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The Timing of Presidential Nominations to the Lower Federal Courts

TAJUANA D. MASSIE, THOMAS G. HANSFORD, and DONALD R. SONGER
UNIVERSITY OF SOUTH CAROLINA

Presidents often move quite slowly to exercise their important power of judicial appointment. This study attempts to explain these delays by developing a strategic conception of the timing of presidential nominations to the lower federal courts. We argue that the judicial selection process may be best conceptualized by viewing presidents as strategic actors who prefer to select judges with policy preferences that are as close as possible to those of the president, given senatorial and temporal constraints. We test our argument by estimating a duration model of the length of time between vacancy and nomination for all vacancies in the U.S. District Courts and U.S. Courts of Appeals from 1977 to 1999. Our results indicate that the timing of presidential nominations is a function of both politics and institutional constraint.

Presidential appointments to the United States District Courts and the United States Courts of Appeals present an interesting puzzle. On the one hand, it is clear that the constitutional prerogative to appoint such judges is an important power of the president. Federal judges on these lower courts are important policymakers whose personal policy preferences have a substantial impact on the development of law (Goldman 1975; Rowland and Carp 1996; Songer, Sheehan, and Haire 2000). Once appointed, these judges typically serve "for life" and their decisions are generally consistent with the political preferences of the president who appointed them (Songer and Ginn 2002). Consequently, any president hoping to influence judicial policymaking must concern himself with those who sit on the lower federal courts.

On the other hand, presidents often move quite slowly to exercise their power of judicial appointment. In many instances, presidents wait well over a year after a judicial vacancy occurs before they announce their nominee. Given the importance of the power to nominate federal judges, why do presidents so frequently delay the exercise of this power? Why do they not quickly seize upon an opportunity to shape the judiciary?

In addition to constituting an interesting theoretical puzzle, presidential nomination delays are of substantive importance. Much recent attention has been paid to the length of time it takes to fill judicial vacancies because enduring vacancies presumably increase the workload for federal judges and overburden the judiciary. Although the Senate sometimes draws out the confirmation process, the data indicate that recent presidents largely have been responsible for the duration of judicial vacancies. Therefore, while

it is important to understand why the Senate delays confirmation (see Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle 2002), it is just as critical to develop an understanding of presidential nomination delays.

An attempt to solve the puzzle of presidential nomination delay requires systematic study of the period between the creation of lower court vacancies and the announcement of presidential nominations. We develop a strategic conception of presidential nominations and argue that the timing of nominations depends on the extent to which the president can select a nominee that reflects his policy preferences, while facing senatorial and temporal constraints. We test our argument by estimating a duration model of the length of time between vacancy and nomination for all vacancies in the U.S. District Courts and U.S. Courts of Appeals from 1977 to 1999.

THE APPOINTMENT OF FEDERAL JUDGES

Extant research on the selection of federal judges provides both a wealth of detailed, descriptive information (e.g., Abraham 1992; Berkson and Carbon 1980; Chase 1972; Fowler 1983; Goldman 1997; Harris 1953; McFeeley 1987; Sheldon and Maule 1997; Yalof 1999) and theoretical, systematic studies of the outcomes of the presidential nomination (Moraski and Shipan 1999) and Senate confirmation (Caldeira and Wright 1998; Overby et al. 1992; Segal, Cameron, and Cover 1992) phases of the selection process. While the outcomes of this process are very important, Nixon and Goss (2001) note that there is also variation in the length of time it takes to fill judicial vacancies. In particular, scholars have taken notice of recent delays in the Senate's confirmation of nominees to the lower federal courts (Slotnick and Goldman 1998). These delays suggest that the *process* of Senate confirmation is as important to study as the outcomes. Accordingly, recent studies investigate the duration of Senate confirmations and find that senatorial delay is a function of politics, institutional features, and nominee characteristics (Binder

and Maltzman 2002; Hartley 2001; Martinek, Kemper, and Van Winkle 2002).

While this recent work adds to our understanding of the process of Senate confirmation, the period of time between the creation of a judicial vacancy and the announcement of a nomination to fill the vacancy is just as important. During this period, the president must identify politically compatible candidates, negotiate with home-state senators, and anticipate the probable reactions of the rest of the Senate. Moreover, an examination of the duration of the judicial selection process suggests that the nomination process is the most time-consuming. Our analysis of the data described below shows that for the 1977-1999 period, the time between vacancy and the announcement of a nomination averaged 317 days. In contrast, the average length of time between nomination and final Senate disposition of a nomination ranges only from 41 days (under Reagan) to 80 days (under Clinton) (Martinek, Kemper, and Van Winkle 2002).[1] Delay by the president in the announcement of a nomination is typically much longer than confirmation delays.

UNRAVELING THE PUZZLE OF NOMINATION DELAYS

Assuming that presidential behavior is goal-oriented, any attempt to explain presidential nomination decisions must start with the positing of a goal or set of goals that presidents pursue. As noted by Goldman (1997), it is likely that presidents pursue multiple goals when selecting judicial nominees. Specifically, Goldman suggests that presidents might seek to influence policy outcomes, bolster political support, or reward personal friends. In order to develop a parsimonious model of the timing of presidential nominations, we make the simplifying assumption that presidents solely pursue policy influence when making nominations.[2] That is, we assume that presidents prefer to select nominees who share their personal policy preferences. Indeed, the findings of the literature on the congruence between the policy preferences of presidents and their lower court appointments suggest that presidents seek nominees who share the president's preferences (Rowland and Carp 1996; Rowland, Carp, and Stidham 1984; Songer 1982; Songer, Sheehan, and Haire 2000).

But, presidents have constraints placed on their behavior and are not always able to choose immediately their most preferred judicial candidate as nominee. We argue that most important are the constraints resulting from the need to secure the confirmation of their nominees by the Senate, the norm of senatorial courtesy, and constitutionally imposed temporal constraints.[3] Presidents will respond to these constraints in a strategic manner and time nominations so as to maximize the opportunity to influence judicial policymaking.[4] Delays can result from this strategic behavior.

Since the Senate must confirm a president's judicial nominee, when making his final selection the president will undoubtedly need to take the preferences of the Senate into consideration (Moraski and Shipan 1999; Hartley and Holmes 1997).[5] Even if the Senate does not formally vote to reject a president's nominees, it can delay the final confirmation vote. In fact, if the Senate does not vote on a nominee by the end of the Congress, then the nomination is effectively defeated. The likelihood of the Senate delaying confirmation of a nominee depends, in part, on whether the Senate is controlled by the president's party (Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle 2002; Slotnick and Goldman 1998). We contend that a strategic president will anticipate the Senate's likely action on a nominee, and thus the timing of nominations can be expected to depend on the partisan control of the Senate. More precisely, it is the interaction between partisan control of the Senate and the length of time remaining in the Congress that will affect the timing of presidential nominations.

When the opposing party controls the Senate, the president must expect senatorial delay (Binder and Maltzman 2002; McCarty and Razaghian 1999). If it is early in the Congress, this delay is unlikely to prevent the ultimate confirmation of the nominee. If the president announces a nomination late in the Congress, then it is more probable that senatorial delay will prevent confirmation. For this reason, we suggest that when the Senate is controlled by the opposing party the president will be more likely to make nominations early in the Congress. When there is little time left in the Congress, however, the president will become less likely to attempt to fill judicial vacancies as the decreasing benefit associated with the diminishing probability of a like-minded nominee being confirmed by the Senate will be, at some point, outweighed by the costs associated with finding, vetting, and promoting the nominee.

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[1] The delays reported by Martinek, Kemper, and Van Winkle (2002) are corrected for Senate recess days. Binder and Maltzman (2002) report an average senatorial delay of 92 days (not corrected for recess days) for appeals courts nominations made between 1947 and 1998.

[2] Many recent studies of judicial appointments at least implicitly make this same simplifying assumption (e.g., Binder and Maltzman 2002; Moraski and Shipan 1999). While it is conceivable that policy goals matter more for nominations to appeals courts than to district courts, we find that our theoretical model applies to both types of nomination (see footnote 22). It is also possible that the exact nature of the goals pursued will vary by president. Qualitative studies do a nice job of capturing differences across presidents when it comes to judicial appointments. Here we focus on the commonalities across presidents, not the differences.

[3] This is not to say that these are the only constraints that presidents ever face when making nominations. We are suggesting that these are the most important constraints that presidents, in general, will face when attempting to nominate like-minded judges.

[4] While our theoretical argument focuses on the strategic aspects of the timing of judicial nominations, delays in the nomination of federal judges can also result from difficulties in finding acceptable nominees. We attempt to control for this by including a dummy variable denoting whether the vacancy resulted from the death of the incumbent judge. Vacancies originating in this manner may allow the president less time to settle on nominees than vacancies that the president could anticipate in advance (e.g., vacancies resulting from retirement).

[5] Formal theories of executive branch appointments also suggest that presidents rationally anticipate the Senate's response to nominations and select acceptable nominees (see Hammond and Hill 1993; Nokken and Sala 2000).

H_{1a}: *During divided government, the president will become less likely to make a nomination on a given day as the Congress progresses.*

The dynamics are different under unified government. If the president's party controls the Senate, then the Senate will be much less prone to delay confirmation and the president will face less resistance when selecting nominees who reflect the president's policy positions. Thus, there will be less pressure to select nominees early in the Congress because the potential for senatorial delay is minimal. Instead, the president's main concern will be selecting a nominee before such a favorable Congress ends. That is, the president will be constrained only by the ending of the Congress. The later it is in the Congress, the more likely it is that the president will move to fill a vacancy. In short, we expect the presence or absence of divided government to affect the timing of the president's nominations. But, this effect will be conditioned by temporal dynamics resulting from the congressional election cycle.

H_{1b}: *During unified government, the president will become more likely to make a nomination on a given day as the Congress progresses.*

A second important constraint on presidential nominations is the Senate norm known as "senatorial courtesy," which has played an important role in the selection of lower federal court judges throughout the past century (see Carp and Stidham 1998; Harris 1953; Rowland and Carp 1996). Under this norm, a nomination must be acceptable to the home-state senator from the president's party.[6] If a nominee is unacceptable to this senator, the Senate typically will fail to confirm the nominee (Goldman 1997). Therefore, we contend that a strategic president must account for the home-state senator's preferences when selecting a judicial nominee.[7]

If for a particular vacancy the home-state senator is ideologically proximate to the president, then the president has an incentive to make a nomination to fill this vacancy. In this situation, the home-state senator will not veto a nominee that reflects the president's preferences. When a vacancy arises in which the home-state senator is ideologically distant from the president, the president will have less incentive to prioritize the filling of that vacancy because a successful nomination will have to involve compromise with that senator, meaning that the president may not be able to select a nominee who fully reflects the president's policy preferences. Further, the additional bargaining that must

occur between a president and a home-state senator who are not compatible on ideological grounds will presumably lengthen the period of time it takes to find a suitable nominee. For these reasons, we hypothesize that the president will take more time to select a nominee if the home-state senator is ideologically distant. This effect will be most pronounced for nominations to district court vacancies, as these are the nominations for which the norm of senatorial courtesy exists in its strongest form (Chase 1966; Harris 1953; Richardson and Vines 1970; Songer, Sheehan, and Haire 2000).

H_2: *The greater the ideological distance between the president and the home-state senator, the less likely it is that the president will make a nomination on a given day.*

H_3: *The ideological distance between the president and the home-state senator will have a greater effect on the timing of district court nominations than appeals court nominations.*

The final constraint on the president's nomination choices that we consider here is the constitutionally mandated restriction on the length of time that the president can serve. At the very beginning of a presidential career, the president has at least four years to serve in office and thus four years to select the optimal nominees to fill extant vacancies. As the president's four-year term nears its end, the president cannot necessarily expect to receive another chance to fill judicial vacancies. Thus, we contend that there is a greater probability of the president acting on a vacancy if it is late in the presidential term. Further, given that once a second term in office ends a modern president can be certain that he will not serve another term, he may be particularly inclined to fill vacancies towards the end of his second term in office.

H_4: *As the end of the presidential term nears, the president will become more likely to make a nomination to fill a vacancy.*

H_5: *A second-term president will be particularly likely to make a nomination as the end of the term draws near.*

DATA AND METHODS

In order to test these hypotheses, we utilized data on all vacancies in the U.S. Courts of Appeals and the U.S. District Courts from 1977 to 1999 (N = 1,204).[8] These data were derived from the Martinek (2000) database, with the missing values for a handful of variables and observations filled in by the authors with data from the Martindale-Hubbell legal directories and the records of the Senate Judiciary

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[6] For purposes of simplicity, we will refer to "the home-state senator" even though there are often two home-state senators of the president's party.

[7] If neither home-state senator is from the president's party, then the president may consult with members of the state's House delegation or other party elites. In this situation, there is no veto gate equivalent to senatorial courtesy. Songer (1982) and Giles, Hettinger, and Peppers (2001) demonstrate that when there is no home-state senator from the president's party judicial appointments are more likely to reflect the president's policy preferences.

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[8] We thus included all vacancies in all district and circuit courts of general jurisdiction. Vacancies in specialized courts, such as the Federal Circuit and the Court of International Trade, are not included as both the criteria for selection and the nomination process may be quite different than for courts of general jurisdiction.

Committee.[9] The observed dependent variable in our analysis is the length of time, in days, that a lower federal court vacancy lasts or "survives" before the president makes a nomination to fill the vacancy.[10] Time "starts" the day that the vacancy occurs and "ends" the day that the president selects a nominee. For a given vacancy in our data set, there is an observation for each day until a nomination is made. We exclude from the data days falling between the end of one Congress and the start of the next. As we noted earlier, the length of time that it takes for a president to announce a nomination is of substantive interest since lengthy delays can lead to an understaffed judiciary. More importantly, by studying the duration between vacancy and nomination we can examine whether the president behaves strategically when deciding when to make a nomination.

Given the nature of our theoretical expectations and data, we employ a duration model to test our hypotheses regarding the timing of nominations.[11] While the observed dependent variable in duration analysis is the length of time until an event occurs, the unobserved dependent variable is the hazard rate, or instantaneous risk that an event will occur at time t, conditional on the event not having occurred prior to time t. The hazard of an event occurring at time t is analogous to the probability of an event occurring at t, although a hazard rate has no upper bound. In our model, the hazard rate is the instantaneous risk that a nomination will be made on a given day. A duration model thus allows us to evaluate the effect of our independent variables on the daily hazard of the president making a nomination to fill a judicial vacancy.

It is important to note that there is an inverse relationship between the hazard of the president selecting a nominee and the duration of a vacancy (i.e., the delay between the day the seat is vacated and the day a nomination to fill the vacancy is made). As the hazard of nomination increases, the expected duration of the vacancy decreases. Thus, if an independent variable has a positive effect on the hazard rate, then it has a negative effect on the duration of the vacancy.

From the family of duration models, we select the Cox regression model and estimate it with robust standard errors. We include in our model the independent variables suggested by our hypotheses. Divided Government is coded as one if the president's party is in the minority in the Senate and zero if the president's party is in the majority.[12] We

argue that the effect of Divided Government will be conditioned by how much time is left in a Congress. We measure Time Left in Congress as the number of days left in the Congress. We interact these two variables (Divided Government × Time Left in Congress) and expect the coefficient to be positive in direction. A positive sign would indicate that during divided government, the president is more likely to make a nomination when there is a lot of time left in the Congress and less likely to make a nomination as the days left in a Congress dwindle. We anticipate that the sign for the component term Time Left in Congress will be negative, demonstrating that under unified government the likelihood of the president selecting a nominee increases as the number of days left in the Congress decreases.

To create a measure for the ideological distance between the president and the home-state senator, we employ Poole and Rosenthal's DW-Nominate scores.[13] Specifically, the ideological distance between the president and the home-state senator (President – Home-State Senator Distance) is measured as the absolute distance between the DW-Nominate score for the president and the DW-Nominate score for the home-state senator.[14] If there are two home-state senators of the president's party, then President—Home-State Senator Distance equals the absolute distance between the president and the average DW-NOMINATE score of these two senators. If there is no home-state senator of the president's party, then this variable equals zero.[15] To test our hypothesis that senatorial courtesy will matter most for district court appointments, we interact President—Home-State Senator Distance with a dummy variable that equals one if the vacancy is on a district court (District Court Vacancy) and expect a negative coefficient for this interaction term.

We also suggest that the hazard of the president making a nomination will be affected by how much time is left in the presidential term. Time Left in Presidential Term is measured as the number of days remaining in the president's term and we expect this variable to have a negative coefficient (i.e., the less time left in the term, the more likely a nomination will be made). Further, we anticipate that this variable will have

[9] The Martinek data exclude vacancies for which there had not been a nomination made by the year 2000. We identified these missing vacancies using Senate Judiciary Committee records and added them to the data.

[10] Once a nomination has been made, we include no more observations for the vacancy. Thus, our data do not include any activity (e.g., renominations) after the initial nomination has been made.

[11] Box-Steffensmeier and Jones (1997) review duration models and their applicability in political science.

[12] Duration models allow for time-varying independent variables, meaning that independent variable values can change over time for a particular vacancy. Divided Government, for example, can equal one for the first 300 days of a vacancy and then equal zero thereafter. Almost all of

the variables included in the model are, in fact, time-varying. Only Vacancy Caused by Death and District Court Vacancy are time-constant.

[13] We use the first dimension of the DW-Nominate coordinates (see Poole and Rosenthal 1997).

[14] Most conceptions of senatorial courtesy indicate that only a senator of the president's party can block a nomination (Giles, Hettinger, and Peppers 2001; Peltason 1955; Richardson and Vines 1970; Rowland and Carp 1996; Songer 1982). Thus, we only include the distance between the president and the home-state senator of the president's party. However, we do recognize that some scholars take the position that home-state senators from the opposing party can block nominations (e.g., Binder and Maltzman 2002). We thus also estimated our model with a variable measuring the distance between the president and the most distant home-state senator, regardless of party. Using this alternative specification, we find that home-state senator distance matters equally for both district and appeals court nominations (i.e., the coefficient for President—Home-State Senator Distance is negative and significant while the coefficient for President—Home-State Senator Distance × District Court is insignificant).

an even stronger negative effect when the president is serving a second term. We therefore interact *Time Left in Presidential Term* with a dummy variable indicating whether the president is serving a second term (*Second Presidential Term*) and expect a negative coefficient for this variable.

In addition to the independent variables suggested by our hypotheses, we include several control variables in the model. We control for whether there is a home-state senator from the president's party (*Home-State Senator*) and the total number of lower court vacancies at time *t* (*Number of Vacancies*). It is possible that a president may take longer to fill an unexpected vacancy resulting from the death of an incumbent judge, as opposed to a vacancy caused by a retirement or the statutory creation of a new seat (Nixon and Goss 2001). We therefore include a dummy variable that equals one if the vacancy was caused by the death of a sitting judge (*Vacancy Caused by Death*). It is also likely that a newly elected president will need some time to establish his administration's judicial selection process. To control for this, we include a dummy variable that equals one if an administration is within its first six months (*New Administration*).[16] Finally, we add fixed effects controls for the president in office during the vacancy. Specifically, we include dummy variables for Clinton, Bush, and Carter. A dummy variable for Reagan is not included in the model and thus Reagan serves as the baseline.[17]

For the 1,171 vacancies in which a nomination was made by the end of 1999 (the last year included in our data), the average length of time between vacancy and nomination (our observed dependent variable) is 317 days.[18] The maximum duration is 1,832 days, while the minimum is one day.[19] Removing the days between Congresses from the data yields a mean duration of 282 days and a maximum of 1,688 days. Descriptive statistics for each of the independent variables in our model are presented in Table 1.

In our data, there are 33 additional vacancies for which a nomination was not made by the end of 1999. These cases are right-censored because the event we are examining (a nomination) has not occurred by the end of our time frame. Fortunately, Cox regression models, like other types of duration models, are designed to handle right-censored data and thus we can include these vacancies in our analysis without biasing the estimated effects of the independent variables (Box-Steffensmeier and Jones 1997).

The results of our Cox regression model are presented in Table 2. A Wald test reveals that the independent variables yield a statistically significant ($p < .05$) improvement in the fit of the model. Moreover, the estimated coefficients for our independent variables largely conform to our expectations. While interpreting these results, it is important to remember that the estimates indicate the effect of the independent variables on the hazard of a president making a nomination to fill a vacancy on a given day. A positive coefficient indicates that as the independent variable increases, the hazard of the president selecting a nominee also increases. An increase in the hazard rate yields a decrease in the length of time until a nomination is made. That is, the greater the hazard rate, the shorter the expected duration of a vacancy. A variable that positively affects the hazard rate has a negative effect on the length of time until nomination.

The variables tapping the dynamics of the relationship between the president and the Senate largely perform as expected and these results indicate that the effect of *Time Left in Congress* depends on whether the president's party controls the Senate. The estimate for *Time Left in Congress* is negative and statistically significant, suggesting that during unified government the hazard of the president making a nomination increases as the Congress progresses (and *Time Left in Congress* decreases).

To understand the effect of *Time Left in Congress* during periods of divided government, it is necessary to consider the combination of the estimates for *Time Left in Congress* and *Divided Government* × *Time Left in Congress* (which is positive and significant). The conditional effect of *Time Left in Congress* during divided government is: $-0.0008 \times$ *Time Left in Congress* $+ 0.0011 \times$ *Time Left in Congress*. Thus, during divided government *Time Left in Congress* appears to exert the positive effect on the hazard rate (a conditional coefficient of .0003) that we expected. A positive effect indicates that, under divided government, the earlier it is in the Congress (i.e., the more time left in the Congress) the greater the hazard of a nomination being made. Conversely, the later it is in the Congress, the lower the hazard of a nomination being made. However, the standard error for the conditional coefficient is sufficiently large that we cannot conclude that the conditional coefficient for the effect of *Time Left in Congress* during divided government is greater than zero.[20]

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[15] As we discuss below, we also include a dummy variable (*Home-State Senator*) indicating whether there is a home state senator of the president's party. Thus, our model distinguishes between situations in which *President—Home-State Senator Distance* equals zero because the president and the senator have the same DW-Nominate scores and situations in which the variable equals zero because there is no home-state senator.

[16] This control variable is not overly collinear with *Time Left in Presidential Term* because *Time Left in Presidential Term* records the time left in either a first or second presidential term while *New Administration* only equals one at the beginning of a first term.

[17] These fixed effects are somewhat collinear with *Divided Government*. The magnitude of the correlation coefficients between these dummy variables and divided government ranges from a low of .21 (Clinton) to .55 (Bush). If these fixed effects are excluded from the model, the main difference in the results is that the estimates for *Time Left in Presidential Term* and *Number of Vacancies* achieve statistical significance. But, we think it appropriate to control for differences in the baseline hazard across presidents. Moreover, our results indicate that these differences are statistically significant.

[18] The median length of time is 246 days.

[19] There are actually 51 instances (4.3 percent of the vacancies) in which a nomination was announced shortly before a seat was formally vacated. In these situations, we code both the vacancy and the nomination as occurring on the day of the nomination (i.e., duration equals one day).

[20] Specifically, the standard error for the conditional coefficient is .0003. See Friedrich (1982) for a discussion of how conditional coefficients and accompanying standard errors can be calculated.

≡ TABLE 1
DESCRIPTIVE STATISTICS FOR THE INDEPENDENT VARIABLES INCLUDED IN THE ANALYSIS

Variable	Mean	Standard Deviation	Minimum Value	Maximum Value
Divided Government	.494	.500	0	1
Time Left in Congress	388	195	1	712
President—Home-State Senator Distance	.133	.167	0	.76
District Court Vacancy	.800	.400	0	1
Time Left in Presidential Term	703	362	1	1369
Second Presidential Term	.301	.459	0	1
Home-State Senator	.655	.475	0	1
Number of Vacancies	64.7	35.9	5	163
Vacancy Caused by Death	.056	.230	0	1
New Administration	.069	.254	0	1
Clinton	.351	.477	0	1
Bush	.229	.420	0	1
Reagan	.263	.440	0	1
Carter	.157	.364	0	1

In short, these results suggest that during unified government the hazard of a president making a nomination increases as the Congress progresses (i.e., *Time Left in Congress* decreases). During divided government, the hazard of a nomination being made appears to decrease as the Congress progresses, but does not do so in a statistically significant manner.

We have also argued that the timing of a presidential nomination will be constrained by the norm of senatorial courtesy. Our results here are mixed. The estimated coefficient for *President—Home-State Senator Distance* does not perform as expected. But, the estimate for the interaction of this variable with *District Court Vacancy* reveals that senatorial courtesy plays a role in the nomination of district court judges. The greater the ideological distance between the president and the home-state senator of the president's party, the less likely it is that the president will make a nomination to fill the vacancy on any given day. In short, presidents appear to be constrained by the preferences of home-state senators when selecting district court judges, but not when selecting appeals court judges.

≡ TABLE 2
COX REGRESSION OF THE TIMING OF PRESIDENTIAL NOMINATIONS TO THE LOWER FEDERAL COURTS, 1977-1999

Independent Variable	Estimated Coefficient	Robust Standard Error
Time Left in Congress	−0.0008*	0.0003
Divided Government × Time Left in Congress	0.0011*	0.0003
President—Home-State Senator Distance	0.1367	0.4173
President—Home-State Senator Distance × District Court Vacancy	−0.7136*	0.4338
Time Left in Presidential Term	−0.0002	0.0001
Time Left in Presidential Term × 2nd Term	−0.0009*	0.0002
Control Variables and Component Terms:		
Divided Government	−0.1990	0.1970
Home-State Senator	0.3014*	0.0817
Second Presidential Term	0.5774*	0.2155
Number of Vacancies	−0.0018	0.0013
Vacancy Caused by Death	−0.2664*	0.1142
New Administration	−1.9020*	0.3426
District Court Vacancy	−0.1195	0.0919
Number of Cases	1,204	
Total Days at Risk	341,558	
Log likelihood	−6995.56	
Chi-Squared Statistic (Wald Test, 16 d.f.)	245.09*	

Notes: * $p < .05$ (one-tailed test). Fixed effects for president confronted with vacancy are also included in the model (estimate, standard error); Clinton (−0.5404, 0.1218), Bush (−0.6402, 0.2048), Carter (0.1465, 0.1019). Reagan is the baseline.

Interestingly, the estimate for *Home-State Senator* suggests that the mere presence of a home-state senator from the president's party increases the hazard of the president selecting a nominee, and thus decreases presidential delay. It is possible that the presence of a home-state senator reduces the length of time it takes to make a nomination because a home-state senator can play an important informational role by bringing potential nominees to the president's attention and providing relevant information on potential nominees. Therefore, while the ideological distance between the president and the home-state senator affects the length of nomination delays for district court vacancies, the simple existence of a home state senator from the president's party decreases delay relative to situations in which there is no such home state senator.

In addition to the constraints imposed by the nature of the president's relationship with the Senate, we have also contended that the president is constrained by constitutional time limits. The estimate for *Time Left in Presidential Term* is in the predicted direction, but just fails to achieve statistical significance.[21] The result for the *Time Left in Presidential Term * Second Presidential Term* interaction variable, however, suggests that *Time Left in Presidential Term* matters when the president is serving a second term. The less time left in a president's second term, the greater the hazard of the president making a nomination.

The results for the control variables included in the model are worth briefly discussing. The negative and statistically significant estimate for *Vacancy Caused by Death* reveals that presidents move more slowly (i.e., the hazard rate is lower) to make nominations when a vacancy arises as result of the death of the incumbent judge. The hazard rate is greater for a president serving a second term (*Second Presidential Term*) than one serving a first term. The negative coefficient for *New Administration* indicates that a president is less likely to make a nomination in their first few months in office. The estimates for *Divided Government, Number of Vacancies*, and *District Court Vacancy* fail to achieve statistical significance.[22]

While the Cox regression model makes no assumptions regarding the shape of the baseline hazard function, it is possible to recover an estimate of the baseline hazard. For

≡ TABLE 3
PREDICTED HAZARD RATES OF A NOMINATION BEING MADE

Independent Variable (at minimum and maximum values)	Hazard of a Nomination Being Made on a Given Day
Time Left in Congress (under divided government)	
1 day	0.0107
712 days	0.0132
Time Left in Congress (under unified government)	
1 day	0.0130
712 days	0.0074
President—Home-State Senator Distance (district court vacancy)	
0	0.0111
.76	0.0071
Time Left in Presidential Term (during second term)	
1 day	0.0223
1369 days	0.0050

Note: All other independent variable values and the baseline hazard were held constant at their means when generating the hazard rates.

our model, the estimate of the baseline hazard indicates that, holding all independent variables at zero, the hazard of a nomination being made remains fairly constant for approximately the first 900 days of a vacancy. From that point on, the baseline hazard decreases. All else being equal, a president is less likely to make a nomination if the vacancy has existed for several years.

To provide a feel for the substantive effect sizes of the statistically significant variables of interest, predicted hazard rates are presented in Table 3. We generated these hazard rates by varying the independent variable in question from its minimum to maximum value while holding all other independent variables constant at their means.[23] These predicted hazard rates are necessarily quite small because they represent the instantaneous risk of a nomination being made on a given day. A small difference between two hazard rates can translate into a substantial difference in the delay between the opening of a vacancy and a nomination. For example, a president is likely to make a district court nomination by the 198th day of a vacancy if the home-state senator is ideologically congruent with the president (*President—Home-State Senator Distance* equals zero).[24] When

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[21] It is possible that a one-unit change in *Time Left in Presidential Term* may matter more when it is near the end of a presidential term than at the beginning of a term. To test for this non-linear effect, we replaced the linear version of this variable with the log of *Time Left in Presidential Term*, estimated our model, and found the logged variable to be statistically insignificant. Further, the log likelihood of the entire model decreases (i.e., the log likelihood is a larger negative number), indicating that this specification of *Time Left in Presidential Term* does not improve model fit. We therefore keep our original linear specification of the variable, as it is easier to interpret.

[22] The insignificant estimate for *District Court Vacancy* indicates that the baseline hazard is likely the same for both district and appeals court vacancies. It is possible, however, that the effect of the independent variables could vary based on the type of vacancy. We therefore estimated two separate models; one for district court vacancies and one for appeals court vacancies. The results are similar across both types of vacancy, suggesting that our theory applies equally in both settings.

[23] We also hold the baseline hazard constant at its mean value.

[24] We consider a nomination likely to have been made by the day that the survival function dips below .5. The survival function represents the probability of an observation surviving beyond time *t* and can be derived from the hazard function.

≡ FIGURE 1

THE EFFECT OF DIVIDED GOVERNMENT AND TIME LEFT IN CONGRESS ON THE HAZARD OF A NOMINATION BEING MADE
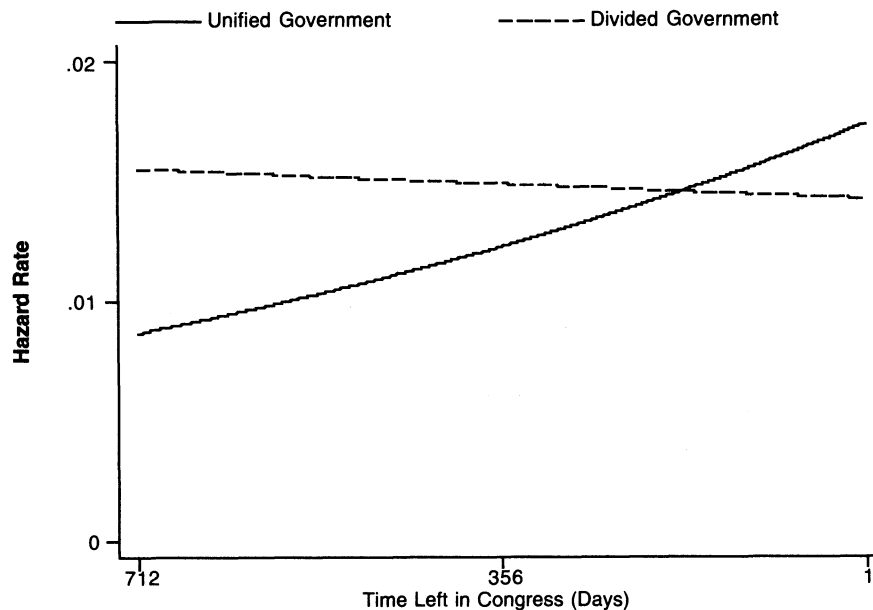
Note: When predicting these hazard rates, *Time Left in Presidential Term* is also allowed to vary from 712 days to 1 day. All other independent variables and the baseline hazard are held constant at their means.

President—Home-State Senator Distance is at its maximum value (.76), a nomination is not likely to be announced until the 305th day.

The predicted hazard rates for Time *Left in Congress* and *Time Left in Presidential Term* should be interpreted with some caution, however. It is unrealistic, for example, to calculate the effect of *Time Left in Congress* and its interaction with *Divided Government* while holding *Time Left in Presidential Term* constant, since these variables covary to an extent. To give a more realistic illustration of the combined effect of *Time Left in Congress* and *Divided Government*, Figure 1 provides a graph of the hazard of a first-term president making a nomination to fill a vacancy over the course of the second Congress of his administration.[25] On the x-axis of this graph, the value of *Time Left in Congress* (and thus *Time Left in Presidential Term*) varies from 712 days to 1 day. We plot the predicted hazard rates for both unified and divided government to illustrate the combined effect of senatorial and temporal constraints on the timing of presidential nominations. All other independent variables are held at their means.[26]

As Figure 1 demonstrates, during unified government a president becomes much more likely to make a nomination as the congressional session progresses. When faced with divided government, a president has a greater hazard of making a nomination at the very beginning of the session.

Over time, however, the hazard of this president making a nomination decreases and eventually falls below the hazard rate for a president operating under unified government.

DISCUSSION

While the authority to nominate judges grants the president the potential to affect the policy outcomes established by federal courts, presidents often appear somewhat indifferent to this opportunity as they delay the selection of a nominee for an extended period of time. In fact, presidential delay in selecting a nominee typically exceeds senatorial delay in acting on a nominee. We have addressed this apparent puzzle by arguing that the timing of presidential nominations depends on the extent to which the president can select a nominee that reflects his policy preferences while facing a combination of senatorial and temporal constraints.

The results of our duration analysis provide support for most of our claims as the presence of divided government or unified government combines with temporal dynamics to determine when the president will put forward a nominee to fill a judicial vacancy. Our analysis also shows that the president sometimes takes into account the norm of senatorial courtesy as well as the amount of time left in the presidential term. In short, the timing of presidential nominations is a function of both politics and institutional constraint.

These results yield several interesting implications regarding the appointment of lower federal court judges. To start, there has been much discussion in the popular press

[25] Thus, we set *Second Presidential Term* at zero.
[26] The baseline hazard is also held constant at its mean value.

regarding the length of time it takes to fill judicial vacancies. Working on the assumption that high vacancy rates lead to an overworked and thus less effective judiciary, legal commentators (and even judges) often bemoan delays in the appointment process. Typically, the blame for such delays has been placed at the feet of the Senate. The data indicate, however, that it is presidents who have often taken their time in selecting nominees to fill extant vacancies and thus have been largely responsible for appointment delays.

Moreover, presidential delay, like senatorial delay (see Binder and Maltzman 2002), is a function of politics. Our analysis indicates that the timing of presidential nominations depends on the extent to which the president can select a nominee that reflects his policy preferences while facing senatorial and temporal constraints. Senatorial constraints depend on whether the president's party controls the Senate. If the Senate is controlled by the opposing party, then the president can anticipate long confirmation delays (Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle 2002). If the president's party controls the Senate, then the president need not rush to make nominations early in the session. But, as the session winds down, the president has a great incentive to take advantage of a friendly Senate by making nominations to fill judicial vacancies. Thus, the president will act earlier in a Senate session during divided government than if the Senate is controlled by his party. As with Senate confirmation votes, senatorial confirmation delays, the ideological nature of the nominees selected by the president, and the involvement of organized interests in the selection process, the timing of presidential nominations is a function of politics.

A third implication involves the norm of senatorial courtesy. Recent studies examining Senate confirmation of judicial nominees either generate mixed results regarding the effect of senatorial courtesy (Binder and Maltzman 2002) or do not account for this norm (Martinek, Kemper, and Van Winkle 2002). Our results, however, demonstrate that senatorial courtesy plays a significant role in the timing of presidential nominations. For a district court vacancy, the greater the ideological distance between the president and a home-state senator, the longer it will take for the president to select a nominee to fill that particular vacancy. A president has less of an incentive to act quickly to fill these vacancies because it is less likely that the president will be able to successfully appoint a judge that fully shares the president's policy preferences. A president will, instead, prefer to make nominations to fill vacancies in which the home-state senator is ideologically proximate. Thus, not all vacancies are treated equally at a given point in time. Some nominations to fill judicial vacancies will be quicker than others, depending on the relationship between the home-state senator and the president.

In conclusion, one of the innovative aspects of our examination of the appointment process is that we focus on the timing of presidential nominations, as opposed to the outcome of Senate confirmation votes (Segal, Cameron, and Cover 1992) or the delays associated with the Senate's con-

firmation role (Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle 2002). Moraski and Shipan (1999) point out that quantitative studies have neglected the obviously important role of the president in the appointment process and have focused almost exclusively on the Senate's treatment of nominees. Moreover, with the notable exception of a few recent studies (e.g., Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle 2002), researchers have focused on the final *outcomes* of the appointment process. There is much to be gained from studying the *dynamics* of this process. Thus, additional insight into presidential choices and strategies during the selection of judicial nominees can result from focusing on the timing of presidential nominations.

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