

# THE POLITICAL BACKGROUNDS OF U.S. COURTS OF APPEALS JUDGES

by

ADAM G. RUTKOWSKI

(Under the Direction of Christina L. Boyd)

## ABSTRACT

Media reports during the Trump administration charged that President Trump was nominating federal judges with deeper political backgrounds than those nominated in the past. These reports led to several questions: How common are political backgrounds among federal appellate judges? When, and under what conditions, do presidents select judges with political backgrounds? How do these backgrounds manifest during the judicial nomination and confirmation processes? This dissertation addresses these questions in three separate chapters. In the first substantive chapter, the political backgrounds of judges are defined and described by identifying indicators of political activity in the questionnaires submitted by judges to the Senate Judiciary Committee. In the second chapter, factors like confirmation environment and presidential characteristics are used to discover when judges with political backgrounds are likely to be selected. In the third, the Senate Judiciary Committee questionnaires are studied via automated text analysis to reveal the amount of political language judges use. Results reveal that political backgrounds are not uncommon among federal judges, but the selection of such judges can depend on the partisanship of the appointing president and the Senate confirmation environment. Further, certain background characteristics of judges can lead to differential uses of

political language. This dissertation contributes greatly to our understanding of how “political” judges are and why that matters.

**INDEX WORDS:** Judicial Selection, Judicial Backgrounds, Political Backgrounds, U.S. Courts of Appeals, Senate Judiciary Committee, Judges, Courts, Political Language, Textual Analysis

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## **CHAPTER 1: INTRODUCTION**

John B. Nalbandian was nominated to the United States Courts of Appeals for the Sixth Circuit by President Donald Trump in 2018. A graduate of the University of Virginia School of Law, Nalbandian spent most of his professional career practicing appellate law at large national firms, and was even identified as among the “Best Lawyers in America in Appellate Law” (Nalbandian 2018). While he had never served as a judge prior to his appointment, he did spend a year clerking for Judge Jerry E. Smith of the Fifth Circuit Court of Appeals. These elite professional background characteristics are somewhat commonplace among judges nominated to the federal bench.

The more striking part of Nalbandian’s background was his heavy involvement in politics. For example, he had been a member of the Federalist Society for almost thirty years at the time of his appointment, serving as both president and advisory board member of his local chapter. Further, he had been a member of the Republican National Lawyers Association since 2008. Beyond his memberships in these partisan groups, he also participated in many political activities. He was both member and chair of the conservative Commonwealth Political Action Committee, member of the Boone County, Kentucky, GOP Executive Committee, alternate delegate to the 2008 and 2012 Republican National Conventions, and delegate to the 2016 Republican National Convention. He also contributed his legal expertise to Republican politics. As a member of the Republican Party of Kentucky, he served as General Counsel and gave advice to the campaigns of Senators Mitch McConnell and Rand Paul, and Congressman Andy Barr. At his law firm, he dabbled in campaign law, providing services to many Republican

organizations and candidates, including the Ohio branch of Romney for President 2012. Additionally, he volunteered for several Republican campaigns in a personal capacity (Nalbandian 2018).

Judge Nalbandian was confirmed by the Senate with a party-line vote of 53-45. While not necessarily unusual for judges confirmed in the last twenty years due to rising polarization in the Senate, this vote could reflect Democratic senators balking at Nalbandian's (and other Trump nominees') political past. This would be unsurprising given the omnipresent media portrayals of Trump's appellate court nominees as overtly political. For example, a 2020 *New York Times* headline read, "A Conservative Agenda Unleashed on the Federal Courts" (Ruiz et al. 2020). Another, towards the end of Trump's term read, "As Trump Leaves the White House, His Imprint on the Judiciary Deepens" (Ruiz and Gebeloff 2020). These articles focus on the prior political involvement of Trump's selections, revealing that most of them were members of the conservative Federalist Society and had deep connections to political parties and politicians.

The aforementioned news stories give the impression that selecting judges with heightened levels of political involvement was endemic to President Trump. However, a fairly quick assessment of other nominees reveals many examples of "political" individuals. Consider Judge Evan Wallach, placed on the U.S. Court of Appeals for the Federal Circuit by President Barack Obama in 2011. A member of the Democratic Party, Wallach provided many legal services to Democratic interests. He served as General Counsel of the Nevada Democratic Party for several years and General Counsel of the Nevada Assembly Democratic Caucus for almost fifteen years.

He also provided campaign support for several Democratic candidates, including the late Nevada Senator Harry Reid, Gore for President 1988, and Mondale for President 1984. Further,

he served as delegate to the 1984 and 1988 Democratic National Conventions and as alternate to the 1980 convention (Wallach 2011).

Next, consider Judge Leslie Southwick, placed on the Fifth Circuit by President George W. Bush in 2007. A member of the Federalist Society, he volunteered for many campaigns in the 1970s, including George H.W. Bush's and Thad Cochran's U.S. Senate campaigns. During the 1980s, he worked for the George H.W. Bush 1980 primary campaign, the 1984 Reagan-Bush campaign, and was a member and officer of the Capital Area Republican Club. He also was active in the 1988 efforts to elect George H.W. Bush and was a member of local Republican Executive Committees (Southwick 2007).

President Bill Clinton also selected judges with political pasts. Consider Judge Raymond C. Fisher, placed on the Ninth Circuit of the U.S. Court of Appeals in 1999. In his background questionnaire submitted to the Senate Judiciary Committee, Fisher states the following:

I was moderately active in federal, California and local Los Angeles politics since about 1969, but have not held a formal position in a campaign. For the most part, I have simply contributed modest amounts to candidate or issues; in more recent years I authorized use of my name as an endorser or supporter, and occasionally made a limited number of fund-raising calls... (Fisher 1999, p. 1154)

On the following page of his questionnaire, Fisher goes on to describe his moderate activity by listing over thirty campaigns and issues he supported at the federal, state, and local levels. While his involvement in these particular campaigns may have been surface-level, it at least appears that Fisher did not shy away from mingling with politics (Fisher 1999).

President George H.W. Bush also seems to have selected judges with political backgrounds. Judge Joel Dubina was nominated and confirmed to the Eleventh Circuit of the U.S. Court of Appeals in 1990. A native of Alabama, Dubina was entrenched in the Montgomery political scene. He served as the Montgomery Campaign Chairman of (southern) Democrat

Howell Heflin's 1978 Senate race. He also served as chair of Republican Emory Folmar's 1982 gubernatorial campaign. As chair of these campaigns, he "was responsible for coordinating all of the campaign activity...including making speeches on behalf of the candidate and debating those favoring the opposition" (Dubina 1990, 113). He was also the elected chair of the Republican Executive Committee of Montgomery County and assisted in the campaigns of over a dozen candidates for local, state, and federal office (Dubina 1990).

How common are political backgrounds among judges placed on the federal appellate bench? Broadly construed, this dissertation seeks to answer this question. While the examples presented above suggest anecdotally that President Trump may not be alone in selecting judges with robust political backgrounds, a rigorous, systematic assessment of judges' political backgrounds does not exist.

Studying political backgrounds of federal judges matters for a couple of significant reasons. First and foremost, it is important to know the pasts of individuals being selected for these positions since judges enjoy life tenure and have the ability to influence and make legal policy. Relatedly, given the behavioral effects of other background characteristics unearthed over decades of judicial political scholarship, it is possible that political backgrounds could similarly influence judges' behavior on the bench. In order to assess these potential behavioral effects, it is necessary to provide a complete picture of the political involvement of these judges. To this end, this dissertation presents a wholesale account of appellate judges' political backgrounds in three substantive chapters.

In Chapter Two, I descriptively analyze judges' political backgrounds using indicators identified in the Senate Judiciary Committee questionnaires that all nominees to the federal bench have submitted since the late 1980s. In this chapter, I define political background, argue

for the importance of studying political backgrounds, and present original data and statistics on the presence of prior political involvement among appellate judges confirmed between 1989 and 2019. In Chapter Three, I move beyond the broad question on the commonality of political backgrounds toward exploring when, and under what conditions, presidents are likely to select judges with political backgrounds. To answer this question, I develop a theory of political judicial selection considering factors like presidential partisanship and the Senate confirmation environment. In Chapter Four, I address how political backgrounds manifest during the confirmation process by using textual analysis methods to measure the use of political language by nominees in their questionnaires. In the following sections, I provide more-detailed overviews of the substantive chapters to come in this dissertation.

## **Chapter 2: The Political Backgrounds of U.S. Courts of Appeals Judges**

The first substantive chapter of this dissertation answers a rather broad question: how common are political backgrounds among judges of the United States Courts of Appeals? Reports during the Trump administration suggested that his selections for the appellate courts were more political than those appointed by previous presidents. While the examples above provide some anecdotal evidence that his predecessors selected judges with significant political backgrounds, the commonality of political backgrounds among judges has never been tested systematically.

To determine the presence of political backgrounds, I utilize the questionnaires every federal judicial nominee submits to the Senate Judiciary Committee. These questionnaires contain a plethora of background information on nominees and are considered to be reliable and thorough (Dancey, Nelson, and Ringsmuth 2020; Rutkus 2016). Although the questionnaires have existed since the late 1970s, they have only been used consistently since the late 1980s. Because the questionnaires are the best sources of political background information, it is

important that a questionnaire is available for each judge included in the study. Therefore, my original data and analysis of political background includes the judges nominated and confirmed between 1989 and 2019 (i.e., those appointed by Presidents George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Donald Trump).

To measure political background, which I define as past actions taken on behalf of a political party or candidate, I developed three key indicators: the pursuit of partisan, non-judicial elected office, formal membership in a political party, and work performed on behalf of a political party or political candidate. Information for these three variables are available in the questionnaires consistently from 1989 to 2019.

The summary statistics presented show a great deal of variation in political backgrounds across the judges. For example, judges appointed prior to the George W. Bush administration were more likely to have pursued elected office, and judges selected by Republican presidents were more likely to formally belong to a political party. Interestingly, many judges had worked on behalf of a political party or candidate, regardless of who appointed them. Overall, the results suggest that judges with political pasts are not uncommon.

This chapter provides the first systematic analysis of judges' political backgrounds. Covering almost three hundred judges, it reveals that recent reports of "more political" judges may be misleading. Overall, this chapter contributes greatly to scholars' and the public's understandings of who is being placed on the federal appellate bench.

### **Chapter 3: Presidential Selection of Judges with Political Backgrounds**

The second substantive chapter expands on the first by asking: when, and under what conditions, are judges with political backgrounds selected? A large amount of scholarship exists on the factors that go into judicial nominations and confirmations; however, the role of a nominee's

political background has not been explored. This chapter presents a theory-driven response to the first chapter with an analysis of the presidential selection of judges with political backgrounds.

The three political background indicators (pursuit of partisan, non-judicial elected office, membership in a political party, and work on behalf of a party or candidate) are used as dependent variables in this chapter to help address when these political backgrounds are more or less likely to appear among judges confirmed between 1989 and 2019. The theory posits that several factors like the partisanship of the appointing president and Senate confirmation factors (i.e., the 2013 nuclear option and divided government) will affect the selection of political judges.

The theorized factors do indeed affect the selection of these judges, but the results are largely contingent on the *type* of political background being considered. For example, the party of the appointing president only affects the selection of judges who were members of a formal party organization. Particularly, judges selected by Republican presidents were more likely to belong to a political party. Results also suggest that, since the 2013 nuclear option was instituted, more judges with political party work have been selected. Further analysis of this finding reveals a strong Trump effect. Trump was significantly more likely than his predecessors (even past Republican presidents) to select judges who had deep connections to parties and candidates.

The results of this chapter contribute to the understanding of why judges with political backgrounds are selected. The results also give some credence to the charges that President Trump had different motivations when selecting judges. Taken together, the first two substantive chapters identify and *explain* the presence of political backgrounds among federal judges.

#### **Chapter 4: Let's Talk Politics: The Use of Political Language in the Senate Judiciary Committee Questionnaires**

The third substantive chapter seeks to understand how political backgrounds manifest during the judicial confirmation process through nominees' use of political language. To discover the amount of political language used, the Senate Judiciary Committee questionnaires are analyzed via textual analysis software. Despite the importance and thoroughness of the information included in the questionnaires, scholars have never analyzed the language they contain. However, there are many studies on the different types of language used during judicial confirmation hearings. Inspired by this body of scholarship, this chapter applies textual analysis to an earlier component of the judicial confirmation process.

What leads nominees to use more or less political language in their questionnaire? The theory presented in this chapter includes several categories of potential factors: demographics, professional experiences, judicial experience, political background, and confirmation environment. Some of these are theorized to decrease the amount of political language used (e.g., race and gender, given the barriers people of color and women face becoming involved in politics), while some factors should lead to an increased amount of political language (e.g., political background, given that having deep political pasts will lead to the use of more political language).

The key contribution of this chapter is the fact that it is the first known analysis of language used in the questionnaires. Further, the chapter develops a novel political word dictionary to use with the software. Using this dictionary, a score is created measuring the percentage of political language used by nominees confirmed between 1989 and 2019. This "score" is used as the dependent variable with the theorized factors serving as independent variables.

Results suggest that judges possessing political backgrounds (measured by the three political indicators from previous chapters) do use more political language. Nominees who had previously served as a judge use less political language. Overall, this chapter contributes to our understanding of how certain backgrounds lead to different amounts of politicized language. This political language further describes political background and could serve as a warning to how these judges might behave on the bench.

**CHAPTER 2: THE POLITICAL BACKGROUNDS  
OF U.S. COURTS OF APPEALS JUDGES<sup>1</sup>**

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<sup>1</sup> Rutkowski, Adam G. To be submitted to *Judicature*.

## **2.1. Abstract**

Media sources claim that recently selected federal appellate judges are more politically involved than those appointed in the past. Is this a current phenomenon or is the presence of judges with political activities fairly consistent over time? To answer this question, this first substantive chapter dives deep into judges' political backgrounds. After reviewing more common background characteristics of federal judges such as race, gender, and prior professional experiences, the concept of political background is introduced, and its importance as a distinct characteristic is stressed. The questionnaires submitted to the Senate Judiciary Committee by judicial nominees are used to develop three indicators of political background: pursuit of partisan elected office, formal party membership, and work on behalf of a political party. Descriptive analyses of the federal Courts of Appeals judges selected by Presidents George H.W. Bush, Clinton, George W. Bush, Obama, and Trump reveal that political backgrounds are not uncommon among these judges. Although there are some variations based on the party of the appointing president, selecting judges with prior political activity is not a recent trend.

## **2.2. Introduction**

According to a statement released during his administration, former President Donald J. Trump was, “committed to appointing judges who set aside their personal views and political prejudices to do what the Constitution and the law demand” (The White House 2019). Despite this claimed focus on judicial impartiality, media outlets expressed concern that the president’s judicial picks – particularly his selections for the U.S. Courts of Appeals – were more political than those of previous presidents (Ruiz et al. 2020). These allegations centered on the judges’ political backgrounds such as partisan memberships, political connections, and campaign activities.

John B. Nalbandian, selected by President Trump for the Sixth Circuit of the United States Court of Appeals in 2018, particularly embodies these charges of heightened political prowess. As noted in the introductory chapter, a significant portion of Judge Nalbandian's pre-bench career was spent supporting the Republican Party. Over a fifteen-year period, Nalbandian was a member and chairman of the Commonwealth Political Action Committee, and either an alternate or actual delegate to the 2008, 2012, and 2016 Republican National Conventions. Further, he served on the Executive Committee and as General Counsel of the Republican Party of Kentucky. In private practice in Cincinnati, Ohio, Nalbandian worked for numerous Republican campaigns including the Ohio branch of Romney for President. On a personal level, Nalbandian volunteered for numerous Republican campaigns at the state and federal levels (Nalbandian 2018).

It is possible that the example of Judge Nalbandian's political background is an extreme case. President Trump also selected judges with little to no prior political involvement. Amy St. Eve, confirmed to the Seventh Circuit in 2018, was a United States District Judge of the United States District Court for the Northern District of Illinois (nominated by President George W. Bush) prior to her elevation by President Trump. Starkly juxtaposed to Judge Nalbandian, Judge St. Eve has an almost imperceptible political background. Official documents reveal she never ran for public office, never worked on behalf of a political party, and never belonged to a particular partisan organization (St. Eve 2018).

While judicial background scholarship addresses characteristics such as race, gender, age, education, judicial experience, and career experiences, there has been little attention given to the political backgrounds of federal judges, particularly those judges on courts other than the Supreme Court. Recognizing this lack of research on prior political experience and involvement

of federal appellate judges led to a couple of questions: How common are prior political activities among the judges placed on the federal appellate bench? Is there variation among these activities based on the nominating president? Answering these questions will provide a more complete look at judicial backgrounds and presidential selection of federal appellate judges.

Since no work on judicial background is complete without consideration of a plethora of characteristics, I begin this chapter by highlighting common characteristics of federal judges using existing scholarship and original data. I then argue for the importance of considering political background in judicial studies and identify key indicators of political activity using under-utilized Senate Judiciary Committee documents. After a descriptive account of judges' political backgrounds is presented, comparisons will be made between judges of different presidents. Finding that political backgrounds are not uncommon among judges appointed by the past five presidential administrations, the chapter concludes with a discussion of political backgrounds in light of other judicial characteristics and presents avenues for future research on this important topic.

### **2.3. Common Background Characteristics and Experiences of Federal Judges**

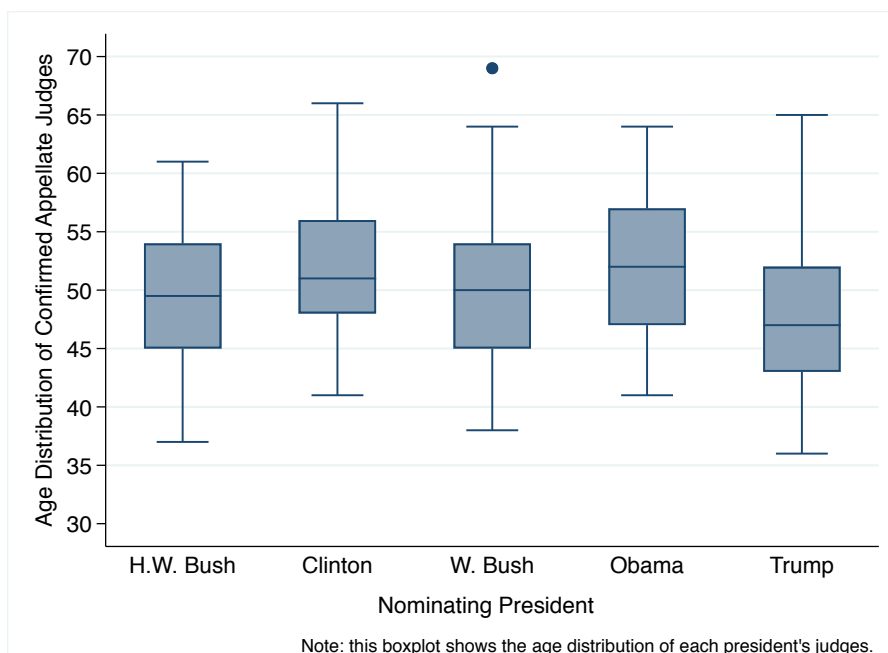
As Sheldon Goldman (1999, 1978, 1974) asserts, there must be knowledge of who is being placed on the federal bench given these judges' potential to serve for life and influence judicial outcomes for decades. Fueled by the import of understanding who makes up the federal judiciary, scholars have worked for many years to identify key background characteristics of judges. This work has led to numerous articles, scholarly books, and even comprehensive databases expanding back to judges confirmed during the first years of Congress (Zuk, Barrow, and Gryski 2004). In the following sections, I highlight common characteristics of federal judges

using existing scholarship bolstered by updated original data and show that political involvement as a background characteristic has been overlooked.

### **2.3.1. Demographic Characteristics**

The first set of characteristics I consider are demographics including age, gender, and race. Article III dictates that judges will hold their offices during good behavior. In theory, this means that judges enjoy life tenure once they are confirmed to the federal bench. In practice, this means that judges stay on the bench until they die, retire, or elevate to the Supreme Court (Vining 2009; Yoon 2006). Because judges have the potential to serve – and therefore influence judicial policymaking – for so many years, presidents have an incentive to select younger judges. It is far better to select a 45-year-old judge who could sit on the Court of Appeals for thirty-plus years, rather than an 80-year-old judge who may only be able to serve five years. How have presidents approached this age issue?

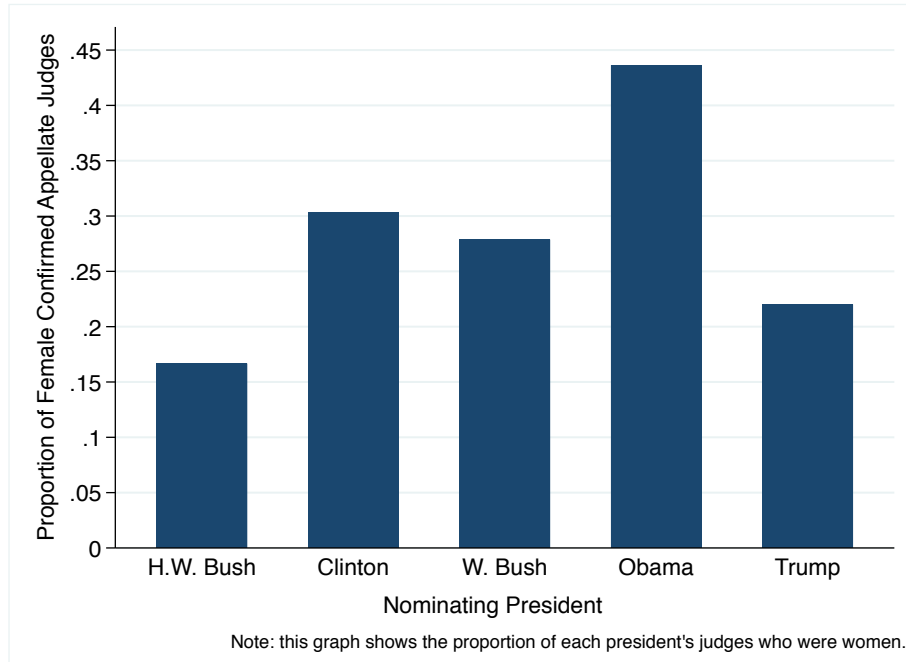
**Figure 2.1** shows the age distribution of federal appellate judges confirmed during the past five presidential administrations via a boxplot. The horizontal lines of the boxes and whiskers represent the 0, 25<sup>th</sup>, 50<sup>th</sup>, 75<sup>th</sup>, and 100<sup>th</sup> percentiles for age. Any dots that appear represent age values that fall outside of the “normal” range. The horizontal line within the boxplot shows the 50<sup>th</sup>-percentile, or average age of the judges of each president. Judges confirmed under each president before Trump had an average age around 50 to 52 years. Trump’s judges have a slightly lower average age of 47 years, a slight but potentially significant difference. On average, presidents select judges who have twenty to thirty years of judging potential.



**Figure 2.1: Age of Appellate Judges**

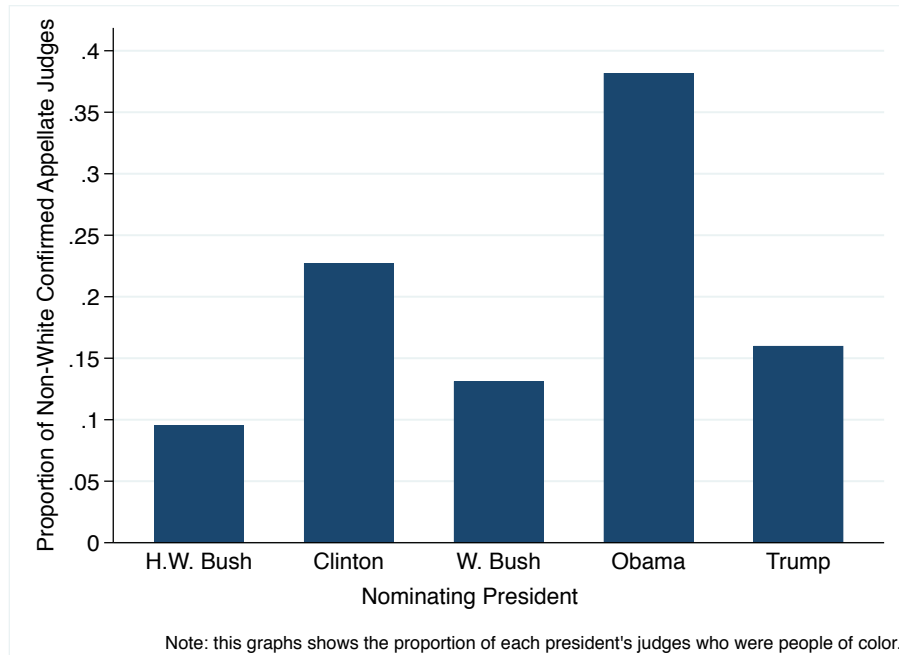
The next two characteristics concern judicial diversity. Overall, scholars find that Democratic presidents have placed more focus on diversifying the federal bench by selecting significantly more people of color and women for the federal courts than Republican presidents (Jeknic et al. 2020; Solberg and Diascro 2018; Sen 2017; Haire and Moyer 2015; Diascro and Solberg 2009; Solberg and Bratton 2005; Solberg 2005; Spill and Bratton 2001; Goldman and Slotnick 1997; Goldman and Saronson 1994; Goldman 1987, 1978). The updated data I collected confirms this contention. **Figure 2.2** shows the proportion (or percentage) of each president's judges who were women. Only 15 % and 22% of Presidents George H.W. Bush and Donald Trump respectively were women. Interestingly, 28% of President George W. Bush's selections were women, which is only two percentage points behind Clinton. Different than previous Republican presidents, George W. Bush made diversity a priority (Diascro and Solberg 2009).

Unsurprising given his repeatedly stated focus on diversity (Solberg and Diascro 2018), President Obama had the highest percentage of women at almost 45%.



**Figure 2.2: Gender of Appellate Judges**

When race is considered, the partisan differences are starker. **Figure 2.3** shows that the percentages of judges who were people of color appointed by the three Republican presidents range from 10% to 16%. President Clinton greatly affected the racial makeup of the federal bench with 23% of his judges being non-white. President Obama had the largest impact with almost 40% of his judges being people of color.



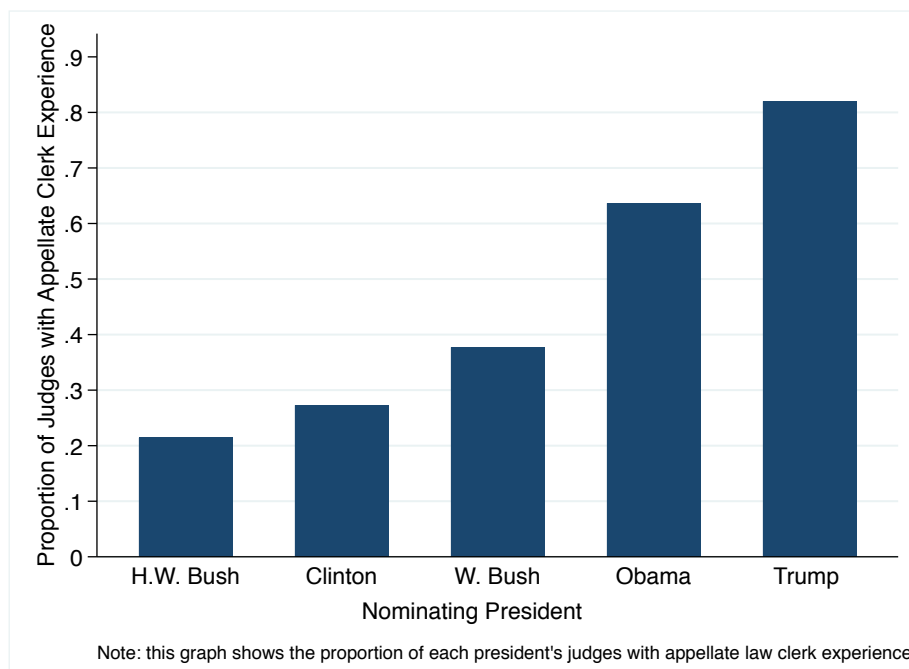
**Figure 2.3: Race of Appellate Judges**

Why should we care about racial and gender diversity on the federal bench? These characteristics have been shown to influence both judicial behavior and the legitimacy of the federal judiciary (e.g., Boyd and Rutkowski 2020; Boyd 2016; Haire and Moyer 2015; Kastellec 2013; Boyd 2013; Boyd, Epstein, and Martin 2010; Chew and Kelley 2009; Scherer 2004; Farhang and Wawro 2004; Crowe 1999; Songer, Davis, and Haire 1994; Sherry 1986).

### 2.3.2. Judicial Experience

Another common characteristic of federal judges, particularly those appointed to the Courts of Appeals and the Supreme Court, is prior judicial experience (Epstein, Knight, and Martin 2003). A characteristic related to judicial experience is judicial clerking experience. Judicial clerks serve many important functions including writing judicial opinions. This training under a judge is invaluable for future judgeships. **Figure 2.4** shows the percentage of each president's judges

with judicial clerking experience.<sup>2</sup> Perhaps the most interesting finding in **Figure 2.4** is that over 80% of President Trump's judges served as appellate clerks at some level.<sup>3</sup> Obama's judges are not too far behind at 62%, but the other president's judges fall far behind in this experience.



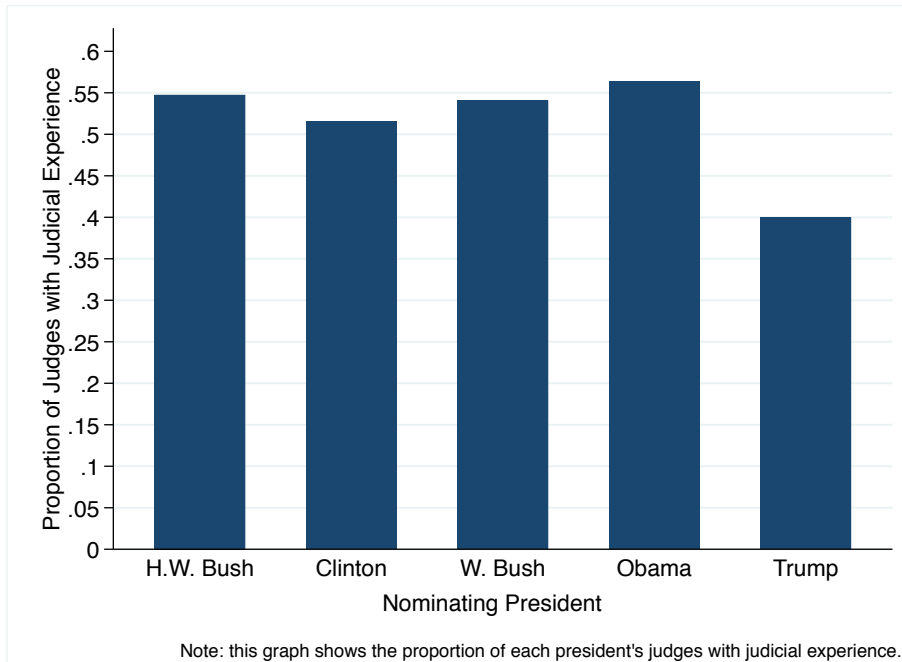
**Figure 2.4: Clerk Experience of Appellate Judges**

I also consider *actual* judicial experience. **Figure 2.5** shows the proportion of each president's judges who had prior judicial experience at any level. Prior to Trump, at least 50% of each president's judges had judicial experience at some level. Trump's judges were somewhat unusual in that only 40% of them had prior judicial experience.

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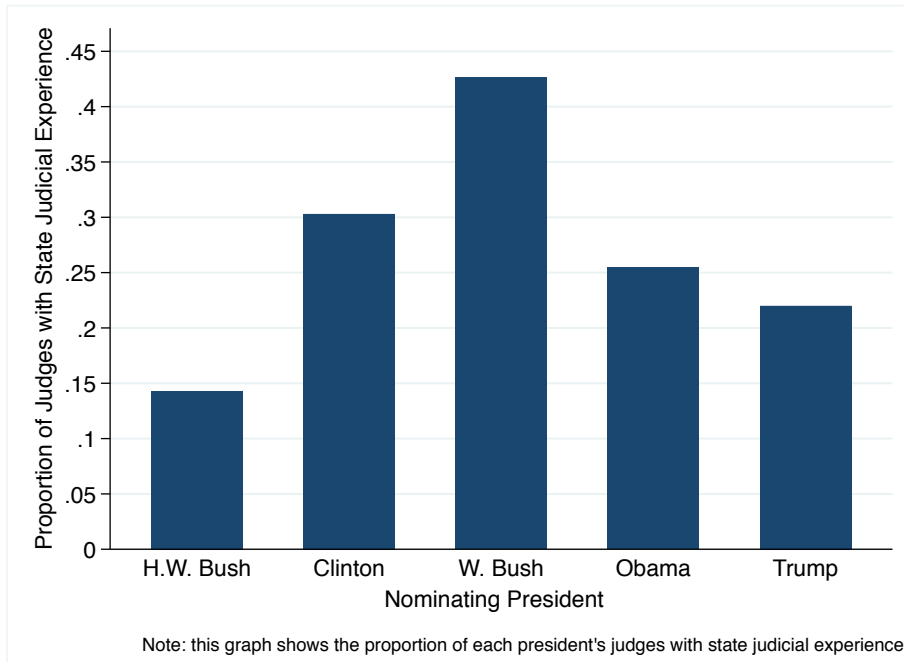
<sup>2</sup> I plot appellate clerk experience since I am studying appellate judges. While clerking for trial judges is important training, appellate judging is a horse of a different color and requires specialized skills.

<sup>3</sup> This can include federal appellate courts or state intermediate appellate courts or high courts.

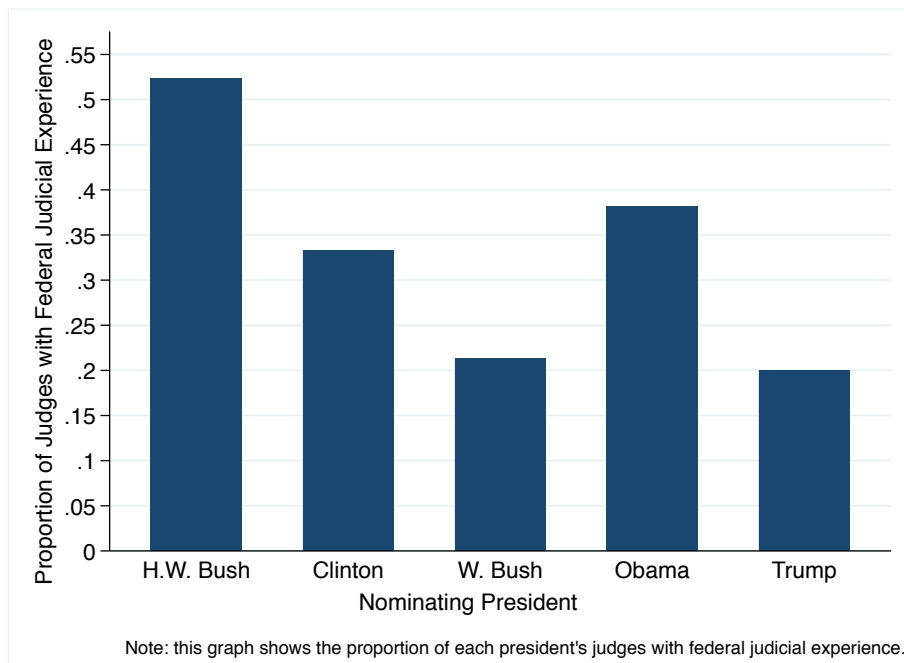


**Figure 2.5: Judicial Experience of Appellate Judges**

I also collected information clarifying whether judges had state or federal judicial experience. **Figure 2.6** shows state judicial experience and **Figure 2.7** shows federal judicial experience. Although there are a few deviations, it appears that federal judicial experience has a slight edge over state judicial experience. George W. Bush’s judges, for example, do not follow this pattern – almost 45% of his judges had state court experience while only 20% of his judges had federal judicial experience. Trump’s judges, who overall had lower judicial experience than presidents of other judges, had about equal levels of federal and state judicial experience.



**Figure 2.6: State Judicial Experience of Appellate Judges**

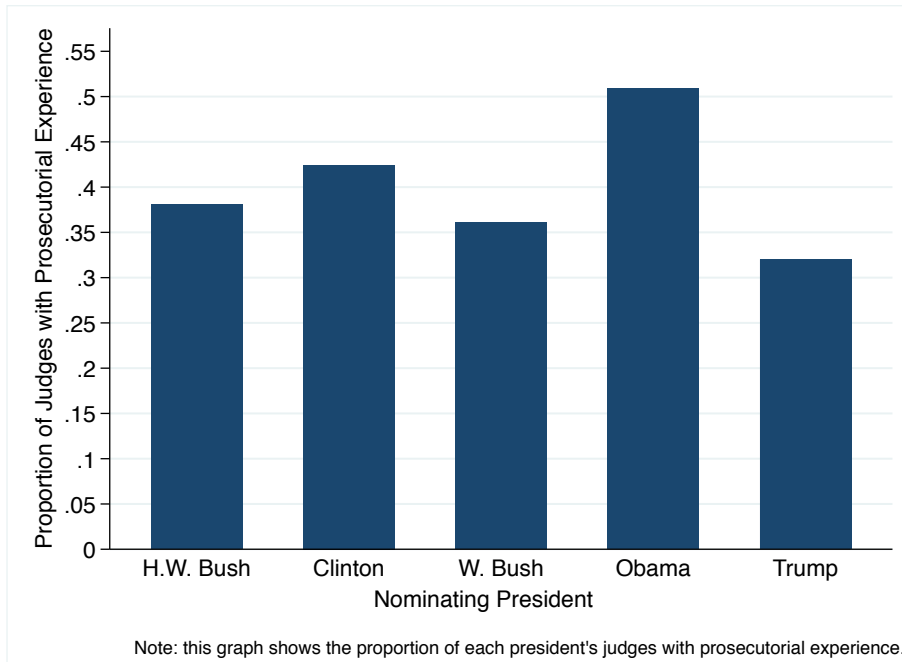


**Figure 2.7: Federal Judicial Experience of Appellate Judges**

Like race and gender, judicial experience is an important characteristic of federal appellate judges. Given the general demands of appellate judging and the often complicated cases that reach the appellate courts, it is important that judges understand the workings of their unique courts. After all, since the Supreme Court decides to hear so few cases, the vast majority of cases that reach the Courts of Appeals find their final disposition there. Judicial experience is consistently shown to influence judicial behavior in areas such as consensus-building and opinion quality (Wheeler 2003; Brudney et al. 1999; Goldman 1999; Tate and Handberg 1999; Howard 1981; Tate 1981; Schmidhauser 1979; Dolbeare 1969; Ulmer 1973; Grossman 1965; Vines 1964).

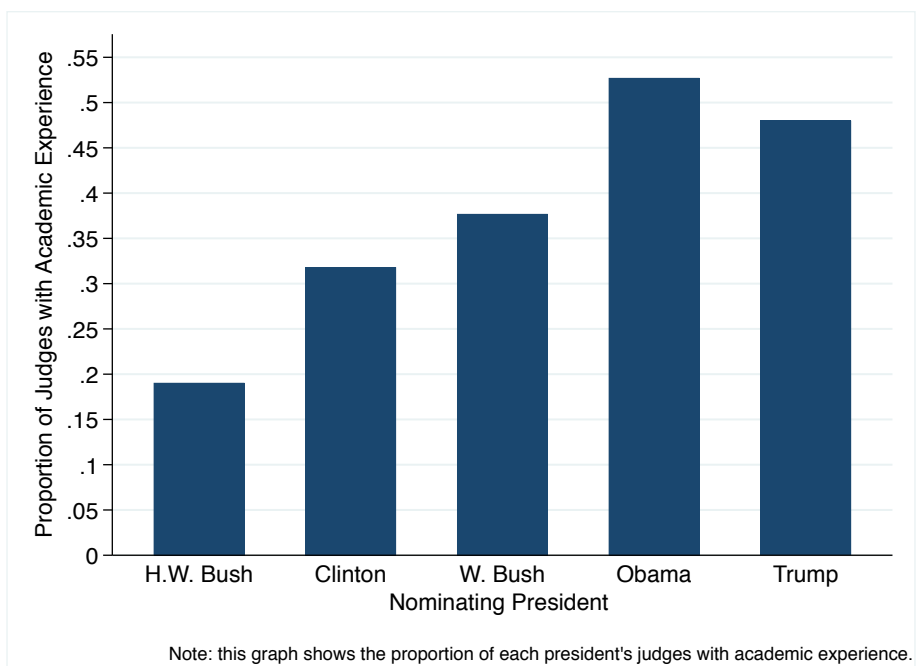
### **2.3.3. Professional Experience**

The final two characteristics focus on professional career experiences. **Figure 2.8** shows the proportion of each president's judges with prior prosecutorial experience, which can include experience as a local district attorney, a state attorney general, a United States Attorney, and many other forms of prosecutors. At least 30% of all judges had this experience. Around 50% of President Obama's judges had this experience, which is striking since prosecutorial experience is often believed to make judges lean conservatively (Robinson 2011; Sisk, Heise, and Morriss 1998; Johnston 1976; Nagel 1962).



**Figure 2.8: Prosecutorial Experience of Appellate Judges**

The second professional characteristic concerns experience as a law professor. **Figure 2.9** shows the proportion of each president's judges who had some type of legal academic experience prior to their appointment to the federal bench. Since prior judicial experience and employment at large elite law firms are usually the feeder pools for judicial nominees, it is less common to have full-time law professors chosen. According to some scholars, this could be a mistake given the unique legal perspectives those in academia bring to the bench (Epstein, Knight, and Martin 2003; Brudney et al. 1999; Sisk, Heise, and Morriss 1998). Presidents Obama and Trump took the lead in judges with academic experience since over 45% of their judges had some experience in the legal academic world.



**Figure 2.9: Legal Academic Experience of Appellate Judges**

### 2.3.4. The Missing Piece: Political Background

The previous sections highlight the demographic, judicial, and professional backgrounds of federal appellate judges. Missing from this conversation has been political background; i.e., the political activities and experiences that judges bring to the bench. Political background has been addressed in a limited way in judicial politics scholarship. Goldman (1999) includes a measure called *prominent party activism* in his work that captures judges' connections to senators and presidents. Other scholars have addressed political experience in terms of partisanship and experience holding elected office (Brudney et al. 1999; Gryski, Main, and Dixon 1986; Vines 1964). While interesting and important, the studies concerning political background are sparse and cover narrow areas of political experience that has more to do with connections to politicians and partisan labels. I argue that this approach does not present a complete picture of judges' political backgrounds. In the following section, I assert several reasons for considering political

activity and identify sources and novel indicators that more directly capture political backgrounds.

## **2.4. Political Activity as a Distinct Background Characteristic**

At the outset, it is necessary to define political background. Political backgrounds can include any prior political activity, including holding positions in partisan campaigns, pursuing partisan non-judicial elected office, or joining a partisan organization. While it is one thing to consider oneself a Democrat, it is another to have worked on numerous campaigns for Democratic candidates, run for office as a Democrat and join a formal local or state Democratic organization. The activities and experiences making up a political background come together to form a distinct characteristic that is separate from other politically related characteristics such as partisanship and ideology and is incredibly important to consider in judicial scholarship.

### **2.4.1. The Importance of Political Background as a Distinct Background Characteristic**

Political background is separate from the concepts of shared partisanship with the appointing president and ideology. Similar partisanship as the appointing president focuses more on partisan labels. It is not groundbreaking to state that Republican presidents select nominees with Republican leanings or that Democratic presidents select Democratic-leaning nominees. After all, selecting judges of the same party helps presidents secure a lasting judicial legacy (Solberg and Diascro 2018; Diascro and Solberg 2009; Goldman 1999). On the other hand, the political activities that make up a political background are tangible, lived experiences that judges have chosen to participate in. Partisanship is simply a label given to judges (usually by others besides the judges themselves). While important for studying judicial process and behavior, partisanship does not count as a characteristic that captures real experiences. Studying political background solves this issue.

Political background is also distinct from ideology. Similar to partisanship, ideology deals with the political leanings of judges. It places judges on various political spectrums and is typically used in models of judicial behavior. It is typically measured using votes the justices have cast in cases while on the bench (e.g., Epstein et al. 2007; Martin and Quinn 2002) or the ideologies of the Senators and president involved in their nominations and confirmations (Giles, Hettinger, and Peppers 2001). These ideological measures do not take into account political activity participated in prior joining the bench. Again, a political background represents real-world lived experiences in the political realm.

In addition to being distinct from other key concepts of judicial scholarship, political background is important to study for a couple of practical reasons. First, if political backgrounds are more common now (or even if they have been common for many years), this suggests a changing path to the federal bench. As indicated in section 2.3., it is normally professional experiences and qualifications that are considered the typical first steps to a federal judgeship. While it is unsurprising that people with political connections get selected for the political process of judicial nominations, a wholesale account of what these connections are does not exist. Therefore, this chapter contributes to our understanding of how political backgrounds come into play on the road to judging.

Since political background is a distinct characteristic representing experiences judges have had prior to their appointment, it is possible that it could affect judicial behavior. Just as background characteristics like race, gender, prior judicial experience, academic experience, and prosecutorial experience have been shown to influence judicial behavior (see section 2.3.), these political experiences could affect the way judges view cases. Participating in political activities suggests a political mindset with the potential to influence judges' actions. In the following

section, I further explicate the idea of political background by conceptualizing specific political activities and identifying a rich source of this information.

#### **2.4.2. Conceptualizing and Measuring Political Background**

Where can information on judges' political backgrounds be found? While information may appear in news reports of judicial nominations, or in datasets focusing on other background characteristics, a comprehensive source of information on this background has not been identified and coded in a way that directly captures political backgrounds. The most complete data source for judges' political backgrounds is the Senate Judiciary Committee (SJC) questionnaires.<sup>4</sup>

Since around 1988, each federal judicial nominee has answered a similar set of 25-30 questions.<sup>5</sup> These questions cover everything from career experience, memberships, television appearances, published writings, judicial experience, and political activities. These are just a few of the many pieces of information that can be found about judges in these questionnaires. As Dancey, Nelson, and Ringsmuth (2020) point out, the SJC questionnaire is “long and thorough... ‘monstrous’” (21). Asking similar questions of each nominee helps members of the Senate Judiciary Committee, and the Senate at large, make comparisons between nominees. This standardization also helps scholars make methodologically sound comparisons between judges over a thirty-plus year timespan.

Even more important than their standardized form, these questionnaires are considered trustworthy (Dancey, Nelson, and Ringsmuth 2020, Rutkus 2016). In other words, the

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<sup>4</sup> Recent groundbreaking work has been done on confirmation hearings of lower court judicial nominees (e.g., Collins and Ringhand 2016; Dancey Nelson, and Ringsmuth 2014, 2020). These studies focus more on the interactions between Senators and nominees. I use questionnaires as my source of information, given that I am focused on objective background characteristics.

<sup>5</sup> Questionnaires have been around since the 1970s but have been used consistently since the late 1980s (Dancey, Nelson, and Ringsmuth 2020).

information provided by the judges is thorough, accurate, and reliable. This accuracy makes these questionnaires robust sources of information on political backgrounds and other characteristics.

After spending time fastidiously combing through the questionnaires to find evidence of political background, I discerned three key indicators of prior political activity. Considered together, these variables of interest account for the prior political involvement of judges. The indicators I selected come primarily from the following two questions:

*List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elected office or unsuccessful nominations for appointed office.*

*List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title, and responsibilities.*

These questions provide information on nominees' prior non-judicial offices and their connections to political parties. From these questions, I developed variables capturing whether the judge pursued public office in the past, whether they claim to be a member of a political party, and whether the judge worked for a party organization in the past.<sup>6</sup>

*Elected office* takes a value of (1) if the judge pursued elected office prior to their federal appellate judgeship and (0) otherwise. Running for Congress, a state legislative seat, or even a local city council seat are all political activities. Pursuing public office suggests political ambition that is distinct from partisanship. It is one thing to be a Republican, but it is quite another to run for a legislative seat on the Republican ticket.

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<sup>6</sup> This information is available consistently in the SJC questionnaires across the years they are available.

*Party membership* indicates whether the judge listed membership in a political party and is coded dichotomously. Party memberships can include memberships in the actual national party or membership in a partisan lawyer's club. Listing party membership is identified as a political activity because it represents a judge's conscious choice to identify themselves with a party. While many people consider themselves belonging to one party, formally joining the party represents a further step.

*Party work* is given a value of (1) if the judge listed work for a particular political campaign and (0) otherwise. Examples of party work include serving as a delegate to a political convention, campaigning for a partisan candidate, participating in political fundraising activities, and volunteering for the party in other ways. *Number of party work entries* is a continuous variable that captures the number of entries of partisan work listed by the judge on their questionnaire. I include this continuous measure to capture variation in the *amount* of party work entries.

## **2.5. A Descriptive Overview of the Political Backgrounds of U.S. Courts of Appeals Judges**

I ascertain how common prior political activities are among federal judges and reveal partisan variations by analyzing the confirmed Courts of Appeals judges of Presidents George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Donald Trump.<sup>7</sup> This provides 274 appellate judges confirmed between 1989 and 2019. What follows is a descriptive account of these activities.

**Table 2.1** provides the summary statistics of the novel political activity variables. First, consider the pursuit of elected office. It seems as if selecting judges who have pursued non-

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<sup>7</sup> I analyze confirmed judges for two reasons: first, I am concerned with how these political activities can ultimately affect judges' decisions. Unconfirmed nominees do not have the chance to influence policy. Second, finding the questionnaires is tedious work and the unconfirmed nominees' questionnaires are often unavailable.

judicial elective office is falling out of fashion for presidents. While the percentage of the judges of Presidents H.W. Bush, Clinton, and W. Bush who pursued elective office prior to the bench hovers around 20%, only 7% of 6% of Obama’s and Trump’s judges respectively ran for elected office.

**Table 2.1: Summary Statistics of Political Activity Variables**

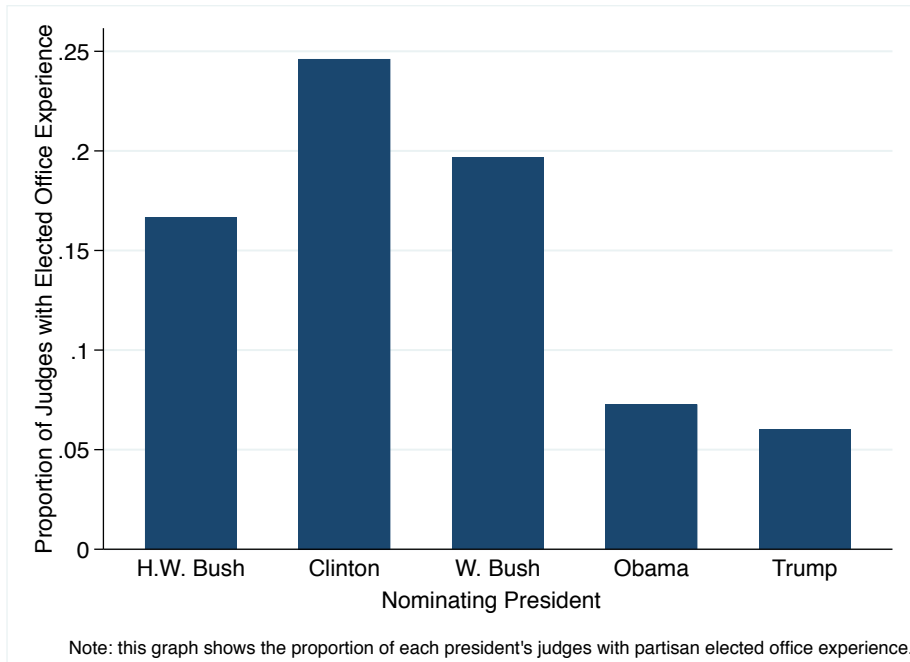
	<b>Elected Office (%)</b>	<b>Party Membership (%)</b>	<b>Party Work (%)</b>	<b>Party Work (average # of entries)</b>
<b>H.W. Bush</b>	17%	24%	57%	2.4
<b>Clinton</b>	25%	12%	60%	3.0
<b>W. Bush</b>	20%	28%	54%	2.2
<b>Obama</b>	7%	15%	53%	1.8
<b>Trump</b>	6%	30%	78%	3.1

Note: This table shows the summary statistics of the political variables. N = 273<sup>8</sup>

**Figure 2.10** provides a visual representation of this falling trend in elected office pursuit. The proportion of judges who pursued elected office prior to their appointment peaked during the Clinton years, diminished during the George W. Bush administration, and dramatically tapered off thereafter.

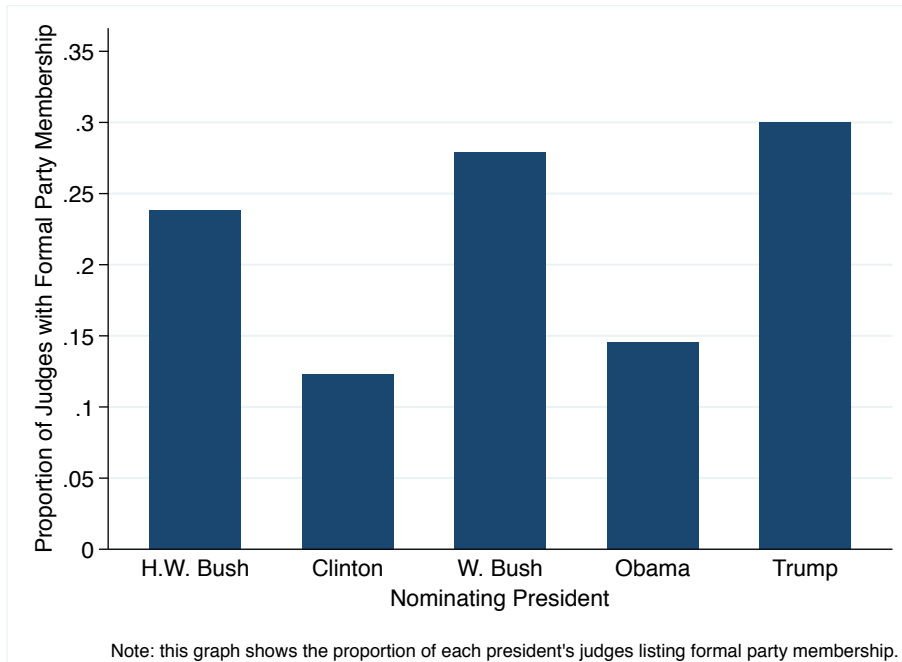
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<sup>8</sup> The questionnaire for one judge, Richard Linn, was missing. According to the Congressional Record, the questionnaire is held in private Judiciary Committee records. Therefore, Linn was excluded from the analyses in this dissertation.



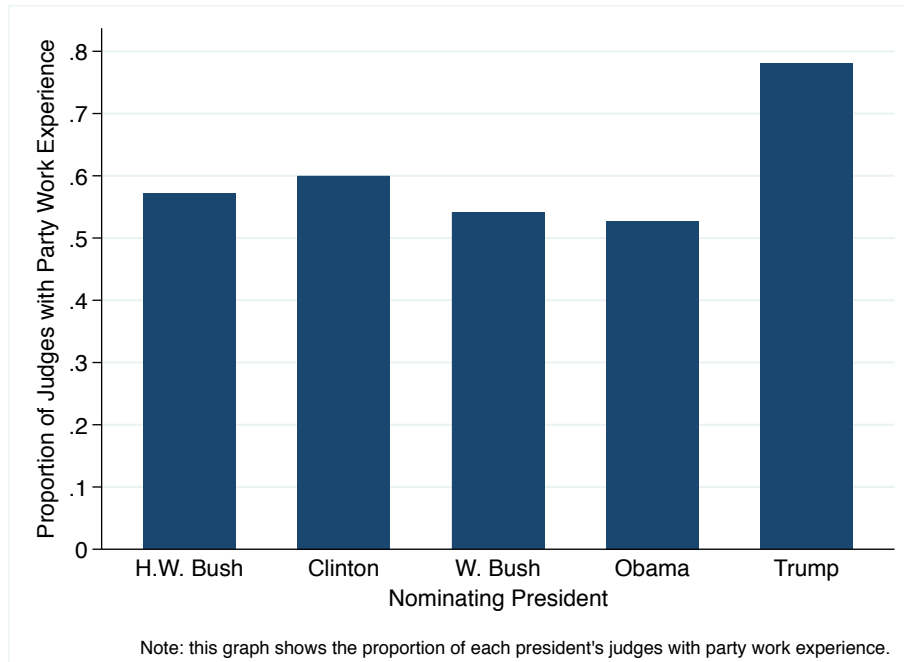
**Figure 2.10: Elected Office Experience of Appellate Judges**

A partisan divide appears when one analyzes the percentage of judges listing party membership on their questionnaires. It appears that more judges appointed by Republican presidents are willing to claim party membership. **Table 2.1** shows that 24% of H.W. Bush's, 28% of W. Bush's, and 30% of Trump's judges claimed membership in a political party (almost always the Republican party). On the other hand, only 12% and 15% of Clinton's and Obama's judges listed membership in a party on their questionnaire. Republican presidents are either appointing more partisan judges, or nominees of Republican presidents are more willing to list party membership. Remember that the information provided in these questionnaires is controlled by the nominees themselves. **Figure 2.11** illustrates this partisan trend.



**Figure 2.11: Party Membership of Appellate Judges**

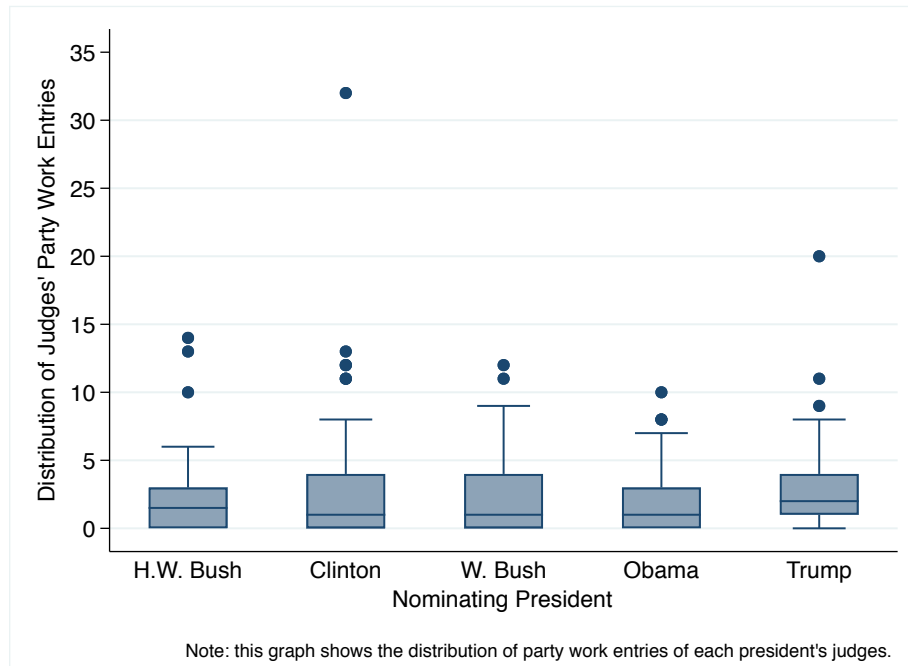
Perhaps the most interesting political activity is captured by the *party work* variable. At least 50% of all judges listed at least one instance of party work on their questionnaire, regardless of the appointing president. There is no clear trend present in the party work variable besides the fact that Donald Trump’s nominees had more party work experience overall. Indeed, 78% of Trump’s judges listed party work on their questionnaires. Around 60% of Presidents George H.W. Bush, Clinton and George W. Bush’s judges had this experience, while only around 53% of Obama’s did. The fact that almost 80% of Trump’s judges listed party work gives some credibility to the charges mentioned in the introduction section that Trump appointed more politically active judges. **Figure 2.12** illustrates this trend.



**Figure 2.12: Party Work of Appellate Judges**

I also included a variable capturing the number of party work entries. While the standard party work variable indicates judges who listed at least one party work entry, there is variation in how many entries are listed. Interestingly, Presidents Clinton and Trump had the highest average numbers of party work entries at 3.0 and 3.1. But, as **Figure 2.13** shows, this higher average may be due to the high outlying values. For example, one Clinton judge had 32 party work entries, and one Trump judge had 20 entries. President George H.W. Bush's judges came in a close second with an average of 2.4 entries. The average for the judges of President George W. Bush was 2.2, followed by an average of 1.8 entries for the judges of President Obama. **Figure 2.13** does reveal an interesting difference about the average number of entries for Trump's judges. Notice how the boxplots for the presidents prior to Trump are clustered closely to zero. This suggests that many of these judges had no party work. On the other hand, Trump's boxplot has a

visible bottom whisker. This speaks to the fact that many more of Trump’s judges listed party work.



**Figure 2.13: Party Work Entries of Appellate Judges**

The descriptive analysis of prior political activities of federal appellate judges reveals several key insights. First, it appears that judges placed on the bench more recently are not as likely to have pursued non-judicial political office. **Figure 2.10** reveals that the number of judges with prior pursuit of elected office is steadily declining. Second, a more partisan trend is seen in listing party membership on the SJC questionnaires (**Figure 2.12**). Consistently, more Republican appointed judges claimed membership in a political party. Third, when considering party work, the judges of President Trump worked more often on behalf of a political party than the judges of the previous presidents, including previous Republican presidents. Overall, this section illustrates that political backgrounds are not uncommon. Although there are ebbs and

flows in the presence of certain types of political activities based on the appointing president, a judge being selected with some kind of political background is not a rare event.

### **2.5.2. Comparing Political Backgrounds of U.S. Courts of Appeals Judges**

Although the purpose of this chapter is to introduce the concept of political background and provide a descriptive overview of these backgrounds among appellate judges, simple statistical tests can be performed to make comparisons between judges appointed by different presidents. These tests will help unpack meaningful substantive differences between the presence of political backgrounds among judges.

To make these comparisons, I utilize independent sample t-tests that assume unequal variance. This test allows one to check for differences of proportions between two groups when the number of observations in each group is different. Since judges are often categorized by who appointed them, I compare judges selected by Democratic presidents to those selected by Republican presidents.

**Table 2.2** shows the results of these tests. The only significant difference is found in the political background activity of formally joining a political party. Significantly fewer judges chosen by the Democratic presidents were members of a political party when compared with judges chosen by Republican presidents.

**Table 2.2: Comparing Political Backgrounds of Judges Based on the Party of the Appointing President**

	<b>Difference between judges appointed by D pres. vs. judges appointed by R pres.</b>	<b>Significant Difference?</b>
<b>Elected Office</b>	+	No (t = 0.51)
<b>Party Member</b>	-	Yes* (t = -2.96)
<b>Party Work</b>	-	No (t = -1.01)
<b># of Party Work Entries</b>	-	No (t = -0.22)

Note: this table shows the results of independent sample t-tests that assume unequal variances between samples. \* Indicates  $p \leq 0.01$ .

The lack of significant differences shown in **Table 2.2** is actually its most interesting quality. It suggests that, on average, Republican and Democratic presidents select judges with political backgrounds fairly equally. It also further answers my original research question on the commonness of political backgrounds of federal appellate judges. Judges clearly have political backgrounds that warrant further attention.

## **2.6. Discussion and Conclusion**

In this chapter, I show that political activities are not uncommon among federal appellate judges appointed by the last five presidential administrations. While charges of more political judges were levied at President Trump during his tenure, it appears that he was not alone in selecting judges with political backgrounds. I also developed a set of three comprehensive indicators of political activity using an information-rich data source. These indicators included: whether a judge pursued non-judicial elected office prior to joining the federal appellate bench, whether the judge listed membership in a political party on their SJC questionnaire, and whether or not the judge listed work on behalf of a party or candidate in their SJC questionnaire. Making comparisons between judges of each president revealed that Republican presidents appointed

more judges who were members of a formal party organization. Otherwise, no significant differences were found between presidents of different parties in selecting judges with political backgrounds.

At the outset of the chapter, I reviewed common background characteristics of federal judges, using original data I collected to highlight existing studies. Future work in this area should attempt to uncover how characteristics like race, gender, and prior judicial experience affect the presence of political backgrounds. For example, only 40% of President Trump's judges had prior judicial experience, but almost 80% of his judges had worked on behalf of a party (usually the Republican Party) prior to being placed on the appellate bench. Since there are professional ethics standards guiding judges at the state and federal levels, is it possible that the judges with prior judicial experience will have less political activity? Further, are there any race and gender effects at play? Chapters Three and Four of this dissertation will begin to unpack some of these questions.

The questionnaires should also be studied more closely. It is important to remember that these questionnaires are self-reported. While one expects the nominees to be forthcoming about their pasts, and research has found these to questionnaires to be reliable (Rutkus 2016), there is *technically* room for manipulation. There has been at least one controversy in which a federal judicial nominee has been accused of withholding information from the SJC on their questionnaire. Recently, Wendy Vitter, a Trump district court nominee, was criticized for leaving several anti-abortion speeches off of her questionnaire (*Vice* 2018). In addition to the potential to control what information is included (though, again, this limited), nominees can also choose *how* to describe that information. Textual analysis could be a fruitful avenue of research for these

information-rich documents. Chapter Four will analyze the political language used in the questionnaires.

Overall, this chapter stresses the importance of considering *who* presidents nominate to the federal appellate bench, and the results provide deeper insights into the political backgrounds of federal judges. To understand the pasts of judges of judges is to understand how they can be expected to behave on the bench and ultimately influence policy.

**CHAPTER 3: PRESIDENTIAL SELCTION OF  
JUDGES WITH POLITICAL BACKGROUNDS<sup>9</sup>**

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<sup>9</sup> Rutkowski, Adam G. To be submitted to *Journal of Law and Courts*.

### **3.1. Abstract**

Chapter Two revealed that political backgrounds among federal judges are not uncommon. This chapter develops a theory of prior political activity among federal judges to help explain which factors, like confirmation environment and presidential partisanship, lead to the selection of politically active judges. Studying judges placed on the U.S. Courts of Appeals between 1989 and 2019, I conduct systematic analyses of when judges with political backgrounds are chosen. The results suggest that selecting judges with prior political activity is a fairly common practice, although there are variations based on the type of political activity, party of the appointing president, and the Senate confirmation environment. Further, President Trump is shown to have had a distinct impact on the federal appellate bench by selecting more judges with political backgrounds than his predecessors, including previous Republican presidents. These findings have important implications for judicial selection and could help explain judicial behavior looking forward.

### **3.2. Introduction**

Federal judges with political backgrounds are not uncommon. Results from Chapter Two suggest that each of the last five presidents selected Courts of Appeals judges with political backgrounds, although there is some variation based on the party of the president and the type of political background activity being considered. While recent charges of political judges have focused on President Trump's nominees (Ruiz et al. 2020), the 45<sup>th</sup> president was not alone in selecting such judges.

Judge Harold Raymond DeMoss, Jr. was placed on the United State Court of Appeals for the Fifth Circuit by President George H.W. Bush. DeMoss, a partner in an elite Houston law firm, never served as a judge prior to the appellate bench. Although the primary focus of his

practice was Admiralty and Maritime law, Judge DeMoss made time for promoting the electoral fortunes of Republican candidates. He was active in the Congressional and Senatorial campaigns on George H.W. Bush in the late 1960s and served as the Texas Chairman of the George Bush for President Primary Campaign in 1979 and 1980. He also claimed to be active in the 1972 efforts to elect Richard Nixon. He was a delegate to the Republican National Convention in 1980 and was a co-chairman of his local Reagan-Bush campaign organization. Most interestingly, he was the Vice Chairman of the Bush for President 1988 primary efforts in Texas and worked at the national Bush headquarters in 1988 as a research analyst. Just a few years later, he was nominated by President Bush to the Courts of Appeals and confirmed by the Senate. (*Senate Judiciary Committee* 2021).

Raymond C. Fisher was nominated to the influential Ninth Circuit of the United States Courts of Appeals by President William J. Clinton in 1999. Although Judge Fisher did not serve as a judge prior to his appointment to the Court of Appeals, he had been a law clerk in the D.C. Circuit and served as an Associate Attorney General in the Clinton Justice Department. Prior to his appointment to the Department of Justice, Judge Fisher was very active in Democratic politics. At the federal level, he worked on behalf of the campaigns for politicians including Barbara Boxer, Dianne Feinstein, Clinton/Gore (1992 and 1996 campaigns), and Jimmy Carter (1976 campaign). At the state level, he worked for campaigns of many Democratic candidates for governor and state attorney general. He also served the campaigns of many local candidates and California propositions. All in all, Judge Fisher listed over thirty instances of political campaign activity in his questionnaire submitted to the Senate Judiciary Committee (*Senate Judiciary Committee* 2021).

While perhaps extreme examples, these judges illustrate that presidents of both partisan stripes selected judges with significant political backgrounds. However, as Chapter Two showed, there are many judges with no political background. Recall Judge Amy St. Eve of the Seventh Circuit who was introduced in the previous chapter. Nominated by president Trump, Judge St. Eve had a nonexistent political background – no pursuit of elected office, no political party work, and no formal membership in a political party (*Senate Judiciary Committee* 2021).

While it is interesting to know that all presidents have selected “political” judges, in light of knowing that there are also “apolitical” judges selected, it is necessary to answer this question: when, and under what conditions, are federal appellate judges with political backgrounds placed on the federal appellate bench? While decades of judicial politics scholarship address the politics involved in confirmation and characteristics of judicial nominees like race, gender, and professional backgrounds, there has been little attention on the nomination and confirmation processes of judges with political backgrounds.

Since there are a lot of factors and actors at play in judicial selection and confirmation procedures, I begin this chapter with an overview of the judicial selection process from the perspective of the executive and legislative branches. Next, I argue for the importance of studying political backgrounds of federal appellate judges. I then theorize the conditions under which judges with prior political activities are selected (e.g., divided government and the nuclear option). After re-introducing the key political background indicators, I explain the methodological setup of the analysis. The results suggest that while certain nomination conditions do matter in the selection of judges with political backgrounds, the effects are nuanced based on the type of political activity being analyzed.

### **3.3. Federal Judicial Nominations and Confirmations**

The ability to nominate federal judges is a significant source of presidential power. The United State Senate tempers this power with their constitutional obligation to confirm or reject judicial nominees with a simple majority vote. To understand why judges with political backgrounds are selected, it is first necessary to understand the processes by which federal judges are chosen, vetted, nominated, and eventually confirmed. Scholarship on judicial selection often focuses on two facets: *who* presidents choose as judicial nominees and *how* the Senate responds during the confirmation process. In the following two sections, I review the general process and existing scholarship on judicial selection from the perspective of the executive and legislative branches.

#### **3.3.1. Getting Selected: An Overview of a Varied Process**

While the president ultimately makes nominations to federal courts, there are many other actors involved in the identification of federal judicial nominees. For example, there are staffers in the Department of Justice whose job is to vet nominees and walk them through the confirmation process (Goldman 1999). While the president and their staff want to choose judges who will see their policies through the lower courts, they realize they are somewhat constrained by senators' preferences due to the advice and consent requirement of the Constitution (Massie, Hansford, and Songer 2004).

It is important to note another entity that has had significant influence on the selection of federal judges. The Federalist Society is an organization of conservative legal professionals that advocates for original understanding of the United States Constitution. Part of this advocacy is focused on identifying judicial nominees for Republican presidents. Since the 1980s, many lawyers in Republican Justice Departments have been members of the Federalist Society (Scherer and Miller 2009). Over time, the Federalist Society has gained an increasingly

important role in identifying federal judicial nominees, particularly in the recent Trump administration (Baum and Devins 2017). Research finds that judges who are members of the Federalist Society are more conservative than their counterparts, even those that identify as Republicans (Hollis-Brusky 2015).

Once a nominee is selected, the next step in the process is typically the American Bar Association's rating. The ABA scours the records of the nominees and gives each a rating based on their findings. These ratings range from not qualified (the lowest rating possible), to qualified, to well qualified (the highest rating possible). Since members of the ABA committee vote on ratings, it is possible that a nominee can receive one rating from a majority of committee members and another rating from a minority of committee members. For example, a nominee could receive a rating of Well-Qualified/Qualified. This means that a majority viewed the nominee as Well Qualified, but a minority thought the nominee was slightly less qualified.

It is important to note the differences in presidents' usage of the ABA ratings. Historically, Democratic presidents have used the ABA as part of their preliminary vetting process while Republican presidents, who often have claimed that ABA ratings are biased against their nominees, leave the ABA out of the formal process. Research suggests that Republican nominees *do* receive lower scores, but this could be because of Republican presidents' exclusion of the ABA in the formal vetting process (Smelcer, Steigerwalt, and Vining 2012). When the ABA is not part of the process in the early vetting stages, they rate nominees after they are officially nominated.

After candidates are nominated, their names are turned over to the Senate Judiciary Committee (SJC). As of 2022, the SJC has 22 seats, with 11 members representing the majority party and 11 members representing the minority party. During the early stages of the process, the

SJC gives nominees a detailed 26-question questionnaire. This questionnaire allows members of the SJC, and eventually the whole Senate, to learn about nominees' qualification and past experiences. As discussed in Chapter Two, these questionnaires are thorough and reliable sources of information for Senators (Dancey, Nelson, and Ringsmuth 2020; Rutkus 2016).

Senators from the home states of the lower court nominees have typically been given a good deal of discretion in the form of blue slips (Goldman 1999). These slips allow home-state Senators to give an opinion of the nominee at the SJC stage. Negative blue slip reports can, in theory, halt the nomination process. However, the Republican-controlled Senate recently limited the efficacy of blue slips (*The Hill*, 2017). Even two negative slips are no longer enough to stop a nomination.

If the nominee survives the blue slip process (remember that most *do* survive at this point in time), a hearing is scheduled before the SJC. These hearings are typically uneventful and speedy. In fact, Goldman (1999) finds that lower court hearings typically last no more than 20-30 minutes. These hearings are often more beneficial to the senators, who have been found to use their questioning to take positions on controversial matters as a means of signaling to their constituents (Collins and Ringhand 2016; Dancey, Nelson, and Ringsmuth 2014). After the hearing, the SJC holds a majority-vote on whether or not to send the nominee to the full Senate for a final confirmation vote. If the Senate confirms the nominees, which is the case the majority of the time, the president signs the formal commission (Maveety 2016).

So far, I have mainly focused on the general process of judicial selection in this section. While this is important to understand, it is also necessary to understand what kind of individuals are typically chosen.

Democratic presidents have placed more focus on diversifying the federal bench. Indeed, Democrats have placed significantly more minorities and women on the federal courts than Republican presidents (Solberg and Bratton 2005; Solberg 2005; Goldman and Slotnick 1997; Goldman 1987, 1974); however, George H.W. Bush placed a record proportion of women on lower federal courts (Goldman and Saronson 1994). President Obama placed more ethnic minorities on the federal bench during his first term than any other president, and his judges were more diverse overall (Solberg and Diascro 2018; Schwartz 2011). Goldman (1976) also shows that presidents of both parties nominate judges that share their partisan leanings. Some presidents also consider how long their judges will be able to serve. For example, Reagan placed more “young” judges on federal courts than any president in history (Goldman 1987).

An overwhelming majority of individuals nominated to federal courts, particularly the Court of Appeals, have prior judicial experience (Bratton and Spill 2004; Goldman and Slotnick 1997). This experience allows them to handle the demands of oral arguments and opinion writing – essential components of being an appellate judge. From Roosevelt to Clinton, selecting judges with such experience has been the norm. Although there is a norm of professional competence expected, Goldman (1974) still acknowledges that presidents pick federal judges who share their judicial philosophies. In particular, Republican presidents place more focus on selecting judges who will make decisions based on a conservative judicial outlook.

This literature on who presidents select focuses on demographics, education, legal training, qualifications, political proximity to the president, and the confirmation process. While all of these characteristics are important, I believe it is vital to study political background given its unique nature and prevalence (as identified in Chapter Two). This chapter continues to

expand on discovering and explaining judicial political backgrounds by focusing on the selection and confirmation processes that bring forth political judges. In the following subsection, I overview the general politics surrounding judicial confirmations.

### **3.3.2. Getting Confirmed: Politics as Usual**

How does the Senate as a whole react to judicial nominees once they are voted “out” of the Senate Judiciary Committee? The majority of work on judicial nominations and the confirmation process focuses on the Supreme Court, but can typically be generalized to lower court judicial nominees. The key determinants of whether or not a judge is confirmed are the ideologies of the Senate, president, and nominee (Jo 2017; Shipan, Allen, and Bergan 2014; Shipan 2008; Epstein et al. 2006; Shipan and Shannon 2003; Moraski and Shipan 1999). These factors have become increasingly important as the Senate has become more polarized and Supreme Court nominees have become more ideologically extreme (Cameron, Kstellec, and Park 2013).

Public opinion also affects the confirmation success of Supreme Court nominees (Kstellec, Lax, and Phillips 2010). Also, presidents will sometimes “go public” to garner support for their Supreme Court nominees (Johnson and Roberts 2004). While this can be successful, presidents must exercise caution since the Senate will sometimes punish the President for nominating a controversial Supreme Court candidate by delaying their legislative agenda and voting against the president’s lower court nominees (Madonna, Monogan, and Vining 2016).

While some generalizations can be drawn between Supreme Court and lower court confirmations, it is important to discuss findings solely addressing lower courts. In perhaps the most comprehensive of these studies, Martinek, Kemper, and Van Winkle (2002) find that factors such as low ABA ratings and nomination-timing negatively affect the duration and success of lower court confirmations.

In nominating lower court judges, presidents want to choose someone who will see their policies through the lower courts; however, they realize they are constrained by Senators' preferences (Massie, Hansford, and Songer 2004). Other scholars assert that interest group activity affects outcomes and duration of lower court nominees by serving as fire alarms to Senators (Bell 2002; Scherer, Bartels, and Steigerwalt 2008). Such groups are able to alert Senators if a district or appeals court judge is ideologically extreme.

Basinger and Mak (2010) find that opposing Senators are obstructing lower court nominees at an increasing rate. As parties have become more homogeneous and polarized, even lower court judicial nominations feel the effects of delay and ideological opposition. Indeed, the preferences of the majority party median and filibuster pivots have been shown to affect outcomes in the confirmations of appellate and trial court judges (Primo, Binder, and Maltzman 2008). Holmes (2007) finds that presidents will go public for Court of Appeals nominees that are facing a tough confirmation battle; however, nominees who garner more public support from the president are sometimes less likely to be confirmed.

It is important to note the procedural change in the Senate that has affected judicial confirmations. In 2013, Senate Majority Leader Harry Reid (D-NV) activated the nuclear option, which lowered the cloture requirement for ending debate on judicial nominees from 60 to 51 votes. Republican Mitch McConnell has kept the nuclear option in place, although he was adamantly opposed to the practice when Harry Reid and the Democratic controlled Senate instituted it. Boyd, Lynch, and Madonna (2015) find that while the nuclear option did not produce more ideologically extreme nominees, it did lead to speedier confirmation durations.

Overall, the previous two sections show that judicial nominations and confirmations are varied processes. Many actors are responsible for selecting individuals to nominate to federal

courts and many factors go into the nominees' success in the confirmation process. Largely missing in studies on judicial confirmations is the importance of political background. Since judicial selection is such a political process, it is vital to understand the political backgrounds of judges who are nominated and confirmed. Echoing the sentiments of Chapter Two, I discuss why selecting political judges matters in the following section.

### **3.4. Why Selecting Political Judges Matters**

By my definition, a political background consists of actions that nominees have taken on behalf of a political party. These actions can include positions in partisan campaigns, the pursuit of partisan non-judicial elected office, or serving in the administration of the nominating president. While it is one thing to “be a Democrat,” it is another to have worked on numerous campaigns for Democratic candidates, ran for office as a Democrat, and joined the national Democratic Party organization.

I stress that political backgrounds and prior political activity are distinct from politically related concepts such as shared partisanship with the appointing president and ideology. These concepts focus more on partisan labels. It is not groundbreaking to state that Republican presidents select nominees with Republican leanings or that Democratic presidents select liberally leaning nominees. After all, selecting judges with similar views helps presidents secure a lasting judicial legacy.

Different from partisanship and ideology, political backgrounds represent real, tangible experiences that judges have chosen to participate in. As discussed in Chapter Two, political backgrounds are critical to understand for a couple of reasons. First, the presence of so many political activities among federal appellate judges suggest that presidents value those activities in their judges. This suggests a deviation from the conventional, though perhaps misguided,

wisdom that judges are selected primarily for qualifications and experiences. Second, since political background is a distinct characteristic that judges bring to the bench, it is possible that this experience will influence their behavior in the same vein as characteristics like race, gender, and professional experiences.

### **3.5. A Theory of Selecting Political Judges**

Given the importance of political backgrounds as a distinct judicial characteristic – and knowing from Chapter Two that these backgrounds are prevalent among judges appointed in the last thirty years – it is necessary to unpack when judges with political backgrounds are chosen. Although there is a large amount of work on judicial confirmation politics, there is limited work on why or presidents choose certain types of judges. In this section, I theorize the conditions that may lead to more political judges.

There are three factors that could lead a president to nominate judges with more or fewer political activities: partisanship of the appointing president, divided partisan control of the presidency and Senate, and the institution of the 2013 nuclear option for judicial nominees. The first factor considered is partisanship of the president. Are Democrats more likely to nominate “political” judges or is this an attribute of Republican presidents? Goldman (1999) notes that presidents of both parties select judges with their partisan leanings. This is unsurprising; presidents nominate judges who will make decisions based on their preferences. Goldman (1987, 1978, 1974, 1967) also asserts that presidents pick federal judges who share their judicial philosophies. Particularly, Republican presidents choose judges with a conservative judicial outlook (Solberg and Bratton 2005). While partisan leanings and judicial philosophies are not the same as political activities, it seems plausible that these insights could still apply.

If Republican presidents are more likely than Democratic presidents to choose judges who share their judicial outlook, it is possible that political activities could serve as cues to nominating presidents. For example, a judge actively involved in Republican party work may indicate to a Republican president that he or she will share their views on the bench. Since Republicans are said to care more about partisanship and conservative judicial outlooks, it follows that they will also view prior political activities positively. These expectations led to the following hypothesis:

*H1: Republican presidents will be more likely than Democratic presidents to select judges with political backgrounds.*

The next two factors focus on the political environment surrounding the nomination. The second factor that could lead a president to nominate more or fewer politically active judges is whether or not there is divided government. When the opposition party controls the Senate, the President may be less likely to nominate politically active judges. The political activities could alarm members of the opposition party and lead to “no” votes or a forced nominee withdrawal.

The political makeup of the Senate has certainly been found to affect the confirmation process. Studies find that opposing Senators are obstructing lower court nominees at an increasing rate (Casella, Turban, and Wawro 2017; Basinger and Mak 2010; Hartley and Holmes 1997). As parties have become more homogeneous and polarized, even lower court judicial nominations feel the effects of delay and ideological opposition (Marshall 2004). Indeed, the preferences of the majority party median and filibuster pivots have been shown to affect outcomes in the confirmations of appellate and trial court judges (Primo, Binder, and Maltzman 2008). Also, presidents must worry about opposition to their nominations if they attempt to fill the bench with judges whose ideologies oppose the Senate majority (Dancey, Nelson, and Ringsmuth 2020; King and Ostrander 2020; Martinek, Kemper, and Van Winkle

2002), especially if interest groups get involved (Scherer, Bartels, and Steigerwalt 2008; Bell 2000; Caldeira, Hojnacki, and Wright 2003). Presidents must also consider the preferences of home state senators, given the norm of senatorial courtesy for lower court nominations (Howard and Hughes 2020; Rutkus 2008). These expectations lead to the following hypothesis:

*H2: Presidents will be less likely to select judges with political backgrounds during periods of divided government.*

The third factor focuses on a procedural change in the Senate that has affected the judicial selection process. In 2013, Senate Majority leader Harry Reid (D-NV) activated the nuclear option, which lowered the cloture requirement for ending debate on judicial nominees from 60 to 51 votes. Republican Majority leader Mitch McConnell (R-KY) kept the nuclear option in place once he took over, although he was adamantly opposed to the practice when Harry Reid used it.

In theory, the nuclear option makes it easier to select judges that the minority party may not like. How has this affected who presidents select to serve as judges? Boyd, Lynch, and Madonna (2015) find that while the nuclear option did not produce more ideologically extreme nominees, it did lead to speedier confirmation durations. This finding might lead one to assume that the nuclear option would not lead to judges with more political activities. However, this study covered a short period after the nuclear option was put into effect. Also, it is important to remember that ideology is different than political activity. Political activities are listed on the questionnaires submitted to the Senate, while ideology is usually an assumption Senators must make about a nominee. After the nuclear option was started, presidents may have been more likely to select politically active and loyal judges since the minority party would have little power to obstruct those nominees. This leads to the third hypothesis:

*H3: Presidents will be more likely to select judges with political backgrounds after the nuclear option was established.*

### **3.6. Data and Methods**

The analysis focuses on the confirmed Courts of Appeals judges placed on the federal bench between 1989 and 2019 by Presidents George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Donald Trump. The 274 judges appointed by these presidents are the units of analysis.

The primary data sources for judges' political backgrounds are the questionnaires that judicial nominees submit to the Senate Judiciary Committee. As discussed in the previous chapter, these questionnaires provide thorough and reliable background information on federal judges (Dancey, Nelson, and Ringsmuth 2020; Rutkus 2016). They are particularly useful for studying judges' political backgrounds. Two specific questions directly capture political activities:

*List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elected office or unsuccessful nominations for appointed office.*

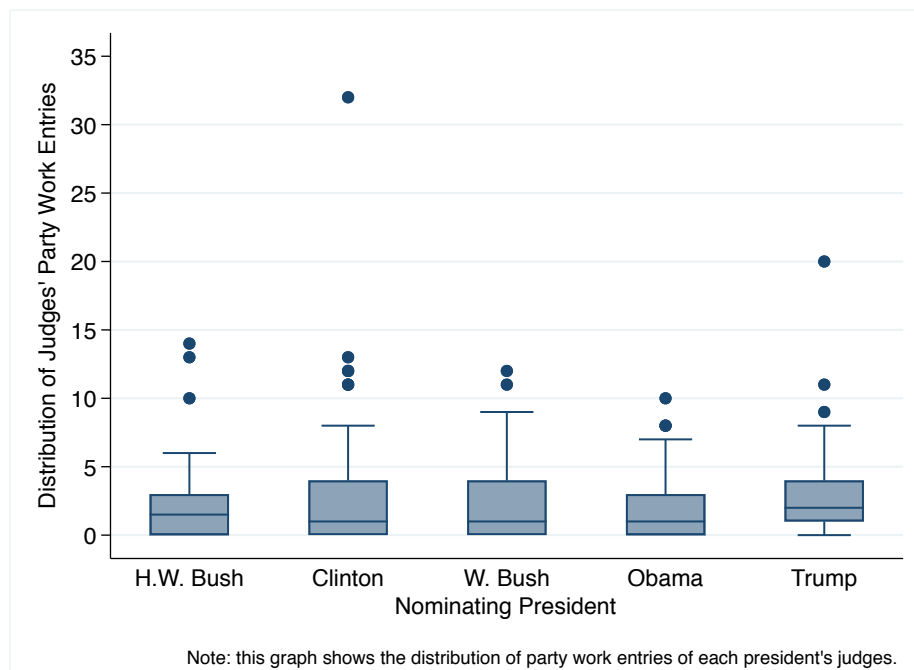
*List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title, and responsibilities.*

In Chapter Two, I identified three indicators of political background from these questions: whether or not the judge held non-judicial elected office, whether the judge belonged to a party organization, and whether or not the judge worked on behalf of a political party. These indicators will serve as the dependent variables in this analysis. As a reminder, the variables are

measured as follows:<sup>10</sup> *elected office* takes a value of (1) if the judge pursued elected office prior to their federal appellate judgeship and (0) otherwise. *Party membership* indicates whether the judge listed membership in a political party and is coded dichotomously. *Party work* is given a value of (1) if the judge listed work for a particular political campaign and (0) otherwise. Given the dichotomous nature of the dependent variables, I utilize logistic regression.

I also include a dependent variable for the *Number of Party Work Entries*. This is a continuous measure accounting for the variation in the amount of party work judges have.

**Figure 3.1**, previously presented in Chapter 2, shows the variation among the amount of work judges have done on behalf of political parties. OLS will be used for the model with this continuous variable.



**Figure 3.1: Party Work Entries of Appellate Judges**

<sup>10</sup> A more thorough explanation of these variables' measurements is included in Section 2.4.2. of Chapter 2.

The independent variables focus on the partisanship of the president and political environment identified in the theory/hypothesis section. *Republican president* takes a value of (1) if the nominating president is a Republican (i.e., H.W. Bush, W. Bush, and Trump) and (0) if the president is a Democrat (i.e., Clinton and Obama). It would be possible to have the appointing president represented by a five-category factor variable to pick up nuances between presidents. However, given the similarities in appointing behavior based on the partisanship of the president (e.g., Goldman 1999), it makes sense to place them in this partisan dichotomy.

*Divided government* represents situations where the presidency and Senate are controlled by two different parties. It takes a value of (1) if there is split partisan control of the Senate and the presidency, and (0) when the two institutions are controlled by the same party. It is important to note that divided government between the Senate and President was rare during this thirty-year time period. The Senate was only controlled by the opposition party a few times during the H.W. Bush, Clinton, and W. Bush administrations. Unified control of the presidency and the Senate was the norm between 1989 and 2019.

The *nuclear option* variable takes a value of (1) if the nomination happened after the 2013 nuclear option was in place and (0) if it occurred before. Given the 1989 to 2019 timeframe, only 74 judges were nominated after the nuclear option. Admittedly, the limited variation in the *divided government* and *nuclear option* variables will make it difficult to discover effects.

I also include three control variables capturing demographic background characteristics.<sup>11</sup> First, *gender* takes a value of (1) if the nominee is female and (0) otherwise. Second, *minority*

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<sup>11</sup> I considered including other background characteristics such as judicial experience and other career experience. This would be problematic because it is difficult to entangle which came first – the political activity or the other career experience. Untangling these temporal issues is beyond the scope of this paper.

takes a value of (1) if the nominee is a racial minority and (0) otherwise. Third, *age* is a continuous variable measuring the age of the judge on the date of their nomination. Data for these variables come largely from the Martinek (2006) data on lower court nominees and the Federal Judicial Center’s biographical data on federal judges (Federal Judicial Center 2020).

### 3.7. Analysis

Table 3.1 reports the results from four separate regressions.

**Table 3.1: Results from Logistic Regression**

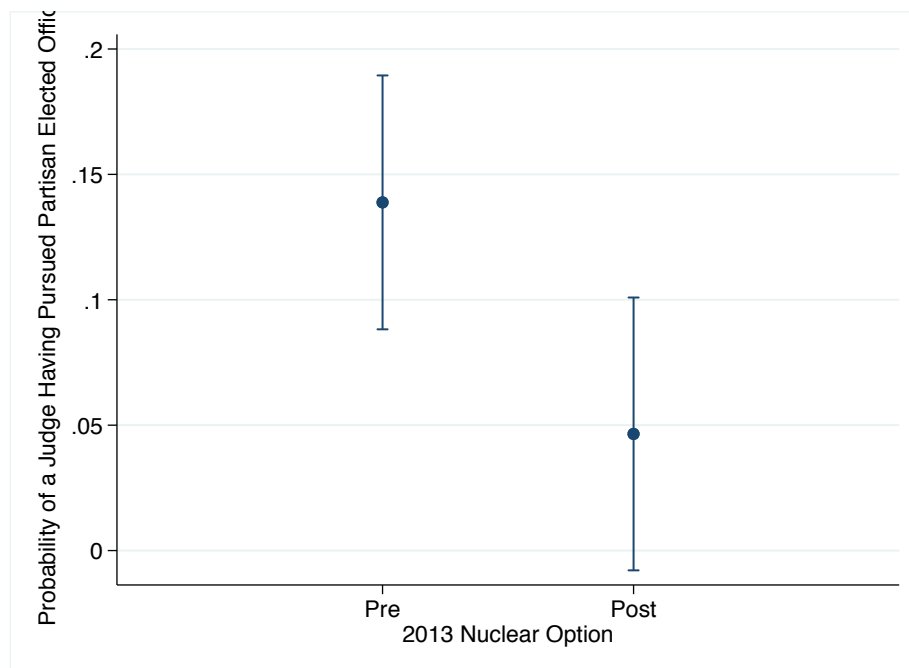
N=273	<u>Model 1</u> DV = Elected	<u>Model 2</u> DV = Party Member	<u>Model 3</u> DV = Party Work	<u>Model 4</u> DV = # of Party Work Entries
<b>Republican President</b>	-0.14 (0.37)	0.70** (0.36)	-0.17 (0.29)	-0.22 (0.29)
<b>Divided Government</b>	0.34 (0.39)	-0.08 (0.36)	-0.05 (0.29)	-0.06 (0.29)
<b>Nuclear Option</b>	-1.20* (0.65)	0.17 (0.39)	0.73** (0.35)	0.82** (0.36)
<b>Gender</b>	-0.97** (0.46)	-0.48 (0.38)	-0.70** (0.29)	-0.66** (0.29)
<b>Minority</b>	-1.83*** (0.74)	-0.82* (0.47)	-1.19*** (0.33)	-1.23*** (0.34)
<b>Age</b>	0.06* (0.03)	0.01 (0.03)	-0.00 (1.13)	-0.00 (0.02)
<b>Constant</b>	-4.06** (1.89)	-1.79 (1.41)	0.83 (1.13)	0.86 (1.14)

**Note:** This table shows the regression results from three different models. Models 1-3 use logistic regression, while Model 4 uses OLS. Each model has a different dependent variable but the same independent variables. \*\*\*  $p \leq 0.01$ , \*\*  $p \leq 0.05$ , \*  $p \leq 0.10$

First, consider Model 1. When the dependent variable is whether or not the judge pursued non-judicial elected office, it appears that only the nuclear option had an effect on the likelihood that a selected judge had this political activity. Since the nuclear option was instituted in 2013, it is less likely that a nominee has pursued elected office. Interestingly, Republican presidents are

not more or less likely to place judges with this political activity on the federal bench. Also, divided government does not seem to have a statistical effect on the prevalence of this political activity. *Gender* and *minority* are both negative and statistically significant. Both female and racial minority judges are less likely to have pursued elected judicial office, which is most likely due to the historical reluctance of members of these groups to run for public office (Sen 2017). Age has a positive and significant effect on having elected office experience. It appears that older judges (when nominated) were more likely to have pursued non-judicial partisan elected office.

To help understand the results from **Table 3.1**, I plot predicted probabilities. While the coefficients in **Table 3.1** help discern the direction and significant effects, predicted probabilities provide understandable and visualizable representations of a variable's substantive effects based on the model results.



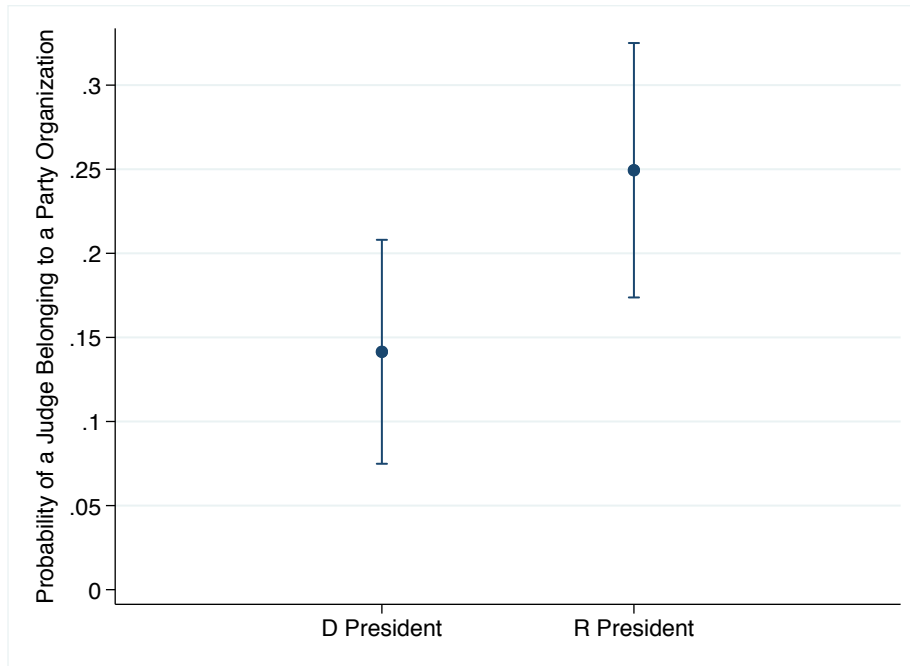
**Figure 3.2: Predicted Probabilities of Elected Office**

In **Figure 3.2**, I plot the predicted probabilities of a judge having pursued non-judicial partisan elected office before and after the 2013 nuclear option. Prior to the nuclear option, a judge had a 14% probability of having pursued office. After the 2013 rule change, that probability drops to 5%. This 9-percentage-point decrease is a significant difference supporting the results from Model 1.<sup>12</sup>

Model 2 takes *party member* as the dependent variable. Recall that *party member* captures whether or not the judge listed membership in a political party on their SJC questionnaire. While neither of the confirmation environment variables (*divided government* and *nuclear option*) had meaningful effects, whether or not the appointing president is a Republican has a positive and significant effect on listing party membership, as expected in H1. This suggests that Republican presidents are more likely to select judges who are stated members of a political party (usually the Republican party). This comports with Goldman's (1999) expectation that Republican presidents in particular select judges with conservative judicial philosophies and partisanship. Interestingly, minority judges are less likely to state their partisanship.

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<sup>12</sup> Although the confidence intervals overlap in Figure 3.2 (and some of the other figures), the differences are significant.



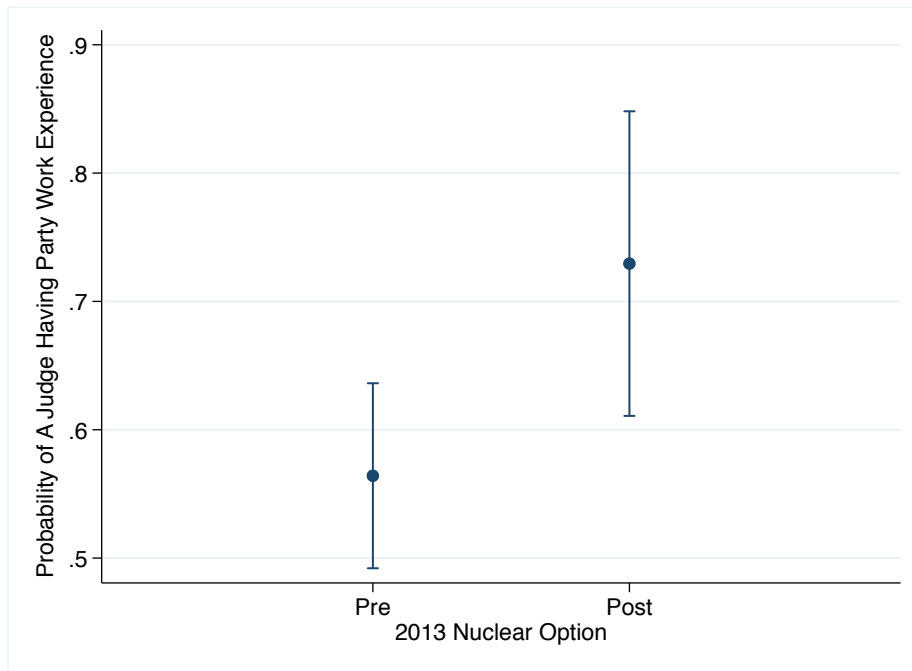
**Figure 3.3: Predicted Probabilities of Party Membership**

In **Figure 3.3**, I provide the predicted probabilities of listing party membership based on the party of the appointing president. A Democrat-appointed judge has a 14% probability of listing party membership, while a Republican-appointed judge has a 25% probability of list party membership. This substantial 11-point difference suggests that Republican nominees are significantly more likely to embrace their partisanship during the nomination/confirmation process.

Model 3 uses *party work* as the dependent variable. Which factors lead to more judges who have worked on behalf of a party or candidate? Republican presidents are no more or less likely to select judges with past political party work. It seems that loyalty to a party in terms of campaigning and volunteering is rewarded on both sides of the aisle. In terms of confirmation environment, it appears that the likelihood of a president appointing a judge with past party work increased significantly after the nuclear option was put in place. This conforms with the third

hypothesis that presidents will be more likely to select judges with prior political activities. With the ease of pushing nominees through the confirmation process given this procedural change, presidents are freer to select politically active judges.

In Model 3, both women and racial minorities are less likely to report working on behalf of a political party. Again, this is probably due to the world of politics being dominated historically by whites and males. Though beyond the scope of this paper, further investigation of race and gender dynamics is warranted across these models.



**Figure 3.4: Probability of a Judge Working for a Political Party**

In **Figure 3.4**, I plot the predicted probability of a nominee listing party work both before and after the 2013 nuclear option was instituted.<sup>13</sup> Prior to the nuclear option, judges had a 56%

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<sup>13</sup> Note that although the confidence intervals overlap in Figures 3.3 and 3.4, the differences between the predicted probabilities *are* statistically significant.

probability of listing party work. However, after the nuclear option, this probability leaps to 74%. This 18-point difference suggests that the nuclear option made it easier for presidents (and the majority Senate party) to appoint more partisan loyalists.

Model 4 uses the continuous *number of party work* entries variable. The results comport with the results of Model 3. After the nuclear option, judges listed significantly more party work entries. Holding all other variables equal, the nuclear option led to an average of almost one more entry of party work. Although a small increase, it does seem that judges appointed after 2013 were more politically active. Consistent with other models, women and minorities listed fewer party work entries.

### **3.7.1 Disentangling President Trump's Impact**

Results from Models 3 and 4 suggest that the nuclear option led to more judges with party work experience being placed on the federal appellate bench. It is plausible that the nuclear option's effects on listing party work are actually capturing the effects of President Trump nominating more politically active judges as stated in the introduction (Ruiz et al. 2020). This begs the question: was Trump able to do this because of the nuclear option or was this due to his proclivity for defying norms? To address this question, I constructed another model, replacing the nuclear option variable with a dichotomous variable accounting for President Trump. *Trump* takes a value of (1) if the judge was nominated by President Trump and (0) if the judge was nominated by any of the other four presidents being studied. *Party work* is used as the dependent variable and all other independent variables are the same as those used in the models above.

**Table 3.2: Results from Logistic Regression<sup>14</sup>**

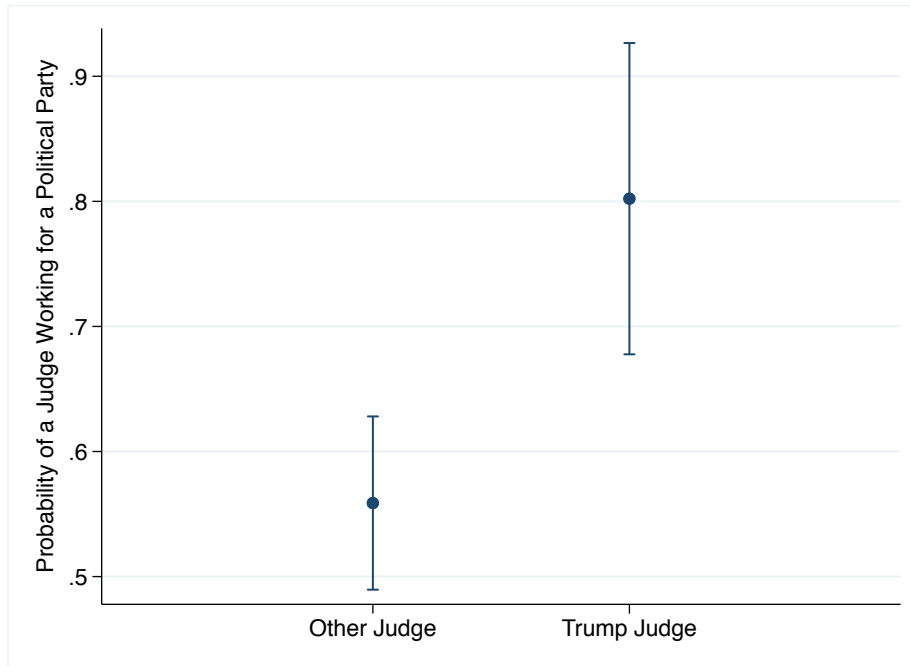
<b>N=273</b>	<b>DV = Party Work</b>
<b>Republican President</b>	-0.38 (0.31)
<b>Divided Government</b>	-0.01 (0.28)
<b>Trump</b>	1.16*** (0.69)
<b>Gender</b>	-0.64** (0.29)
<b>Minority</b>	-1.21*** (0.33)
<b>Age</b>	-0.00 (0.02)
<b>Constant</b>	0.89 (1.12)

**Note:** This table shows results of the reconstructed model including the Trump dummy variable. \*\*\*  $p \leq 0.01$ , \*\*  $p \leq 0.05$ , \*  $p \leq 0.10$

It appears from **Table 3.2** that President Trump’s judges were significantly more likely to list party work on their questionnaires than the judges of all other presidents, both Republican and Democrat. As in Model 3 from **Table 3.2**, both women and minorities were less likely to list party work.

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<sup>14</sup> Note: The *republican president* and *Trump* variables correlate at 0.42. While this is higher than ideal, it does not come close to “perfect correlation.”



**Figure 3.5: Probability of a Working for a Political Party (Trump Judges)**

**Figure 3.5** plots the predicted probabilities of listing work for a political party based on whether the nominating president was Trump or not. When considered together, the four presidents prior to Trump had about a 55% probability of selecting a judge who had worked for a political party. In contrast, President Trump had an 83% probability of selecting a judge who had worked for a political party. This 28-percentage-point difference is statistically significant and gives validity to claims that President Trump placed more politically active judges on the bench during his time in office.

### **3.8. Discussion and Conclusion**

While the previous chapter tracked the presence of federal appellate judges with political backgrounds, this chapter sought to explain their presence. After outlining the nuances of the judicial selection and confirmation processes, I utilized the political background indicators identified in Chapter Two to determine when judges with these activities materialize. I

performed systematic analyses of each political variable and tested how the partisanship of the appointing president and the confirmation environment affected the likelihood of a president selecting a more political nominee.

While divided government never affected the likelihood of a politically active judge being selected, the nuclear option and partisanship of the appointing president mattered in a nuanced way. Republican presidents were more likely to nominate judges who claimed party membership, and more judges with party work were appointed after the nuclear option was started. More specifically, President Trump was significantly more likely to place politically active judges on the federal appellate bench. Overall, the results are varied based on what type of political background is being considered. These findings provide interesting insight into the political activities of federal judges and how the president and Senate procedural rules can potentially lead to judges with more political activities.

Moving forward with this line of research, there are many areas of inquiry to explore. First, it is important to recognize that not all political activities are created equal. For example, listing party membership is different than claiming that you worked on a behalf of a political party. This led me to construct three models with different political activity dependent variables. However, it would be interesting to construct an index of political activity that could provide for more straightforward analyses. The problem arises when determining how much weight to give one activity in the index versus another.

The effects of gender and race also warrant further consideration. As pointed out in the results section, race and gender often had a negative effect on the likelihood of a judge having prior political activities. In other words, women and racial minorities were less likely to have prior political activities. Although this is unsurprising given the historical and cultural barriers to

these groups to the political process, this brings about other questions of race and gender's role in the questionnaire process. Are women and minority nominees more reluctant to reveal political activities at the risk of appearing too extreme? Are these nominees scrutinized more heavily when they have these activities? Affirmative answers to these questions could have significant impacts on the diversity of the federal bench.

Another fruitful line of research would be to extend these analyses to district court judges since there are so many more district judges than appellate judges. Also, district courts are the workhorses of the federal judiciary and the judges on these courts have the final say in most legal outcomes. Would these judges have more political activity since they may be less likely to have prior judicial experience since they sit at the "bottom" of the federal judiciary? Studying these judges would both provide more nuance to the political background discussion and greatly increase the number of possible observations.

Collectively, Chapters Two and Three illustrate and explain the presence of judges with political backgrounds. Overall, political backgrounds are not uncommon and their presence depends on the partisanship of the appointing president and Senate procedural rules. Building on the theme of political judges, the fourth chapter will show how judges use political language to describe themselves in the Senate Judiciary Committee questionnaires. Together, these studies present a novel and complete political picture of federal appellate judges.

**CHAPTER 4: LET'S TALK POLITICS – JUDGES' USE OF POLITICAL  
LANGUAGE IN THEIR SENATE JUDICIARY COMMITTEE QUESTIONNAIRES<sup>15</sup>**

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<sup>15</sup> Rutkowski, Adam G. To be submitted to *Journal of Politics*.

#### **4.1. Abstract**

Each individual nominated to a judgeship on the federal bench submits a questionnaire to the Senate Judiciary Committee. Covering everything from professional experience to personal financial information, these detailed questionnaires are considered an important part of the judicial nomination process and a rich source of background information for senators, scholars, and the public. While scholars often utilize these questionnaires to collect background information on judicial nominees, there has been little attention given to the questionnaire itself or how nominees describe themselves in their responses. Inspired by language studies of judicial confirmation hearings, this chapter applies textual analysis to the questionnaires submitted by judicial nominees. Keeping with the broader theme of this dissertation, the use of political language is studied through the construction and application of a political word dictionary. Analyses of the questionnaires submitted by federal appellate judges confirmed between 1989 and 2019 reveal that factors such as a judge's political background led to increased use of political language, while professional characteristics like prior judicial experience led to decreased use of political language. These results bolster the importance of studying political background and highlight the ways in which such backgrounds can appear at the judicial selection stage.

#### **4.2. Introduction**

The two previous chapters of this dissertation demonstrate that judges with political backgrounds are not uncommon on the federal appellate bench. Further, judges with prior political activity were selected more frequently by Republican presidents – particularly by President Trump – and after the 2013 nuclear option was instituted. Until this point, the political background characteristics studied include the pursuit of partisan, non-judicial elected office, membership in

a formal political party organization, and actions taken on behalf of a political party. While these factors represent key indicators of a judge's political background, they do not necessarily embody a wholesale account. Capturing these experiences in a simple dichotomous way is useful for analytical purposes, but a more complete and robust exploration of judges' political backgrounds can come from analyzing the political language they use during their nomination and confirmation processes.

Consider Judge Robert L. Wilkins, nominated by President Barack Obama to the U.S. Courts of Appeals for the D.C. Circuit and confirmed by the Senate in 2014. In his questionnaire submitted to the Senate Judiciary Committee (SJC), Judge Wilkins explained his role in the 2008 Obama presidential campaign:

Obama for President (2008), Member of Committee of Lawyers for Obama, provided voluntary assistance with fundraising, canvassing, and vetting (Wilkins, *Senate Judiciary Committee*, 2014).

In previous chapters, this piece of information would have been treated as one instance of working on behalf of a political party. However, this statement actually provides much more detail via words with political connotations. Judge Wilkins is identifying which political candidate he represented (Obama), what political organization he belonged to (Lawyers for Obama), and the political activities he participated in as a volunteer (fundraising, canvassing, and vetting). Not only did Judge Wilkins campaign for President Obama, but he did so as a part of a political organization and served three functions in his role as a volunteer.

Judge Wilkins also listed membership in the American Civil Liberties Union (ACLU) in his questionnaire. While not a political party organization (as captured in Chapters Two and Three), the ACLU and organizations like it are inherently political groups with membership determined by a person's ideological views. Listing memberships in the ACLU, the NAACP, the

Federalist Society, the John Birch Society, or other organizations with political leanings and motivations, represents further use of political language in the questionnaires. By considering the words used to describe both political and other activities, a richer account of political background is achieved.

This chapter seeks to discern the factors that lead judges to use political language when describing their backgrounds in their Senate Judiciary Committee questionnaires (SJCQs). Analyzing the language used in questionnaires via textual analysis methods serves two primary purposes. First, it provides the first known language analysis of the SJCQs. Each individual nominated to a judgeship on the federal bench submits a background questionnaire to the SJC. Covering everything from professional experience to personal financial information, these detailed questionnaires are considered an important part of the judicial nomination process and a rich source of information for senators, scholars, and the public. While the questionnaires are considered reliable and valid in terms of the information they contain (Dancey, Nelson, and Ringsmuth 2020, 2014; Rutkus 2016, 2010), nominees ultimately decide how to describe and present this information. For example, Judge Wilkins in the above example could have simply indicated that he assisted the 2008 Obama campaign. Second, this chapter will add to the understanding of judges' political backgrounds introduced in the previous two chapters of this dissertation. Analyzing each word of the questionnaires through a political, text analysis lens will reveal previously uncaptured nuance and insight.

This chapter begins with an overview of the SJCQs – their origins, the information included within them, how they are used by Senators, and how they have been used in judicial politics research. Next, I discuss what political language is, why it is important, and how it can appear in the SJCQs. I then theorize which factors (e.g., demographics, professional experiences,

and confirmation environment) may lead judges to describe their backgrounds politically and/or include more political information in their questionnaires. I then show how textual analysis methods can be used to build a custom political language dictionary and analyze the questionnaires. Results from an analysis of the questionnaires submitted by federal appellate judges confirmed between 1989 and 2019 reveal that factors such as political background and prior judicial experience affect judges' use of political language.

#### **4.3. Tell Us About Yourself: The Senate Judiciary Committee Questionnaires**

Each individual nominated to the federal bench submits a questionnaire to the Senate Judiciary Committee (SJC). These questionnaires (SJCQs) provide members of the SJC and the full Senate with rich background information on nominees. What are the origins of these questionnaires? What information is included? How do they fit into the confirmation process? How are they used by senators? How have they been used in judicial politics research? This section provides an overview of these important documents.

While SJCQs appear sporadically in the 1960s and earlier, it was in the 1970s that the SJC started to develop a formal questionnaire (Haire 2001; Goldman 1999, 1967; Slotnick 1983, 1978). However, it was not until the late 1980s that the SJCQs were administered consistently (Goldman 1999). In the following decades, these questionnaires have become a vital, and practically required, part of the judicial nomination and confirmation process (Hatch 2002).

The SJCQs provide in-depth insight into nominees' pasts. They have even been described as, "long, thorough...monstrous" (Dancey, Nelson, and Ringsmuth 2020, 21). The SJCQs contain a set of 25-30 questions on key pieces of background information, including education, employment history, honors and awards, bar and court admissions, professional and personal memberships, publications, details on judicial experience, details on legal experience,

explanations of political activities, teaching experience, potential conflicts of interest, pro bono representation interests, and even income sources and net worth. Although there have been slight variations in the questions asked of nominees over the last three decades, the information described above is included consistently across time. Earlier forms of the questionnaires (usually those administered before the turn of the 21<sup>st</sup> Century) requested particulars such as home addresses, phone numbers, marital status, details about a nominee's spouse, and a brief essay on views of judicial activism. These types of questions have been removed in favor of questions that focus on objective, professional details. It is also now common to have specifics about nominees' net worth withheld from public release.

Once an individual is nominated to any level of the federal judiciary, the SJC requests completion of the questionnaire. The nominees have a pre-determined time to gather the information – remember, there are 25-30 questions requiring great detail – and submit it back to the SJC before their formal hearing. By having these questionnaires on hand prior to the hearing, members of the SJC are able to scrutinize the nominees' backgrounds and form questions to ask the nominees (Rutkus and Rybicki 2009; Rybicki 2013). Senator Orin Hatch (R-UT), who chaired the SJC from 1996 to 2001, lauds the importance and usefulness of the SJCQs. Since it is impossible to determine every facet of a nominee's background during the confirmation hearings, which typically last only thirty minutes to an hour, the questionnaires provide a fuller account of nominees' pasts (Dancey, Nelson, and Ringsmuth 2020; Hatch 2002; Goldman 1999).

Because of the numerous questions asked, filling out the SJCQ can be arduous process for nominees (Goldman 1999). It is important to recognize that because the questionnaires are self-reported, nominees do theoretically have some discretion in what information to include. Although this may seem like a concern, scholars find that the SJCQs are reliable and the

information included is accurate (Dancey, Nelson, and Ringsmuth 2020; Rutkus 2016, 2010).

Also, given that the completed questionnaires are usually a minimum of thirty pages in length, it appears that nominees take them seriously and include as much detail as possible. Therefore, the SJCQs are considered true and complete reports of nominees' background experiences.

Given the massive amount of reliable information included in the SJCQs, they have been a valuable source of information on judge characteristics for judicial politics scholars. The questionnaires have been used in countless studies on the professional experiences (i.e., judicial experience, legal experience, academic experience, etc.) federal judges bring to the bench (e.g., Goldman 1999, 1987, 1974; Goldman and Slotnick 1997; Goldman, Slotnick and Schiavoni 2010; Slotnick, Goldman, and Schiavoni 2015; Solberg and Bratton 2005). Prior to the regular use of questionnaires, scholars had to rely on interviews of presidential staff, judges, and senators to discern this information (e.g., Goldman 1974, 1967). The questionnaires have also been used to determine judges' political connections. In the previous two chapters of this dissertation, I used the questions about political involvement to capture judges' political backgrounds in activities such as campaigning, party membership, and elected office experience. Scholars have also used the SJCQs to capture nominees' memberships in partisan groups like the Federalist Society (Scherer and Miller 2009). Given the breadth of information available in the SJCQs, there are undoubtedly countless possibilities for how they can be used.

While the SJCQs have been utilized as a source of information for decades, there are no known studies that analyze the language within them. Textual analysis has often focused on the more public-facing portion of the judicial confirmation process – the SJC confirmation hearings. These formal hearings represent an important part of the process, whereby members of the SJC can ask nominees questions about their backgrounds and even their views on salient issues

(Dancey, Nelson, and Ringsmuth 2020; Collins and Ringhand 2013). These exchanges serve an important democratic and public function by allowing elected legislators to ask questions of appointed nominees (Collins and Ringhand 2013; Ringhand and Collins 2010). However, it must be mentioned that senators sometimes use these hearings to ask tough questions that reflect and reinforce their own views (Dancey, Nelson, and Ringsmuth 2020; Farganis and Wedeking 2014; Schoenherr, Lane, and Armaly 2020).

Language analyses also reveal that the hearings are not robotic exercises occurring in a vacuum. For example, members often ask more questions when the Senate is controlled by the party opposite the president since the nomination success is uncertain (Schoenherr, Lane, and Armaly 2020). Further, Republican and Democratic Senators place disparate focus on certain issues based on their partisanship (Ringhand and Collins 2010). Demographic-based differences in language used during the hearings have also been uncovered. Boyd, Collins, and Ringhand (2018) find that female nominees are more closely scrutinized on their judicial philosophies than their male counterparts, particularly by male senators. Bolstering the fact that the hearings are a democratic process, studies find that public opinion of senators' constituents influences the questions asked and the language used (Collins and Ringhand 2013; Schoenherr, Lane, and Armaly 2020).

Despite the demonstrated benefits of using language and text analysis in confirmation hearings, there has been little to no focus on the language used in the SJCQs. I believe this is an oversight that must be addressed for a couple of reasons. First and foremost, the questionnaires provide the most comprehensive overview of judicial nominees that will ever exist. Each questionnaire contains tens of pages and tens of thousands of words outlining the nominee's entire professional career. The richness of the SJCQs make them interesting to study in and of

themselves. Second, the questionnaires are self-reported. While the information is considered valid, nominees still choose *how* to describe their experiences. The questions are fairly broad, giving nominees wide latitude in how much detail to include in their responses. Unlike hearings, which represent exchanges between senators and nominees, the questionnaires singularly represent the voice of the nominee.

Recognizing the success of using textual analysis in confirmation hearings and appreciating the authority of the SJCQs, I apply textual analysis methods to federal appellate judges' questionnaires. To enhance the story of judges' political backgrounds presented throughout this dissertation, I analyze the political language judges include in their SJCQs. In the following sections, I will explain what political language is in the context of the SJCQs and discuss the construction and execution of a novel political language dictionary.

#### **4.4. What is Political Language and Why Does it Matter?**

Chapters Two and Three introduced and explicated the idea of political backgrounds among federal appellate judges. Political background was defined as a judge's past consisting of any political activity, including holding positions in partisan campaigns, pursuing partisan non-judicial elected office, and joining a partisan organization. While a different concept, the use of political language can be closely connected to political background.

I define political language as words with connotations suggesting links with common themes in American politics (see Pennebaker et al. 2015). These themes can include partisanship and ideology, political media (i.e., partisan media outlets such as newspapers and cable news programs), political actors (e.g., presidents, governors, and legislators), and political groups (e.g., the ACLU and the Federalist Society.) Words that directly capture or evoke these themes can be classified as political language. Reconsider the example of Judge Wilkins mentioned in the

introduction section of this chapter. When describing his role in President Obama's 2008 campaign, he stated:

Obama for President (2008), Member of Committee of Lawyers for Obama, provided voluntary assistance with fundraising, canvassing, and vetting. (Wilkins, *Senate Judiciary Committee*, 2014)

Words like Obama, president, voluntary, fundraising, canvassing, and vetting have political connotations when used in this context. Therefore, these words can be classified as "political language." The process of classifying words as political language will be presented in a more formal and systematic way in Section 4.6.

The benefit of analyzing political language in the SJCQs is two-pronged. First, since the questionnaires are self-reported, nominees have the opportunity to describe their political pasts using as much or as little political language as they prefer. As I pointed out earlier in this chapter, Judge Wilkins could have simply stated that he worked on behalf of the 2008 Obama campaign. Instead, he gave particular details about his activity using overtly political language.

Second, studying political language can provide a more complete picture of judges' political backgrounds. The categories of political background established in Chapter Two are fairly limited and specific. The purpose of conceptualizing political background with three dichotomous indicators was to provide a useful and straightforward way to capture judges' political pasts and apply those pasts to various analyses. Examining political language will pick up political nuances that the three key indicators may have missed – nuances like membership in partisan legal groups like the Federalist Society and American Constitution Society, more specific details of campaign activities, and details on appearing on partisan news shows and writing political opinion pieces in national news publications. Overall, studying political

language provides a more complete look at judges' political backgrounds and political motivations.

Studying the use of political language is also beneficial from a practical, methodological perspective. In this chapter, I am analyzing the choice to list political activity and describe this activity (and other professional activities) in political ways. Because of this, I am able to use any characteristics of the nominees that were in place before the questionnaires were completed as independent variables. Taking such an approach allays the concerns of temporal issues that prevented certain characteristics from being included in the Chapter Three analyses. Therefore, this chapter will increase understanding of political backgrounds and the characteristics that lead to them.

The political language used by judicial nominees is important to study because of its potential applications to other aspects of judicial behavior. For example, many background characteristics like race, gender, and professional experiences, are said to influence judicial behavior (e.g., Boyd and Rutkowski 2020, Haire and Moyer 2015; Robinson 2011; Boyd, Epstein, and Martin 2010; see Chapter Two, Section 2.3 for a complete overview of relevant literature). These characteristics matter because they give judges a different lens through which to view cases. Heightened use of political language suggests a political lens these judges may have and could potentially use once on the bench.

#### **4.5. A Theory of Political Language**

Armed with an understanding of what political language is and why it should be studied, I now turn to theorizing the presence of political language in the SJCQs. What factors lead judges to use more or less political language? In the following subsections, I consider factors such as

political backgrounds, professional experiences, demographic characteristics, and confirmation environment politics.

#### **4.5.1. Political Background Factors**

The first factor that could influence a judge's use of political language is their political background. While political backgrounds of judges have been addressed to a limited extent in judicial background scholarship (e.g., Brudney et al. 1999; Goldman 1999; Gryski, Main, and Dixon 1986; Vines 1964), the earlier chapters of this dissertation provide one of the most wholesale accounts of judges' political backgrounds. The particular political backgrounds studied included the judges' pursuit of elected office, their membership in a formal party organization, and their work on behalf of political parties.

It is plausible that judges having any of these characteristics would use more political language in their questionnaire for two reasons. First, it could be that judges with political backgrounds have more of a political mindset and would subconsciously – or consciously – use more political language. For example, a judge who lists membership in the Republican Party and has worked on behalf of a Republican campaign may use political language both to describe those particular background characteristics and other unrelated activities. This judge could also be a member of the Federalist Society and mention speeches given to the organization or media appearances commenting on the legal issues of the day. Second, even judges with substantial political backgrounds may use political language differently. Some may not describe their activities in much detail, or some may be more reticent for professional reasons (i.e., they have a political background, but they served as a judge at the time of their appointment).<sup>16</sup> The point

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<sup>16</sup> This statement suggests interactive effects that are outside the current scope of this chapter. The point I am trying to make is that the political activity indicators are not necessarily measuring the same thing as a political language variable.

here is that these two concepts (political background and the use of political language) can be treated as distinct. The political background indicators represent tangible activities, while the use of political language reflects a conscious choice by judges to describe experiences politically in their SJCQs. These expectations lead to the first hypothesis:

*H1: Judges with a political background will use more political language in their SJCQs than judges without a political background.*

#### **4.5.2. Professional Background Characteristics**

Other factors that could affect the use of political language concern a judge's professional background. I consider two common professional experience characteristics of federal judges, prior judicial and prosecutorial experience (Robinson 2011; Wheeler 2003; Goldman 1999).

Will judges with these experiences be more or less likely to use political language?

Judges, whether at the state or federal level, are bound by professional ethics standards. These ethics standards forbid judges from participating in various types of activities, especially those that are considered political. For example, Canon 5 of the *Code of Conduct for United States Judges* prohibits several facets of political activity. Judges cannot hold office in a political organization, make speeches for a political organization or candidate, solicit funds or make donations to candidates, and must resign any political offices upon candidacy to the federal courts. In other words, judges are not allowed to engage in traditional, electoral political activities (Guide to Judiciary Policy, Canon 5, Volume 2A, Chapter 2, 18-19). Individuals who are being nominated to the federal appellate bench from a lower federal court would have been subject to the ethics code from the time they began service on that court. The same expectation should hold for judges who served on state courts, despite the different ways in which state judges are selected. Although some judges may have been elected in partisan campaigns, once they are on the bench, they will be subject to ethics rules similar to those at the federal level. If a

judge has prior judicial experience, they will have had less time to participate in politics and may be more hesitant to use political language in the questionnaires. This leads to the following hypothesis:

*H2: Federal appellate judges with prior judicial experience will use less political language in their SJCQs.*

The second professional characteristic that could influence the use of political language is prior prosecutorial experience. Chapter Two revealed that at least thirty percent of each of the last five president's judges served as prosecutors prior to their appointment to the federal appellate bench. Judges with this experience are said to be more conservative politically (Robinson 2011; Sisk, Heise, and Morriss 1998; Johnston 1976; Nagel 1962). Additionally, the overwhelming majority of prosecutors in the United States are elected by their constituents, with a small percentage appointed by their states' governors (Hessick and Morse 2020). Whatever the selection method, the role of prosecutor is often considered more political than that of a judge (Boyd et al. 2021; Boldt and Boyd 2018; Robinson 2011). Further, the national standards for prosecutorial conduct do not always prohibit external political activity. While prosecutors are not allowed to *prosecute* on the basis of politics, there are no consistent rules against participating in politics in other ways (Fourth Edition (2017) of the *Criminal Justice Standards for the Prosecution Function, American Bar Association*). These expectations lead to the following hypothesis:

*H3: Judges with prior prosecutorial experience will use more political language in their SJCQs.*

### **4.5.3. Demographic Factors**

I also expect that demographic factors like race and gender will influence the use of political language. Although not a focus of Chapter Three, race and gender were included in models of

the presidential selection of judges with political backgrounds. Fairly consistently, judges who were female and people of color were less likely to have political backgrounds. This finding is consistent with existing scholarship on political ambition and political success. In terms of gender, there is a striking gap between men's and women's ambition to run for office and be involved in politics more generally (Frederick 2013; Lawless and Fox 2012, 2010, 2005). This predisposition towards staying out of politics begins at a young age and is exacerbated by political recruitment systems (Fox and Lawless 2014, 2010). People of color, while not necessarily less politically ambitious than their white counterparts, are ultimately less successful in their political ventures (Holman 2016; Shah 2015; Frederick 2013). Taken together, these findings could suggest that, from a practical standpoint, women and people of color will use less political language.

Judges belonging to these groups may also use less political language because of the disparities in the judicial confirmation process itself. Although a push for diversity on the federal bench has been in place for decades (Haire and Moyer 2015), women and people of color are not always treated like their white male counterparts when nominated. Both female and minority nominees are subjected to longer confirmation durations and less successful outcomes (Sen 2017; Asmussen 2011; Martinek, Kemper, and Van Winkle 2002; Hartley 2001). Further, nominees belonging to these groups receive lower ratings from the American Bar Association, despite having the same qualifications as their white male counterparts (Sen 2014). Female nominees are also found to receive disparate treatment during their confirmation hearings and are scrutinized more closely on their judicial philosophies (Boyd, Collins, and Ringhand 2018). Given their disadvantaged status in the process, women and people of color may use less

political language to avoid even further scrutiny. These expectations lead to the following hypothesis.

*H4: Female and minority judges will use less political language than their white or male counterparts.*

#### **4.5.4. Confirmation Environment Factors**

Three confirmation environment factors could lead to the use of more or less political language in the SJCQs: partisanship of the appointing president, divided partisan control of the presidency and Senate, and the establishment of the 2013 nuclear option for judicial nominees. First, consider partisanship of the president. Will a Republican-nominated judge be more likely to use political language than a Democrat-appointed colleague? Goldman (1999, 1987, 1974, 1967) asserts that presidents of both parties select judges with their own partisan leanings and judicial philosophies. Republican presidents in particular choose judges who are more conservative and consistently identify as Republicans (Solberg and Bratton 2005; Goldman 1999). While partisanship and ideology are distinct from political language, it seems possible that the application could hold. If Republican-appointed judges are more likely to be conservative and partisan, it follows that they may use more political language. This could be because they have several political activities and also because they may be willing to describe their activities more politically. These expectations lead to the following hypothesis:

*H5: Judges selected by Republican presidents will use more political language in their SJCQs than judges selected by Democratic presidents.*

The second confirmation environment factor that could lead a nominee to use more or less political language is the presence of divided government. When the party opposite the appointing president controls the Senate, nominees may be less likely to use political language.

Political language may serve as a fire alarm to Senators and could ultimately harm their confirmation success.

The political makeup of the Senate certainly affects the confirmation process. Senators now scrutinize lower court nominees more intensely, and these judges feel the effects of delay and ideological opposition in a way they did not just a couple of decades in the past (Casella, Turban, and Wawro 2017; Basinger and Mak 2010; Marshall 2004; Hartley and Holmes 1997). Senators also react negatively to ideologically extreme nominees the presidents select, especially if interest groups come out in opposition to those nominees (Bell 2000; Dancey, Nelson, and Ringsmuth 2020; King and Ostrander 2020; Martinek, Kemper and Van Winkle 2002; Scherer, Bartels, and Steigerwalt 2008). Because copious amounts of political language used in the SJCQs may “flag” a nominee as ideologically extreme or hyper-partisan. This expectation leads to the following hypothesis:

*H6: Judges will use less political language in their SJCQ during periods of divided government.*

The third confirmation environment factor focuses on a fairly recent procedural change in the Senate that has affected judicial selection. In 2013, Senate Majority leader Harry Reid (D-NV) activated the nuclear option, which lowered the cloture requirement for ending debate on lower court judicial nominees from 60 to 51 votes. This rule has stayed in place despite changes in partisan control of the Senate and was even extended to include debate on Supreme Court nominees.

In theory, the nuclear option makes it easier for judges to get confirmed, in terms of both time and partisan opposition. Scholars find that while the nuclear option did not produce more ideologically extreme nominees, it did lead to speedier confirmation durations and greater ultimate success (Boyd, Lynch, and Madonna 2015). Since the nuclear option in theory makes it

“easier” to move forward in the confirmation process, nominees may feel less need to temper their political language. Results from Chapter Three show that more judges with political activities were selected after the 2013 nuclear option, particularly by President Trump. This leads to the final hypothesis:

*H7: Judges nominated after the 2013 nuclear option was established will use more political language in their SJCQs.*

#### **4.6. Data and Methods**

To discover the differential use of political language in the SJCQs, I use textual analysis software to analyze the questionnaires of all judges confirmed to the federal appellate bench between 1989 and 2019. While the units of analysis are the individual judges, hundreds of thousands of words are studied across the 273 judges. In the following subsections, I discuss the detailed process of creating a political word dictionary and using Language Inquiry & Word Count (LIWC, Pennebaker et al. 2015) to apply the dictionary to the SJCQs to form a novel dependent variable measuring political language. Measurement of key independent variables capturing my theoretical expectations will also be outlined.

##### **4.6.1. Constructing the Dependent Variable Using LIWC**

In order to determine the amount of political language used in the SJCQs, political language must be measured as a dependent variable using textual analysis software. Following the lead of many other studies in the social sciences (e.g., Boyd, Collins, and Ringhand 2018; Li et al. 2017; Graham et al. 2009; Madera et al. 2009; Brownlow 2003), I utilize the Linguistic Inquiry and Word Count (LIWC) software. Created by social psychologist James Pennebaker, LIWC is a robust text-processing software able to classify and count words along numerous dimensions (Pennebaker et al. 2015). LIWC is able to analyze documents to determine linguistic structure (i.e., punctuation, prepositions, articles, etc.) and assign words to categories using dictionaries.

LIWC is equipped with several in-house dictionaries that can analyze the tones – the positive and negative connotations – and emotions of words. LIWC also provides external dictionaries created by scholars studying different aspects of language not covered in the LIWC dictionaries.

Given the novelty of political textual analysis of the Senate Judiciary Committee questionnaires, there is no existing internal or external LIWC dictionary equipped to handle the task. Therefore, I constructed a novel dictionary of political words to apply to the SJCQs. I outline the process of creating such a dictionary, and thereby creating the political language dependent variable, in the following paragraphs.

The first step towards analyzing text of any kind is to make sure all documents are accounted for and in the proper format. In this chapter, I am analyzing the 273 questionnaires submitted to the SJC by confirmed appellate judges who were nominated between 1989 and 2019. Finding these documents is somewhat of a treasure hunt. Questionnaires submitted since 2009 are available in clear, text-readable format on the SJC website, but questionnaires submitted before 2009 can be found only by combing through the United States Congressional Record (*Senate Judiciary Committee, 2022*).

Because many of the questionnaires in the Congressional Record were originally typewritten or scanned into databases decades ago, not all of them are available as text-readable files. However, the documents must be text-readable in order for software like LIWC to work. To remedy this problem, I used Optical Character Recognition (OCR) software. OCR software is able to convert documents that are stored as images, or any other non-text-readable-format, to text-readable pdf files. Once these technical tasks are completed, the dictionary of political words can be constructed.

While certain words are inherently political in the context of American Politics (e.g., Republican, Democrat, senator, liberal, etc.), it is impossible to come up with an exhaustive list of political words that may appear in the SJCQs simply by brainstorming. To make sure I captured most of the potential political words, I followed several steps. First, I selected the five judges with the most political activities (as defined and identified in Chapters Two and Three) appointed by each of the last five presidents. Selecting these more political judges increases the potential pool of political words. Second, I ran these twenty-five questionnaires through the general LIWC program. This yielded a list of every unique word in these questionnaires. Third, I read through this list and identified words with a seemingly political connotation. Fourth, I revised this list by weighing whether each word on the original list could have many meanings that were not political. This process yielded a list of 65 words. These words can be broken down into the following categories: ideology and partisanship (e.g., conservative\*<sup>17</sup>, liberal\*, libertar\*, socialis\*, etc.), electoral politics (e.g., politic\*, campaign\*, fundraise\*, elect\*, etc.), general titles for political actors, (e.g., congress\*, president\*, governor, legislator\*, etc.), political news (e.g., ABC, CNN, Fox News, *The Washington Post*, etc.), political groups (e.g., NAACP, National Rifle Association, Federalist Society, American Constitution Society, etc.), and specific political actors (e.g., President Trump, President Obama, etc.). A complete list of the words in my novel political dictionary is included in **Appendix A**.

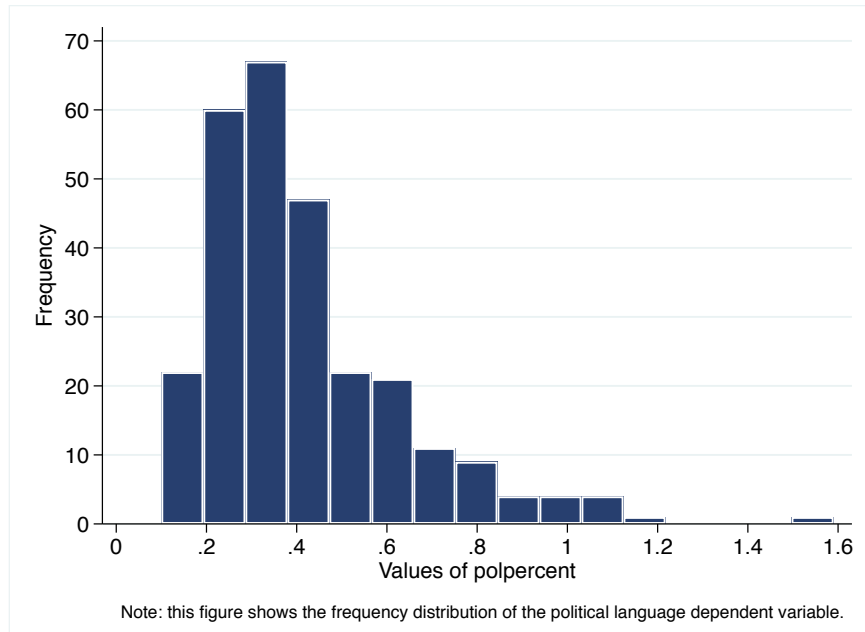
Armed with the text-readable questionnaires and a political language dictionary, a political language dependent variable was calculated. LIWC, like other text analysis software, calculates the percentage of words that match the dictionary in the document being analyzed (Pennebaker 2015; Grimmer and Stewart 2013). Each of the questionnaires was analyzed order

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<sup>17</sup> In LIWC, the \* denotation allows for many variations stemming from a word root to be captured. For example, socialis\* captures both socialism and socialist.

to create a political language percent score for each judge. This dependent variable is denoted as *polpercent*, or the percentage of words in each judge's questionnaire that were political.

**Figure 4.1** shows the frequency distribution of the dependent variable across the 273 judge SJCQs. *Polpercent* ranges from 0.1% to 1.6%, with a mean percentage of 0.41. There are several important features of the *polpercent* that must be addressed. First, one notices that there are no values of "0" for political language, meaning that no judges had zero political language in their questionnaires. This can be explained by the fact that some of the questions include political words. For example, Question 15 asks nominees to list any public offices held or services rendered to a political party or candidate. Since I am concerned with the use of more or less political language, a baseline of zero is not necessary. Second, it is clear that the data distribution is "skewed right." Since some questions do include political language, the baseline value for little or no political language is most likely in the 0.1-0.3% range, depending on the year of the questionnaire. Because of this, the values of this variable are bounded by that lower baseline value (many judges have low values), and the median value is less than the mean. Third, one notices that the values are quite low. Indeed, political words constitute only 1.6% of the questionnaire of the judge who used the most political language. The low values of *polpercent* are somewhat understandable given the sheer amount of information covered in the questionnaires. While important, political activities and language represent only a small fraction of everything included in the questionnaires. It is misguided to expect the values of *polpercent* to reach values of 10% or higher.



**Figure 4.1: Frequency Distribution of “polpercent” (DV)**

#### 4.6.2. Independent Variables of Interest

Conceptualizing the independent variables is more straightforward. The independent variables capture the theorized factors that could influence the use of political language. The political background variables are measured as follows: *elected office* takes a value of (1) if the judge pursued elected office prior to their federal appellate judgeship and (0) otherwise. *Party membership* indicates whether the judge listed membership in a political party and is coded dichotomously. *Party work* is given a value of (1) if the judge listed work for a particular political campaign and (0) otherwise.

The professional background characteristics capture the judicial and prosecutorial experience of the judges. *Judicial experience* takes a value of (1) if the appellate judge had prior judicial experience at any level at the time of their nomination and (0) otherwise. *Prosecutor* takes a value of (1) if the judge had served as a prosecutor at any level prior to their appointment and

(0) if they had not. The demographic variables are measured dichotomously also. *Female* takes a value of (1) if the judge is a woman and (0) if the judge is a man. *Race* takes a value of (1) if the judge is non-white and (0) if the judge is white.

The confirmation environment variables are measured in the same way they were for the analyses in Chapter Three. *Republican president* takes a value of (1) if the nominating president is a Republican (i.e., H.W. Bush, W. Bush, and Trump) and (0) if the president is a Democrat (i.e., Clinton and Obama). While a measure with more presidential nuance could be constructed, given the similarities in appointing behavior based on the partisanship of the president (e.g., Goldman 1999), this partisan dichotomy makes sense.

*Divided government* represents situations where the presidency and Senate are controlled by two different parties. It takes a value of (1) if there is split partisan control of the Senate and the presidency, and (0) when the two institutions are controlled by the same party. Divided government between the Senate and President was rare during this thirty-year time period. The Senate was only controlled by the opposition party a few times during the H.W. Bush, Clinton, and W. Bush administrations. The *nuclear option* variable takes a value of (1) if the nomination happened after the 2013 nuclear option was in place and (0) if it occurred before.

I also control for a couple of judge characteristics that could influence the use of political language, although I do not theorize the direction of these effects. *Age* is a continuous variable capturing the judge's age at the time of their nomination. *Academic* is a dichotomous variable measured as (1) if the judge had any academic experience as a law professor and a (0) otherwise.

Since the dependent variable, *polpercent*, is continuous, I use OLS regression to perform my analysis. In the following section, I present the statistical results of the analysis along with substantive explanations of the factors that lead to more or less political language.

## 4.7. Analysis

**Table 4.1: Results from OLS Regression<sup>18</sup>**

	<b>DV = <i>polpercent</i></b>
<b>Elected Office</b>	0.07* (0.04)
<b>Party Membership</b>	0.07** (0.03)
<b>Party Work</b>	0.12*** (0.02)
<b>Judicial Experience</b>	-0.10*** (0.03)
<b>Prosecutor</b>	-0.03 (0.02)
<b>Gender</b>	-0.01 (0.03)
<b>Race</b>	-0.01 (0.03)
<b>Republican President</b>	0.02 (0.03)
<b>Divided Government</b>	-0.03 (0.02)
<b>Nuclear Option</b>	0.05 (0.04)
<b>Age</b>	0.00 (0.00)
<b>Academic Experience</b>	0.02 (0.03)
<b>Constant</b>	0.36*** (0.11)

**Note:** \*\*\* indicate  $p \leq 0.01$ , \*\* indicate  $p \leq 0.05$ , \* indicate  $p \leq 0.1$

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<sup>18</sup> To check for multicollinearity in the model, I performed the variance inflation factor (VIF) test after running the model. The typical threshold suggesting multicollinearity is a VIF of 10, with a more conservative threshold of 4. The VIF ratio for each variable is below 1.4, suggesting that multicollinearity is not an issue. This also supports my earlier point (see theory section) that the *polpercent* variable and the political activity indicators are measuring different things. The VIF ratios for the political activity indicators are as follows: *elected* (1.18), *p\_member* (1.23), and *p\_work* (1.25). These VIFs, well below even the conservative threshold of 4, suggest that these variables are not correlated with the political language dependent variable in any meaningful way.

**Table 4.1** shows the results from an OLS regression, with standard errors clustered by judge.<sup>19</sup> I will first consider the effects of political background. Each of the three political activity variables has a positive and significant effect on the amount of political language used in the questionnaires, lending support to *H1*. In terms of professional experience, prior judicial experience has a negative and significant effect on the use of political language, a finding consistent with *H2*. In addition to prior prosecutorial experience (*H3*), demographic characteristics (i.e., gender (*H4*) and race (*H5*)), and confirmation environment factors (i.e., partisanship of the president (*H6*), divided government (*H7*), and the nuclear option (*H8*), do not influence the use of political language. Only judicial experience and political backgrounds led to differential uses of political language.

**Table 4.2** reports the substantive effects of the key significant independent variables.

**Table 4.2: Substantive Effects of Key Independent Variables**

<b>Variable</b>	<b>Hypothesized Effect</b>	<b>Substantive Effect (percentage point)</b>
<b>Elected Office</b>	+	0.07
<b>Party Membership</b>	+	0.07
<b>Party Work</b>	+	0.12
<b>Judicial Experience</b>	-	-0.10

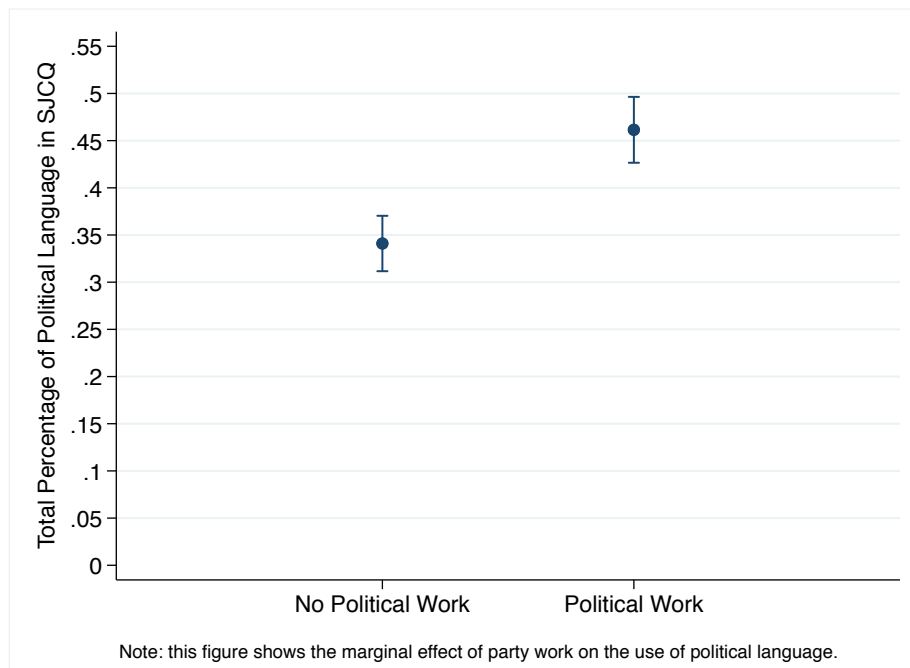
*Note: this table shows the marginal effect of the significant variables identified in Table 1.*

Judges with either elected office experience or formal party membership will have political language percentage scores that are 0.07 percentage points higher, all else equal. Judges who had at least one instance of political party work see a more considerable increase in political

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<sup>19</sup> Tobit regression is sometimes used in models where the dependent variable is a bounded percentage. However, OLS is generally easier to interpret, allows for simpler clustering of the standard errors, and in this case, yielded identical results.

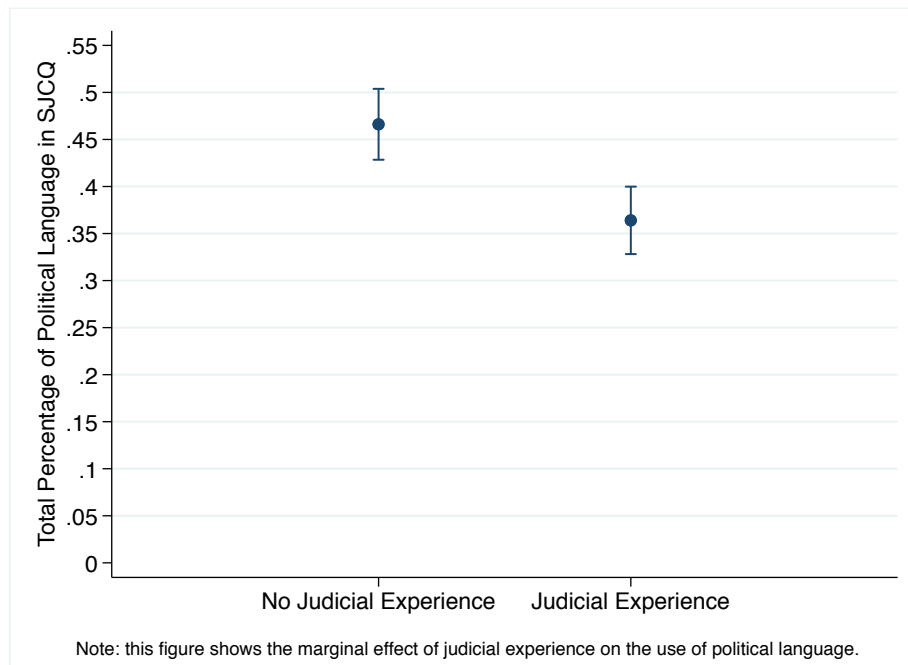
language of 0.12 percentage points. **Figure 4.2** illustrates the marginal effect of a judge having worked for a political party on the percentage of political language in the SJCQs. A judge without this experience will have, on average, a political language percentage score of 0.34, while a judge with this experience will have, on average, a score of 0.46. As explained in the theoretical expectations leading to *H1*, judges with political activity will naturally use more political language to describe their activities. Further, they will use more political language in other areas of the questionnaire when describing speeches given, organization memberships, cases litigated, etc.



**Figure 4.2: Marginal Effect of Party Work**

Nominees with prior judicial experience had political language percentage scores that were 0.10 percentage points lower than nominees who had never served as judges. **Figure 4.3** shows the marginal effect of prior judicial experience on the percentage of political words in the

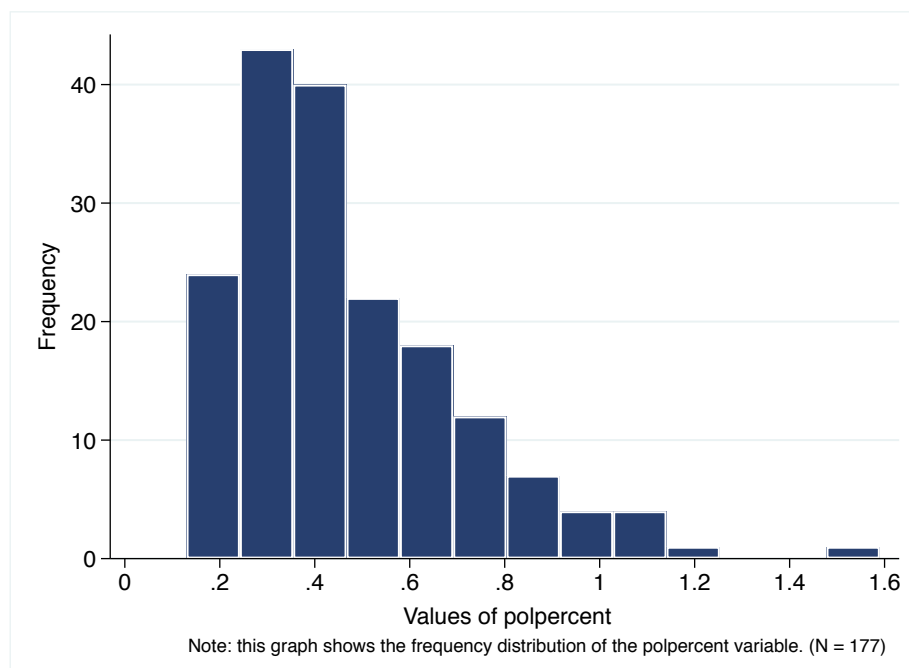
SJCQ. A nominee who had not served as a judge had a political language percentage score of 0.46, compared to 0.36% for their non-judge counterparts. Prior judicial experience, as expected by the second hypothesis, led to a certain reticence in using political language. It could be that ethics standards prevented those judges from engaging in politics. Further, current judges filling out a questionnaire may use less political language to avoid a political appearance.



**Figure 4.3: Marginal Effect of Judicial Experience**

One notable feature of the results presented in this section is the small magnitude of the coefficients, and thereby the substantive effects. For example, the largest effect is provided by party work, which leads to a 0.12 percentage-point increase in the use of political language. While this effect may seem substantively minor, remember that the percentages of political language used in the SJCQs ranges from 0.1% to 1.6%, with a mean value of 0.41%. When this is considered, a percentage-point increase of 0.12 seems more substantial.

In the theory section of this paper, I asserted that the three political background indicators are distinct concepts from political language. The results suggest that judges with political backgrounds do indeed use more political language. One way to check whether these concepts are distinct is to plot the distribution of *polpercent* (as in **Figure 4.1**), but only for judges with political backgrounds. **Figure 4.4** provides this by showing the distribution of *polpercent* for judges with at least one of the three political background indicators (having pursued elected office, listing party membership, and having worked for a political party).



**Figure 4.4: Frequency Distribution of “polpercent” (DV) for Judges with Political Backgrounds**

One notices that the distribution in **Figure 4.4** is similar to the distribution in **Figure 4.1**, in which all judges are included. This suggests that even judges with political backgrounds are using political language at varied rates and the concepts are distinct. Further, this variation hints that some interactive effects may be at play between the political background variables and other

variables. These interactive effects, which can be explored in future research, would provide further insight why some judges embrace political language in their questionnaires.

#### **4.8. Discussion and Conclusion**

This chapter executes the first known textual analysis of the questionnaires submitted by nominees to the Senate Judiciary Committees by determining the amount of political language used by nominees and studying the factors that influence its use. Perhaps one of the largest contributions of this chapter is the establishment of a political language dictionary. This dictionary, consisting of over sixty words, captures language with connotations suggesting many themes of American politics. Applying this novel dictionary to the SJCQs revealed that factors such as political background led to an increased use of political language. In other words, judges with political backgrounds use more political language. On the other hand, prior judicial experience led to decreased amounts of political language. These results show that judges with certain backgrounds describe themselves differently, and the political language used during the questionnaire stage could have implications for judicial behavior in the future.

There are several directions for this line of research to take. First, the political language dictionary can be applied to other types of judicial texts. While many studies focus on the language of nominee-senator exchanges during the SJC judicial confirmation hearings, there has been little to no focus placed on political language. Do certain senators use more political language? Do nominees use very little political language? It will also be useful to apply the political language dictionary to other categories of judicial text. For example, do judges with more political language in their SJCQ use more political language in their written opinions once they are on the bench? An affirmative answer to this question would have serious implications for judicial selection and behavior.

Second, given that the SJCQs have been understudied in terms of the language they use, it will also be fruitful to analyze other types of language in the questionnaires. Sentiment analyses would reveal the use of emotional or confidence-focused language. Do certain judges describe themselves in more confident ways? Because of the rich and detailed information contained in the SJCQs, their language is ripe for further study.

Third, scholars should determine which questions evoke responses with more political language. There are the obvious examples like the questions ascertaining political activities, but there are also more subtle questions that could elicit political language. For example, judges are asked to list and describe their ten most significant cases they either litigated or presided over. Do nominees choose certain cases because of their political implications? While this chapter considered the SJCQs as a whole, a more question-refined approach would provide greater nuance.

Overall, this chapter shifts the conversation on judicial selection to the often overlooked SJCQs. By studying the questionnaires, scholars have an abundance of self-reported characteristics and attributes in the words of the nominees themselves. Language matters, and understanding its use in the SJCQs gives a glimpse into who is being placed on the federal bench.

## CHAPTER 5: CONCLUSION

The goal of this dissertation was to ascertain the political backgrounds of federal appellate judges. To this end, the project answers three broad questions in three substantive chapters. How common are political backgrounds among federal appellate judges? When, and under what conditions, are judges with political backgrounds selected? How do political backgrounds manifest via political language during the nomination process?

To discover how common political backgrounds were among federal appellate judges, Chapter Two used the Senate Judiciary Committee questionnaires (SJCQs) to collect information on judges' political pasts. From these thorough and detailed SJCQs, I identified three indicators of political backgrounds for judges confirmed between 1989 and 2019: pursuit of partisan, non-judicial elected office, formal party membership, and work on behalf of a political party.

Descriptive analyses of the federal appellate judges selected by George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and President Trump revealed that political backgrounds among these judges are not uncommon. However, there are some variations based on the party of the appointing president and the type of political activity being considered. Overall, this first substantive chapter introduces, defines, and illustrates judges' political backgrounds.

Having its foundations in the introduction and descriptions of political backgrounds addressed in Chapter Two, Chapter Three furthered the understanding of political judges by exploring when, and under what conditions, these judges were selected. To accomplish this, a theory of prior political activity incorporating factors like confirmation environment and presidential partisanship was presented. Studying the same 274 appellate judges confirmed

between 1989 and 2019, the results confirmed that selecting judges with political backgrounds is common practice, but there is important variation based on the type of political background being considered, the party of the appointing president, and Senate rule changes like the nuclear option. Consistent with recent media charges (e.g., Ruiz et al. 2020), President Trump made a distinct impact by placing many more judges with political campaigning experience than his predecessors, including previous Republican presidents. Overall, this second substantive chapter increases the understanding of political judges by bringing the judicial selection process into the conversation.

Chapter Four built on the previous chapters by taking advantage of the SJCQs in a novel way. Each federal judicial nominee fills out a questionnaire and has a chance to describe their previous experiences and activities. Inspired by textual analyses and language studies of confirmation hearings, I applied Language Inquiry and Word Count (LIWC) text analysis software to the questionnaires of the 274 judges confirmed between 1989 and 2019 to measure the percentage of political language used. This endeavor involved gathering and properly formatting the SJCQs and building a dictionary of political words to be used with the LIWC software. The construction of this political dictionary is perhaps the most important contribution of this chapter since it can be adapted for language analyses of many different aspects of American politics. After theorizing which factors might lead to the use of more or less political language (e.g., demographic characteristics, professional experiences, political experiences, and confirmation environment features), analyses revealed that judges possessing the political background indicators identified in earlier chapters used significantly more political language than judges without those experiences. On the other hand, judges who had prior judicial experience before being nominated to the federal appellate bench used less political language.

Overall, this third substantive chapter contributes to judicial politics scholarship by performing the first textual analysis of the SJCQs, building a novel political language dictionary, and gaining insight into how judicial nominees describe themselves.

Although this dissertation makes great strides towards understanding judges' political backgrounds, there is still work to be done. Given the understudied nature of political background as a distinct judicial characteristic, the limited scope of a dissertation project only allows for so many questions to be answered. In this section, I outline several broad avenues for future research. More nuanced avenues for further research are included in the individual substantive chapters.

First and foremost, the analyses of political backgrounds should be extended to include judges of other federal courts. This would be particularly fruitful at the federal district court level. This dissertation analyzed the 274 judges nominated to the federal appellate bench between 1989 and 2019. During that same thirty-year period, almost 1500 judges were confirmed to the district courts. I chose appellate judges for this dissertation project because of the manageable number of judges; however, increasing the sample size by a multiple of five would allow for more generalizable conclusions to be drawn about political backgrounds. Given the role of federal district courts as the virtual "final arbiter" in most federal litigation (Boyd and Rutkowski 2020), understanding these judges' political backgrounds is vital.

Expanding the study of political backgrounds to district court judges is near the top of my own future research agenda. As a result of work on other projects on federal judges, I have a large percentage of the SJCQs for district court judges. Following the model of this dissertation, it will be fairly straightforward, yet time-consuming, to replicate the analyses for these lower court judges.

A smaller scale study could also be done on the political backgrounds of Supreme Court justices. Because the number of high court judges is much smaller when compared to lower court judges, such an analysis could benefit from both quantitative and qualitative approaches. Given the Supreme Court's persistent reluctance to appear political, such a project would be interesting and beneficial to scholars and the public alike.

Second, armed with an understand of judges' political backgrounds, another natural step is to ascertain how such backgrounds affect judicial behavior. As I discussed on numerous occasions in the substantive chapters of the dissertation, the whole idea of political background is that it gives judges a certain political mindset. Similar to other characteristics like race, sex, and professional experiences, having experience in the political arena could certainly give judges a political lens through which to view cases. To this end, I have taken steps to apply political backgrounds to studies of judicial behavior. I am collecting data on appellate court cases in the issue areas of campaign finance, sex discrimination, affirmative action, Title VII race, and abortion – all politically charged issue areas. Once these data are completely collected, I will be able to merge my political background data with the case data to analyze if judges with political background decide cases differently than judges without those backgrounds. It will be interesting to see whether or not there is cause for the modern concerns of “more political” judges.

Third, in future research on political backgrounds, scholars should further consider the views of other actors involved in the judicial confirmation process. While one can assume that staffers in the Justice Department (who play a large role in identifying nominees) and Senators (who confirm the nominees) are aware of judge's political backgrounds through vetting measures like the SJCQs, interviews of these actors could provide insights into a) how aware they are of

judges' political backgrounds, and b) how those backgrounds affect the selection and confirmation of nominees.

Fourth and finally, work needs to be done to create a single measure of political background. In this dissertation, I identified three indicator variables capturing the pursuit of elected office, membership in political parties, and work on behalf of political parties and candidates. I also created a measure capturing the percentage of political language present in the SJCQs. Taken together, these measures provide the most comprehensive accounting of judges' political backgrounds that exists. However, for future analyses on how these backgrounds affect other aspects of judicial behavior, it will be helpful to have a single measure to use. This could come in the form of an additive index variable that captures many different political activities or a factor variable that accounts for both political activities and political language. Creating such a variable that is distinct from partisanship and ideology would make a lasting contribution to judicial politics scholarship.

The selection of federal judges is perhaps one of the most salient aspects of American politics today. Since these judges have the potential to serve for well over thirty years, it is vital to understand who is being placed on the bench. While many judicial characteristics have been identified over the years, judges' connections to politics have been largely ignored or understudied by scholars – despite heightened media attention. This dissertation illuminates judges' political backgrounds through comprehensive theoretical and analytical studies and paves the way for decades of scholarly work in this area.

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## APPENDIX: The Political Language Dictionary

conservativ*	NYT
liberal*	USA Today
republican*	New York Post
democrat*	Los Angeles Times
libertar*	Star Tribune
socialis*	Newsday
progressiv*	Chicago Tribune
GOP	The Boston Globe
RNC	Wall Street Journal
DNC	Washington Post
PAC	National Association for the Advancement of Colored People
politic*	NAACP
campaign*	American Civil Liberties Union
canvas*	ACLU
fundrais*	National Rifle Association
elect*	NRA
poll*	Federalist Society
congress*	American Constitution Society
representativ*	ACS
president*	Heritage Foundation
senator*	Cato Institute
governor	Brennan Center
legislat*	John Birch
CNN	Judicial Watch
MSNBC	American Center for Law & Justice
Fox News	ACLJ
NBC	Alliance for Justice
ABC	AFJ
CBS	President Obama
BBC	President Bush
National Public Radio	President Clinton
NPR	President Trump
New York Times	