMINATE measures are not clear indicators of individual preferences, but represent the best available measures. The first dimension DW NOMINATE coordinate acts as ideological preference locations for presidents, senators, and parties.

cation of the executive⁹ and the location of senators and party coalitions within the appointment process.

Senatorial courtesy may be structured in a number of ways, with the norm potentially applying to a vacancy with two senators of the president's party, two senators of the opposing party, or those with a senator from both parties. In a traditional form of senatorial courtesy, only senators of the president's party are believed to have rights of consultation, but it may also be that senators with the greatest ideological differences act as the primary veto player within the process. To evaluate these alternative forms of courtesy rights, independent variables are tested for each of the three courtesy configurations and two separate specifications were tested. The traditional courtesy specification includes the absolute distance between the executive and senator of the same party for those vacancies in which both parties are represented. A greatest distance specification, simply takes the greatest of the executive-senator distances for each pairing. The best performing courtesy specification is presented in period results.

Constraint related to the committee procedure is tested with an absolute distance measure between the executive and committee chairman. The floor procedure variable controls only for unified senate situations and therefore helps capture interactive effects related to divided government situations. The floor variable is the absolute distance between the executive and median senator of the opposing party multiplied by the number of unified seats. This interaction with the

⁹ DW NOMINATE values for the executive are not available before Eisenhower. The best alternative is the median position of the president's party in the Senate, and it is adopted for the early period of analysis (1901 – 1953). The Pearson correlation coefficient is 0.98 between the two measures for periods where both are available. Models results for the party median produce consistent relationships in periods where the presidential measure is available.

number of unified seats serves two purposes. First, it reduces correlation with the committee variable. And second, It has the substantive effect of controlling for those situations when greater majorities of the president's party can push nominations through to confirmation. It is at these times that floor strategies, which act as the last tools of resistance and obstructive strategies – legislative holds, filibuster, and grass roots interest group lobbying – should be greatest.

It is crucial to provide a rigorous test for the established hypotheses. Additional independent variables are included that act as competing / supporting explanations for appointment events. While these additional covariates are not of primary interest, they have been found to be significant factors in existing research (e.g., Martinek, Kemper and Van Winkle 2002). One is an independent variable related to the elapsing executive term.¹⁰ Four other variables capture nominee characteristics. Dichotomous identifiers of female, African American, and Latino American nominees are included. A final dichotomous control identifies nominees associated with a “Not Qualified” rating from the ABA.

PERIODIC REGIMES WITHIN THE APPOINTMENT PROCESS

The primary goal of this analysis is to gain leverage on structural changes in the judicial appointment process. Because of the lengthy period of analysis, it is likely that the underlying structure of the appointment process has varied with time. One method to ascertain when such changes take place is to evaluate existing changes in dependent variables. A scatter plot of the

¹⁰ The right censorship of confirmation at the end of each session of the Senate creates a series of observations that are considered in similar circumstances. To control for this effect, a continuous measure from 1 to 4 is used to identify the year of the executive term. The same is not true of selection events, since they tend to overlap sessions of the Senate and the filling of vacancies cannot be easily attributed to a session or particular year of the presidential term.

confirmation period (Figure 3) offers such evidence. These observations are aggregated by each Congress and exhibit high levels of heteroskedastic variance within the individual appointment events. Controlling for this type of heteroskedasticity is crucial to the operationalization of the research design. Methodological critiques of duration analysis (Box-Steffensmeier and Jones 1997; Box-Steffensmeier and Zorn 2001) indicate that interpretation of model results is predicated on the assumption of stable parameters and homogeneous residuals. Models run for the entire period (and shorter periods) reveal significant violations of the underlying assumption of stability. However, changes in variance do coalesce around points where existing research indicates that they should be found.

[INSERT FIGURE 3 ABOUT HERE.]

Confirmation events (see Figure 3) show an increase in dispersion for the 80th Congress ending in 1948. This coincides with Scherer's (2005) hypothesis related to changes in party coalitions and Epstein, Lindstadt, Segal and Westerland's (2006) observance of increased ideological influence within the Supreme Court process. At this time, controversial civil liberties and rights disputes were moving toward the center of American political debate. Presidential actions, such as Truman's *Committee on Civil Rights*, placed Southern segregation squarely upon the political agenda, leading to what V.O. Key (1949) describes as the "Revolt of 1948." Party politics of this time were in flux, with Democrats devolving into distinct Northern and Southern constituencies. These changes in party structure and the emergence of divided government may have led to a transformation of inter-branch relationships within the judicial appointment process.

A second increase in dispersion takes place in the 95th Congress ending in 1978. Delay of confirmation begins a strong curvilinear growth trend, which is compatible with Goldman's (1997) hypothesis of independent executive selection strategies. President Carter's attempt at

merit selection panels and President Reagan's use of the White House Counsel's office (Goldman 1997, 358) provides a useful account of this transformation. Another less obvious explanation may be found in the completion of a secular realignment (Carmines and Stimson 1989) that saw Southern Democrats slowly replaced with Republicans. By the Carter administration this process had largely been completed and party coalitions were more ideologically consistent, possibly leading to another structural change in the appointment process.

Evidence of a third transition point can be found in the series of lengthy confirmation events at the end of the sample. Research on the most current process emphasizes the use of floor procedures (Palmer 2003; Steigerwalt 2004; Beth 2005) and interest group lobbying (Bell 2002a) to prevent confirmation votes. The exact point of this transformation in inter-branch relations is debatable, but significant change in senate relations has been associated with the transfer to Republican control in the 104th Congress (Sinclair 2006, 294). Thereafter, the appointment process devolved into a fractious partisan contest over appointment that may differ structurally from the earlier period of independent executive choice.

To account for temporal variance and heteroskedasticity and to test for structural change on the basis of existing hypotheses, the sample for this analysis was divided into 4 separate periods or appointment regimes. Independent sample tests for these 4 regimes reveal significantly different mean values and inter-period variances (Table 1), indicating that the duration of the selection and confirmation of lower court nominees is unique to each regime. Regime 1 runs from 1901 to 1947 and acts as baseline period where appointments were thought to be based upon patronage concerns. Regime 2 begins in 1947 with the emergence of divided government and controversial civil liberties and rights disputes that altered the existing party coalitions. Regime 3 begins with the Carter administration (1977), when attempts at merit selection threatened senato-

rial influence over the appointment process and political parties were becoming more ideologically consistent. Regime 4 begins in 1996 or the transition to Republican Party control of the senate and covers the most recent period of conflict over floor procedures.

[INSERT TABLE 1 ABOUT HERE.]

DURATION RESULTS BY APPOINTMENT REGIME

Models of the duration of selection and confirmation of District Court nominees can be found in Table 2, which presents estimates for each of the 4 appointment regimes. Regime 1 (1901 to 1946) yields results that are consistent with the expectations of a mechanistic or patronage driven process. The selection model finds no support for the existence of inter-branch constraint related to senatorial courtesy, committee consideration, or floor procedures. The selection model as a whole is insignificant, indicating that systematic bargaining relationships could not be found on the basis of executive-senate differences. Confirmation results do provide evidence in the form of traditional courtesy rights. Ideological distances between presidents and home state senators are associated with longer confirmation events (i.e., confirmation events are significantly less likely and consume greater amounts of time). When two senators of the president's party or two senators of the opposing party were present, parameters controlling for the more distant senator are in the anticipated negative direction and significantly different. When senators from both parties maintained courtesy rights, a parameter controlling for the senator of the president's party is also negative and significantly different.

[INSERT TABLE 2 ABOUT HERE]

The selection and confirmation models for Regime 1 suggest that presidents of this era typically were free to select nominees for the District Courts. Senatorial courtesy rights were present, but essentially represented a reactive constraint that only could be found at the confirmation

stage. Together, these results are consistent with a *Consent* view of the appointment process where the senate reacts to independent executive choices.

Regime 2 (1947 to 1976) reveals a starkly different structure of appointment relationships and shows that presidents began to face considerable levels of constraint when selecting District Court nominees. The selection model exhibits a series of negative and significant parameters related to a traditional courtesy norm and committee consideration. Ideological differences between the executive and key veto-players – home state senators and the committee chairman – are associated with significantly longer selection events. These relationships reflect greater amounts of bargaining over nominees and, consequently, a transition to a more equal balance of appointment powers between the two branches.

This process of heightened bargaining often resulted in consensus nominees. Censored confirmation events account for 12% of observations and are only slightly greater than the first regime rate of 7%. Evidence of constraint at the confirmation stage is lacking. The sole significant relationship is opposite to the hypothesized direction. Those nominations associated with two senators from the president's party were confirmed more quickly and show no evidence of resistance. Significant levels of resistance during confirmation can be associated with variables controlling for the elapsing executive term and female nominees. Nominee specific resistance also is found in the selection process for African Americans and those with public cues regarding poor qualifications, therefore nominee characteristics do affect the appointment process in this era. However, the substantial level of ideological influence from senators during the selection of nominees and the lack of such influence during confirmation would point toward a transition to an *Advice and Consent* process with successful bargaining outcomes.

The prevailing level of executive-senator bargaining over nominees diminishes with transi-

tion to Regime 3 (1977-1994). The selection model shows only a single significant courtesy relationship for vacancies associated with two senators of the same party as the executive. Constraint related to committee consideration is absent. The relationship for floor procedures is opposite of the anticipated direction, but efficiently captures appointment activities. Inter-branch constraint and senatorial influence is marginalized and the floor is not, per se, a constraint upon the selecting president. However, unified control of the senate and larger majorities of the president's party do make selection events more likely and consume less time. Generally, the selection process is longer when the president's party has a strong claim to senatorial courtesy rights (i.e., when two senators of the same party are present), but shorter when the president's party has greater control over the senate and can push nominations through the process.

Confirmation results show a similar pattern. Parameters controlling for courtesy ties with the president's party are significant, but capture a positive relationship where confirmation events are more quickly consummated. The primary source of constraint can be found at the committee stage, when the ideological preference of the judiciary chairman acts as a source of obstruction and the parameter identifies significantly longer confirmation events. Confirmation events also exhibit more robust resistance as the executive term comes to an end. Nominee specific effects are found for "Not Qualified" nominees and again for African Americans within the selection process.

With limited evidence of inter-branch bargaining during the selection of nominees, the balance of power within Regime 3 tended to shift back toward the executive. The successful completion of the appointment process in this period was predicated on getting nominees through committee and this strategy was less effective than in the past (e.g., censored confirmation account for 23% of observations). Given the lack of wide ranging constraint relationships during

selection, the appointment process bears more similarities to Regime 1 than to that of the preceding period. Although an argument could be made for an *Advice and Consent* process, Regime 3 appointments appear to be more consistent with that of a simple *Consent* process.

Regime 4 reflects recent attempts to reestablish lost senatorial influence. The selection model for this period again provides evidence of a broader norm of senatorial courtesy, but the structure of these relationships is altered. Inter-branch bargaining takes place between the president and senators with the greatest ideological differences. This marks a transition from the traditional norm of senatorial courtesy and these inter-branch differences induce greater delay of selection regardless of party affiliation. The ideological preferences of the committee chairman¹¹ also act as a constraint upon presidents within the selection process and extend the amount of time necessary to complete selection events.

Unlike Regime 2, where systematic consultation and bargaining led to consensus appointments, Regime 4 continues to show substantial forms of constraint at the confirmation stage. This resistance can be found at each stage of the process and is most often associated with partisan opponents. Controls for senatorial courtesy reveal one significant constraint relationship for nominees associated with 2 opposing senators. The committee stage is a second source of constraint on the basis of chairman preferences. However when the president's party controls the senate and the committee is less of an obstacle, partisan opponents continue to resist nominations

¹¹ The committee chairman parameter does exhibit signs of instability at $\rho < .001$, but the overall model specification is stable (i.e., Schoenfeld $\sim \chi^2$). The source of instability can be associated with a divided government effect and the relationship can be made stable through interaction with the number of divided seats. All other parameters and model specifications accept the null hypothesis of stability at $\rho < .01$.

at the floor stage. Ideological distance between the president and the opposing party median reveals a negative and significant parameter, suggesting that constraint has now branched out to include the floor and tends to increase with larger majority coalitions of the president's party.

The remaining control variables offer a handful of significant relationships. The progression of the executive term produces incrementally increasing delay of confirmation events. Nominees with "Not Qualified" ratings encounter resistance both during selection and confirmation. Female nominees face greater delay during confirmation, but not African American or Latino American nominees. Given the lack of gender effects in the third regime, it seems a little out of place in the current context. This finding could, however, be a reflection of attempts to use gender to insulate nominees from scrutiny on the basis of ideological preferences.

In Regime 4, systematic bargaining during the selection of nominees does not necessarily result in the production of consensus nominations. Censored confirmation events (37% of observations) are more common than in previous regimes and the confirmation model identifies significant resistance throughout the process. This evidence of constraint at both stages of the appointment process is compatible with an *Advice and Consent* framework with unsuccessful bargaining outcomes.

The above results reveal substantive differences in the operation of the District Court appointment process over the last century. A transition between *Consent* and *Advice and Consent* configurations takes place between Regime 1 and 2 and also between Regime 3 and 4. The cyclical nature of inter-branch constraint indicates that each period should be treated as unique, but these differences are best viewed through the unspecified function of the Cox Proportional Hazard estimations. The baseline hazard rates of the selection models (Figure 4) reflect significant transformation by appointment regime. The heightened level of inter-branch bargaining that ac-

companies the transition to an *Advice and Consent* framework is reflected in movement of the most likely selection outcome – Regime 1 (7 months) to Regime 2 (20 months), and Regime 3 (17 months) to Regime 4 (31 months). The baseline confirmation functions (Figure 5) not only show alteration from mechanistic processing to appointment gridlock, but also reflect the problem of singular focus upon the confirmation stage. For example it may be possible to model the first and last pair of regimes together within a single model specification. However, this would obscure differences between periods. In Regime 2, the duration of confirmation events is similar due to greater senate influence over the selection process. In Regime 4, duration is similar *despite* evidence of greater bargaining during the selection process.

[INSERT FIGURES 4 AND 5 ABOUT HERE]

CONCLUSIONS AND IMPLICATIONS

This simultaneous analysis of District Court selection and confirmation events within sequential appointment regimes provides new empirical evidence that helps integrate and expand upon existing accounts of the judicial appointment process. Early research (Harris 1953) places emphasis upon the norm of senatorial courtesy and results from Regime 1 do confirm the presence of a traditional form of courtesy rights. The necessary qualification, however, is that these courtesy rights were only found at the confirmation stage. Presidents of this era were free to nominate their preferred candidate, but faced some potential for conflict with home state senators during confirmation. The simple *Consent* process of Regime 1 most likely is a product of partisan structure. Strong party coalitions and sizeable majorities of the president’s party are found at this time, perhaps negating demands for senatorial influence within the selection process.

The same cannot be said of Regime 2, where appointment research (Scherer 2005) hypothesizes that growing attention to civil liberties and rights disputes should have led to new focus

upon policy consideration. The results clearly show the greater influence of the senate within the selection process and a transition to an *Advice and Consent* process. This transformation is intuitive and theoretically pleasing from a Neo-Institutional perspective. The beginning of Regime 2 coincides with attention to civil liberties and rights issues, divided government, and weakened party structure. Within this context, senators have stronger incentives to invoke dormant institutions, such as their right to consultation, and thereby gain new leverage over judicial appointments. Facing either divided government or an ideologically weak party coalition, presidents appear to have acquiesced to these demands and ceded some control over the selection of nominees. Although the confirmation process does not appear remarkably different between Regime 1 and 2, the appointment process as a whole is substantively different and consensus nominees produce a similarly smooth confirmation process.

The results of Regime 3 fit what we know of this era. Goldman (1997) focuses upon independent executive selection strategies, as seen in President Carter's merit selection plan and President Reagan's independent vetting of nominees. The corresponding results exhibit very limited constraint relationships during selection and imply that the appointment process is best captured by a *Consent* view. The success of a *Consent* framework obviously depends upon senatorial deference. This deference appears to have taken place in unified government situations, but was much less successful with divided government where the committee posed an obstacle to confirmation.

The literature on the most recent appointment process identifies floor procedures (Steigerwalt 2004; Beth 2005) and interest group lobbying (Bell 2002a) as significant obstacles to confirmation. Results for Regime 4 confirm the existence of such strategies during confirmation, but also show an alteration of the selection process. The renewed level of bargaining within the current

selection process has received little attention because it has not resulted in successful appointment outcomes. It is counterintuitive to conclude that inter-branch relationships within the current appointment process bear more similarity to those in the 1950s, than those of the 1980s. However, this disparity can be explained by the structure of existing party coalitions. Weak party coalitions, such as those found Regime 2, offer considerable overlap in preferences and create choice sets where it is possible to strike bargains. The recent polarity of parties provides little, if any, overlap in preferences and therefore creates few opportunities for successful bargains. While conflict over the confirmation of nominees is equivalent in Regimes 3 and 4, the roots of this conflict are distinct. In Regime 3, appointment failures are related to more independent executive choice. In Regime 4, appointment failures are related to unsuccessful bargaining outcomes between the two branches.

Anecdotal evidence exists for a relationship between the realignment of party coalitions and the cyclical transformation of the judicial appointment process found here. Some caution is necessary, as it is not possible to draw conclusions on the basis of cross-sectional analysis of individual appointment events. Analysis of a macro-level time series dependent variable could provide stronger evidence of a relationship with partisan realignment, along with other factors, like ongoing changes within the judicial agenda. The above results do have implications for studies regarding lower court decision making. Existing measures of judges' ideology (e.g., Giles, Hettinger, and Peppers 2001) assume traditional courtesy relationships govern the selection process. This analysis finds that the influence of courtesy rights is cyclical and does not always take a traditional form. With this in mind, decision making research that takes these cycles into account may prove to be fruitful additions to the literature.

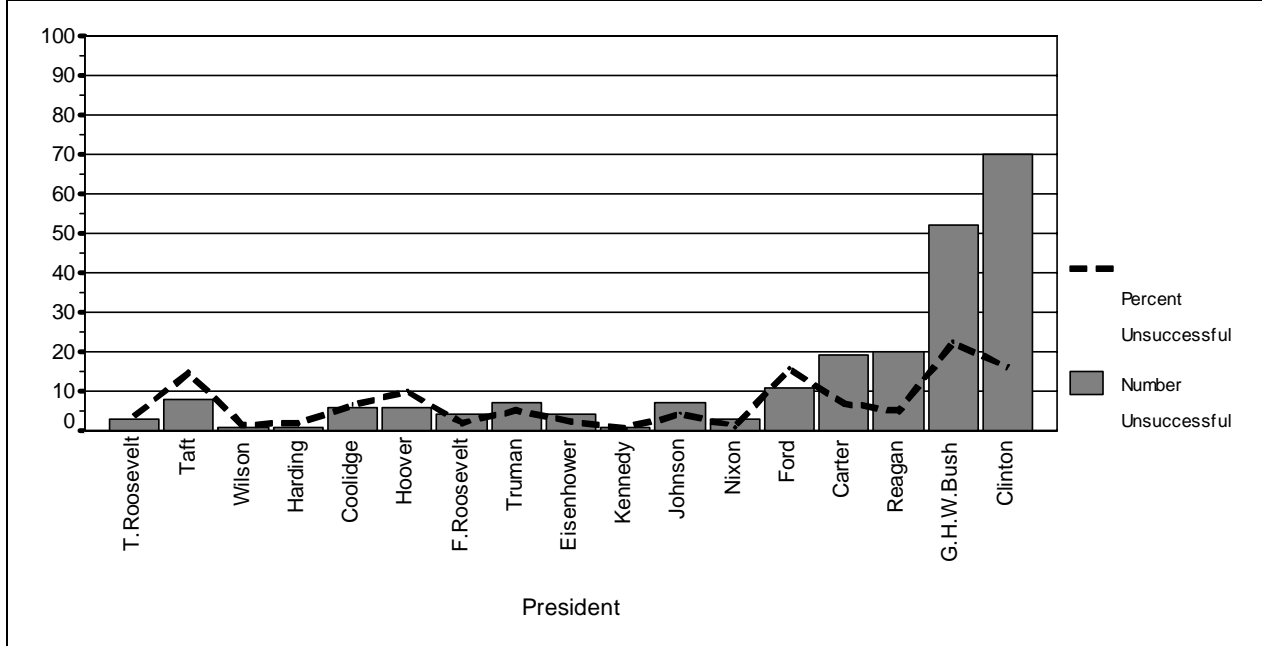
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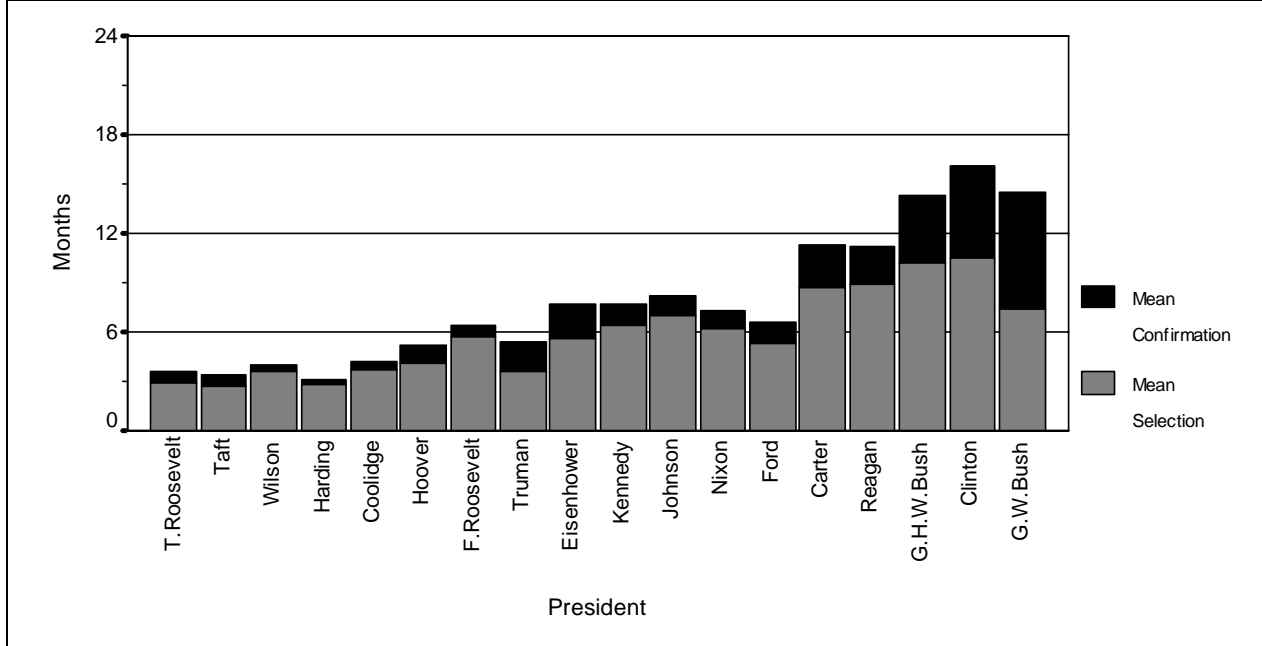
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Figure 1: Unsuccessful Appointments to Federal Courts – 1901 through 2000



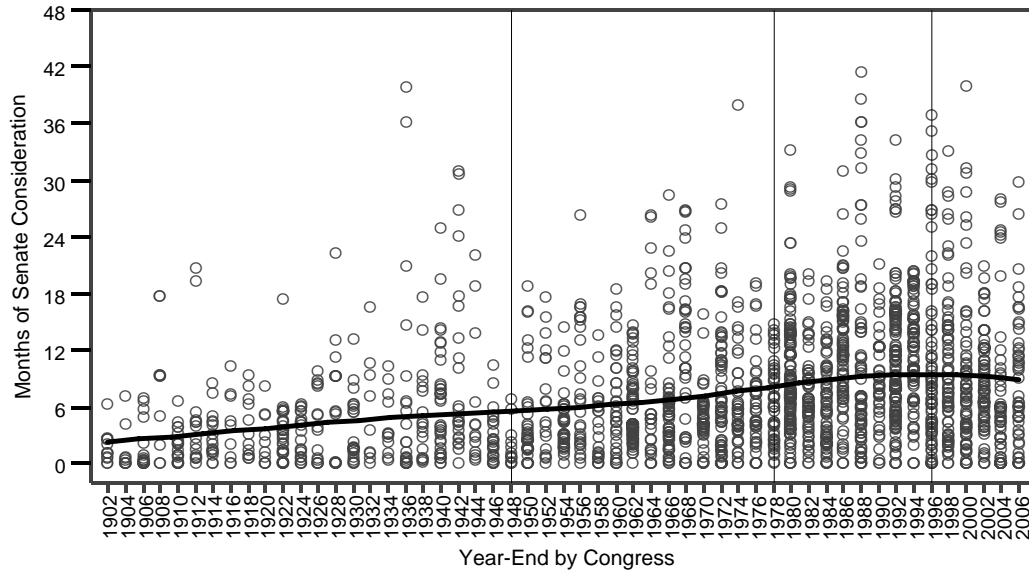
Note: Figure comprises the United States Supreme Court, Courts of Appeals and District Courts (including the District of Columbia and Puerto Rico, but not the Commerce Courts). Unsuccessful appointments are those nominee-vacancy pairings that were not confirmed on the floor of the Senate, withdrawn from consideration, or returned to the president in the last session of Congress of his term. The figure does not present George W. Bush appointments because the process is ongoing. At the end of the 109th Congress, 50 appointments, or 16.5%, meet these criteria. Of these 50 pairings, 34 have been resubmitted to the 110th Congress for reconsideration.

Figure 2: Delay of Appointments to Federal Courts – 1901 through 2006



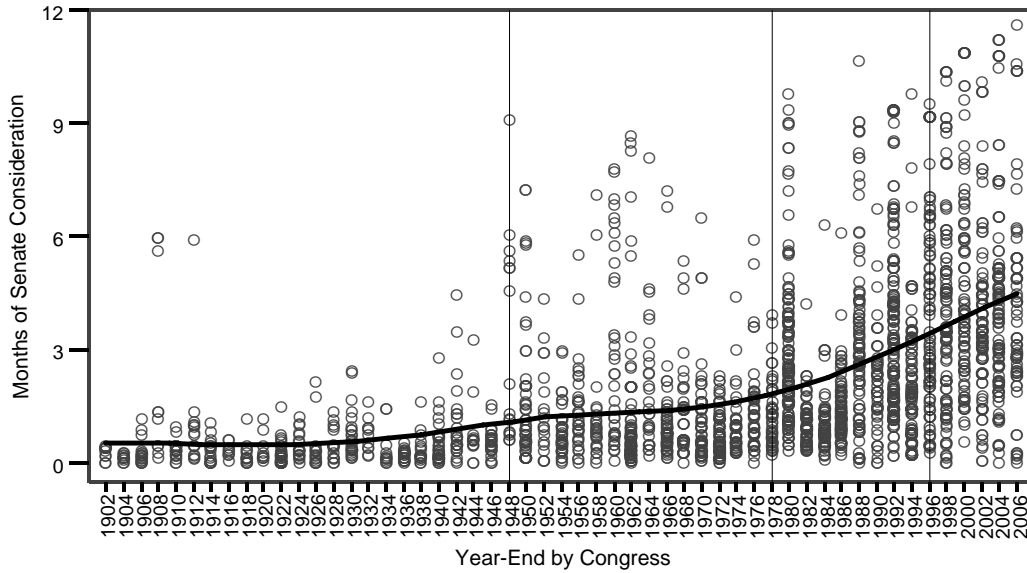
Note: Figure comprises the United States Supreme Court, Courts of Appeals and District Courts (including the District of Columbia and Puerto Rico, but not the Commerce Courts). The selection measure is the mean period of delay between the opening of a vacancy and the submission of a nomination. The confirmation measure is the mean of accumulated days of Senate consideration for each nominee-vacancy pairing (N = 3191).

Figure 3: Dispersion of U.S. District Court Selection Events



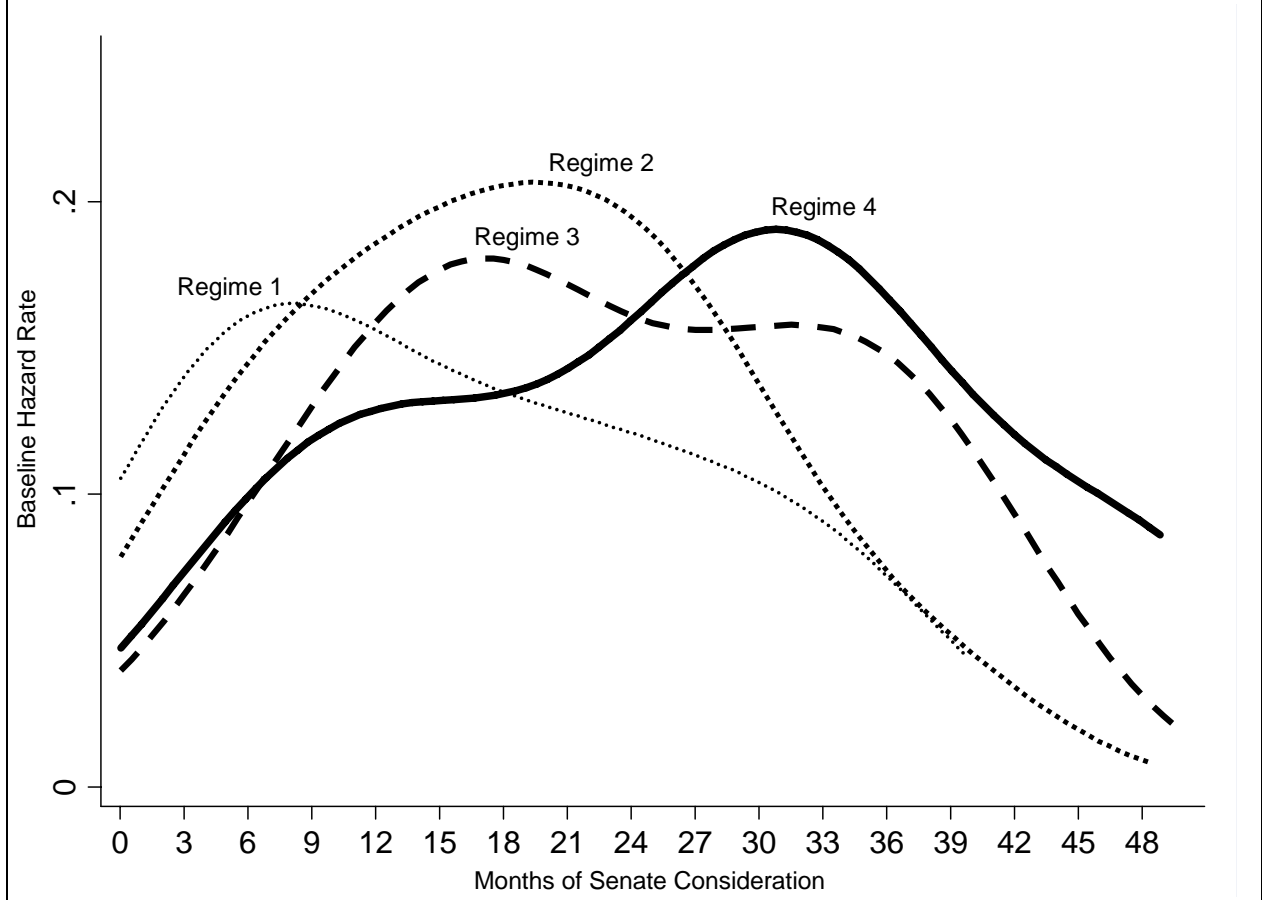
Note: Individual events represent the selection period - the number of days between the opening of a vacancy and the submission of a nomination. District of Columbia and Puerto Rico are both excluded. Lame duck appointment events – those taking place after the November presidential election with forthcoming change in control of the executive – are excluded (36 observations). Projection is the result of localized linear regression for every 30 observations. N = 2314.

Figure 4: Dispersion of U.S. District Court Confirmation Events



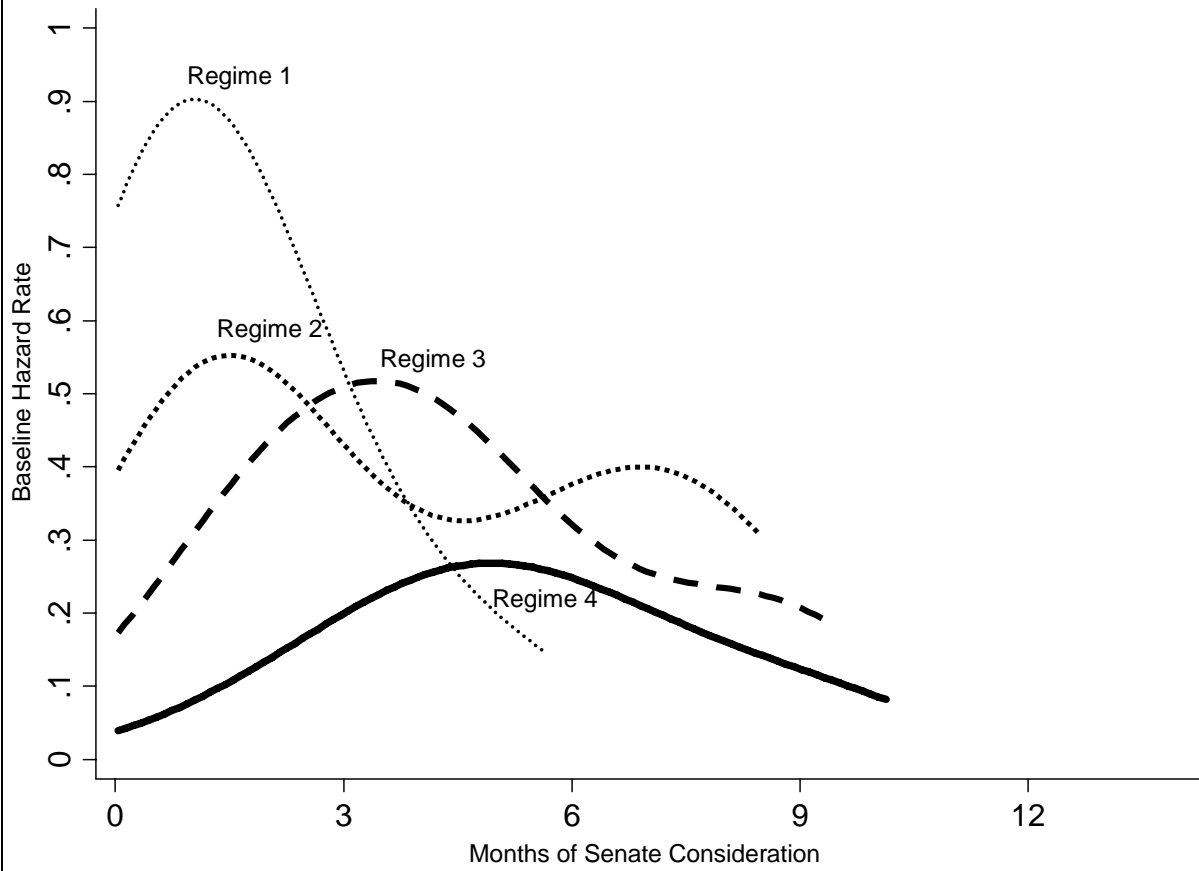
Note: Events represent the confirmation period – the number of days between the submission of a nomination and confirmation, withdrawal, failure, or return to the president at the end of a session of Congress without action. District of Columbia and Puerto Rico are both excluded. Lame duck appointment events – those taking place after the November presidential election with forthcoming change in control of the executive – are excluded (36 observations). Projection is the result of localized linear regression for every 30 observations. N = 2692.

Figure 5: U.S. District Court Selection Function by Regime



Note: Plots represent the baseline hazard rate, which is the unspecified functional form of the Cox Proportional Hazards estimation. The hazard rate is the conditional failure rate, or in this case, the conditional rate of selection as time elapses within a typical Senate session.

Figure 5: U.S. District Court Confirmation Function by Regime



Note: Plots represent the baseline hazard rate, which is the unspecified functional form of the Cox Proportional Hazards estimation. The hazard rate is the conditional failure rate, or in this case, the conditional rate of confirmation as time elapses within a typical Senate session.

Table 1: U.S. District Court and Courts of Appeals Events: Independent Samples

	N	Mean	Standard Deviation	Independent Mean ~ t	Independent Variance ~ F
USDC					
Selection					
1901 – 1946	410	133.37	167.44		
1947 – 1976	653	188.08	176.73	-5.08 ***	3.78
1977 – 1994	799	292.65	197.78	-10.63 ***	10.80 ***
1995 – 2006	452	261.26	231.94	2.42 *	7.68 **
Confirmation					
1901 – 1946	429	15.59	21.93		
1947 – 1976	715	38.72	45.46	-11.55 ***	97.16 ***
1977 – 1994	932	69.49	57.82	-12.09 ***	48.91 ***
1995 – 2006	616	124.05	77.04	-15.01 ***	58.71 ***

Note: District of Columbia and Puerto Rico are excluded. Lame duck appointment events – those taking place after the November presidential election with forthcoming change in control of the executive – were excluded (XX observations). Independent mean test does not assume equal variances. Independent variance test is Levene's test. * $p < .05$, ** $p < .01$, and *** $p < .001$ (two-tailed test).

Table 2: Cox Proportional Hazards Estimates of the Duration of U.S. District Court Appointments 1901 though 2006

Variable	1901 – 1946		1947 – 1976		1977 – 1994		1995 – 2006	
	Selection	Confirmation	Selection	Confirmation	Selection	Confirmation	Selection	Confirmation
Senators 2-Same	-.10 (.40)	-.74 * (.40)	-.46 * (.23)	.54 ** (.21)	-.71 * (.31)	.62 * (.30)	-1.18 * (.52)	-.31 (.48)
Senators 2-Opposite	.10 (.18)	-.58 ** (.20)	-.70 *** (.19)	-.19 (.17)	-.18 (.12)	.06 (.13)	-.64 *** (.14)	-.53 *** (.18)
Senator 1-Same	-.09 (.62)	-1.72 ** (.65)	-1.40 *** (.25)	.05 (.24)	-.10 (.29)	.51 * (.28)		
Senator 1-Opposite							-.42 * (.20)	-.21 (.20)
Judiciary Chair	.04 (.35)	-.36 (.34)	-.93 * (.34)	-.24 (.26)	.15 (.15)	-.93 *** (.21)	-.67 * (.31) ^b	-.43 * (.26)
Opposite Party * Unified Seats	-.01 (.02)	.01 (.02)	.01 (.01)	.01 (.01)	.06 ** (.02)	-.02 (.03)	-.00 (.04)	-.09 * (.04)
Year of Term		.04 (.04)		-.17 *** (.05)		-.37 *** (.04)		-.11 * (.06)
Female			-.09 (.26)	-.95 * (.45)	-.09 (.09)	.13 (.09)	-.09 (.11)	-.37 ** (.12)
African-American			-.49 * (.25)	-.01 (.28)	-.21 * (.11)	-.21 (.14)	.15 (.15)	.02 (.19)
Latino-American			.70 (.53)	.27 (.17)	-.17 (.15)	-.17 (.20)	.01 (.17)	.21 (.17)
“Not Qualified” ABA Rating			-.61 * (.33)	-.22 (.21)	-.11 (.10)	-.35 ** (.13)	-.35 * (.16)	-.37 * (.18)
Observations	410	429	653	715	799	932	452	616
Censored Events	28	28	38	86	24	211	47	227
Log Likelihood	-1896.28	-2060.10	-3318.34	-3539.41	-4378.43	-4193.87	-2020.11	-2166.41
Wald Test ~ χ^2	2.11	16.28 **	62.23 ***	63.14 ***	23.84 **	226.51 ***	28.73 ***	38.67 ***
AIC	3802.57	4132.19	6654.69	7098.81	8774.85	8407.75	4057.07	4352.83
Schoenfeld ~ χ^2	2.51	12.55	9.27	7.35	20.17	18.08	18.42	13.26

Note: District of Columbia and Puerto Rico are excluded. Lame duck appointment events - those taking place after the November presidential election with forthcoming change in control of the executive – were excluded (36 observations). The selection of a nominee sometimes takes place prior to the retirement of the sitting judge. These cases are assigned a value of 1 and treated as censored observations. Nominations not confirmed within a session of Congress are treated as censored observations. Robust standard errors in parentheses. * $p < .05$, ** $p < .01$, and *** $p < .001$ (one-tailed tests). ^a Exhibits temporal instability ($p < .001$, two-tailed test). ^b Exhibits temporal instability ($p < .001$, two-tailed test)