LISA MARIE HOLMES
Reform in the Appointment Process for U.S. Courts of Appeals Judges, 1977-1998
(Under the Direction of SUSAN B. HAIRE)

The appointment process for judges to the U.S. Courts of Appeals has undergone significant reform in the past 25 years brought about by the increased political salience and policy-making role of circuit court judges. President Jimmy Carter instituted reforms aimed at providing more independence from home-state senators in the selection of nominees. Former Senate Judiciary Committee Chair Edward Kennedy (D-MA) altered the Committee's role in the confirmation process in order to allow an independent ability to investigate nominees. The purported purpose of the reforms was to remove the vestiges of patronage and senatorial courtesy from the appointment process, in favor or selecting judges based on merit, qualifications, and background characteristics.

In this study, the implications of appointment reforms are examined for various stages in the appointment process. The modern appointment process is characterized by increasingly long delay in both the selection and confirmation procedures, as well as decreased opportunities for outside actors to testify at the confirmation hearings. Institutional reforms and the political climate of the day largely dictate how judicial appointments proceed with respect to nominee success, delay, and outside participation, with a less-consistent influence played by the background and characteristics of the individual nominee. This situation has serious implications for the efficient staffing of the U.S. Courts of Appeals, with more vacancies languishing for longer periods of time. The modern appointment process, therefore, is compromising the ability of the courts of appeals to accommodate growing caseloads and policy influence by preventing the efficient staffing of judges onto the bench.

INDEX WORDS: U.S. Courts of Appeals, Appointments, Nominee selection delay, Confirmation delay, Outside participation

REFORM IN THE APPOINTMENT PROCESS

FOR U.S. COURTS OF APPEALS JUDGES, 1977-1998

by

LISA MARIE HOLMES

B.A., The University of Vermont, 1991

M.A., The University of Georgia, 1997

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

Partial Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2001

© 2001

Lisa Marie Holmes

All Rights Reserved

REFORM IN THE APPOINTMENT PROCESS

FOR U.S. COURTS OF APPEALS JUDGES, 1977-1998

by

LISA MARIE HOLMES

Approved:

Major Professor: Susan B. Haire

Committee: Scott Ainsworth
Paul-Henri Gurian
Stefanie Lindquist
Susette Talarico

Electronic Version Approved:

Gordhan L. Patel
Dean on the Graduate School
The University of Georgia
August 2001

DEDICATION

This manuscript is dedicated to the memory of my father, Bernard G. Holmes, Sr.

ACKNOWLEDGMENTS

I am indebted to Susan Haire for assistance with this project. Her guidance and support have been invaluable and are very much appreciated. I am also grateful to Scott Ainsworth, Paul-Henri Gurian, Stefanie Lindquist, Susette Talarico, and John Maltese for their assistance and commitment over the years. Roger Hartley is a continuing source of support and encouragement. I would also like to acknowledge and thank Sheldon Goldman for his generosity with both his time and his data over the last few years.

Many people from UGA and Athens provided friendship and encouragement throughout my graduate school experience. Kevin Pybas, Liam Anderson, Chris McDonald, Paige Newman, and many from the LRG are especially thanked here. I would also like to thank my colleagues at UNCG for their encouragement and support. A final note of thanks and appreciation goes to my family in Massachusetts and New Hampshire.

TABLE OF CONTENTS

Page

ACKNOWLEDGMENTS v

CHAPTER

1 INTRODUCTION AND OUTLINE OF THE CURRENT STUDY 1

The Origins and Evolution of the Judicial Appointment Process 2

An Examination of the Modern Appointment Process 7

The Organizational Framework of the Current Study 13

2 PRESIDENTIAL SELECTION OF COURTS OF APPEALS NOMINEES 15

The Carter Administration 17

The Reagan Administration 29

The Bush Administration 40

The Clinton Administration 46

Trends in Success Rate and Referral Delay 53

3 DETERMINANTS OF REFERRAL DELAY 56

Determinants of Referral Delay 57

Summing up the Modern Nomination Process 76

4 ADVICE AND CONSENT: A NEW ROLE FOR THE SENATE JUDICIARY COMMITTEE 80

Changes in the Confirmation Process Imposed by
Judiciary Committee Chairs....................81
The "New" Role of the Judiciary Committee: Gatekeeping and Delay..............90
Determinants of Hearing Delay....................100
Summing up the Modern Confirmation Process....................118
5 OUTSIDE PARTICIPANTS IN THE CONFIRMATION PROCESS.............123
The Role of Outsiders in the Confirmation Process....................125
Outsider Participation in Confirmation Hearings:
Testimony and Record Submissions....................132
Explaining Outsider Involvement in Confirmation Hearings....................136
Summing up Outsider Involvement in Confirmation Hearings....................160
6 THE CURRENT AND FUTURE STATE OF THE
APPOINTMENT PROCESS....................163
The Current State of the Appointment Process....................163
Appointment Delay and the Staffing of the U.S. Courts of Appeals................168
The Future of the Appointment Process....................173
REFERENCES....................177
APPENDICES
A INDEPENDENT VARIABLES: LABELS, OPERATIONALIZATION,
AND DATA SOURCES....................185

B INDEPENDENT VARIABLE MEANS: ALL NOMINATIONS AND SUCCESSFUL NOMINATIONS....................188

C UNSUCCESSFUL NOMINATIONS TO THE U.S. COURTS OF APPEALS, 1977-1998....................190

CHAPTER 1

INTRODUCTION AND OUTLINE OF THE CURRENT STUDY

Stephen T. Early (1977, 100) described the U.S. Courts of Appeals as "perhaps the least-noticed of the regular constitutional courts," due to the nature of their work, the lack of attention placed on them by the press, and the little interaction that circuit court judges have with the public. This situation, however, belies the importance of the courts of appeals to law and policy in America, particularly in recent decades. The courts of appeals are an integral part of the federal judiciary, overseeing the federal district courts, acting as the courts of last resort for most federal litigation, and shaping law and policy (Banks 1999). Due to the growing caseload and scope of litigation brought before the circuit courts, the influence of this level of the federal judiciary over public policy has expanded in recent decades (Songer 1991; Songer, Sheehan, and Haire 2000). Therefore, growing attention has been placed on the courts of appeals by those interested in their importance to American law and policy.

Among those placing more emphasis on the U.S. Courts of Appeals are those responsible for staffing the judicial branch. Presidents have begun to look to the courts of appeals as another avenue of advancing their policy agenda, while those in the Senate have begun to reassess their "advice and consent" role in order to scrutinize more closely the presidents' nominees (see Goldman 1997; O'Brien 1988). Due to the changing perceptions of those responsible for nominating and confirming circuit court judges, the appointment process

has undergone important alterations over the last 25 years, changing long-held norms of how judges for these positions are selected. The focus of this study is on the procedural reforms in the appointment process for courts of appeals judges and the ramifications the reforms have had on how the courts are staffed.

The Origins and Evolution of the Judicial Appointment Process

According to Article II, Section 2 of the U.S. Constitution, federal judges are to be nominated by the president "by and with the advice and consent of the Senate." With respect to this appointment scheme, Alexander Hamilton asserted that "[i]t is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union" (*The Federalist* No. 76). Vesting the nomination power in the president would allow for careful consideration of the qualities necessary to fill the positions. A senatorial "advice and consent" role, however, would provide a necessary check on the president's selection of judges, and prevent him from using these appointments to court favor with the public or repay political allies. The Senate would be the appropriate body to execute this check on the president, furthermore, because the stability and small size of the Senate would prevent the "infinite delays and embarrassments" that would occur if the check were entrusted to the House of Representatives (*The Federalist* No. 77).

According to Harold Chase (1972, 6), Hamilton expected the Senate to "participate no further in the appointment process than to pass on presidential nominations and to do so *as a body*." The Senate's role was expected to be limited to posing an ever-present reminder to

the president that judges should be selected carefully, based on their qualifications, with no important role to be exerted by individual senators. This appointment strategy, therefore, was designed to allow for the efficient staffing of the federal judiciary with judges selected according to their qualifications for holding the office. By vesting the nomination power in the single person of the president, and placing the "advice and consent" power in the small, politically stable institution of the Senate, judicial selection considerations were to be as divorced as possible from political advantage or public influence.

Political Influence of Supreme Court Appointments

Regardless of the framers' intentions in establishing the judicial appointment process in this manner, presidents have long viewed judicial appointments, particularly to the U.S. Supreme Court, as opportunities to advance policy (Massaro 1990; McFeeley 1987; Silverstein 1994). In addition, Supreme Court positions have been utilized as patronage appointments and for symbolic purposes of demographic and regional representation (Kahn 1995; MacKenzie 1981). In turn, those in the Senate have long viewed their constitutional "advice and consent" role differently than that expressed by Hamilton in *The Federalist* No. 77. Rather than act as an institutional check on the president to ensure the appointment of qualified judges, senators have utilized their confirmation powers to their own political gain, as well as to hinder a president's ability to further policy through the Court for political purposes (see, for example, Kahn 1995; Maltese 1995; Massaro 1990; Silverstein 1994). Many recent

examinations have concluded that the Supreme Court appointment process has been used for political purposes since the earliest days of the judiciary's history. As Kahn asserted,

> [f]rom the time George Washington established specific representational, doctrinal, and professional qualifications for his appointments in 1789 and the Senate rebuked him by rejecting his nominee John Rutledge to replace John Jay as Chief Justice in 1796 for the political reason that Rutledge opposed the Jay treaty, the nomination and confirmation process has always been an essentially political battlefield where political goals, strategy and tactics dictate the results (1995, 38).

With respect to Supreme Court appointments, therefore, it appears as if Hamilton's vision has never been a reality. Rather, Supreme Court appointments have been viewed by those responsible for nominating and confirming justices as having important policy-making implications and as being useful for political gain.

Senatorial Courtesy and Appointments to the Lower Courts

The Framers' vision of appointment procedures for judges to the lower levels of the judiciary was also quickly set aside with the rise of senatorial courtesy, when those in the Senate recognized the opportunity that judicial appointments offered for strengthening political support in their home states (Chase 1972). The birth of senatorial courtesy, whereby senators would defer to a senator of the president's party who objected to a nominee from his home state, altered the appointment process by providing an important role for individual senators in the selection of federal judges. Indeed, the unforseen development of senatorial courtesy has led one scholar to remark that this custom had "in effect transferred from the President to the senators of his party the selection of district judges in their own states" (Harris 1953, 380).

Although the norm of senatorial courtesy was not as influential a power with respect to courts of appeals appointments, special consideration was also given to the protests of a senator of the president's party from the home state where the vacancy originated (Chase 1972; Harris 1953). Individual senators, therefore, were quick to recognize their ability to augment their position in the appointment process by developing for themselves a role in the selection of judges from their home states, usurping the power that the Framers' had intended for the president. Although scholars have noted that the power of the senatorial courtesy norm has lessened over the years since its establishment in 1789, the power of individual senators over the selection of nominees to the lower courts from their home states remained influential throughout the 20th century (Chase 1972; Goldman 1997; Harris 1953; McFeeley 1987).

The Reform Period in Lower Court Appointments

In recent decades, presidents have taken a newfound interest in appointments to the lower courts and have attempted to wrest more control over the nomination process from home-state senators. In the late 1970's, President Jimmy Carter instituted measures aimed at divorcing the nominee selection process from the control of home-state senators, and attempted to end political patronage considerations in favor of merit and affirmative action criteria in the selection agenda (Goldman 1997; McFeeley 1987). Within the Senate at this time, confirmation procedures changed dramatically as well when Senator Ted Kennedy (D-MA) became chair of the Senate Judiciary Committee in 1979. As Committee chair, Kennedy implemented procedures aimed at reforming the Committee's role in the confirmation process

by allowing an independent investigation and scrutiny of nominees and opening the confirmation process to more outside involvement (Goldman 1997). The efforts spear-headed by Carter and Kennedy signaled an important shift in the appointment process for lower court judges. Now, the primacy of the home-state senators in selecting nominees was being challenged not only by the President in his attempts to alter selection criteria, but also by the leadership of the Senate Judiciary Committee in attempting to establish a serious investigatory role for the Committee and allowing involvement by outside actors.

Appointments to the U.S. Courts of Appeals, therefore, have become more salient to those responsible for staffing the judiciary, with both presidents and those on the Judiciary Committee stating an interest in implementing measures to allow for careful screening of candidates to ensure the selection of well-qualified individuals. The stated intentions of both Carter and Kennedy were reminiscent of Hamilton's vision of judicial appointments proceeding according to ability and qualifications rather than political considerations. The growing interest in the courts of appeals due to their increased policy-making role and political importance, however, may have only served to make circuit court appointments more similar to those on the U.S. Supreme Court. Qualification considerations may not dominate the appointment process for circuit court judges any more completely than they do for appointments to the Supreme Court. Circuit court appointments may instead be driven by political considerations. Replacing senatorial courtesy norms with a system where each of the important actors in the appointment process attempts to gain more control and power may allow for instability and political discord. Michael Kahn characterized the appointment process for Supreme Court Justices as "an

essentially political battlefield where political goals, strategy and tactics dictate the results" (1995, 38). The changing nature of lower court appointments may have created a similar situation for the staffing of the courts of appeals.

The purpose of this study, therefore, is to provide an examination of judicial appointment reforms beginning in the 1970's and their effects on how the actors in the appointment process conduct their responsibilities. As positions on the courts of appeals have become more important to legal and public policy, the background and experience of those placed on the bench is more crucial than ever. However, appointment reforms and the increased political salience of these positions may result in an appointment process driven by political and institutional considerations, rather than nominee qualifications. Judicial selection practices for courts of appeals judges may not be any closer to that envisioned by Hamilton, but instead allow these appointments to be used for political advantage.

An Examination of the Modern Appointment Process

This study provides an examination of the appointment process for positions on the U.S. Courts of Appeals since the institution of the crucial reforms introduced by President Carter and former Judiciary Committee Chair Kennedy. The courts of appeals have exercised a growing influence over public policy since the 1960s due to an expansion in both the number of federal cases and the social reach of federal law (see, for example, Banks 1999; Howard 1981; Songer, Sheehan, and Haire 2000). This has placed appointments to the U.S. Courts of Appeals at the center of attention with regards to judicial selection reforms. All appointments to

the U.S. Courts of Appeals made between 1977 and 1998 are included in the study, with the exception of those to the Federal Circuit.[1] As the first year of the Carter administration, 1977 signals the beginning of the reform era with respect to the appointment process for courts of appeals positions. In the period between 1977 and 1998, 271 nominations were made to the U.S. Courts of Appeals, with 219 of these nominations successfully confirmed in the Senate, providing a sufficient number of cases for analysis.

The Importance of the Current Study

An examination of judicial appointment procedures is of great importance to an understanding of when and how judges are placed on the U.S. Courts of Appeals. The increased political salience of these appointments and a magnified interest in using these positions to further a policy agenda affect the composition of the federal judiciary. The type of individual who is eventually selected to serve on the bench may be affected by a change in the criteria dictating who is qualified to serve in this capacity. Furthermore, the political implications of these positions may alter how much influence those with opposing ideologies allow each other to have over the composition of the courts of appeals. The increased policy-making role of judges on the courts of appeals makes these appointments more important to national law and policy than ever. However, if appointments to the courts of appeals have become a

---

[1]The U.S. Court of Appeals for the Federal Circuit was created in 1982 with the merging of the Court of Claims and the Court of Customs and Patent Appeals (Carp and Stidham 1998). The specialized nature of this court as a jurisdictional rather than a geographic court accentuates the difference between this court and the geographical circuits.

"political battlefield," then the selection and confirmation of these judges, as with Supreme Court Justices, can only be understood "in response to the political realities of the day" (Silverstein 1994, 5).

There is one important difference between appointments to the courts of appeals and the Supreme Court that makes an understanding of the modern circuit court appointment process even more crucial. Supreme Court vacancies arise, on average, approximately once every two years (O'Brien 2000). Vacancies on the courts of appeals, however, are a more regular occurrence. The integral role of the courts of appeals in the judicial system, the growing caseload facing these courts, and the lack of discretion over the docket highlight the necessity of maintaining adequate staffing levels. Political maneuvering in the appointment process may therefore have more costly implications for the courts of appeals than for the Supreme Court with respect to the institution's ability to conduct its business. Appointments to the U.S. Supreme Court may represent a "political battlefield" that is waged once every few years (or longer), but a "political battlefield" over appointments to the U.S. Courts of Appeals would be an on-going affair involving the filling of numerous vacancies at any given time with potentially serious implications for the judicial institution.

Judicial Appointments: A Political Process from Beginning to End?

Michael Kahn (1995, 25) characterized the appointment process for Supreme Court Justices as "a political process from beginning to end." The beginning of the judicial appointment process begins when a sitting judge vacates her position due to death, resignation,

retirement, or elevation, or when a position is newly created by Congress. The process ends when the full Senate votes to confirm a nomination. The complete appointment process, however, involves different stages and the participation of numerous actors (see, for example, Carp and Stidham 1998; Goldman 1997; McFeeley 1987). Once a vacancy occurs, responsibility for selecting a nominee and referring the nomination to the Senate falls to the president in conjunction with personnel in the Department of Justice and the White House staff. Once a nominee is referred to the Senate, the Senate Judiciary Committee takes control of the confirmation process by investigating the nominee, holding hearings, and sending a report on the nomination to the full Senate. The Senate's majority leadership then controls the last stage of the process in determining if and when to hold a final vote on the nomination. After a favorable vote, the nominee's commission is signed and the judge takes his or her place on the federal bench. In addition, at many points in the appointment process, input and influence may be allowed to other interested government officials, groups, and private citizens.

The appointment of federal judges, therefore, can only be properly understood through an analysis of its distinct phases. Each stage is controlled by different actors, and each accomplishes a different purpose. Whether political considerations dominate the various stages of the appointment process must be determined before we can conclude that the appointment process has become political from beginning to end.

Political, Nominee-specific, and Institutional Influences on Judicial Appointments

The purpose of this study is to understand the various stages in the appointment process and determine what drives the behavior of those responsible for selecting and confirming circuit court judges. Although the influence of political considerations to the stages in the appointment process will be of particular interest, the role of nominee characteristics and institutional constraints on the behavior of the actors in the appointment process are of relevance here as well. Therefore, the general framework of this study examines the influence of *political considerations*, *nominee characteristics*, and *institutional concerns* on the various stages in the appointment process. *Political considerations* refer to the dynamic effects of the relative power of the important actors in the appointment process. Most studies of judicial appointments point to the nature of the executive-legislative relationship as the dominant force in appointment politics (see, for example, Abraham 1999; Goldman 1997; Kahn 1995; Maltese 1995; Massaro 1990; Silverstein 1994). Various stages in the appointment process, however, may also be influenced by the political power of other actors, including home-state senators and members of the Senate Judiciary Committee.

Nominee characteristics refer to the influence associated with each candidate's background and qualifications. The appointment process is conducted on a dynamic individual level, with the characteristics of each individual nominee having a potential influence on how the appointment proceeds. Many of the reforms initiated by Carter and Kennedy were aimed at influencing the characteristics of those placed on the federal bench and it is therefore important

to determine if and when the background and qualifications of the individual nominee influences the actors in the appointment process.

Finally, *institutional concerns* refer to the influence of the structure of the institutions involved in the appointment process. Although much of the focus on judicial appointments is on the influence of political considerations and nominee characteristics, the influence of institutional considerations and constraints cannot be overlooked (see, for example, Segal 1987). Slotnick and Goldman (1998, 197) refer to the judicial selection process as "a rare interface in American politics where all three branches of government are brought, sometimes sharply, into focus at the same time." There are institutional considerations involving all three branches of government that may have an influence on appointment procedures. Among these considerations are the institutionalization of selection procedures in the executive branch and investigatory procedures in the Judiciary Committee, workload constraints, and the relative importance of the position being filled on the judiciary. In order to determine adequately the influence of political and nominee-specific factors on the appointment process, these relevant institutional considerations must be examined as well. Therefore, the aim of this study is to determine the influence of these three considerations on various stages in the appointment process. Before we can determine whether appointment to the courts of appeals are political from beginning to end, the influence of all relevant factors to the appointment process must be examined for each of the important stages in the process.

The Organizational Framework of the Current Study

Organized into five sections, this study begins with an analysis of the selection and referral of nominees by the president. The focus of this chapter is on reforms initiated during the Clinton administration with regards to nomination procedures and how these reforms have affected and been furthered by subsequent presidents. The implications of presidential reforms on nominee success rates and delay in the referral process are examined.

The third chapter provides a closer examinations of the implications of changes in the nominee selection process, focusing on referral delay. With more control over the identification and selection of nominees, presidents must take additional care when identifying and selecting nominees in order to achieve confirmation. The factors influencing the length of delay in the referral process are identified, with special attention given to the influence of political considerations, nominee characteristics, and institutional forces on the length of delay in the referral process.

The fourth chapter turns to the Senate confirmation process. Procedural changes imposed by Senator Kennedy have created a new role for the Senate Judiciary Committee as important gatekeepers to the confirmation process. Subsequent reforms imposed by other chairs and party leaders on the Judiciary Committee have furthered the influence and independence of the Committee in the appointment process. The consequences of this heightened influence, including delay in the confirmation process (particularly at the hearing stage) are examined. The impact of political, nominee-specific, and institutional factors on how those on the Judiciary Committee conduct their responsibilities is considered as well.

The focus of Chapter 5 is on the ability of outsiders to participate in the appointment process, particularly at the confirmation hearing stage. By participating in confirmation hearings, outsiders engage in their most public and formal role in the appointment process. The increased need to conduct nominee investigations may allow for more involvement by outsider actors in the hearing process, but the increasingly cumbersome nature of the appointment process may limit their opportunity to do so. Therefore, the ability of outside actors to participate in the hearing process through hearing testimony and the less-costly submission of material on the hearing record will be examined, with particular emphasis placed on the influence of political climate, nominee characteristics, and institutional constraints to outsider participation in hearings.

In the final chapter, the implications of appointment reforms on the staffing of the U.S. Courts of Appeals are discussed, focusing specifically on the numbers of judges appointed and the amount of delay in the appointment process. Some predictions on the future of the appointment process are also given. The ability of the current administration to affect the composition of the federal bench will be discussed, with specific emphasis on how the sudden change in the partisan composition of the Senate may influence the appointment process for courts of appeals judges.

CHAPTER 2

PRESIDENTIAL SELECTION OF COURTS OF APPEALS NOMINEES

Presidential interest in appointments to the federal judiciary is nothing new. These positions have always been looked upon as opportunities to pursue an administration's agenda. Even the earliest appointments to the federal judiciary, including George Washington's first six appointments to the Supreme Court - all of which went to Federalist party members - attest to an important political dimension to the nomination process (Kahn 1995).

Appointments to the United States Supreme Court generally garner more interest and attention from all important actors in the appointment process, in addition to attention from those in the media and academia. However, the ability to fill lower court positions has long been considered important as well. Presidents have typically been interested in filling positions on the lower judiciary (both to the circuit and district court levels) with nominees who are well-qualified and are members of their political party (see, for example, Goldman 1965). However, selecting nominees on the lower courts has become more complex, time-consuming and political in recent decades, leading to the current controversy of gridlock and delay during the Clinton administration. The driving force behind the current situation has its origins in the administration of President Jimmy Carter. In the late 1970's, Carter successfully altered the nomination process of lower court judges by removing some of the power and control away

from individual senators and shifting the focus to the administration. Presidential influence over the selection process of lower court judges was furthered during Ronald Reagan's two terms (Goldman 1997). In the 1980's, the selection process became more complex, characterized by an increasing number of people involved in screening and scrutinizing potential candidates. The heightened political salience of courts of appeals appointments and the increased centralization of the selection process within the White House may have had implications for the ability of presidents to appoint judges successfully and efficiently. Presidents must consider more closely the political climate in which the nominations are being made, as well as assess carefully the qualifications and background of the nominees before referral to the Senate in order to secure confirmation. Efforts at seizing more control over judicial selection procedures may afford presidents the opportunity to place their desired candidates on the bench. However, this greater control may have affected the ability to nominate successful candidates efficiently.

This chapter provides an examination of the selection process for nominees to the U.S. Courts of Appeals. The chapter begins with a discussion of the important modifications made between 1977 and 1998 respecting the selection of appeals court nominees. Presidential interest in the selection of nominees has increased and presidents have attempted to orchestrate an institutional shift in power over judicial selection away from the Senate in favor of more centralized control within the administration. Although such efforts were initially attempted during the Carter administration, subsequent administrations have continued or even intensified efforts to maintain more control over the selection of appeals court nominees.

Improved control over the selection of judicial nominees, however, may have hindered the president's ability to nominate successful candidates efficiently. These costs, more

specifically, may be in the form of a lessened ability to nominate successful candidates, as well as an increase in how long it takes the administration to identify and select nominees. Therefore, along with a discussion of the institutional changes and judicial selection approaches initiated within each presidential administration, a descriptive analysis will be provided focusing on how presidential initiatives have impacted both nominee success rates and referral time. Wresting power from individual senators with respect to the selection of courts of appeals nominees requires presidents to be more careful in vetting potential nominees closely in order to secure confirmation. The nominee selection process requires that potential nominees be identified, questioned, investigated, and scrutinized. Eventually, after all the background checks and interviews have been conducted, the nominee is selected and referred to the Senate. This intense process now represents a larger responsibility for the administration, requiring more time and effort in order to select confirmable nominees.

The Carter Administration

Selection of federal judges during the Carter administration was characterized by three major developments:

1) The establishment of a merit selection system for seeking out and scrutinizing potential judicial nominees
2) An affirmative action agenda focusing on finding and appointing more women and members of minority groups to the federal bench

and, 3) The passage of the Omnibus Judgeship Act of 1978, which allowed Carter the opportunity to advance his judicial selection agenda

Taken together, these three factors revolutionized the nomination process of lower court judges by taking some power and control away from individual members of the Senate, and placing

more control within the administration itself. Furthermore, by initiating affirmative action considerations in his selection calculation, Carter began to utilize lower court vacancies more for the advancement of his own agenda than to provide for patronage appointments. Carter's merit and affirmative action concerns, along with the passage of the Judgeship Act, initiated changes that impacted subsequent presidents, including the current Bush Administration.

Merit Selection of Judges

During his presidential campaign in 1976, Jimmy Carter promised to remove the vestiges of patronage from the judicial appointment process and instead appoint judges based on merit and qualifications. Carter's dedication to altering the appointment process became apparent even before his inauguration. Carter met with Senate Judiciary Committee Chairman James O. Eastland (D - MS) in December of 1976 to discuss potential changes in judicial selection procedures (Berkson and Carbon 1980). Although Eastland insisted on individual senators retaining power and influence in the selection of district court nominations to fill vacancies in their home states, he agreed to Carter's proposal for the establishment of a commission for the selection and screening of nominees to the appellate courts (Berkson and Carbon 1980).

The establishment of this nominating commission occurred soon after Carter's inauguration, with the issuing of Executive Order 12059 in May of 1978. The United States Circuit Judge Nominating Commission consisted of one panel for each circuit other than the geographically large fifth and ninth circuits, which would have two panels each (Berkson and Carbon 1980). Positions on these panels were to be appointed by the president. Panelists

were chosen from each state within the circuit and had the responsibility of searching for qualified candidates from a specific state within the circuit (Fowler 1984).[2]

The primary purpose of the nominating panels was to seek out and screen qualified nominees to the courts of appeals. Upon notification of a circuit court vacancy, the panel was first instructed to publicize the vacancy and then begin the process of "seeking out" any prospects by contacting lawyers, judges, law professors, or other citizens in the area (Berkson and Carbon 1980). Potential candidates filled out written questionnaires and were interviewed personally by a majority of the panelists, after which the panel was instructed to conduct a discussion (of "sufficient duration") of the candidates prior to submitting a written report identifying five potential nominees to the president (Berkson and Carbon 1980). From the beginning, the panelists worked under difficult time constraints. Carter's initial executive order required that the panels submit their reports to the president within 60 days of being notified of a vacancy. Difficulty in meeting this deadline was addressed in 1978, when the Justice Department's supplemental instructions to the executive order required reports to be submitted "'within the time specified in the notification of the vacancy received by the [panel] chairman'" (Berkson and Carbon 1980, 28).

By 1978, Carter also recognized that he would have to become more personally involved in the selection of nominees, rather than leave most of the initial screening work to Attorney General Bell and the White House staff (including White House counsel Robert J.

---

[2]In 1978 after the passage of the Omnibus Judgeship Act, Carter issued an executive order encouraging individual senators to create their own nominating panels for district court positions as well. After 1978, senators from 30 states had taken Carter's recommendations and established their own nominating panels (Fowler 1984).

Lipshutz). Carter's initial approach was to delegate responsibility of examining the panel's report and give a recommendation to the president. By October of 1978, however, Carter indicated that he wanted to become personally involved at an earlier stage in the selection process, being informed of prospective nominees prior to the background checks conducted by the FBI and the ABA (Goldman 1997).[3] Carter's interest in becoming more personally involved prior to the final selection of a nominee was largely due to his commitment to appointing more women and minorities to the bench (Goldman 1997).

Affirmative Action and Judicial Appointments

Carter's initial Executive Order in 1978 required that membership on the Commission panels include both men and women. However, the Executive Order also required that "candidates with 'less than 15 years of legal experience' were not to be considered except 'in unusual circumstances and if exceptionally meritorious'" (Berkson and Carbon 1980, 30). This 15 year requirement, however, limited the pool of women and minority candidates for consideration. None of Carter's nominees to the courts of appeals made through August of 1978 were women, and only four were racial minorities (three African-Americans and one Asian-American). In the 1978 revision of the initial Executive Order, the 15 year requirement

---

[3]Goldman (1997) discusses how Carter's personal involvement in the selection process was likely due to tensions between member of the White House staff and the Justice Department (particularly between Attorney General Bell and White House counsel Libshutz) over the lack of affirmative action nominations in the early years of the Carter administration. Upon both of these men leaving the Carter administration within a few months of each other in 1979, Goldman states that the decreased tension between these two departments allowed Carter to once again remove himself from the early stages of the selection process.

was loosened and the panelists were instructed to "maintain some flexibility in years of experience in order to avoid elimination of superior candidates" (Berkson and Carbon 1980, 30). The revised Order also required panelists to consider race and sex as factors when determining how best to achieve balance on the circuit bench. Carter's interest in broadening involvement in the selection process and incorporating the interests of women and minorities was also evident by having potential nominees reviewed by not only the ABA and the FBI, but also by the National Bar Association and the Federation of Women Lawyers (Fowler 1984).

By the midpoint of his administration, therefore, Carter had formally established new procedures aimed at ensuring an increase in the gender and racial diversity on the federal bench. He took care to staff his nominating panels with women and racial minorities. These panels were instructed to seek out carefully any potential nominees for judicial vacancies in individual states in order to find as many qualified women and minorities as possible. Officials in the Justice Department and the White House staff were to work closely together (along with Carter himself) to ensure that qualified women and minority candidates were not missed along the way to a formal nomination. The impact of these changes in the selection process is notable in that by the end of 1980, the Carter administration had appointed fewer white males to the federal bench (both at the courts of appeals and district court levels) than any previous presidential administration or, for that matter, than any subsequent presidential administration, save for the Clinton administration.[4]

---

[4]By the end of his administration, Carter had appointed 56 persons to the courts of appeals, including 11 women (nearly 20% of his total appointments) and 12 minorities (just over 20% of all appointees) (Goldman and Slotnick 1999).

The Omnibus Judgeship Act of 1978

Although Carter's attempts to wrest some control over judicial nominations from individual senators and his dedication to increasing the role of merit selection and affirmative action in judicial nominations were important alterations of the appointment process, the impact of the Carter administration on the federal bench would have been relatively minor had it not been for the passage of the Omnibus Judgeship Act of 1978 (PL 95-486). Without the creation of new lower court positions, Carter's impact on the federal judiciary would have been greatly lessened, if not negligible, particularly in light of his inability to appoint a single Supreme Court justice. The creation of new judicial positions is far from unusual. On the contrary, Carter's predecessor, Gerald Ford, was the first president since the administration of John Tyler (1841-1845) to not have the opportunity to appoint judges to new positions (Barrow, Zuk and Gryski 1996). What made the passage of PL 95-486 extraordinary, however, was the magnitude of the growth of the federal bench, the timing of this legislation, and Carter's ability to utilize new positions as opportunities to appoint more diversified nominees.

The Magnitude of PL 95-486

With this legislation, 152 positions were created for the federal judiciary (35 appellate and 117 district court positions). Carter, therefore, was handed the opportunity to fill more vacancies created during his administration than any president before or since. The addition of 152 new positions was, at the time, more than twice as large as the previous record number of created positions during the Kennedy administration (Barrow, Zuk and Gryski 1996). Furthermore, these new positions would increase the size of the federal judiciary by nearly one-

third. (Barrow, Zuk and Gryski 1996, 73). For Carter's ability to influence the composition of the judiciary, therefore, it was the unprecedented magnitude, and not merely the passage, of the Judgeship Act in his administration that was significant.

The Timing of PL 95-486

The timing of the passage of PL 95-486 was significant as well. First, of course, the large number of newly-created positions was contingent upon timing. Unlike Gerald Ford, who had to contend with divided government as well as the legacy of the Watergate scandal, the Carter years were characterized by united Democratic control of the White House and both houses of Congress, simplifying the politics of creating so many new positions. Secondly, the timing of PL 95-486 coincided with Carter's revision of Executive Order 12059 and his renewed commitment to affirmative action. The passage of PL 95-486 became an essential tool for achieving diversity on the bench in that it coincided with the administration's ability to reconsider how to organize and approach selection diversity initiatives.

PL 95-486 and Diversification

The passage of the Omnibus Judgeship Act of 1978 provided Carter with a vehicle for achieving diversity by allowing him to pool vacancies from the same state together and refer multiple nominees to the Senate as a "slate" rather than as a series of individual nominations. As noted in a White House memo in the wake of the passage of PL 95-486:

> [a]t the District Court level, we should concentrate on those states having multiple vacancies.... If there is only one opening in a state, it is likely that a Senator may have a candidate who is not a minority or female lawyer. If there is more than one vacancy,

> however - and that will be the situation in about 25 states - we can fairly ask the Senators in question to assist us and help themselves politically by agreeing to the nomination of some minority or female lawyers (Goldman 1997, 243).

Multiple vacancies created within a single state (either district court positions or circuit court positions awarded to specific states) can be handled by the presidential administration as slates of nominees, as opposed to making nominations on a case-by-case basis. The importance of nominee slates manifests itself in a president's strategy to nominate a few individuals deemed highly desirable to individual senators from the home state along with a nominee of the president's liking who would unlikely be confirmed on his or her own. In this way, presidents are able to extract concessions from important individual senators to confirm otherwise problematic nominees (Chase 1972).

As the memo quoted above indicates, this strategy was likely to be successful with respect to nominations to the district courts in states with multiple new seats. In these cases, an individual senator would be encouraged to make one concession in exchange for two, three, or more victories. For example, Carter referred four nominations, including two women (Judith Nelson Keep and Marilyn Hall Patel, along with Thelton Eugene Henderson and A. Wallace Tashima) to the Senate on May 9, 1980 for newly created district court positions in California. The Judiciary Committee held confirmation hearings on all four individuals on this slate on the same day (June 10, 1980) and all were confirmed by the full Senate on June 26, 1980.[5]

---

[5]The dates referred to in this section are all derived from *The Senate Committee on the Judiciary Calendar of Nominations for the 96th Congress*.

This strategy could also be used, however, for vacancies to the courts of appeals. With 35 new appellate court positions created, many circuits would have more than one new seat and if two or more vacancies were attributed to a single state within that circuit, then some bargaining could go on between the administration and the home state senators with respect to nominations. Carter was able to take advantage of this situation after the passage of PL 95-486. For example, on April 23, 1979, Carter nominated two individuals from Georgia (R. Lanier Anderson III and Albert J. Henderson) to newly created positions on the U.S. Court of Appeals for the Fifth Circuit. He also nominated two individuals from California (Arthur L. Alarcon and Harry Pregerson) to newly created positions on the U.S. Court of Appeals for the Ninth Circuit on September 5, 1979. Although the "slate" was much smaller, the strategy appeared to be the same. The Judiciary Committee held hearings for the whole slate on the same day (on June 25th for Anderson/Henderson and on October 3rd for Alarcon/Pregerson) and the full Senate confirmed the pairs of nominees on the same day (July 12th for Anderson/Henderson and October 31st for Alarcon/Pregerson).

Carter Administration officials also appeared to compose slates of nominees consisting of both circuit and district court nominations. For example, on September 28, 1979, Carter referred four nominations to the Senate for individuals from the state of California - two for district court positions (Terry J. Hatter, Jr. and Milton Lewis Schwartz) and two for positions on the Court of Appeals for the Ninth Circuit (Warren John Ferguson and Dorothy Wright Nelson). All four nominees were eventually confirmed in this case, but it is interesting to note that the Judiciary Committee broke this "slate" in half, holding hearings for Schwartz and

Ferguson on November 15th (with confirmation for both coming on November 26, 1979) and for Hatter and Nelson on December 12th (with confirmation coming on December 19, 1979).

The passage of the Omnibus Judgeship Act of 1978, therefore, not only afforded Carter the opportunity to fill more newly created positions than any other president in American history, but also provided him with the positions needed to create slates of nominees containing more women and minority appointees than any other president, save for Bill Clinton. The institutional changes initiated by the Carter administration altered judicial selection procedures by incorporating merit selection criteria and affirmative action considerations when seeking out and nominating judges. However, these institutional changes would have had only a minor, short-term effect on the federal judiciary had it not been for the passage of the Omnibus Judgeship Act of 1978. What would have been an interesting experiment with respect to judicial selection became instead a turning point in the modern judicial selection process due to the magnitude, timing, and opportunity of the largest single increase in the size of the federal judiciary to date. Many of Carter's selection initiatives were soon to be altered or abandoned by the Reagan administration. However, Reagan's interest in the federal judiciary, and particularly in those appointed to the lower courts, was clearly heightened due to the impact Carter was able to exert on the district and circuit courts in only four years.

Judicial Selection under Carter: Success Rate and Scrutiny

Carter was very successful in filling positions on the courts of appeals. Of the 61 nominations Carter made to the courts of appeals, only five failed (a 92% success rate) (see Table 2.1). The five failures all occurred during the tail end of the Carter administration, with

the earliest failed nominee referred in October of 1979 and the latest in September of 1980. This is not surprising, given the weakened power of the president during an election year (Cameron, Cover, and Segal 1990; Kahn 1995; Maltese 1995). In 1980, Carter was further weakened by Judiciary Committee Chair Ted Kennedy's (D-MA) bid to wrest the Democratic nomination from Carter in 1980. None of the failed nominees were women, although the five failures did include one minority nominee, and were fairly evenly split between nominees to positions created by PL 95-486 and vacated positions.

Table 2.1
Carter Nominations: Success Rates and Mean Referral Times[6]

	All Nominees	**Women**	**Men**	**Minority**	**White**	**New Seats**	**Vac'd Seats**
% of all Nominations	100 (N=61)	18.0 (N=11)	82.0 (N=50)	21.3 (N=13)	78.7 (N=48)	59.0 (N=36)	41.0 (N=25)
Success Rate	.92	1.00	.90	.92	.92	.94	.88

	Average Days to Referral (Std Dev)	**Women**	**Men**	**Minority**	**White**	**New Seats**	**Vac'd Seats**
All Nominations	232 (122.35) (N=61)	196 (64.61) (N=11)	240 (130.87) (N=50)	232 (93.88) (N=13)	231 (129.84) (N=48)	252 (124.97) (N=36)	202 (114.50) (N=25)
Successful Nominations	228 (124.10) (N=56)	196 (64.61) (N=11)	236 (134.06) (N=45)	224 (92.39) (N=12)	230 (132.32) (N=44)	245 (125.00) (N=34)	202 (120.88) (N=22)

---

[6]All data regarding numbers of nominations, success rates, and referral time were collected from *The Senate Committee on the Judiciary Calendar of Nominations*, various years.

Failed Nominations	268 (104.83) (N=5)	-----	268 (104.83) (N=5)	337 (**) (N=1)	251 (112.50) (N=4)	369 (45.25) (N=2)	200 (62.32) (N=3)

In terms of time for nominee vetting and selection, Carter took an average of 232 days from vacancy date to referral date (with a standard deviation of 122.35).[7] Carter's successful nominations were processed in 228 days, on average, whereas nominations that failed were processed more slowly (an average of 268 days from vacancy to referral). Carter's male nominees were referred more slowly than were his female nominees (240 days for the men compared to 196 days for the women) although there is virtually no difference with respect to referral delay between Carter's minority nominees and his white nominees. Finally, Carter's nominations to fill positions created by PL 95-486 took an average of 252 days for referral, whereas nominations to vacated positions required only 202 days on average. This trend of

---

[7]This variable (the number of days from vacancy to referral) is calculated for most cases as the number of days from the date the *original* vacancy was created (either by the creation of a new position via an Omnibus Judgeship Act or the elevation, death, or resignation of a judge) to the date a nomination is formally referred to the Senate. However, for some cases this operationalization scheme was not appropriate. In some cases, the president made one or more failed nominations prior to the ultimately successful nomination. If the previous nominee was a *different* individual than the successful nominee, then the vacancy date was determined as the date the previous nominee failed. In this way, the time to referral variable was calculated as the time it took the presidential administration to scrutinize, question, choose and refer the successful nominee. If, however, the president was required to submit the *same* individual's name more than once in order to secure a successful appointment, then the days to referral variable was calculated as the number of days from the original vacancy date to the date of the *first* time that nominee's name was referred to the Senate. The rationale here is that the background work and research on an individual nominee is most highly concentrated during the period prior to the initial nomination and subsequent re-nominations of the same individual for the same position would require little added input from the president or those in his administration. I am indebted to Dr. Sheldon Goldman of the University of Massachusetts-Amherst for his assistance in resolving this difficult operationalization issue.

increased referral time for newly-created positions compared to vacated positions extends to both successful nominations as well as failed nominations.

Overall, Carter was quite successful at filling positions on the U.S. Courts of Appeals. He appointed 56 persons onto the circuit courts, with the vast majority (44 of 56 or 79%) of them coming in the 96th Congress after the passage of PL 95-486 and the reorganization of his administration's selection procedures. Carter enjoyed a high success rate in filling these positions with his only failures coming at the end of his administration. Finally, he was successful at achieving some new-found racial and gender diversity on the courts of appeals, and took advantage of the opportunity afforded to him with the passage of the Omnibus Judgeship Act of 1978.

The Reagan Administration

In some ways, judicial selection approaches during the Carter and Reagan administrations were similar: both Carter and Reagan recognized the importance of judicial selection to their administrations, both campaigned with the selection of judges as one of their campaign issues, both entered office with the intention of altering the composition of the federal judiciary, and both had the opportunity to succeed in achieving their goals concerning the federal courts. These broad similarities, however, coincided with significant differences in what Carter and Reagan hoped to achieve with the judiciary and how they went about altering the selection process. Whereas the Carter administration had been characterized by a shift to merit selection procedures, affirmative action initiatives, and the unique opportunity afforded him by

the passage of the Omnibus Judgeship Act of 1978, the Reagan administration's approach to judicial selection was characterized by the following four points:

1) Reagan's commitment to ebbing the tide of liberal, activist judges that he saw appointed to the bench by the Democratic presidents who preceded him, including Carter.
2) The formalization and centralization of the selection process within the White House to afford the administration more control over nominations.
3) The unique opportunity afforded Reagan as a 2-term Republican president enjoying a Republican-controlled Senate for 6 of his 8 years in office.

And 4) Problems faced during the last years of Reagan's second term in office concerning judicial selection.

Strict constructionists on the courts

The ideological direction of Reagan's judicial appointees was clearly of great concern to him and those in his administration. Although the Supreme Court was the primary arena of presidential and public concern during the Reagan administration, he was also interested in appointments to the lower courts. Disgusted with what he saw as liberal activists placed on the district and circuit courts in great numbers during the Carter administration, Reagan was determined to appoint individuals to the bench who would "interpret the laws, not make them" (Cannon 1991, 802). It was Reagan's intention upon entering office to appoint judges to all levels who shared his legal and political philosophy. Carter's success at altering the judicial selection process for lower court judges and appointing such a large number of Democrats to the federal bench was certainly a motivating factor for Reagan in making early, important alterations in the judicial selection process upon taking office.[8] Reagan was also successful at

---

[8]It is important to point out here that although Carter was interested in removing patronage concerns from the selection process and establishing merit selection initiatives, he was also very successful at appointing large numbers of Democrats to the federal bench, with

reforming the federal judiciary by appointing a large number of conservative judges.[9] Although Reagan did face some problems and controversial nominations, he was able to appoint more judges to the federal courts than any previous president. Consequently, by the end of his second term, Reagan had appointed a higher percentage of the bench than any previous president besides Franklin Roosevelt (Cannon 1991). Although "public attention was focused on Reagan's Supreme Court appointments, his Justice Department was systematically changing the face of the federal judiciary" (Cannon 1991, 804).

Centralization of the selection process

To carry out his goal of appointing conservative restraintists to all levels of the federal judiciary, Reagan centralized the process of selecting judicial nominees and formally shifted control to officials in the White House. This move allowed the administration more power and control over seeking out, scrutinizing, and eventually selecting nominees.

Reagan's first initiative regarding judicial selection was the disbanding of the U.S. Circuit Judge Nominating Commission established during the Carter administration. Goldman (1997) concludes that this move was intended to distance the Reagan administration from Carter and to tighten control over the screening of potential judges' policy views. The

---

more than 90% of this nominations going to Democrats (Murphy 1990).

[9]With respect to the courts of appeals, for example, Reagan was ultimately able to make 78 appointments, none of whom were Democratic party members (Goldman 1989). Goldman (1989) concludes that this record indicates that "appeals courts are much too important to risk appointing a Democrat who might not fully share the judicial philosophy of the administration" (Goldman 1989, 326).

centralization of the screening process was furthered with the establishment of the Office of Legal Policy (OLP) in the Department of Justice, which was charged with reviewing district and circuit court nominations. The OLP was responsible for "collecting every piece of published writing by the person [considered for nomination] as well as interviewing by telephone those who know the candidate both professionally and personally" (Cannon 1991, 803). The nominee evaluations were then sent to the newly-established President's Committee on Federal Judicial Selection, the establishment of which "institutionalized and formalized an active White House role in judicial selection" (Goldman 1997, 292). The Committee included "presidential aides and confidants such as Edwin Meese III, James Baker and Fred Fielding" and did not "simply react to initiatives from the Justice Department and rely on its candidate investigations" (Slotnick 1988, 319). Instead, the Committee served "as an important source of names" (Slotnick 1988, 319). Potential candidates were also subject to independent investigation by the president's personnel office. Committee meetings held regularly at the White House "symbolized ... the importance the Reagan administration placed on judicial selection and its central role in furthering the president's agenda" (Goldman 1997, 293).

With the establishment of the OLP and the President's Committee, potential nominees were subjected to increased scrutiny in an active manner by those in the "highest levels of the White House staff" (Goldman 1997, 292). Furthermore, the Reagan administration began the practice of bringing the leading candidates to Washington for "detailed interviews designed to elicit their judicial philosophy" (Cannon 1991, 803). Potential nominees during the Reagan years, therefore, were subject to an intense scrutiny unlike that seen in any previous administration. The screening role of the American Bar Association Committee on the Federal

Judiciary, however, was greatly reduced. Reagan's efforts to increase the ability of those within his administration to scrutinize candidates was offset by his refusal to send possible names to the ABA until after the short list of candidates had been narrowed down to the final choice (Murphy 1990).

Reagan's opportunity to fill vacancies

Reagan's ability to shape the federal judiciary surpassed even that of Carter before him. Many factors accounted for this, including the number of judicial positions to be filled during his administration, the congressional political environment, and Reagan's own popularity. As noted earlier, Reagan appointed more persons to the federal bench than any preceding president. This was due in large part to Reagan's two terms in office, and, to a lesser extent, the expansion of the federal bench by Congress. In 1984, Congress added 24 new circuit court positions and 61 new district court positions to the federal bench as part of a larger bill (PL 98-353) that transformed bankruptcy procedures and created hundreds of new bankruptcy judge positions (Barrow, Zuk, and Gryski 1996). The establishment of "only" 85 new Article III judgeships clearly paled in comparison to the 152 new positions created during the Carter administration (Barrow, Zuk, and Gryski 1996). Reagan's ability to shape the bench was further compounded, however, by the more than 90 vacancies that existed on the federal judiciary in January of 1981 when Reagan took office. These three factors together - a two term presidency, the creation of 85 new positions, and a large number of vacancies held over from the previous administration - allowed Reagan an opportunity to utilize his newly-established centralized selection apparatus to achieve his vision of transforming the federal judiciary.

Reagan was able to capitalize on this opportunity in large part because he enjoyed the unique situation of being a Republican president in the 20th century who entered into office with a Republican majority in the Senate. Initially, "relations between the administration and Republican senators appeared to be reasonably cordial," and Reagan and Strom Thurmond (the new chair of the Judiciary Committee) had similar attitudes regarding judicial selection (Goldman 1997, 307). This did not eliminate all problems between the administration and those in the Senate, however. For example, Reagan's request that Republican senators submit as many as five names for each district court vacancy was met with some resistance, but the Republican Senate certainly provided Reagan with a more sympathetic venue, at least for the first six years of his administration.

Finally, Reagan's ability to transform the judiciary was achieved in part by his own personality and actions as president. Reagan was dedicated to appointing conservative, restraintist judges. Any other policy consideration was set aside. For example, with the exception of his appointment of Sandra Day O'Connor to the Supreme Court, the affirmative action goals that were so crucial to the Carter administration were completely abandoned during the Reagan years. The roles of the National Bar Association and the Federation of Women Lawyers were completely eliminated and these groups no longer received the names of candidates prior to nomination (Fowler 1984). The vestiges of affirmative action criteria in the selection process had been removed quickly by Reagan.

Reagan also was able to parlay some of his personal strengths into the judicial selection process. As the most popular president since Roosevelt, Reagan utilized his ability to communicate to the public in order to "articulate his vision of how he wished to shape the

judiciary through his appointments" (Goldman 1997, 296). He also spoke directly to the public in defense of troubled nominations, not only for those (such as Robert Bork) appointed to the Supreme Court, but also for occasional troubled nominations to the lower courts (including Jefferson Sessions and Daniel Manion in 1986) (Goldman 1997).

Judicial selection during the 100th Congress

The beneficial circumstances surrounding judicial selection during the first six years of the Reagan administration changed dramatically during the last two years of Reagan's second term. As a result, the selection of judges became more high profile and more contentious. Although most of the public attention focused on the failed nomination of Robert Bork to replace Justice Lewis Powell on the Supreme Court in 1987, several other nominations to the federal courts (at both the district and circuit court level) ran into serious problems as well. Overall, during the 100th Congress (1987-1988), five nominations were withdrawn by Reagan and 16 others were not confirmed by the Senate. Reagan was able to appoint only 66 district court judges and 15 circuit court judges during the 100th Congress, compared to 95 district court and 32 circuit court appointees during the 99th Congress (Goldman 1989).

What had changed during the final years of the Reagan administration to affect Reagan's ability to appoint federal judges? Most importantly was the re-establishment of Democratic control of the Senate after the election of 1986. Controlling the Judiciary Committee (now chaired by Senator Joseph Biden of Delaware) and the full Senate, Democrats were much less inclined to approve of Reagan's efforts to pack the judiciary with conservatives. The changing political climate surrounding judicial selection during the 100th

Congress also included the upcoming 1988 presidential election. With Reagan's control over the White House coming to an end, delay tactics appeared to surface in the nomination process. According to Goldman (1989, 319), "at least 20 nominations appeared stalled in the Senate" by August of 1988, with Republicans in Congress beginning to stall the passage of legislation in turn. Reagan was not immune to the effects of a lame-duck presidency on the ability to appoint judges.

Reagan administration attempts to appoint conservative judges were also stymied by problems within the White House. Controversy surrounding Attorney General Edwin Meese III was increasing due to allegations that Meese intervened on behalf of a friend in an effort to win a defense contract (Cannon 1991). In the spring of 1988, the conflict-of-interest dispute involving Meese led to the resignations of Deputy Attorney General Arnold Burns and Assistant Attorney General William Weld (Cannon 1991). Goldman (1989, 327) concluded that this scandal was no doubt "a drain on the attorney general's time and energies and may have diverted some of his attention from judicial selection."

Finally, judicial selection during the 100th Congress was also characterized by some of Reagan's most controversial and high-profile nominees. The most highly publicized failure during this time was the rejection of nominee Robert Bork to the Supreme Court by a full Senate vote of 42 to 58 on October 23, 1987. Although Bork had easily secured Senate confirmation to the Court of Appeals for the District of Columbia Circuit in 1982, the political climate in 1987 had shifted in the Senate. Democrats in the Senate were sensitive to Reagan's nomination of an outspoken, clear conservative to replace moderate Lewis Powell during an era where the Court's ideological make-up was shifting (Stookey and Watson 1988).

In the 100th Congress, lower court appointments also drew fire in the Senate. Reagan's nomination of Bernard H. Siegan to the U.S. Court of Appeals for the Ninth Circuit in 1987 ran into problems in the Judiciary Committee, with a vote of 8-6 against confirmation and refusal to report the nomination to the full Senate (Goldman 1989). The nomination of Stuart A. Summit to the U.S. Court of Appeals for the Second Circuit in 1987 initially cleared by the Judiciary Committee in 1988 was later halted by Republican Senator Alfonse D'Amato (Goldman 1989). Numerous other district and circuit court nominations were unsuccessful during the 100th Congress, for reasons ranging from opposition by gay rights' groups[10] to concerns by Republican Senators for liberal policy views[11] (Goldman 1989). Criticism of Reagan's nominees during this time came not only from the Democrats now controlling the Senate, but from some important Republican senators as well.

The political climate, the controversy surrounding Meese, and the controversial nature of some of Reagan's late-term nominees all limited the administration's ability to continue appointing conservatives to the bench in the numbers that had occurred during the first six years of the administration. Even these problems facing judicial nominations during the 100th Congress, however, must be assessed according to the over-all success of the Reagan administration in appointing significant numbers of relatively young[12], conservative judges to the

---

[10]To the nomination of Vaughn R. Walker to the district court in California.

[11]To the nomination of James R. McGregor to the district court in Pennsylvania.

[12]At the end of his second term, Reagan had filled the bench with, on average, younger judges than any of the previous four presidents. Reagan's appointees had an average age of 50.0 years, compared to Carter judges (the next youngest cohort), averaging 51.9 years of age (Goldman 1989).

federal bench. Reagan ultimately appointed slightly more than half of the federal judiciary and was able to do so without appointing a single Democrat to any appeals court position (and only 14, or 4.8%, Democrats to the district courts) (Goldman 1989). Goldman (1989, 330) sums up the Reagan administration's impact on the courts as "having had the greatest influence on the shape of the American judiciary and law since Franklin Roosevelt."

Judicial Selection Under Reagan: Success Rate and Scrutiny

Reagan enjoyed a high success rate in filling positions on the courts of appeals. Overall, 84% of the Reagan nominees were successfully confirmed (see Table 2.2). The 84% success rate was consistent in both the first and second terms, indicating that Reagan may not have suffered much of a lame duck effect in his last term with regards to success rate. Furthermore, Reagan was able to appoint 47 judges onto the circuit courts in his second term, compared to only 31 successful nominations made in his first term. The 84% success rate during Reagan's second term is somewhat misleading, however. Courts of appeals nominations made during the 100th Congress ran into much more trouble in the Senate, with only a 65% success rate during Reagan's last two years in office. Furthermore, whereas only 1 nomination failed during the 99th Congress, 8 failed during the 100th Congress.

Table 2.2
Reagan Nominations: Success Rates and Mean Referral Times

	Both Terms	**First Term**	**Second Term**	**100th Congress**
% of all Nominations	100 (N=93)	39.8 (N=37)	60.2 (N=56)	24.7 (N=23)

Success Rate	.84	.84	.84	.65

	Days to Referral (Std. Dev.)	First Term	Second Term	100th Congress
All Nominees	233 (221.60) (N=93)	174 (169.96) (N=37)	272 (243.66) (N=56)	239 (294.71) (N=23)
Successful Nom's	248 (227.66) (N=78)	190 (172.31) (N=31)	286 (252.33) (N=47)	283 (345.01) (N=15)
Failed Nominees	155 (172.79) (N=15)	91 (140.98) (N=6)	197 (186.25) (N=9)	157 (152.39) (N=8)

With respect to referral time, Reagan nominees were referred to the Senate an average of 233 days after vacancy (with a standard deviation of 221.60). However, referral time increased sharply between Reagan's first term (average referral time of only 174 days) and his second term (average referral time of 272 days). This increase is likely due to the problems facing the Reagan administration during the 100th Congress, as well as to the impact of a handful of extremely long-delayed nominees during the 99th and 100th Congresses.[13] Unlike the Carter administration, however, Reagan's successful nominations suffered from an increase in referral delay when compared to their unsuccessful counterparts. During the Reagan years, therefore, it appears as if nominees who were ultimately successful were typically referred to the Senate only after a fairly long period of delay for consideration and investigation. The unsuccessful nominees, however, were typically referred to the Senate after a relatively brief period of investigation. During Reagan's first term, for example, the six failed nominations were

[13]In 1987, for example, Reagan nominated Jerry Smith to the U.S. Court of Appeals for the Fifth Circuit after a delay of 1057 days and David Ebel to the U.S. Court of Appeals for the Tenth Circuit after a delay of 1085 days.

sent to the Senate after an average delay of only three months, compared to an average delay of more than six months for successful first-term nominees. The speed with which Reagan made his unsuccessful nominations may be accounted for by the timing of these failed nominations. Nine of Reagan's 15 failed nominations (60%) were made during election years. As referral time tends to decrease sharply during election years (a point that will be discussed in more detail later), the speedy selection of Reagan's failed nominees is likely a factor of his attempting to nominate individuals quickly as his terms expired.

In terms of sheer numbers of appointees, Reagan had a greater impact on the courts of appeals than did Carter. His ability to appoint circuit court judges was, however, attenuated by a slightly lower overall success rate than was enjoyed by Carter, particularly due to problems faced by the administration in the 100th Congress. The ability of the executive branch to continue the agenda of appointing young conservatives to the courts of appeals looked promising, though, with the election of George Bush in 1988.

The Bush Administration

In some ways, George Bush's approach to judicial selection borrowed aspects of both of the preceding administrations. He incorporated an interest in appointing a more diversified bench, but he also continued the Reagan administration's commitment to extensively screening and interviewing prospective nominees (Goldman 1991). One important component of judicial selection under Bush was continued control over nominations in the White House, albeit in a more subtle manner than during the Reagan administration. Bush continued the President's

Committee created by Reagan and expanded the role of the White House counsel's office, although the Justice Department continued to play a crucial screening role (Goldman 1991).

Bush was unable to have as dramatic an impact on the composition of the courts of appeals as his two immediate predecessors, however. As with Carter, Bush served only one term as president, but unlike Carter, he was faced with a divided government throughout his term. As with Reagan, Bush had the opportunity to appoint a moderate number of judges to new positions, but he entered office weakened by the controversies concerning the Reagan Justice Department and judicial selection process. Therefore, influence over the composition of the federal judiciary during the Bush administration was constrained by three predominant developments:

1) Bush's deliberate attempts to avoid controversy over judicial nominations due to the lingering effects of controversy in Reagan Justice Department.
2) The relatively small number of new positions created on the courts of appeals with the passage of PL 101-650.

And 3) The existence of divided government throughout Bush's term.

Avoiding controversy

Upon entering office, Bush's initial strategy concerning judicial nominations was characterized as one focusing on the avoidance of controversy, largely due to the problems that faced the Reagan Justice Department in the 100th Congress. Bush retained Dick Thornburgh as Attorney General. Thornburgh had been appointed by Reagan to replace Meese in August of 1988 and was regarded as providing the Department of Justice with a less confrontational and more professional demeanor (Goldman 1991). Thornburgh continued the tradition of

incoming administrations dissolving selection initiatives in place from the previous administration. Here, Reagan's Office of Legal Policy was terminated and control over judicial selection was shared between the White House and the Justice Department. The shift to more power within the White House was furthered in 1991 with Thornburgh's departure (Goldman 1993).

Bush's selection procedure reforms and his early efforts to repair the image of the Justice Department led to a slow start for judicial selection. In his first year as president, Bush only referred 22 nominees to the federal bench, less than half the number that would be sent in the following year (Goldman 1991). Bush's strategy of avoiding conflict was successful in that by the end of the 101st Congress, only three nominations (two to the district courts and one to the appeals court) were allowed to languish and fail in the Senate (Goldman 1991). However, this strategy limited Bush's ability to exert an impact on the judiciary, as seen by the relatively low numbers of judges appointed by Bush compared to his predecessors. Bush's ability to influence the judiciary would improve during the 102nd Congress, but not enough to compensate for his relatively slow start, resulting in the failure to forward nominations for nearly 50 positions to the federal district and circuit courts by the end of the 102nd Congress (Goldman 1993). Bush's inability to expedite referrals to the Senate and the resulting numbers of unfilled positions at the end of his presidency garnered criticism from some Republican senators for Bush's failure to maximize his impact on the judiciary (Goldman 1993).

Bush's Opportunity to Fill Vacancies

In the waning days of the 101st Congress, 85 new judicial positions were created (the same number as during the Reagan administration) with the passage of PL 101-650. As with

the Reagan administration, the Democrats in Congress (who now controlled both chambers) refused to authorize anywhere near the same number of positions created during the Carter administration. Furthermore, since the federal bench had been expanding regularly for many years, the 85 new positions created during the Bush administration accounted for only 11.1% of the judiciary - the lowest percentage increase of any judgeship bill since 1969 (Barrow, Zuk and Gryski 1996). Although Bush and Reagan were provided with the same number of positions to fill, only 11 of the 85 positions created in 1990 were to the courts of appeals (compared to 24 courts of appeals positions created in 1984) and, unlike Reagan, Bush would be confronted with a Democratically-controlled Senate when filling these positions. Ultimately, Bush was able to appoint 37 judges to the courts of appeals, a far cry from the 56 positions filled by Carter, another one-term president, and less than half of the 78 positions filled during the Reagan years. Although the number of judges that Bush placed on the courts of appeals was significantly lower than for either of his predecessors, he was able to give nearly 90% of his positions on the courts of appeals to young, Republican judges (Goldman and Slotnick 1999).

Although Bush was unable to exert the same magnitude of influence over the federal judiciary as did his two predecessors, some important points can be made from his approach to judicial selection. First, Bush's recognition of the need to steer clear of controversy highlights how political and contentious the appointment process was becoming, particularly during a period of divided government. This apprehension was felt not only for appointments to the Supreme Court, but to the lower courts as well. Second, Bush followed Reagan's approach of appointing conservatives to the bench, solidifying the perception of the judiciary at all levels as being politically important to a president's agenda and legacy. Thirdly, Bush continued the

trend of centralizing the nomination process more in the administration itself by requiring more involvement by administration officials in the screening and selection process. Finally, the increasingly complex judicial selection machinery in the administration had made the nomination process more cumbersome, resulting in fewer, less efficient nominations.

Judicial Selection under Bush: Success Rate and Scrutiny

Bush's lessened impact on the judiciary (compared to his immediate predecessors) is evident from his success rate information provided in Table 2.3. Bush appointed fewer judges to the courts of appeals than either Carter or Reagan (with only 37 successful nominations) with a success rate of only 76%. As with both Carter and Reagan, however, most of Bush's failed nominations came late in his term. Of the 12 failed Bush nominations to the courts of appeals, five came during the 1992 election year, with another four coming after mid-September of 1991. Only three of the 15 failed nominations came prior to mid-September of 1991. Furthermore, Bush's early failures largely centered on his efforts to replace Paul H. Roney's position on the U.S. Court of Appeals for the Eleventh Circuit after Roney took senior status in 1989. Bush nominated Kenneth L. Ryskamp of Florida to the position on April 26, 1990, only to have the nomination returned at the end of the 101st Congress. Opposition to Ryskamp focused on concerns over his alleged insensitivity to civil rights claims and his membership is a country club that discriminated against African-Americans and Jews (Goldman 1991). Bush soon renominated Ryskamp on January 8, 1991. After two days of hearings, after which the Judiciary Committee unfavorably reported the nomination out of committee, Ryskamp's nomination was once again returned to Bush on August 2, 1991. Filling the Roney vacancy

would once again haunt the Bush administration, after the nomination of Federico Moreno in March of 1992 was returned to Bush at the end of the 102nd Congress.[14] With most of the failed Bush nominations coming late in his term (and two of the three early failures centering on one particularly controversial nominee), the Bush years continued the trend of early success, followed by a lowering of the president's success rate due to electoral cycle influences.

Table 2.3
Bush Nominations: Success Rate and Mean Referral Time

	Full Term	101st Congress	102nd Congress
Number of Nominations	49	19	30
Success Rate	.76	.95	.63
Mean Days to Referral (Std. Dev.)	. 253 (187.87) (N=49)	227 (174.90) (N=19)	270 (196.72) (N=30)
Successful Nominations	248 (211.12) (N=37)	228 (179.90) (N=18)	267 (240.46) (N=19)
Failed Nominations	270 (88.03) (N=12)	207 (---) (N=1)	276 (89.95) (N=11)

With respect to referral time, Bush took an average of 253 days to forward a nominee to the Senate (with a standard deviation of 187.87). Although Bush appointed fewer judges to the courts of appeals, the nominations he did make took only slightly more time than under the Carter or Reagan administrations. However, the standard deviation for Bush's 37 successful

[14]The Roney vacancy would finally be filled by President Clinton when Rosemary Barkett was confirmed by the Senate in 1994, more than four and a half years after Roney vacated the position.

nominations (211.12) is much larger than the standard deviation for Bush's 12 failed nominations (88.03), indicating a wider variation in referral time for the successful nominations than the failed nominations. The median referral time for Bush's successful nominations was only 192 days, a much shorter period of time than the mean referral time for Bush's failed nominations.

Bush nominated far fewer judges in the 101st Congress than in the 102nd, indicating that his administration was inefficient in organizing its judicial selection program and referring nominees in the early part of the administration. However, average referral time during the 101st Congress was actually faster than during the 102nd Congress. The inefficiency in organizing the judicial selection agenda, therefore, resulted in fewer nominations early in the Bush administration, but no increase in referral delay.

The Bush administration, therefore, is characterized as having a lessened impact on the composition of the U.S. Courts of Appeals than either the Carter or Reagan administrations. However, there was only a slightly increased delay in the naming of Bush's nominees than in the previous two administrations. The slow start in the Bush administration, therefore, was due less to an increase in referral delay than an inability to refer many nominees to the Senate.

The Clinton Administration

Problems in the appointment process reached what was referred to as a "crisis" level during the Clinton presidency (see, for example, Goldman 1998; Rehnquist 1998). Clinton entered office in 1993 facing a Senate controlled by Democrats. However, the "Republican revolution" of 1994 altered the political landscape, increasing the problems faced by the Clinton

administration in placing judges on the courts of appeals. Overall, the Clinton administration's approach to judicial selection can be characterized by the following developments:

1) A lessened ability to influence the judiciary due to a slow start to the selection process and an increasingly hostile Senate Judiciary Committee after the 1994 elections.

And 2) Criticism over increasing delay in the nomination process during the Clinton administration.

Opportunities to impact the judiciary

Upon assuming office, Bill Clinton inherited many benefits regarding judicial selection from the Bush administration, but he acquired some problems as well. Bush's inability to forward nominations for nearly 50 vacancies, combined with the Senate's refusal to confirm approximately 50 Bush nominees, provided Clinton with almost 100 judicial vacancies (including 15 to the courts of appeals) at the start of his administration. Clinton recognized that taking advantage of this opportunity, however, would require altering selection procedures to allocate more resources to expedite the forwarding of nominations (Goldman 1995). As with Bush, therefore, judicial selection began slowly as Clinton assigned persons in the White House and the Justice Department with responsibility over judicial selection (Goldman 1995). Upon entering office, Clinton's opportunity to have an immediate impact on the judiciary was furthered by a Democratically controlled Senate. This political advantage would be short-lived, however, due to the "Republican revolution" of 1994.

Regardless of the large backlog of vacancies inherited by Bush and the early advantage of unified government, Clinton was not able to staff the judiciary to the same degree as Reagan, another two-term president, particularly at the courts of appeals level. Clinton was able to

appoint 305 district court judges - more than any of the three previous administrations. However, by the close of the 106th Congress, Clinton was only able to appoint 61 appeals court judges - 17 fewer than were appointed by Reagan in his two terms, and only 5 more than Carter during his single term in office (Goldman et. al. 2001). This lessened impact is largely due to the "flashpoint of Republican senatorial delay and opposition" that accompanied appointments to the courts of appeals during the 106th Congress, when only 13 of Clinton's nominees were confirmed, and 18 nominations languished without Senate action at the end of the session (Goldman et. al. 2001,).

The problems that Clinton's appeals court nominees faced in the 106th Congress only heighten the consequences of some criticisms of the lost opportunity that was afforded the Clinton administration, particularly when compared to the previous administrations. Unlike his predecessors, for Clinton, "judgeships did not take center stage, by most accounts, on [his] domestic policy agenda" (Slotnick and Goldman 1998, 203). Instead of viewing the judiciary as a battlefield to win or lose, those in the Clinton administration were interested in appointing persons who were highly qualified, not ideologically controversial, and who would diversify the bench by their gender and race (Slotnick and Goldman 1998). In this way, Clinton's approach to judicial selection was even more conciliatory than that of Bush.

Slotnick and Goldman (1998) characterize Clinton's approach as being "consultative" in that those in the Clinton White House appeared, at least, to have a smooth relationship with key senators on the Judiciary Committee, even after the "Republican revolution" of 1994.[15]

---

[15]Slotnick and Goldman explain in detail the reasons for this collaborative approach in the 104th Congress. They point to the non-ideological bend of the Clinton nominees (making

Clinton, furthermore, did not radically alter the screening and selection procedures within the administration, retaining the Office of Policy Development created during the Bush administration and continuing the cooperation between the Justice Department and the White House, particularly for selection of circuit court judges.

Gridlock and delay in the selection process

Upon closer examination, however, the transition from unified to divided government after the 1994 midterm elections did not occur without incident. In particular, appointments to the judiciary were beset by allegations of unprecedented gridlock and delay.[16] Senate Judiciary Committee Chair Orrin Hatch (R-UT) has criticized the Clinton administration for taking too long to refer nominations to the Senate. Clinton administration officials, including Attorney General Janet Reno, have alleged that Republicans on the Judiciary Committee were responsible for the slow-down in confirmations, an opinion shared by Senator Patrick Leahy (D-VT), the ranking minority member on the Committee at the time. U.S. Supreme Court Chief Justice William Rehnquist even weighed in on this issue. In his 1997 Year-End Report on the Federal Judiciary, Rehnquist admonished both sides of the selection and confirmation

---

them less controversial), the inability of the "Gingrich revolution" to have much of an impact on the Senate and the Judiciary Committee, and the professionalism and commitment of Republican Judiciary Committee chair Orrin Hatch (UT) regarding judicial confirmation as key sources for cooperation here.

[16]For example, Clinton was able to appoint 107 district court and 18 appeals court judges during the 103rd Congress when Democrats controlled the Senate, but was only able to appoint 62 district court and 11 circuit court judges during the 104th Congress, after Republicans gained control.

process and urged the "President [to] nominate candidates with reasonable promptness, and the Senate [to] act within a reasonable time to confirm or reject them" (Rehnquist 1998, 3-4).

The bipartisan Miller Center Commission was established in October of 1994 to assess the situation and report on the state of the selection of federal judges. In this report, the Commission concluded that with a larger judiciary and more complex selection procedures, the number of vacancies to the bench had risen and referral time had increased to unprecedented levels (Miller Center Report 1996). Regardless of the Clinton administration's moderate approach to judicial selection and the lack of ideologically-driven choices in nominees, the appointment process had become increasingly complex and beset by political maneuvering. Due to the amount of scrutiny and screening of nominees and the number of people involved in the process, referral of nominees to the Senate had allegedly become increasingly time-consuming.

Selection under Clinton: Success Rate and Scrutiny

Concerns over delay in the selection of nominees during the Clinton administration appear to be well-founded. Clinton's success in filling vacancies to the courts of appeals is low (with a success rate of only 71% through the 105th Congress) (see Table 2.4). Furthermore, Clinton appeared to face more difficulties in appointing successful candidates as his presidency proceeds, with a success rate of only 68% in the 105th Congress. Furthermore, as reported by the Goldman et. al. (2001), with only 13 successful appeals court nominations out of 31 nominations during the 106th Congress (a success rate of only 42%), Clinton's ability to appoint

judges to the courts of appeals appears to have deteriorated even further during his lame-duck period.

Table 2.4
Clinton Nominations: Success Rate and Mean Referral Time

	All Nominees	Women	Men	Minority	White	First Term	105th Congress
% of all Nom's	100 (N=68)	29.4 (N=20)	70.6 (N=48)	26.5 (N=18)	73.5 (N=50)	58.8 (N=40)	41.2 (N=28)
Success Rate	.71	.80	.67	.61	.74	.72	.68
	Days to Referral (Std Dev)	**Women**	**Men**	**Minority**	**White**	**First Term**	**105th Congr.**
All Nom's	421 (280.98) (N=68)	356 (232.41) (N=20)	448 (296.94) (N=48)	420 (262.02) (N=18)	422 (290.05) (N=50)	465 (317.38) (N=40)	359 (208.80) (N=28)
Successful	401 (279.17) (N=48)	335 (220.93) (N=16)	434 (301.91) (N=32)	486 (263.20) (N=11)	376 (282.27) (N=37)	450 (312.08) (N=29)	327 (206.00) (N=19)
Failed	469 (286.63) (N=20)	442 (293.07) (N=4)	476 (294.34) (N=16)	317 (242.23) (N=7)	552 (282.53) (N=13)	505 (343.16) (N=11)	426 (210.13) (N=9)

Clinton's efforts to diversify the courts of appeals with the addition of more women and minority candidates met with mixed results. By the end of the 105th Congress, Clinton had appointed 16 women to the courts of appeals, more than any previous president. Furthermore, Clinton's success rate in getting his female nominees confirmed by the Senate, at 80%, was higher than his success rate at getting male nominees confirmed (at only 67%). Clinton's ability to appoint members of racial minority groups to the appeals courts, however, was less

impressive. He was only able to appoint 11 minorities to the courts of appeals in his first six years in office (one less than was appointed by Carter in his single term). What is more striking, however, is the low success rate enjoyed by Clinton's minority nominees. At only 61%, the minority success rate is much lower than the 74% success rate enjoyed by Clinton's white nominees.

Furthermore, the data provided in Table 2.4 provide clear evidence that delay in referral time increased dramatically during the Clinton administration. Average referral times surpassed the 420 day mark for all Clinton nominations through the 105th Congress (with a standard deviation of 280.98), with those made during Clinton's first term hitting the 465 day mark. Referral time during the 105th Congress dropped to an average of 359 days. The amount of referral delay seen in the first term of the Clinton administration (at 465 days on average) supports criticisms that Clinton wasted the opportunity afforded to him with two years of unified government and a large number of outstanding vacancies left over from the Bush administration. The inability of the administration to proceed quickly with nominations in the first term prevented Clinton from having an early impact on the composition of the courts of appeals. This, compounded with the appointment problems that surfaced in the 106th Congress, accounts for much of Clinton's incapability at having the sort of consequence that Reagan had on the composition of the courts of appeals.

Referral time during the Clinton years reached unprecedented levels for all nominee categories, with respect to race, gender, and success or failure. With a mean referral time of 552 days, Clinton was slowest to refer the 13 white nominees who were eventually unsuccessful. These unsuccessful nominations included only one made during an election year

(when referrals are typically made more quickly) and included six nominees whom the ABA rated as only qualified or lower. It is not surprising that the decision to put forth lesser-qualified nominees during non-election years would take an especially long period of consideration and investigation. The average referral time of these six lesser-qualified white nominees was 676 days, with a standard deviation of only 112.59. It is quite clear that the Clinton administration took its time prior to putting forth these nominations of questionable qualifications during non-election years when time constraints are less crucial to the administration.

Appeals court nominations during the Clinton years were therefore characterized by decreasing success rates as the administration progressed. Clinton's ability to get women and minority candidates on the circuit courts was fairly successful with respect to female nominees (with a high success rates and relatively shorter referral time), although his minority nominees suffered from a decreased success rate and longer delays prior to referral. Finally, and most striking, compared to previous administrations, the Clinton years were marked by a large increase in referral delay for all nominees, whether male or female, white or minority, successful or unsuccessful. The addition of data from the 106th Congress will allow for a complete analysis of referral delay during the Clinton years. However, even with the addition of data from 106th Congress, referral delay during the Clinton administration will likely remain at unprecedentedly high levels.

Trends in Success Rate and Referral Delay

The increased complexity and time-consuming nature of the selection process can be traced back to the Carter administration. Success rates have decreased steadily since the

Carter administration (see Table 2.5). By attempting to wrest more control over the nomination process from individual senators and placing it within selection commissions established within the administration, the long-standing relations between those in the Carter administration and the Senate were altered. Furthermore, the increased scrutiny and screening of potential nominees that was initiated during the Reagan administration have increased the number of persons involved in judicial selection and the length of time necessary to vet nominees and send nominations to the Senate. Although referral time remained consistent from the Reagan to the Bush years, the Bush administration experienced a slow start to the judicial nomination process in that he referred only a small number of nominees in the first few years of his administration. The most dramatic increase in referral time is found in the Clinton era, due in large part to the inability to handle the increasing backlog of vacancies efficiently.

Table 2.5
All Administrations: Success Rate and Mean Referral Time, 1977-1998

Administration		Success Rates
Carter	n=61	.92
Reagan	n=93	.84
Bush	n=49	.76
Clinton	n=68	.71
All Administrations	n=271	.81

Administration		Mean Days to Referral (Std. Dev.)
Carter	n=61	232 (122.35)
Reagan	n=93	233 (221.60)

Bush	n=49	253 (187.87)
Clinton	n=68	421 (280.98)
All Administrations	n=271	284 (228.85)

Although presidents have long been interested in judicial appointments to all levels of the federal judiciary, the initiatives established during the Carter and Reagan years have increased the political nature of these appointments. Limiting traditional senatorial prerogatives and using judicial selection to advance presidential policy goals have "raised the stakes" for appointments to the courts of appeals. The nomination process has become increasingly thorough and important for presidents, but it has accordingly become more complex, time-consuming, and contentious, especially during the Clinton administration. More time must be dedicated to the investigation of nominees prior to referring nominations to the Senate for consideration. Determining the factors that drive referral delay, including political considerations and nominee characteristics, is the focus of the next chapter of this study.

CHAPTER 3

DETERMINANTS OF REFERRAL DELAY

Since the Carter administration, presidents have attempted to gain more control over the selection process in order to utilize judicial nominations to advance their legal and policy agendas. With this control comes the burden of identifying and vetting potential nominees. As discussed in the previous chapter, presidents have suffered to the courts of appeals from steadily decreasing success rates with respect to their courts of appeals nominees. Presidents must take additional care when selecting nominees for positions on the courts of appeals in order to secure confirmation.

Presidents now enjoy more opportunity to investigate and select nominees to the courts of appeals, but this opportunity comes with a responsibility to examine nominees closely, particularly those whose qualifications or background are less certain (Harris 1981; MacKenzie 1981). Doing otherwise may risk Senate opposition and defeat. Referral time may be increased, therefore, when the qualifications of a particular nominee are in question, in that serious consideration must now be given before sending a nominee to the Senate who may be deemed unqualified for the position. Furthermore, the growing political importance of positions on the courts of appeals may dictate that those in the administration will have to take particular care in referring nominations to the Senate when relations between the two branches are strained (Kahn 1995; Goldman 1998). In order to secure a successful confirmation in an

unfriendly Senate, the administration may have to identify, screen, and consider all potential nominees carefully. Finally, presidents may be faced with institutional considerations when selecting nominees to the courts of appeals. For example, presidents have attempted to gain more control over the nominee selection process, requiring the dedication of more time and personnel within the administration (Goldman 1997; Miller Center Commission 1996). The institutional changes within the administration to develop an independent ability to vet and select nominees may have an influence on a president's ability to nominate successful candidates efficiently. Therefore, the impact of political, nominee-specific, and institutional factors on referral delay is the focus of this chapter.

Determinants of Referral Delay

Background and Hypotheses

Little quantitative research has been conducted on referral delay, and that which has been done typically provides descriptive information on the length of referral delay only. As discussed above, average referral times increased only slightly from the Carter administration through the Reagan and Bush years, and then increased dramatically during the Clinton presidency. The descriptive findings in this study are fairly consistent with those from a recent report published by The Century Foundation (2000). That study found average referral times to be similar during the Carter and Reagan years (at approximately 225 to 230 days), with an increase in referral time during both the Bush and Clinton administrations.

Going beyond a descriptive analysis of referral delay over time, however, is necessary in order to determine whether political atmosphere, nominee considerations, or institutional concerns affects the nomination process for courts of appeals judges. Many scholars have argued that presidential nomination strategies are affected by political considerations. Maltese (1995, 5) characterizes appointments to the Supreme Court as "a test of presidential strength." "Weak" presidents are thought to have a more difficult time securing confirmation of their nominees before the Senate than "stronger" presidents. With respect to judicial appointments, presidential strength is influenced by factors such as the president's relationship to the Senate and electoral considerations (see Deering 1987; Kahn 1995; Krutz, Fleischer, and Bond 1998; Maltese 1995; Massaro 1990; and Moraski and Shipan 1999). When the president is in a position of relative weakness, he may have to take more care and consideration in judicial nominations prior to referral to the full Senate. Stronger presidents, on the other hand, may have more freedom to refer nominees efficiently.

Hypothesis 1: Referral delay will increase during periods when the president is politically weak.

Referral delay may also be influenced by the characteristics of the nominee under consideration. Many previous studies have highlighted the relevance of candidate experience and professional competence to nomination considerations (Howard 1981; Kahn 1995; MacKenzie 1981; and Solomon 1984). The relevance of qualification considerations to the nomination process may require that those in the administration investigate a less qualified

nominee more carefully prior to referral. Furthermore, most judges on the U.S. Courts of Appeals have followed traditional paths of socialization prior to appointment (Howard 1981). Judges with less traditional backgrounds, therefore, may also require more consideration prior to referral. These two propositions lead to a second hypothesis concerning referral delay:

> *Hypothesis 2: Referral delay will increase for non-traditional nominees and those who are less qualified.*

Institutional considerations may also influence referral delay. Beginning with the Carter administration, presidents have taken a increased interest in altering the selection process for nominees to the U.S. Courts of Appeals (Goldman 1997; McFeeley 1987). In order to maintain an ability to screen and select nominees independently from the influence of home-state senators, presidents have had to establish and maintain procedures and personnel within the administration dedicated to nominee identification and screening (Goldman 1997). Therefore, with more administration resources and personnel dedicated to selecting nominees, more time may be required prior to the nominee referral. The third hypothesis concerning referral delay follows:

> *Hypothesis 3: Referral delay will increase as administrative procedures concerning nominee selection become more complex.*

Lastly, delay in the referral process may be related to the relative policy-making power associated with the position being filled. Appointments to positions that are recognized as

having more legal and policy influence may require more care and consideration than others in order to secure Senate confirmation (see, for example, Carp and Stidham 1998; Harris 1953; Howard 1999; and Krutz, Fleisher, and Bond 1999). Therefore, the last hypothesis concerning referral delay concerns the institutional importance of the position being filled to the judiciary:

Hypothesis 4: Referral delay will increase for nominations to positions that are recognized as having more influence over policy.

In order to test these four hypotheses, a multivariate regression analysis was run measuring the influence of political, nominee-specific, and institutional variables on the amount of time (in days) between vacancy and referral to the Senate for all 271 U.S. Courts of Appeals nominations (save for those to the Federal circuit) made between 1977 and 1998. As in the previous descriptive analysis, referral delay was calculated as the number of days from the date the vacancy began (due to a retirement, creation of a new position, nomination sent back to the president, etc.) to the date the nomination was officially referred to the Senate. On rare occasions, the president refers a nomination to the Senate a few weeks prior to the official vacancy date. The referral time for these cases, therefore, are negative numbers. Rather than impose an artificial minimum referral time of zero days, the seven cases where this occurred were allowed to have negative referral times in order to account for the instances where presidents act quickly in anticipation of upcoming official vacancy dates.[17]

---

[17]Due to the fact that negative referral times only occurred seven times out of the 271 nominations considered, and that negative referral times typically only reflect presidential anticipation of vacancy dates by a few weeks, this operationalization scheme is unlikely to have

Furthermore, in 11 cases in the data set, individuals who had previously been nominated to a circuit court position and were not confirmed by the full Senate were renominated in the subsequent legislative session. For these cases, the referral time was recalculated and coded as the time between vacancy and referral dates during the first nomination rather than as the time between when the nomination failed in the Senate to when the individual was renominated. The motivation here is that most of the vetting and investigation into the nominee would have occurred the first time the candidate was considered, and the decision to renominate the same person would be made with less scrutiny and investigation into the nominee's background. Occasionally, for example, a nomination is returned to the president at the end of a legislative session and is immediately renominated by the president at the beginning of the next session. The few weeks that have gone by over the holiday season are unlikely as indicative of the amount of consideration given to that nominee by the administration as the length of time it took the president to decide to nominate that person the first time around. Therefore, for these few renominated individuals, the time prior to the first referral is utilized. Of course, the decision to renominate a failed nominee may not always be so routine, and new information on the candidate or changing political circumstances may require additional consideration prior to the second referral. However, although this is somewhat of a

---

much of an influence on the results that would be found if these negative referral times were recoded as zeros.

subjective decision, it is more appropriate to take the earlier referral time as the best indicator of the time required for the administration to consider the nomination.[18]

The Referral Delay Model: Independent Variables[19]

A number of political, nominee-specific, and institutional variables were included in a model measuring their impact on the length of time required prior to nominee referral by the administration. The political variables were included to determine the influence on referral delay of the relative strength of a president due to his relationship to the Senate and electoral considerations. Nominee-specific variables were included to determine whether the background or characteristics of the individual nominee influenced how long the administration considered the nomination prior to referral. The institutional variables were included to determine the impact of administrative centralization of the nominee selection process on the length of delay prior to referral. In addition, variables measuring the institutional importance of the position being filled on the courts of appeals were included to determine if a referral to a position considered to be more influential to the composition of the courts of appeals required more time.

---

[18]I would like to thank Dr. Sheldon Goldman of the University of Massachusetts-Amherst for assistance with this difficult coding problem.

[19]Unless otherwise indicated, all independent variables are coded according to the operationalization scheme provided in Appendix A.

Political Variables

When considering potential nominations to the circuit courts, presidents must be cognizant of the political climate in which the appointment process is being conducted. When the president is in a politically weaker position, due to electoral or partisan considerations, for example, he may have to consider potential nominees more carefully due to his lessened ability to help push nominations through the Senate. Problems can arise for a president when confronted with a Senate that is ideologically opposed to him. The most obvious measure of the ideological relationship between the president and the Senate is the party control of the two branches. Presidents should have to consider nominations more carefully during periods of divided government than during periods of unified government (Cameron, Cover, and Segal 1990; Maltese 1995; Massaro 1990; Segal 1987) .

A simple measure of divided government, however, is less appropriate than a variable that provides a more direct measure of the relationship between the president and the Senate Judiciary Committee. The Judiciary Committee controls much of the confirmation process through the power to conduct hearings and report a nomination to the full Senate (Carp and Stidham 1998; Deering 1987; Moraski and Shipan 1999). In particular, the chair of the Judiciary Committee is capable of exerting tremendous influence over confirmation procedures, particularly through the ability to block and delay nominations (Bond and Fleischer 1990; Deering and Smith 1997). Therefore, a more refined measure of the relationship between presidents and those in control of the Senate confirmation process is provided by the incorporation of a variable measuring the ***Presidential Support*** score of the Senate Judiciary

Committee chair.[20] When the Committee chair is more ideologically aligned with the president, nominations should require less consideration prior to referral, indicating that the relationship between this variable and referral delay will be negative.

Election cycle effects must be considered here as well. Presidential election years, for example, are characterized as periods of relative weakness in an administration (Cameron, Cover, and Segal 1990; Kahn 1995; Massaro 1990; Maltese 1995). A weak president may have to consider judicial nominations more carefully prior to referral than a president in a position of relative strength. Presidential election years, however, also bring a time constraint to the president, due to the uncertainty of the upcoming election, and Senate rules dictating that all outstanding nominations be returned to the president when the Senate adjourns prior at the end of the congressional session. In an ***Election Year***, therefore, presidents should nominate judicial candidates more quickly in an attempt to secure a few last-minute confirmations before election day, which may (or in the case of a second-term president, will) bring about the end of their administration. Sending nominations to the Senate late in an election year will likely end in having all of these late nominations simply returned to the president due to the inability of even a receptive Senate to investigate, hold hearings, and vote on these nominees prior to the end of the session, especially since many of the senators themselves are up for reelection at the same time. Therefore, presidents should try to make nominations as quickly and efficiently as

---

[20]Other measures gaging executive-senatorial relations were considered here, including nominate scores and median support scores of all Judiciary Committee members. However, the central role of the Judiciary Committee chair to the confirmation process justifies the use of the presidential support score variable for this analysis (Bond and Fleisher 1990; Deering and Smith 1997; O'Brien 1988).

possible in the later stages of their administrations, resulting in a negative relationship between election year nominations and referral delay.

Early in the presidential term, on the other hand, presidents spend a good deal of time organizing their judicial selection staffs and determining how to proceed with their judicial selection agenda (Buchanan 1990; MacKenzie 1981; Pfiffner 1987). MacKenzie (1981, 3) states that "the first and most formidable of the tasks facing a new President is the problem of finding men and women to fill the most important positions in his administration." Therefore, efficient selection of early judicial nominees may take a back seat to organizational concerns, increasing referral delay in the early days of an administration. Although a honeymoon effect may be more prominent during only the first term of a two-term administration, presidential reorganization of the administration and a reconsideration of judicial selection procedures in the second term may slow nominations as well. The ***Honeymoon Year*** variable, therefore, is predicted to increase the length of referral delay.

Lastly, the existence of home-state senators of the president's party may also increase referral delay because of the expectation that presidents should confer with home-state senators of his party prior to nominee selection. Although ***Senatorial Courtesy*** is considered to be less of a constraint on the selection of appeals court nominees than those to the district courts, and presidential efforts have focused on drawing selection powers away from home-state senators, the expectation that presidents should nonetheless consult with these senators requires the inclusion of this variable in a model measuring referral delay (Goldman 1997; Harris 1953).

Due to the potential need to consult with same-party home-state senators, senatorial courtesy should increase the amount of time required for the selection of a nominee.

Nominee-Specific Variables

Nominees with more questionable qualifications or less traditional backgrounds may require more careful consideration by the administration prior to referral. Many previous studies have highlighted the relevance of a judicial nominee's background and experience to the recruitment and selection process (see, for example, Abraham 1999; Harris 1981; MacKenzie 1981). Nominee ratings by the American Bar Association have been provided to the administration for all potential nominees since the Eisenhower administration (Goldman 1997). A nominee with a higher ***ABA Rating*** may therefore require less time to investigate and consider prior to referral. Nominees with lower ratings, being more likely to draw opposition in the Senate, may require more investigation and consideration prior to referral. Presidents may be reluctant to nominate less qualified candidates quickly, and may only do so once they are more assured that the nominee will be acceptable to the Senate. A higher ABA Rating, on the other hand, should decrease the length of referral time due to the increased assurance that the nominee will be more easily confirmed. Higher ABA ratings, therefore, should have a negative impact on the length of referral delay.

"Non-traditional" nominees, on the other hand, may require more time on the part of the president prior to referral in order to identify these nominees and investigate their qualifications. Howard (1981) found that most judges on the U.S. Courts of Appeals followed

similar educational and professional paths to the bench. Nominees who deviate from the traditional characteristics of circuit court judges may require more investigation and consideration prior to referral. Efforts to diversify the bench may, in particular, result in nominees whose backgrounds are less traditional than their fellow nominees. Slotnick (1988), for example, found that women and minority nominees tend to rise to judicial positions through less-traditional legal careers. The relative lack of the typical pedigree for a federal judicial position (such as attendance at Ivy League law schools and a partnership at an elite law firm) may require that non-traditional nominees be considered more carefully prior to referral. Going out of the mainstream to find qualified women and minority candidates may require more time, and assuring that such non-traditional candidates are ideologically compatible enough to merit a nomination and qualified enough to secure confirmation may demand even more time. Therefore, ***Gender*** and ***Race*** variables were included in the Referral Delay Model, with the expectation that both would have a positive impact on referral delay.

Institutional Variables

Institutional reforms within presidential administrations regarding nominee selection were instituted in attempts to wrest control away from home-state senators. During the Carter administration, the United States Circuit Judge Nominating Commission was created in order to facilitate Carter's agenda of selecting nominees based on merit and furthering diversification goals for the judiciary (Goldman 1997). The Carter administration failed to nominate many women and minority nominees until the nominee identification and selection process was

changed to allow for a more careful, organized screening of all potential nominees. In the Reagan years, selection procedures were institutionalized further with more control centralized in the White House council's office and the creation of the President's Committee on Federal Judicial Selection (Goldman 1997). The Reagan administration was determined from the outset to keep as much control over judicial appointments as possible in order to further his agenda of appointing ideological conservatives to the bench (Pfiffner 1987). The Bush and Clinton administrations continued the efforts of their predecessors to shift more power to the White House (Goldman 1993, 1995).

These efforts have placed a growing responsibility over judicial nominations to those within the administration over time as judicial selection procedures have become institutionalized within the administration. In the early days of the Carter administration, serious time commitments were required for panelists on the Nominating Commission to identify and investigate potential nominees thoroughly (Berkson and Carbon 1980). Through the years, as nominee identification and investigation has become further institutionalized within the administration, more time may be required for identification, vetting, and selection to be conducted by those in the White House and the Justice Department. A ***Time*** variable was included in the model to account for the growing institutionalization of the selection process within the administration. With more personnel involved in the selection of nominees, more delay may be seen in the period between vacancy and nominee referral. This variable, therefore, is expected to have a positive impact on referral delay.

Furthermore, as the descriptive statistics discussed previously indicate, referral delay during the Clinton administration appear to have reached a "crisis" level (see also Goldman 1998). Although Clinton maintained many of the selection initiatives instituted by his predecessors, critics have charged that his administration was slow and disorganized in its nominee selection procedures (Slotnick and Goldman 1998). Therefore, a ***Clinton*** variable was included in the model to control for the dramatic increase in referral delay during the Clinton administration. This dichotomous variable (coded as "1" for nominations made during the Clinton administration, and "0" otherwise) is expected to have a positive relationship to the dependent variable.

The last institutional variables incorporated into the model account for the relative importance of the position being filled to the courts of appeals. The U.S. Court of Appeals for the District of Columbia Circuit has been characterized as the "second most important court in the land" due to its influence over administrative and criminal law and policy (Banks 1999, 6-7). The difference between appointments to the D.C. Circuit and the geographical circuits has been found to have an influence on the nominees selected to serve on this bench. Howard (1981) argues that presidents have a freer hand in selecting nominees to the D.C. Circuit due to the absence of traditional home-state senators for the District of Columbia. Banks (1999, 4) furthermore, characterizes appointees to the D.C. Circuit as "high quality, nationally oriented judges." The heightened importance of positions on the D.C. Circuit may be reflected as well in referral delay. The need to select nominees for these positions with the utmost care and

consideration is expected to increase the length of referral delay, resulting in a positive relationship between the ***DC Circuit*** variable and the dependent variable.

Lastly, the creation of new positions with the passage of Omnibus Judgeship legislation provides the president with an opportunity to have a large impact on the composition of the judiciary in a relatively short span of time (Barrow, Zuk, and Gryski 1996; Carp and Stidham 1998). Therefore, nominations to newly created positions present the administration with an opportunity to have a greater ability to influence judicial policy through their appointments. This may influence referral delay by requiring more time and consideration to identify and select nominees to ***New Positions*** created as part of Omnibus Judgeship legislation than is required to select nominees for positions created when sitting judges vacate the bench. Therefore, this variable is predicted to have a positive impact on referral delay. Table 3.1 provides a brief description of each independent variable in the Referral Delay Model and the predicted direction of impact of each independent variable on the length of referral delay.

Table 3.1
Independent Variables Included in the Referral Delay Model and Predicted Directions of Influence

Variables	**Variable Description**	**Predicted Impact on Referral Delay**
Political Variables		
Presidential Support	Presidential support score of Judiciary Committee chair	Negative
Election Year	Nomination made in presidential election year	Negative

Variables	Variable Description	Predicted Impact on Referral Delay
Honeymoon Year	Nomination made in first year of presidential term	Positive
Senatorial Courtesy	Number of home-state senators of president's party	Positive
Nominee-specific Variables		
ABA Rating	Nominee ABA Rating	Negative
Gender	Nominee Gender	Positive
Race	Nominee Race	Positive
Institutional Variables		
Time	Institutionalized selection procedures over time	Positive
Clinton	Referral delay crisis during the Clinton administration	Positive
DC Circuit	Nomination made to D.C. circuit court of appeals	Positive
New Position	Nomination made to a newly-created position	Positive

The Referral Delay Model: Results[21]

The results for the multivariate regression model measuring the influence of the independent variables on the length of referral delay are provided in Table 3.2. The model performs fairly well, with an R-Square of .241 and an adjusted R-Square of .208.[22]

---

[21]The means for the independent variables are provided in Appendix B.

[22]Collinearity among the independent variables was determined by examining a correlation matrix of the independent variables, regressing each independent variable against the others, and examining the VIF (Variance Inflation Factors) of each independent variable. Of all the independent variables, only the correlation between the Clinton variable and the Time variable was high (at .764). However, the VIF of the time variable (the highest of the

Furthermore, a number of the independent variables in the model achieve statistical significance in the predicted directions.

Table 3.2
OLS Regression Results for the Referral Delay Model,
Circuit Court Nominations, 1977-1998

Variables	B Score	Std. Error	Stand. Coeff.	t
Political Variables				
Presidential Support	-1.293	.630	-.146	-2.051*
Election Year	-140.554	36.606	-.230	-3.840***
Honeymoon Year	-28.146	31.761	.055	-.886
Senatorial Courtesy	-9.187	19.143	-.029	-.480
Nominee-specific Variables				
ABA Rating	-25.343	8.735	-.166	-2.901**
Gender	-52.129	34.618	-.086	-1.506
Race	-30.637	37.564	-.047	-.816
Institutional Variables				
Time	1.464	3.713	.040	.394
Clinton	211.823	52.852	.402	4.008***
DC Circuit	-64.469	50.295	-.077	-1.282
New Position	105.759	31.086	.210	3.402***

---

independent variables) was only 3.513, and regressing the time variable against the others resulted in an R-Square of .715. According to Mendenhall and Sincich (1993), serious problems with multicolinearity are likely present when an independent variable's VIF score is greater than 10 or when the R-Square of is greater than .90 when regressing the independent variables against each other. Finally, removing the Time variable from the model does not affect which variables achieve statistical significance, or the direction of the significant variables' coefficients. Therefore, the collinearity checks indicate that there are no serious problems with multicollinearity in this model.

Variables	B Score	Std. Error	Stand. Coeff.	t
Constant	442.506	81.404		5.436***
N = 265 R Square = .241 Adj. R Square = .208 F. Statistic = 7.289*** Significance Levels: * t<.05 (One-Tailed Test) ** t<.01 *** t<.001				

With respect to the political variables, higher presidential support on the part of the Judiciary Committee chair and nominations made in election years both have the effect of decreasing the length of time from vacancy to referral to a statistically significant extent. A president, as expected, does not have to consider circuit court nominations as thoroughly when he has a good political relationship with the Committee chair than he would if his relationship to the chair was more contentious. Therefore, the president appears to make referrals more efficiently when confronted with a like-minded Committee chair. Also, as expected, referrals are made more quickly during election years, due to the inclination on the part of the administration to proceed with as many nominations as possible before the upcoming election.

Referral delay is not affected to a statistically significant degree by the presence of home-state senators of the president's party. A president may still have to consult with home-state senators of his party, but this does not appear to affect the length of referral time to a statistically significant degree. The honeymoon period of a presidential term also fails to have a statistically significant impact on referral delay. Although presidents may struggle with structuring their judicial selection procedures upon entering office, this organizational challenge

does not impact referral delay, at least with respect to courts of appeals nominations. Possibly, the increased importance of circuit court positions relative to those on the district courts compel presidents to be more efficient early in their terms in selecting appeals court nominees. President George W. Bush's early action of nominating a number of circuit court nominees before any district court nominees bears this out. The organizational burdens imposed on a new administration, furthermore, may be felt less with regards to referral delay than with respect to the number of referrals made in the first year. The descriptive statistics discussed previously provides evidence that presidents often refer fewer nominees during the early stages of their term than in the later years.

The impact of the political variables on the length of referral delay provides some support for the hypothesis that political climate will impact referral delay by increasing delay during periods of presidential weakness (*Hypothesis 1*). Referral delay is increased significantly by both a Judiciary Committee chair who is less ideologically aligned with the administration. Referral delay is also influenced by electoral considerations, although the weakened and uncertain position of the president in an election year compels him to nominate judges more rapidly due to the time constraints imposed by the pending election.

With respect to the nominee-specific variables, only the nominee rating by the ABA has a statistically significant impact on the dependent variable. More highly qualified nominees, according to ABA rating, are referred more quickly. Highly rated nominees require less caution on the part of the president before referral. Women and minority nominees, however, are not referred more slowly than their male and white counterparts to a statistically significant degree.

These findings provide mixed support for *Hypothesis 2*. Although more highly qualified nominees, according to ABA rating, appear to require less time prior to referral than less highly qualified nominees, non-traditional women and minority candidates do not require a statistically significant increase in referral time.

With respect to the institutional variables, the centralization of selection mechanisms within the administration does not appear to have the effect of increasing referral time to a statistically significant extent. However, the administrative inefficiency of the Clinton administration in selecting and referring nominations to the Senate has resulted in a statistically significant increase in referral time during the Clinton years. With respect to *Hypothesis 3*, however, it is unclear as of now whether this delay during the Clinton administration is due to the culmination of a growing complexity in the selection process over time, or simply the disorganization of Clinton White House. As the current Bush administration continues to nominate judges to the courts of appeals, we will be able to determine whether the Clinton administration was an anomaly or a turning point with respect to referral delay.

Lastly, there is mixed support for the hypothesis that more important and influential positions on the U.S. Courts of Appeals will require more time prior to referral (*Hypothesis 4*). Newly-created positions require a statistically significant increase in referral time, as expected, whereas nominations to the D.C. Circuit do not require any more referral time than do nominations to the geographical circuits. The creation of numerous positions by a Judgeship Act poses an administrative burden on the administration. The president’s ability to influence the composition of the judiciary in the wake of Omnibus legislation may also require more

consideration of potential nominees by the administration, as well as more consultation with home-state senators and others interested in these appointments.

Positions on the D.C. Court of Appeals, on the other hand, may be politically and institutionally more important, but do not require a statistically significant increase in time on the part of the administration prior to referral. This may be due to the lack of home-state senators that must be consulted prior to referral for D.C. circuit positions. Another potential explanation may be that these positions are considered to be so important that presidents have a "short-list" of potential D.C. circuit nominees more readily available in order to take advantage of vacancies on this court as efficiently as possible.

Summing up the Modern Nomination Process

Judicial selection procedures for positions on the U.S. Courts of Appeals have become increasingly centralized within the White House through attempts by recent presidents to wrest some control over the selection of nominees from the Senate. As a result of the increased politicization of appointments to these positions, nomination success rates have steadily decreased since the Carter administration. Although nomination success rates have declined over time, most nominations remain successful. The growing salience of judicial appointments and the increased control over the selection of nominees by the White House has affected the length of time required for the administration to name circuit court nominees. The delay resulting from an increasingly cumbersome nominee selection process within the administration has come to a head during the Clinton administration, where referral delay has risen

dramatically. This dramatic increase in referral delay may be due to the culmination of years of increasing burdens on the administration's judicial selection resources as these nominations have become more crucial. On the other hand, the Clinton years may be representative of the administration's inefficiency and lessened interest in furthering a policy agenda through judicial appointments.

Referral delay is also affected by political climate. Presidents take additional care when their relationship to the Judiciary Committee leadership is less friendly, but must act more expeditiously when an election is approaching. Referral delay is influenced by a nominee's qualifications as measured by ABA rating as well. Presidents are able to act more quickly when a nominee is considered highly qualified for the post, but are more cautious when a nominee's qualifications may be called into question.

More time is now required for the nomination of appeals court candidates, especially when the political climate surrounding judicial appointments is more tenuous, or when the nominee's background indicates that he or she may not be suitably qualified for easy confirmation. Presidents look to the courts of appeals as an important avenue for advancing policy, and this interest in judicial appointments has affected both the procedures implemented in the selection of courts of appeals nominees and the success rate of these nominations. Focusing selection procedures within the administration to afford some independence from the Senate not only requires more time on the part of the administration, but also requires that the president be cognizant of the current political climate as well as the background and qualifications of any potential nominee prior to referral.

This increased attention to the courts of appeals is likely to continue in the future. After the election of George W. Bush in the wake of the protracted election dispute of 2000, appointments to the district and circuit courts seem to have only increased in status and attention. In May of 2001, President Bush made his first nominations to the federal courts when he selected 11 nominees to the courts of appeals (Lewis 2001b). These nominations, furthermore, drew a great deal of attention in both legal circles and the mainstream press, with much of this attention placed on the nominees' experience, diversity, and ideology (Lewis 2001b, The Associated Press 2001). While the Bush administration appears to have considered strongly both the qualifications and the diversity of these early judicial picks, the political atmosphere surrounding the appointment process is clearly unsettled. Entering office facing a Senate divided down the middle by political party, the administration faced a Judiciary Committee controlled by Republicans who would likely be more receptive to his nominees than those put forth by former President Clinton for the last six years. However, the tenuousness of the composition in the Senate became apparent when the defection of Senator James Jeffords (I-VT) from the Republican party gave control of the Senate, as well as the Judicial Committee, to the Democrats. What this party realignment means for the fortunes of Bush's initial 11 nominations, as well as subsequent nominees, remains to be seen. What can be predicted from the findings discussed in this chapter, however, is that Bush's early, public interest in filling positions on the judiciary, as well as the sudden change in the politics surrounding judicial appointments with the Jeffords defection, will likely result in a need for the Bush administration

to consider nominations to the courts of appeals long and hard as the administration confronts a more hostile Judiciary Committee.

CHAPTER 4

ADVICE AND CONSENT: A NEW ROLE FOR THE SENATE JUDICIARY COMMITTEE

Beginning with the Carter administration, presidents have become increasingly interested in developing an ability to select appeals court nominees with more independence from the Senate. This heightened importance of positions on the courts of appeals and the subsequent attempts to centralize the selection process within the administration have been met by reforms in the Senate aimed at strengthening the ability of those in the Senate to engage in "advice and consent" over judicial appointments. In particular, those in leadership positions on the Senate Judiciary Committee have expressed a newfound interest in investigating and questioning nominees to the federal bench. The recent history of the Senate Judiciary Committee's approach to the judicial appointment process, therefore, mirrors the recent history of presidential selection initiatives in that as positions on the courts of appeals have become more salient to Committee leaders, the leaders have initiated reforms aimed at providing an investigation into nominees that is more thorough and conducted independently from the administration's investigation.

Judiciary Committee initiatives have therefore provided those on the Committee with a power and responsibility over appeals court confirmations that is greatly enhanced, and this

heightened influence has affected if and how nominees are ultimately confirmed. In this chapter, the changing role of the Senate Judiciary Committee within the confirmation process will be examined, beginning with a discussion of how procedural reforms have altered the Committee's role from one of a "rubber stamp" for the president's nominations, to one of influence over if and how nominations are confirmed by the Senate. This discussion will be followed by an examination of how nominations succeed or fail in the Senate. The vast majority of unsuccessful nominations fail in the Senate due to delay in the confirmation process, particularly at the confirmation hearing stage. The chapter will conclude, therefore, with an examination of hearing delay, focusing on how Judiciary Committee reforms have increased the length of delay prior to hearings and how political considerations, nominee characteristics, and institutional concerns influence how Committee members use hearing delay in the confirmation process.

Changes in the Confirmation Process Imposed by Judiciary Committee Chairs

Most of the policy-formulation work in Congress is done in committee (Deering and Smith 1997; Goodwin 1970; Groseclose and King 1998). Committee action, furthermore, "sets the stage for legislating on the House or Senate floor" due to the respect and deference given to the committee's expertise (Groseclose and King 1998, 135-6). This assessment of the role of committees in Congress is true of the influence of the Senate Judiciary Committee over the judicial confirmation process. The Senate Judiciary Committee today is responsible for much of the Senate's role in the confirmation process. The Committee investigates nominees, conducts hearings where the nominee is questioned by members of the Committee, and provides a report on the nominee to the full Senate (Deering 1987). But for rare exceptions,

once a nomination is sent to the full Senate, confirmation is assured, with the vast majority of nominees being confirmed by voice vote (Goldman 1997). The process through which nominations reach a vote in the full Senate, however, has changed and, with these changes have come unprecedented political and public scrutiny. Critics charged that Senate confirmation procedures during the 105th Congress became bogged down in political maneuvering to such an extent that numerous vacancies were allowed to languish without Senate action on nominations (Hartley and Holmes, N.d.; Slotnick and Goldman 1998).

The confirmation reform measures that have culminated in the current "crisis" situation were initiated over time by members of the Senate Judiciary Committee, particularly the chairs and the ranking minority members. Committee chairs are typically the most powerful members on any given committee, having control over the committee's agenda, schedule, budget, and staff (Deering and Smith 1997). Committee chairs, furthermore, are able to exercise their powers with an autonomy from the party leadership that allows chairs (particularly in the Senate) to establish the internal organization of the committee to advance their own agendas (Deering and Smith 1997; Groseclose and King 1998). Senate Judiciary Committee chairs have used these powers to establish important reforms in the Committee's confirmation approach, transforming the role that the Committee enjoys in the confirmation process. The ideological division typically associated with the Senate Judiciary Committee, however, has compelled ranking members of the minority party to spearhead reform initiatives as well (Evans 1991; O'Brien 1988). These transformations in the Judiciary Committee's procedures have had a great deal of influence over how judicial nominations are handled in the Senate.

The "Rubber Stamp" Committee

Historically, the Senate's "advise and consent" role was largely routine, particularly with respect to lower federal court judges (see, for example, Grossman 1965; O'Brien 1988; Schuck and Kumar 1975). Deference was given to the president's nominee, largely due to the reliance on the "blue slip" process of senatorial courtesy whereby a home-state senator of the president's party could exercise great control over the selection of the president's nominee. The Judiciary Committee's role at this time was to initiate the blue slip process, send inquiries to the American Bar Association and state and local bar associations, and schedule hearings (Schuck and Kumar 1975). The Committee's hearings were largely perfunctory affairs, as was the subsequent full Senate vote, with hearings, subcommittee and full committee approval, and Senate confirmation often occurring on the same day (Chase 1972; Schuck and Kumar 1975).

The limited role of the Judiciary Committee in independently scrutinizing nominees was exemplified by Senator James Eastland's (D-MS) approach to his responsibilities as Committee chair from 1956 through 1977. According to David O'Brien (1988), Eastland had no special staff to investigate nominees, relying on a single aide instead. Furthermore, a small *ad hoc* subcommittee was established to "consider all lower-court nominees" (O'Brien 1988, 73). This subcommittee consisted of Eastland and two additional conservative members who conducted their scrutiny of nominees through hearings that were rudimentary and brief (O'Brien 1988). This "Rubber Stamp" Committee, however, would soon develop into a pivotal part of the appointment process, using nominee investigation and delay to shape the composition of the federal bench.

The Kennedy Years: 1979-80

Midway through the Carter administration, control over the Senate Judiciary Committee shifted from long-time chair James Eastland (D-MS), who had chaired the Committee since 1956, to Senator Ted Kennedy (D-MA). During the 96th Congress, Kennedy imposed a number of judicial confirmation initiatives that changed the way that Committee members from that point on approached the advice and consent process. The Kennedy reforms, taken in conjunction with the Carter approach to judicial selection procedures, would signal a new era in judicial appointment politics. In retrospect, Kennedy's brief stint as chair of the Committee was as revolutionary to the judicial appointment process, if not more so, than Carter's term as president.

Kennedy approached his responsibilities as chair of the Judiciary Committee from a very different perspective than did his predecessor. Kennedy took the initiative to "shake up" the confirmation process by increasing the amount of scrutiny placed on the president's nominees and removing some of the stranglehold of the senatorial courtesy norm, whereby a home-state senator of the president's party had the power to halt a nomination. He instituted an independent questionnaire (in addition to the ones already in place for the ABA and the Justice Department) to be completed by each nominee specifically for the Committee, and established a staff to scrutinize nominees, arguing that such measures were necessary in order to gather information for the Committee in its unique advise and consent role (Slotnick 1979). The investigatory staff consisted of a full-time and a part-time investigator, as well as assistance from an FBI agent when necessary (O'Brien 1988). Kennedy also instituted measures to prevent a single home-state senator from being able to unilaterally halt confirmation proceedings

and to reexamine the role of ABA ratings in the selection and confirmation process.[23] Finally, Kennedy hoped to open the investigatory process more to outside interests and the public at large. He began to provide notice of the public confirmation hearings in the *Congressional Record* and publish hearing records more routinely (O'Brien 1988; Slotnick 1979). Information on nominees was also solicited from a much wider array of interested groups, including the National Bar Association, various women's groups, and the NAACP Legal Defense Fund (O'Brien 1988).

Kennedy's brief reign as chair during the 96th Congress certainly paralleled that of the Carter administration in terms of ushering in a new era with respect to how lower court vacancies were filled. By the end of Kennedy's tenure, the Committee had taken an independent role in investigating nominees, wresting some control away from the home-state senators, and allowing voices from outside the Senate to be heard. These reforms led O'Brien (1988) to conclude that the Kennedy years constituted the only period in the Judiciary Committee's history, before or since, during which the Committee had undertaken an independent, rigorous role in the scrutiny of lower-court nominees.

---

[23]Kennedy's concern over ABA ratings was due to allegations that the rating process rewarded candidates who had risen through "traditional" legal channels, such as attending Ivy League law schools and working at elite law firms. The ratings served, therefore, to disadvantage minority candidates who were less likely to have had these traditional opportunities (Slotnick 1979).

The Thurmond Years: 1981-1986

David O'Brien (1988) argues that the Kennedy investigatory reform measures were short-lived and that the investigatory role of the Committee was lessened when Strom Thurmond (R-SC) became chair when the Republicans gained control of the Senate after the 1980 elections. Although the number of nominations was increasing at this time, the staff resources allocated to investigation were decreased. Furthermore, Thurmond returned to the pre-Kennedy norm of being less receptive to the inclusion of outside groups in the confirmation process. As evidence of Thurmond's return to the pre-Kennedy approach to judicial confirmations, O'Brien points to the amount of delay from nominee referral by the president to the initiation of hearings by the Committee. This delay reached an historic high-point of approximately three months during the Kennedy years, only to be reduced to a period of about three weeks during the Thurmond years (O'Brien 1988). This reduction in delay made Thurmond's reign as chair of the Committee more similar to that of Eastland than to that of Kennedy. O'Brien concludes that the Kennedy years were an anomaly and that confirmation business was soon back to usual: that is, routine, perfunctory, and brief.

Others, however, challenge O'Brien's depiction of the post-Kennedy Judiciary Committee. Sheldon Goldman (1997), for example, argues that the independent investigatory role of the Judiciary Committee was continued into the 97th Congress when Thurmond took control. In particular, Slotnick and Goldman (1998) draw attention to the ability of investigators for the Democratic minority to draw negative attention to the nominations of Daniel Manion (to the U.S. Court of Appeals for the Seventh Circuit) and Jefferson Sessions (to the southern district court in Alabama) in the 99th Congress.

This ability of members of the minority party on the Committee to draw attention to nominees, however, was indicative of reforms spearheaded by the Democratic leadership on the Committee to allow more time for scrutiny of nominees. Thurmond had the support of a solid block of conservative Republicans and conservative to moderate Democrats on the Judiciary Committee at the time. Liberal Democrats on the Committee, therefore, attempted to utilize procedural tactics to delay and obstruct the Committee's conservatives (Evans 1991). Senator Joseph Biden (D-DE), for example, lobbied successfully for a mandatory three week delay period between nominee referral to the initiation of hearings to allow Committee Democrats more time to investigate Reagan's nominees (O'Brien 1988). Biden was also successful at getting Thurmond to include financial disclosure statements on the Committee's nominee questionnaire (a practice that had been halted in 1984 due to pressure from those in the Justice Department) (O'Brien 1988). The split between the Republicans and the Democrats on the Committee was intensified by the actions of some of the more conservative Republicans on the Committee who took the initiative (without Thurmond's knowledge) to send out their own questionnaire to elicit information on the nominee's stand on issues including abortion, affirmative action, and the death penalty (Goldman 1997). Therefore, although Thurmond's approach to judicial confirmations may have harkened back to pre-Kennedy norms, the actions of others on the Committee prevented a whole-sale return to the Eastland approach to judicial confirmations.

The Biden Years: 1987-1994

After the 1986 midterm election, Democrats regained control of the Judiciary Committee, resulting in another change in leadership with Joseph Biden (D-DE) being named chair at the start of the 100th Congress. Once again, a new Committee chair brought an alteration of the judicial confirmation process. After the 1986 election, the Judiciary Committee was decreased in size from 18 to 14 members (O'Brien 1988). Three of those eliminated from the Committee were conservative Republicans. Furthermore, Biden attempted to reassert a more independent investigatory role for the Committee by establishing a four-member panel with its own investigators to screen nominees and single out problematic nominations (O'Brien 1988).

The early Biden years, however, are most often associated with the bruising, failed nomination of Robert Bork to the Supreme Court in 1987. The war over the Bork nomination highlighted another important aspect of the judicial confirmation process at this time. The 100th Congress began the pairing of the era of increased attention to lower court appointments and more intense investigation of lower court nominees with the era of divided government. Although more focus had been placed on the selection and confirmation of judges beginning with Carter and Kennedy, respectively, until this point in time the heightened scrutiny of nominees had occurred during periods of unified government with respect to party control of the presidency and the Senate. However, the Biden years provide the earliest insight into how this new emphasis on appointments to the bench would play out when those in charge of the nomination process and those in charge of the confirmation process are of different political persuasions. Slotnick and Goldman (1998, 202) conclude that this period was characterized

by "increased partisan and ideological wrangling, not only over Supreme Court nominees, but also over some lower-court nominees." Although the era of divided government would be halted briefly during the 103rd Congress after Clinton's victory in 1992, it would soon be reestablished in the wake of the "Republican revolution" of 1994.

The Hatch Years: 1995-2001

The appointment of Senator Orrin Hatch (R-UT) as chair of the Judiciary Committee saw little change in the confirmation process of Clinton's nominations in the initial days of the 104th Congress. Slotnick and Goldman (1998) characterize the early relationship between Hatch and Democratic President Bill Clinton as largely collaborative and consultative when it came to judicial selection procedures, and they found that delay in the holding of hearings rose only slightly in the 104th Congress. Slotnick and Goldman attribute this early ability of the administration and the Committee to work together on appointments to the ideological moderation of the president's nominees as well as the inability of the more ideologically extreme "Gingrich revolution" in the House to make serious inroads in the Senate.

In the waning days of the 104th Congress, however, the collaboration between the president and the Committee appeared to come to an end. Slotnick and Goldman (1998) attribute this confirmation "logjam" to political positioning in anticipation of the upcoming presidential election of 1996. With a powerful, respected senator like Bob Dole (R-KS) challenging the Democratic president, the collaborative approach to the filling of judicial vacancies wilted, to be replaced by more delay and fewer confirmations than earlier in the congressional session.

Moreover, as Slotnick and Goldman suggest:

> the possibility must be considered that what appeared to be a slowdown in the confirmation process in 1996, brought about largely by presidential electoral politics, may actually have been the opening round of an audacious and bold plan by Senate Republicans to bring judicial confirmations to a virtual halt in an effort to play a greater and unprecedented role in determining who, at bottom, would be seated on the federal bench. (1998, 220)

This potential "court-blocking" strategy by Republicans in the Senate in the 105th Congress is what has drawn charges of judicial "hostage-holding" and the current "crisis" in the confirmation process. Some studies have already found evidence that the Hatch Judiciary Committee has engaged in increased and unprecedented confirmation delay in the 105th Congress (see, for example, Hartley and Holmes 2000; Slotnick and Goldman 1998). These criticisms even convinced Senator Hatch to address the confirmation "crisis" in his 1999 *Report on the State of the Federal Judiciary*, where he emphasized a renewed attempt by Committee Republicans to collaborate with the Clinton administration to reduce the backlog of vacancies. The recent gridlock in the confirmation process, however, has its roots in the reforms initiated during Senator Kennedy's tenure as Committee chair, where a new role for the Judiciary Committee was initiated, giving Committee members more interest in and investigatory power over judicial nominees.

The "New" Role of the Judiciary Committee: Gatekeeping and Delay

The Judiciary Committee as Gatekeeper

With respect to the Supreme Court justices, Moraski and Shipan (1999) argue that the Judiciary Committee does not act as a gatekeeper to the confirmation process because a

nominee who is disapproved of by Committee members can still be sent to the full Senate for a confirmation vote. Although the full Senate is ultimately responsible for voting to confirm or reject judicial nominations, the Judiciary Committee sets the stage for the full Senate vote, with final confirmation largely dictated by how a nomination is handled by the Committee (O'Brien 1988). The Judiciary Committee initiates Senate procedures on judicial confirmations when hearings are scheduled before the Committee. Once hearings have been conducted, Committee members then decide whether to report a nomination out of Committee (with either a favorable or an unfavorable report) to the full Senate. The Senate leadership then determines if and when a full Senate vote will be held on the nomination.

The ability of those on the Judiciary Committee to act as gatekeepers to the confirmation process can be seen by an examination of how unsuccessful nominations fail in the Senate. Table 4.1 provides information on the treatment of unsuccessful nominations in the Senate. Of the 52 unsuccessful nominations made to the U.S. Courts of Appeals between 1977 and 1998, 32 failed before the initiation of hearings.[24] In only 20 cases (constituting 38% of all unsuccessful nominations) did a nomination fail after hearings were held. Committee members act as gatekeepers, therefore, in choosing whether or not to hold hearings on nominations.

---

[24]Information on the 52 unsuccessful nominations is provided in Appendix 3. Data were collected from *The Senate Committee on the Judiciary Calendar of Nominations*, various years.

Table 4.1
Senate Action on Unsuccessful Appeals Court Nominations, 1977-1998

Committee Action	Final Disposition
No Hearing Held (N=32)	29 returned; 3 withdrawn
Hearing Held (N=20)	
No Committee Report (N=12)	10 returned; 2 withdrawn
Favorable Report (N=6)	6 returned; 0 withdrawn
Unfavorable Report (N=2)	1 returned; 1 withdrawn

Committee members also act as gatekeepers in determining if and how to report a nomination out of Committee. Of the 20 unsuccessful nominations that reached the hearing stage, 12 never made it out of the Committee and were not reported to the full Senate for a vote. Two more were reported unfavorably, giving a clear signal to those in the full Senate that a majority of those on the Committee did not approve of the nomination. Only six times between 1977 and 1998 did a nomination reach the hearing stage and get favorably reported to the full Senate only to fail prior to final confirmation vote. These six cases constitute only 11.5% of unsuccessful nominations and barely 2% of all the nominations made between 1977 and 1998. It is rare, therefore, for a nomination to survive the hearing and report stages of the confirmation process without being confirmed to a position on the circuit courts. Once the Committee has completed its work, the final Senate vote is, with few exceptions, a foregone conclusion.

An examination of the final disposition of the unsuccessful nominations also highlights the often perfunctory final confirmation vote in the full Senate. At no time between 1977 and 1998

did a nomination fail due to a rejection by full Senate vote. The fate of the nomination is controlled by those on the Judiciary Committee, who can refuse to hold hearings on a nomination, refuse to report a nomination out of Committee, or, on rare occasions, send a nomination to the full Senate with an unfavorable report. Those on the Committee, therefore, act as the gatekeepers to the confirmation process, dictating whether nominations will succeed or fail.

Delay in the Confirmation Process

With respect to the final disposition of unsuccessful nominations, most fail when they are returned to the president according to Senate rules dictating that pending nominations be returned when the Senate adjourns or holds a recess of more than 30 days. As indicated by the statistics provided in Table 4.1, 46 of the 52 unsuccessful nominations failed upon being returned to the president, with the remaining 6 being withdrawn by the president. With only a handful of exceptions, therefore, nominations to the courts of appeals fail because a decision is made to hold the nomination to the end of a session (or the beginning of a long recess) requiring that the nomination be returned in the absence of a holdover vote. Furthermore, the decision to hold a nomination until the end of a session is typically made by those on the Judiciary Committee, where most nominations die prior to hearings or report out of Committee. An important strategy in Senate confirmation procedures, therefore, is the use of delay. Few appeals court nominations failed by being withdrawn by the president, and none were voted down by the full Senate between 1977 and 1998. Rather, the decision is made to delay a nomination until Senate rules require that the nomination be returned to the president.

Delay in confirmation proceedings may be utilized as a strategy for different purposes. As indicated, delay is a useful tool for defeating nominations. In fact, for appeals court nominations made since the Carter administration, delay appears to be the preferred method of defeating nominations. However, delay may be used for other purposes as well. Delay in the confirmation process may be necessary in order to allow for nominee investigation by those in the Senate, particularly the Judiciary Committee. Those in positions of power on the Judiciary Committee have indicated an increasing desire to conduct nominee investigations designed to aid in the Committee's deliberations. Allowing an independent investigation of nominees by those on the Committee requires time. Therefore, confirmation delay may be a necessary consequence of the more deliberate consideration given to judicial nominees by those on the Judiciary Committee. Delay may also be used as a political tool to embarrass or test a president or to influence future nominations (Chase 1972; Watson and Stookey 1988). In this way, delay of even successful nominations sends a message to the president regarding his ability to appoint judges efficiently.

The heightened political salience of appointments to the courts of appeals and efforts to provide a stronger investigatory role for the Judiciary Committee appear to have an influence on confirmation processing time. As mentioned, although delay is used as a means to reject nominations through Senate procedure of returning nominations to the administration, it is seen in the confirmation process for successful nominations as well. Furthermore, delay in the

confirmation process has increased dramatically in the years since Kennedy's tenure as Judiciary Committee chair (see Table 4.2).[25]

Table 4.2
Delay in the Confirmation Process for Successful Courts of Appeals Nominees, 1977-1998

Chair/ Congress	Days from Referral to Hearing (Std. Dev.)	Days from Hearing to Report (Std. Dev.)	Days from Report to Confirmation (Std. Dev.)	Total Days to Confirmation (Std. Dev.)	N
Eastland	**20.50** (14.95)	**8.92** (9.03)	**3.17** (2.82)	**32.58** (14.96)	**12**
95th	*20.50* (14.95)	*8.92* (9.03)	*3.17* (2.82)	*32.58* (14.96)	*12*
Kennedy	**49.27** (27.54)	**24.55** (22.17)	**5.27** (5.20)	**79.09** (47.08)	**44**
96th	*49.27* (27.54)	*24.55* (22.17)	*5.27* (5.20)	*79.09* (47.08)	*44*
Thurmond	**20.07** (18.02)	**14.11** (15.27)	**11.20** (21.84)	**45.38** (34.03)	**61**
97th	*23.21* (14.83)	*9.16* (11.14)	*1.53* (1.17)	*33.89* (16.72)	*19*
98th	*9.75* (21.85)	*24.58* (18.15)	*19.25* (40.54)	*53.58* (48.61)	*12*
99th	*22.20* (17.29)	*13.07* (14.76)	*14.10* (16.31)	*49.37* (34.59)	*30*
Biden	**71.00** (36.28)	**19.86** (20.79)	**11.00** (26.33)	**101.86** (51.97)	**70**

[25]Six successful nominations were dropped from this analysis. Nominations were dropped when an individual was renominated and confirmed whose only confirmation hearings were held during the previous nomination. Due to the inability to accurately measure time from referral to hearing and hearing to report of these atypical nominations, these few cases were excluded from this portion of the analysis. Data on delay in the confirmation process were collected from *The Senate Committee on the Judiciary Calendar of Nominations*, various years.

Chair/ Congress	Days from Referral to Hearing (Std. Dev.)	Days from Hearing to Report (Std. Dev.)	Days from Report to Confirmation (Std. Dev.)	Total Days to Confirmation (Std. Dev.)	N
100th	*70.53* (40.39)	*29.93* (36.54)	*21.00* (41.36)	*121.48* *(65.73)*	*15*
101st	*64.00* (24.77)	*14.56* (8.94)	*2.44* (3.29)	*81.00* (24.96)	*18*
102nd	*71.37* (46.24)	*19.63* (16.25)	*13.68* (31.10)	*104.68* (63.68)	*19*
103rd	*78.00* (31.87)	*17.00* (12.93)	*8.39* (13.75)	*103.39* (40.94)	*18*
Hatch	**113.12** (84.93)	**16.46** (29.36)	**33.88** (48.55)	**163.46** (110.51)	**26**
104th	*67.60* (34.31)	*12.00* (8.64)	*32.90* (48.38)	*112.50* (73.54)	*10*
105th	*141.56* (95.24)	*19.25* (37.02)	*34.50* (50.22)	*195.31* (119.56)	*16*
Total	**54.67** (49.59)	**18.15** (20.77)	**12.23** (26.79)	**84.60** (67.61)	**213**

Confirmation delay has increased since the 95th Congress, the tail end of the Eastland years. The total time from nominee referral by the president to confirmation by the full Senate was six times longer in the 105th Congress than it was in the 95th Congress. This increase, furthermore, is relatively consistent over time, save for the Thurmond years, where confirmation delay decreased compared to delay in the Kennedy years. This finding somewhat supports O'Brien's (1988) conclusion that the Kennedy years were an anomaly, with Thurmond reverting back to the pre-Kennedy norm of routine, speedy confirmations. However, with courts of appeals positions, at least, delay was higher during the Thurmond years than the last two years of Eastland's tenure as Committee chair.

Furthermore, since O'Brien's analysis ends with the 99th Congress, he fails to notice that in the years since Kennedy's reign as Judiciary Committee chair, it is Thurmond, and not Kennedy, who is the anomaly. Confirmation delay increased dramatically during the Biden and Hatch years. Thurmond may have reverted somewhat to Eastland's approach to judicial confirmations, but Biden and Hatch appear to have defined "business as usual" in the Kennedy mold, meaning Senate confirmation with increasingly long delays.

Delay in the confirmation process is, however, the accumulation of delay in distinct stages in the confirmation process (see, for example, Kemper and Van Winkle 1999; Slotnick and Goldman 1998). Delay may be due to a hesitation by those in control of the Committee to initiate hearings. Or, the hearing stage may lag, with dissent on the Committee delaying the reporting of nominations out of the Committee. Delay may also be the result of inaction on the part of the Senate majority leadership in refusing to allow confirmation votes to occur on the full Senate floor.

With respect to where delay tends to occur in the confirmation process, Slotnick and Goldman (1998) found that the delay prior to the initiation of hearings accounted for the bulk of overall confirmation delay, indicating that confirmation delay is driven largely by the actions of the Committee leadership in failing to initiate hearings promptly. The results provided in Table 4.2 substantiate this conclusion. Pre-hearing delay accounts for nearly two-thirds of the overall confirmation delay with an average pre-hearing delay of 54.67 days over the entire period studied. Once the hearings commence, nominations were reported out of committee fairly quickly, typically within a few weeks (with an average time from hearing to report at 18.15

days), with full Senate confirmation occurring soon after the Committee finished its work (with an average report to confirmation time of 12.23 days).

The time from referral to hearing and hearing to report account for the bulk of the entire length of confirmation delay, with full Senate approval typically happening very quickly. However, even this basic trend has broken down in the last few years, with the time from Committee report to full Senate confirmation growing substantially (to over a month in duration) during Hatch's tenure as Committee chair. This finding indicates that the leadership of the full Senate has begun to approach the advise and consent role differently. Possibly, members of the full Senate are beginning to take more time to examine nominees independent from the scrutiny placed on them by the Judiciary Committee, or are simply delaying confirmation even further due to political considerations. Slotnick and Goldman (1998) conclude that the increase in delay between hearing and confirmation vote during the 104th Congress was largely due to the success of Majority Leader Robert Dole (R-KS) in delaying the final vote on many of Clinton's nominees in anticipation of the 1996 presidential election. However, Senate confirmation vote delay was as high in the 105th Congress (at 34.5 days), when such electoral considerations were absent, as it was during the 104th Congress (at 32.9 days), indicating that the sudden interest in delaying final confirmation vote on the full Senate floor is being driven by more than short-term electoral interests. This conclusion is supported by the postscript to Goldman's (1998, 844) analysis of judicial confirmation crisis during the Clinton administration, where he finds that "the unprecedented behavior of the Senate Majority Leader" in delaying the full Senate vote continued into the 105th Congress.

Even with the recent increase in delay at the confirmation vote stage, it is the delay prior to the initiation of hearings that constitutes the bulk of the delay. The period between nomination referral and the initiation of hearings, furthermore, also comprises the most important component of the confirmation process. Not only does the initiation of hearings have great implications for the ultimate success or failure of nominations, but the pre-hearing stage is the crucial period for conducting investigations into nominees (O'Brien 1988). Many of the reforms initiated by Judiciary Committee chairs have been aimed at allowing for an increased ability of Committee members to investigate nominees prior to the holding of hearings. Once hearings are scheduled, the confirmation process becomes more routine, with nominations proceeding quickly and typically ending in successful confirmations.

Most examinations of confirmation delay, however, fail to recognize the importance of the delay period prior to the start of confirmation hearings. Instead, many previous studies focus on explaining the factors relevant to the amount of delay between nominee referral and ultimate confirmation (see, for example, Allison 1996; Cohen Bell 2000; Hartley 2001; Holmes and Hartley 1998; Shipan and Shannon 2001). This approach may allow for an examination of some of the factors relevant to full Senate confirmation pace, but it fails to take into account adequately the important role of the Senate Judiciary Committee in the confirmation process. With respect to judicial confirmations, the Judiciary Committee sets the stage by conducting investigations into nominee qualifications and background, dictating how efficiently a president's nominees will be confirmed, and largely determining which nominations will be successful.

Therefore, an important but largely overlooked aspect of the confirmation process is determining the factors that influence confirmation hearing delay. The growing body of literature

on Senate confirmation delay typically focuses on explaining delay in the confirmation process in its entirety. The role of those on the Judiciary Committee as the gatekeepers of the confirmation process and the investigatory and political importance of the pre-hearing period indicate that more of the focus on the confirmation process should be placed on delay prior to the initiation of hearings rather than delay in the final confirmation vote. As Deering (1987, 104) stated in his analysis of the confirmation process, "[b]ecause committees handle most of the work involved ... an examination and evaluation of that process should be focused largely at [the committee] level." Therefore, this chapter continues with an analysis of confirmation hearing delay, focusing on the relationship of political, nominee-specific, and institutional factors to hearing delay.

Determinants of Hearing Delay

The Hearing Delay Model: Background and Hypotheses

The amount of delay in the confirmation process may be influenced by numerous factors, including political concerns, the need to investigate an individual nominee adequately, and institutional considerations and constraints. Although most of the previous empirical work on confirmation delay has focused on delay between referral and final confirmation vote, these studies may be used to lay a foundation for a more focused look at delay prior to Committee action. Previous studies of confirmation delay, for example, have found that political factors that weaken the president or create a hostile atmosphere between the president and the Senate increase the amount of delay prior to confirmation (McCarty and Razaghian 1999; Moraski and Shipan 1999). Confirmation delay is longer when the relationship between the president and

the Senate is more tense due to divided government (Cohen Bell 2000), or when there is opposition to the president by those in the Senate (Cohen Bell 2000; Holmes and Hartley 1998). Delay is also affected by electoral considerations, resulting in increased confirmation delay during presidential election years (Cohen Bell 2000; Holmes and Hartley 1998), and possibly during midterm election years as well (Kemper and Van Winkle 1999). The first two hypotheses concerning hearing delay, therefore, relate to the relative political power of the president and the Senate.

Hypothesis 1: Hearing delay will increase when the president's relationship to the Senate is more hostile.

Hypothesis 2: Hearing delay will increase when the president is weakened by electoral considerations.

There is also evidence that confirmation delay is affected by nominee characteristics, with less qualified or less traditional candidates requiring more time prior to confirmation than their more qualified or traditional counterparts. Howard (1981, 93) argues that "professional competence - or at least the reputation for it - is a prerequisite for a circuit judgeship." Furthermore, courts of appeals judges have typically followed traditional educational and professional paths to the bench (Howard 1981; Songer, Sheehan, and Haire 2000). Leaders on the Senate Judiciary Committee have asserted that investigation and hearing reforms were aimed at allowing closer scrutiny of nominee qualifications in order to ferret out nominees unfit to serve on the circuit courts (Goldman 1997; O'Brien 1988). Nominee background and characteristics, therefore, may influence the amount of time necessary for those on the Judiciary

Committee to investigate and question nominees adequately prior to the initiation of hearings. The following two hypotheses concern the relationship between nominee characteristics and hearing delay:

Hypothesis 3: Hearing delay will increase for nominees with questionable qualifications and experience.

Hypothesis 4: Hearing delay will be longer for non-traditional nominees.

The reforms imposed on the Senate Judiciary Committee were for the purported purpose of allowing a more serious investigation into nominee qualifications and abilities. However, these reforms have altered the Committee's procedures with respect to staffing, the scheduling of hearings, and nominee questioning (Goldman 1997; O'Brien 1988). These measures have typically been instituted to lengthen the investigatory period or allow more nominee questioning to be conducted by more personnel. Changes in the Committee's institutional structure and procedures, therefore, may have an influence on hearing delay by lengthening the proceedings between nominee referral and the confirmation hearings.

Hypothesis 5: Hearing delay will increase in response to institutional change in the Judiciary Committee aimed at providing an independent investigatory role for the Committee.

In order to test these hypotheses, a multivariate regression analysis was run measuring the influence of a number of political, nominee-specific, and institutional variables on a

dependent variable of hearing delay by the Senate Judiciary Committee. The dependent variable (***Hearing Delay***) was measured as the number of days between nominee referral by the president to the initiation of hearings by the Senate Judiciary Committee. For this model, all successful nominations to the U.S. Courts of Appeals (save those to the Federal Circuit) made between 1977 and 1998 were included. Although hearings are held for some unsuccessful nominations, successful nominations only were included in this analysis in order to determine what factors influence Senate Judiciary Committee procedures for the routine cases that result in confirmation. The rarer cases where the Committee holds hearings only to have the nomination fail may provide some interesting insight into atypical Senate procedures, but excluding these cases from this analysis will allow a better understanding of how the Committee conducts its business on a daily basis. In his examination of presidential appointments, G. Calvin Mackenzie (1981, xi-xii) justifies excluding failed nominations in a similar way when stating that "routine decisions reveal a great deal more about the way administrations are constructed than do those few atypical appointment controversies that penetrate the public consciousness. Studying routine decisions tells us little about extreme behavior but a great deal about normal behavior." Lastly, as with the descriptive analysis conducted previously, the six individuals whose hearings were held during their previous, unsuccessful nominations were dropped from this analysis, leaving 213 cases for consideration in the model.

Hearing Delay Model: Independent Variables[26]

Political Variables

Many previous studies have found that confirmation delay increases when partisan relations between the president and the Senate are tense (Cohen Bell 2000; McCarty and Razaghian 1999; Nixon and Goss 2000; Shipan and Shannon 2001). Incorporating such variables as divided government, presidential opposition in the Senate, and the existence of a filibuster-proof majority in the Senate, however, each utilized measures of the president's relationship to the full Senate. None of these studies, however, focused specifically on the delay period between nominee referral and the initiation of confirmation hearings before the Judiciary Committee. Given the significant control over the scheduling of hearings by the Judiciary Committee chair (Deering and Smith 1997; Groseclose and King 1998), the relationship between the president and the chair is of primary importance to the political climate of the hearing process. Therefore, a variable measuring the ***Presidential Support*** score of the Judiciary Committee chair in the year of referral was included in the model. Ideological compatibility between the president and the chair should influence the chair to schedule hearings more promptly in order to allow the president's nominees to be confirmed easily and quickly. A lack of compatibility between the two, however, should result in increased delay as the chair hopes to hinder or even torpedo nominations made by a less-favored president. This variable is therefore expected to have a negative impact on the length of hearing delay.

---

[26]Unless otherwise indicated, all independent variables in this model were operationalized according to the Table provided in Appendix A.

The impact of electoral influences were considered here as well. Presidential election years provide an opportunity for the president's opponents to engage in delay tactics due to the weakened position of the president and the uncertainty associated with an upcoming election (Maltese 1995; Massaro 1990). Many previous studies of confirmation delay have found that delay increases in the confirmation process during the last days of an administration (Cohen Bell 2000; Holmes and Hartley 1998; Nixon and Goss 2000; Shipan and Shannon 2001). The same behavior is predicted of those on the Judiciary Committee in delaying the hearing process in election years. The ***Election Year*** variable, therefore, is expected to have a positive influence on hearing delay. McCarty and Razaghian (1999), furthermore, found that a president's executive branch nominees faced less delay in the Senate in the early days of the administration, providing some evidence of a honeymoon effect on the confirmation process. However, new presidential administrations are associated with changing judicial selection procedures, particularly in the post-Carter period (Goldman 1997). Therefore, a new administration, or even the restructuring of an administration under a re-elected president, may cause members of the Judiciary Committee to consider the president's judicial nominees more carefully in the honeymoon year than they would otherwise. The ***Honeymoon Year*** variable, therefore, is predicted to have a positive direction of influence on hearing delay.

The last political variable included in the model controls for influence of home-state senators on the length of hearing delay. Previous studies have found that traditional senatorial courtesy norms have little influence on the length of confirmation delay, particularly for nominees to the courts of appeals (Cohen Bell 2000; Holmes and Hartley 2001). Cohen Bell (2000), however, did find a statistically significant relationship between the presence of a home-state

senator on the Judiciary Committee and decreased confirmation delay. The "courtesy" being given, therefore, may only extend to those sitting on the Judiciary Committee. Cohen Bell (2000) found this insider courtesy to exist, furthermore, regardless of whether the Committee insider was of the same party as the president or not. The same collegial benefit is expected to influence the length of hearing delay. The existence of a ***Committee Insider***, therefore, is expected to have a negative influence on the length of hearing delay.

Nominee-Specific Variables

Senate Judiciary Committee leaders have claimed that their reform efforts were imposed in an effort to investigate and question nominees more seriously (O'Brien 1988; Goldman 1997). According to Mackenzie (1981, 113) in his analysis of presidential appointments, "the Senate normally pays more attention to questions of competence than to questions of character." However, "there are few specific or consistent criteria that apply" when considering questions of competence (Mackenzie 1981, 113). The role of the American Bar Association's nominee ratings in the Judiciary Committee's deliberations is indicative of the problems associated with determining a single standard for qualifications for the confirmation process.

The ABA has enjoyed a quasi-formal role in the appointment process since the Eisenhower administration by providing ratings of all potential nominees to the president and forwarding ratings for referred nominees to the Senate Judiciary Committee (Goldman 1997). However, prominent members of the Judiciary Committee have long taken issue with the influence exerted by the ABA over the judicial appointment process. Senator Kennedy (D-

MA) was concerned due to his perception that the rating system disadvantaged minority nominees (Goldman 1997). Senator Hatch (R-UT) also criticized the ABA's role in the appointment process due to his claims of the ABA's liberal bias in the rating of nominees and the group's unique and unfair influence within the appointment process. Accordingly, upon becoming chair of the Judiciary Committee in the 104th Congress, Hatch announced that the ABA would "no longer play a special, officially sanctioned role in the confirmation process" (Wagner 1997). Regardless of Hatch's policy concerning the ABA's role in the confirmation process, however, individual members of the Committee may utilize these ratings in their investigation of nominees. Therefore, an ***ABA Rating*** variable was included in the Hearing Delay Model. Higher nominee rating by the ABA should result in less hearing delay due to the lessened need to investigate a nominee perceived as highly qualified. Less highly rated nominees, on the other hand, are expected to experience more delay prior to hearings. Therefore, the ABA rating variable is expected to have a negative influence on hearing delay.

Given the controversial role of the ABA rating system in the confirmation process and its removal from the formal Committee proceedings by Senator Hatch, two additional nominee qualification variables were included in the model, measuring the influence of nominee background and experience. These two variables, previous ***Prosecutorial Experience*** and previous ***Judicial Experience***, are dichotomous variables measuring the existence of any previous experience at either the state or federal level. Given the important role of previous prosecutorial and judicial experience to the nominee recruitment process (see Howard 1981), nominees with such experience may require less time prior to the holding of hearings for two reasons. First, the qualifications of nominees with previous experience are less questionable,

requiring less time to investigate (Mackenzie 1981). Second, nominees with previous experience have a more easily identifiable background, requiring less digging into the nominee's past by those on the Committee who are in favor of or opposed to the nominee. Both of these experience variables, therefore, should have a negative influence on the length of hearing delay.

The remaining variables measuring the influence of nominee-specific factors on hearing delay relate to nominee gender and race. Recent concerns and criticisms have centered on the treatment of women and minority nominees by the Judiciary Committee, particularly during the Clinton administration (see, for example, Cohen Bell 2000; Hartley 2001; Manning 2001; Nixon and Goss 2000). The Senate has been criticized, with some support from these earlier studies, for delaying the confirmations of "non-traditional" nominees longer than the confirmations of white, male nominees. In light of these earlier studies, two variables were included to gauge the influence of nominee ***Gender*** and ***Race*** characteristics to determine whether the Committee delays the hearings of either women or minority nominees more than their male and white counterparts. Due to the criticisms of the Senate's treatment of non-traditional nominees, and the findings from previous research that there may be increased delay in the final confirmation of these nominees, both the ***Gender*** and ***Race*** variables are predicted to have a positive influence on the dependent variable of length of hearing delay.

Institutional Variables

Institutional reforms by Judiciary Committee leaders have altered the Committee's role in the confirmation process by creating a stronger role for the Committee in investigating and questioning nominees (Goldman 1997; O'Brien 1988). These reforms may influence hearing

delay by requiring more time for Committee members to conduct these investigations before the hearing phase. Committee leadership changes are associated with institutional reform in how the Judiciary Committee handles nominee investigation (Goldman 1997; O'Brien 1988). Therefore, nominees referred to the Judiciary Committee during years of leadership shifts may experience more delay as institutional procedures are reorganized. A ***New Chair*** variable, therefore, was included in the Hearing Delay Model, and is expected to have a positive impact on the length of hearing delay.

A second variable gauging the influence of changing institutional procedures within the Committee measures the Committee's growing responsibility over nominee investigation over time. Although changes in Committee leadership may account for institutional changes in Committee proceedings, such reforms have been imposed at other times as well (O'Brien 1988). A ***Time*** variable was included in the model, therefore, to determine the influence of institutional changes over time apart from those associated with changing leadership. This variable, therefore, is expected to have a positive impact on hearing delay.

Three additional institutional variables were included in the model to control for the type of position being filled and the workload of the Judiciary Committee. Positions on the Court of Appeals for the D.C. Circuit provide the president with greater freedom from traditional senatorial courtesy norms when selecting nominees (Harris 1953; Songer, Sheehan, and Haire 2000). Appointments to these positions, however, are also considered to have broader policy implications than appointments to the geographical circuits (Banks 1999; Howard 1981). Due to the absence of senatorial courtesy considerations and the relative importance of these positions on the courts of appeals, members of the Judiciary Committee may be inclined to

investigate nominees to these positions more strenuously than nominees to other positions. Nixon and Goss (2000), however, found that overall appointment delay is actually reduced for D.C. Circuit positions due to their importance. However, given the specific investigatory responsibilities of the Senate Judiciary Committee, nominations to the ***DC Circuit*** are expected to experience more delay prior to hearings, resulting in a positive relationship of this variable to the dependent variable.

Appointments to newly created positions and those that were vacated by a sitting judge are influenced by different factors (Nixon and Goss 2000). The political nature of the passage of Omnibus Judgeship legislation and the president's ability to use these political plums to advance his agenda on the courts gives new positions political and policy-making importance (Barrow, Gryski, and Zuk 1996). Nominations to new positions, furthermore, "should not be subject to the same constraints stemming from the Senate's advise-and-consent role when compared to those where the nominee replaces a judge who had left the bench" (Songer, Sheehan, and Haire 2000, 32). Therefore, Judiciary Committee members may be inclined to investigate nominees to newly created positions more closely than those nominated to vacated positions, given the lack of senatorial courtesy considerations and the influence of new positions on the president's ability to further his judicial agenda. The ***New Position*** variable, therefore, is expected to have a positive impact on lengthening delay prior to hearings.

Lastly, Judiciary Committee workload considerations may influence the length of hearing delay due to the institutional burdens imposed on the Committee by an increase in its responsibilities. With respect to confirmation hearing procedures, the number of ***Pending Nominations*** before the Committee at the time of nominee referral may have the effect of

lengthening hearing delay. The number of nominations pending before the Judiciary Committee is affected by a number of factors, including the passage of a Judgeship Bill and nominee referral patterns by the president. The Committee's behavior as well can influence workload considerations. Senate rules dictate that pending nominations be returned to the president at the end of a congressional session or prior to a lengthy recess, thus eliminating the Committee's workload concerning pending nominations. However, the Committee members may vote to hold nominations over the recess or adjournment, thus carrying over their workload considerations. Finally, the Committee's workload may be affected by the efficiency with which it handles nominations. Inefficiency may add to a backlog of nominations pending before the Committee. In order to determine the institutional effect of workload on hearing proceedings, a variable measuring the number of nominations pending before the Judiciary Committee at the time of referral was included in the model.[27] McCarty and Razaghian (1999) found that the number of pending nominations had little influence on delay in the Senate's confirmation of executive appointments. With respect to delay in Judiciary Committee procedures, however, an increase in the number of pending nominations is predicted to have a positive impact on hearing delay. Table 4.3 provides a brief description of each independent variable in the Hearing Delay Model, and the predicted direction of influence of the independent variable on the length of hearing delay.

---

[27] Although Judiciary Committee delay may contribute to the number of pending nominations before the Committee, it is theoretically reasonable that pending hearings have an influence on delay. As mentioned, the number of nominations pending before the Committee is controlled by a number of factors, many of which are beyond the control of the Committee members. The behavior of the president in referring nominations, as well as the full Senate in creating judicial positions, contribute to the Committee's workload as well.

Table 4.3
Independent Variables Included in the Hearing Delay Model and Predicted Directions of Influence

Variable Label	Variable Description	Predicted Impact on Hearing Delay
Political Variables		
Presidential Support	Presidential support score of Judiciary Committee chair	Negative
Election Year	Referral made in presidential election year	Positive
Honeymoon Year	Referral made in first year of presidential term	Positive
Committee Insider	Existence of a home-state senator on Judiciary Comm.	Negative
Nominee-Specific Variables		
ABA Rating	Nominee ABA Rating	Negative
Prosecutorial Experience	Nominee's previous state or federal pros. experience	Negative
Judicial Experience	Nominee's previous state or federal judicial experience	Negative
Gender	Nominee Gender	Positive
Race	Nominee Race	Positive
Institutional Variables		
New Chair	Leadership change on the Judiciary Committee	Positive
Time	Increased investigatory organization on Committee	Positive
DC Circuit	Referral made to D.C. circuit court of appeals	Positive
New Position	Nomination made to a newly-created position	Positive
Pending Nominations	Number of pending nominations before Judiciary	Positive

Hearing Delay Model: Results

The multivariate regression analysis results of the Hearing Delay Model are provided in Table 4.4.[28] The Hearing Delay Model performs well, with an R-Square of .432, and an adjusted R-Square of .392. Furthermore, many of the independent variables in the model achieve statistical significance in the predicted directions of influence.

Table 4.4
OLS Regression Results for the Hearing Delay Model, Successful Circuit Court Nominations, 1977-1998

Variables	B Score	Std. Error	Stand. Coeff.	t
Political Variables				
Presidential Support	-.297	.127	-.153	-2.344**
Election Year	-12.120	9.264	-.085	-1.308
Honeymoon Year	12.902	6.658	.118	1.938*
Committee Insider	-18.731	6.395	-.165	-2.929**
Nominee-specific Variables				
ABA Rating	1.578	1.890	.047	.835
Prosecutorial Experience	-18.499	6.054	-.172	-3.056**
Judicial Experience	-6.359	6.097	-.063	-1.043
Gender	21.129	7.347	.162	2.876**
Race	2.869	8.105	.020	.354
Institutional Variables				

[28]Collinearity among the independent variables was determined by examining a correlation matrix of the independent variables, regressing each independent variable against the others, and examining the VIF (Variance Inflation Factors) of each independent variable. No problems with multicollinearity were identified among any of the independent variables. The means for the independent variables are provided in Appendix B.

Variables	B Score	Std. Error	Stand. Coeff.	t
New Chair	24.212	8.241	.221	2.938**
Time	4.108	.595	.516	6.901***
DC Circuit	-12.942	10.506	-.071	-1.232
New Position	-5.370	6.834	-.050	-.786
Pending Nominations	.445	.210	.142	2.119*
Constant	20.856	15.245		1.368
N = 213 R Square = .432 Adj. R Square = .392 F. Statistic = 10.753*** Significance Levels: * t<.05 (One-Tailed Test) ** t<.01 *** t<.001				

With the exception of the election year variable, each of the political variables incorporated into the Hearing Delay Model achieves statistical significance in the predicted direction (using a one-tailed test). When the Judiciary Committee chair is more ideologically aligned with the president, as measured by the presidential support variable, hearing delay decreases. Committee chairs utilize their powers over hearing procedure by expediting hearings when they are in agreement with the president, and delay hearings when they disagree with the president over his agenda. This provides support for *Hypothesis 1*, in that hearing delay increases when the president's relationship with the Committee leadership is more hostile, and decreases when relations are friendlier.

At first glance, the results of the Hearing Delay Model do not appear to provide much support *Hypothesis 2*, which predicted that hearing delay would increase when the president

was weakened by electoral considerations. The uncertainty brought on by a pending presidential election does not have a statistically significant effect on lengthening hearing delay. However, this is likely due to the large number of failed nominations made during election years. Committee members hold hearings on successful nominees promptly enough during election years to confirm the candidate prior to the congressional adjournment. All others are allowed to languish until they are returned to the president. These unsuccessful nominations (the ones that are likely experiencing the effects of election year delay) were not included in this analysis.

The honeymoon period typically associated with presidential strength has a statistically significant influence on lengthening the amount of delay prior to hearings. This was predicted due to the new judicial selection initiatives that accompany a new administration. Therefore, although the relative strength of the newly elected president does not translate into speedier hearing procedures, the uncertainty associated with the new administration causes those on the Committee to be more cautious when handling nominations. Electoral considerations do appear to influence Committee procedures, although in a different manner than may be expected. Those in control of the Judiciary Committee view a new president's nominees with more suspicion and therefore more delay. Furthermore, a president is weakened during an election year, but this weakness manifests itself in more unsuccessful nominations, rather than increased Committee delay of the successful nominations.

The existence of a home-state insider of either political party has the effect of expediting confirmation hearings as well, reaffirming the Cohen Bell's (2000) finding that nominees with an insider of either party on the Committee benefit from the collegiality extended to the insider. In

examining the unstandardized coefficient, the existence of a home-state senator on the Judiciary Committee expedites hearings by more than 18 days over referrals with no such insider benefit.

The results given in Table 4.4 provide mixed support for *Hypothesis 3* (that hearing delay will be greater for nominees with more questionable qualifications). Nominees with higher ABA ratings do not enjoy a statistically significant boost in hearing speed compared to those rated less highly by the ABA.[29] It appears as if the concerns expressed by prominent Committee members regarding the ABA rating process have allowed for little influence of the ABA's assessment of nominees in the Committee's proceedings. Of the two experience variables, furthermore, only nominees with previous prosecutorial experience enjoy a statistically significant decrease in hearing delay. The same is not the case for nominees with previous judicial experience. These differing findings regarding previous experience are understandable, however, in that some nominees with previous judicial experience may provide a paper trail that can be used by Judiciary Committee members to call their suitability to hold a circuit court position into question. Less controversial judicial experience, on the other hand, may be used to expedite their nominations to the hearing stage. Nominees with previous prosecutorial experience, however, may only benefit from such experience due to the lessened ability of Committee members to use previous prosecutorial experience to criticize a nominee. In essence, it appears as if previous prosecutorial experience can only help a nomination by expediting the hearing process, whereas previous judicial experience may be used to either help or harm a nomination.

---

[29]The ABA rating variable's lack of statistical significance is consistent, furthermore, whether the two experience variables are included in the model or not.

Hypothesis 4 posited that hearing delay will increase for non-traditional nominations. With respect to nominee gender, female nominees experience more hearing delay when compared to their male counterparts, providing some support for *Hypothesis 4*. All else being equal, women experience a delay increase of 21 days over male nominees. Nominee race, however, does not have a statistically significant impact on hearing delay. Why nominee gender may influence hearing pace, but nominee race does not can only be speculated upon here, but one possible explanation for these findings could be that the political consequences to Committee members of delaying hearings on minority nominees may be greater than delaying hearings on female nominees. Another possibility could be the lessened need to investigate minority nominees in order to discern their judicial temperaments. Very few non-white judges were placed on the courts of appeals by either the Reagan or Bush administrations (see, for example, Goldman et. al. 2001). Although Reagan and Bush appointed fewer women to the circuit courts than did Carter and Clinton, the Republican presidents had an easier time finding qualified, ideologically compatible women nominees than they did with respect to non-white nominees. As a result, it may have been easier for Judiciary Committee members to discern the ideological disposition of non-white nominees in that all but a handful of them were appointed by Democratic presidents. Women nominees, on the other hand, are more likely than non-white nominees to be from either end of the ideological spectrum, possibly requiring more investigation into their background in order to discern their ideological disposition. Regardless, the results from the Hearing Delay Model indicate that while women nominees experience more delay than the "traditional" male nominee, the same is not the case for minority nominees.

The results of the Hearing Delay Model provide strong support for *Hypothesis 5* (that hearing delay will increase in response to institutional change in the Judiciary Committee). Hearing delay increases to a statistically significant extent when leadership changes occur on the Committee. New chairs reorganize the Committee's investigation and hearing procedures, delaying the processing of nominations to the hearing phase. Furthermore, the increasing investigatory role of the Committee over time has a statistically significant impact on lengthening hearing delay. Institutional reforms in the Judiciary Committee have altered the confirmation process and increased the length of delay experienced by nominees before the hearing phase.

The number of pending nominations before the Judiciary Committee as well has a statistically significant effect on increasing hearing delay. As predicted, a heavier workload results in an increase in delay prior to the initiation of hearings. The increased workload creates an institutional burden that is difficult for the Committee to overcome. The importance of the position being filled, however, does not have a statistically significant impact on the length of hearing delay. Nominations to the D.C. Circuit Court of Appeals are not delayed more than nominations to the geographical circuits, indicating that these positions neither require more time for investigation, nor are they delayed for the political advantage of hindering these important nominations. Likewise, nominations to positions that were newly-created due to the passage of an Omnibus Judgeship Act are delayed no longer than those to vacated positions.

Summing up the Modern Confirmation Process

Beginning with Senator Ted Kennedy's term as chair of the Senate Judiciary Committee during the 96th Congress, members of the Senate Judiciary Committee have taken

an increased interest in investigating nominees to the courts of appeals independently from the nominee scrutiny conducted by the White House and the American Bar Association. Subsequently, the amount of delay in the confirmation process has increased during this period of heightened political salience of lower court appointments. The bulk of this delay, furthermore, is attributed to the actions of the Senate Judiciary Committee in the period between nominee referral by the president and the initiation of hearings before the Committee. Hearing delay accounts for not only most of the delay in the confirmation process, but is also largely responsible for the increase in confirmation delay over time. The initiation of confirmation hearings, furthermore, plays a crucial role in the confirmation process in that most unsuccessful nominations fail without the Judiciary Committee ever scheduling hearings to consider the nomination, whereas most nominations that reach the hearing stage are confirmed, typically with little fanfare or subsequent delay.

Unlike most studies in the growing body of literature on confirmation delay, therefore, the focus here has been on delay at the predominant stage in the confirmation process, that which occurs between nominee referral and the initiation of hearings. Hearing delay, furthermore, has been found to be influenced by the political climate of the day, particularly the president's relationship to the chair of the Judiciary Committee. Increased tension between these two central actors to the appointment process results in increased delay in Committee proceedings. Appointments proceed more efficiently, however, when the president and the Committee chair are on friendlier terms. Electoral considerations are relevant as well, in that nominees referred by a newly-elected president should expect more delay regardless of the relative strength of the new president. Hearing delay is not lengthened during election years.

The relative weakness of the president in an election year appears to result in a larger proportion of unsuccessful nominations rather than increased delay. In effect, the president is punished even more severely during election years that can be seen by an analysis of hearing delay. These findings highlight the importance of the political climate to Judiciary Committee proceedings. The changing political climate in which the appointment process is conducted influences how those on the Committee handle the president's judicial nominees.

Hearing delay is also effected by institutional considerations. Changing Committee initiatives and procedures has resulted in a less efficient confirmation process. This inefficiency, furthermore, is compounded when the Committee is burdened with more nominations to consider. These findings suggest that the handling of nominations by the Senate Judiciary Committee will become further bogged down in delay. Delay may be a particular problem in the 107th Congress, with the Committee having to deal with the organizational challenge of restructuring its procedures in the middle of the congressional session due to the sudden change in party control of the Senate. Beyond the 107th Congress, however, hearing delay may increase further, particularly in response to changes in Committee leadership.

Lastly, nominee characteristics have some influence over Committee proceedings, although less consistently than political or institutional factors. Hearings are expedited for nominees with prosecutorial experience, although the same cannot be said for those with judicial experience or those rated as highly qualified by the ABA. Female nominees, on the other hand, experience more delay by the Committee, although the treatment of minority nominees is similar to that of white nominees. These findings indicate that presidents can influence the Committee's procedures through the characteristics of the individuals they

nominate, but only in limited ways. Diversification interests appear to be problematic if a president is also interested in getting his nominees confirmed quickly. Furthermore, the limited impact of various qualification and experience considerations on the Committee's actions provides little benefit to a president who is interested in selecting nominees based on previous experience and merit. This situation was highlighted by Goldman et. al. (2001) who characterized Clinton's judicial nominees as being highly qualified and experienced. The Clinton nominees not only experienced lengthy delays at the hands of the Senate Judiciary Committee, but by the actions of the Senate majority leadership in creating unprecedented delay after the nominee referral stage as well.

As was seen in the previous chapter, nominations to the courts of appeals have become more politically salient to those in the White House, and the increased importance placed on these nominations has resulted in a decrease in nominee success as well as an increase in referral delay. An increase in the salience of appointments to the courts of appeals has concurrently been seen with respect to Senate confirmation procedure. Confirmation rates have declined at the same time as confirmation delay has increased, most importantly due to the actions of those on the Judiciary Committee.

The findings from this chapter provide some ability to predict the fate of judicial nominations under the current administration of George W. Bush. The influence of political considerations to the length of hearing delay indicates that Bush's nominees to the courts of appeals will likely face additional delay prior to the initiation of hearings now that the Judiciary Committee is controlled by Democrats. Particularly during this first year of the Bush administration, all the political and institutional pieces are in place for even longer hearing delays

than were seen during the Clinton administration. The increased hearing delay seen during the first year of an administration, a change in Committee leadership, and a Judiciary Committee controlled by a chair less ideologically compatible to the president all predict that delay should increase further. Given the suddenly altered political climate, in conjunction with the continuing growth in attention placed on appointments to the lower courts, Bush's nominations to the courts of appeals may experience hearing delay of unprecedented length. Hearing delay will unlikely be eased very much, furthermore, should Bush attempt to placate the Judiciary Committee with the selection of diverse nominees with previous experience and good reputations.

CHAPTER 5

OUTSIDE PARTICIPANTS IN THE CONFIRMATION PROCESS

Appointments to positions on the U.S. Courts of Appeals have garnered a growing amount of attention by those in the administration responsible for selecting nominees, as well as by those in the Senate responsible for confirming nominees. This interest in courts of appeals appointments, however, may have implications for how others interact in the appointment process. Although the U.S. Constitution does not provide a formal role for those beyond the president and the Senate, outsiders have developed an interest in, and means to influence, the appointment process. The heightened salience of positions on the courts of appeals may indeed require some involvement from outside actors to provide information to those with more direct selection and confirmation responsibilities.

Outside involvement in the confirmation process in particular was solicited strongly by the Senate Judiciary Committee when Senator Ted Kennedy (D-MA) took over control of the Committee in 1979 (Goldman 1997; O'Brien 1988). This opening of the confirmation process to outside interests coincided with an increased investigatory role for the Senate Judiciary Committee. As those on the Committee developed a desire to investigate nominees independently from that conducted by the administration, the assistance and participation of outsiders was both necessary and welcomed (O'Brien 1988). The growing complexity of the

confirmation process and the resulting increase in delay may pose a restraint on the amount of outsider involvement that will be tolerated in Senate confirmation proceedings, however. A need to gather information on nominees may need to be tempered, therefore, by a need to keep the confirmation process from becoming too burdened by outside involvement.

The focus of this chapter is on the involvement of outside actors in the confirmation process, particularly at the confirmation hearing level. The chapter begins with a discussion of the role of outsiders in confirmation proceedings. Participation by outsiders in the confirmation hearings before the Senate Judiciary Committee provides the most public, formal role provided to outsiders in the appointment process. Therefore, the ability of outsiders to participate in confirmation hearings will be examined in detail. A growing body of literature on interest group testimony at confirmation hearings has found that, even with appointments to the judiciary becoming more high-profile and politically-relevant, interest groups are no more likely to testify in confirmation hearings today than in years past (see, for example, Caldeira, Hojnacki, and Wright 2000; Cohen 1998; Flemming, Rosenstiehl, and Talbert 1997). However, outside actors attempt to influence the hearing process through means other than hearing testimony. Therefore, this chapter will continue with a descriptive analysis of the prevalence of outsider testimony at confirmation hearings compared to that of outsider participation in confirmation hearings through submissions of informative material on the hearing record as a less costly avenue of access to the hearing process. As the confirmation process for courts of appeals judges has become more institutionally complex and political, and more information is required of nominees, the ability of outsiders to participate in the hearing process may be affected by political considerations, institutional concerns, and nominee characteristics. Therefore, the

chapter concludes with an examination of the political, nominee-specific, and institutional considerations that influence the likelihood of outsider participation in confirmation hearings.

The Role of Outsiders in the Confirmation Process

"Outsiders" to the Confirmation Process: Who they are

Several previous studies have examined the role of interest groups in the appointment process (see, for example, Caldeira, Hojnacki, and Wright 2000, Caldeira and Wright 1998, Cohen 1998, Flemming, MacLeod, and Talbert 1998, and Maltese 1995). Furthermore, these earlier studies examined different aspects of organized interest involvement in the appointment process. Maltese (1995) and Caldeira and Wright (1998) focused on the involvement of interest groups in Supreme Court confirmations. Flemming, MacLeod, and Talbert (1998) provide a longitudinal analysis of organized interest involvement in lower court confirmation hearings from 1945 to 1992. Cohen (1998) and Caldeira, Hojnacki, and Wright (2000), furthermore, examined the recent history of interest group involvement in the confirmation process. One similarity among these previous studies, however, is their focus on the role of organized interests in the judicial appointment process. Although organized groups play an important and at times high-profile role in the appointment process, other outside actors participate in the selection and confirmation process as well. Elected officials, judges, lawyers, and other private citizens also participate in the confirmation process. Although focusing on the role of interest groups in the appointment process is useful in that it provides an ability to broaden knowledge of interest group activity in the judicial appointment arena, this narrow focus places a limitation on our understanding of how judicial nominees are confirmed. Since

those unaffiliated with organized interests participate in the confirmation process, their participation should be examined as well.

For the purposes of this chapter, therefore, I examine the role of all outside actors in the confirmation process, rather than limit the analysis to the participation of organized interests. "Outside actors" are defined as any individual or group participant who was not a current member of the presidential administration or the U.S. Congress at the time of the participation.[30] Therefore, "outsiders" include interest groups, bar associations, judges, state government officials, and private citizens, with the exception of the American Bar Association. The ABA has played a quasi-formal role in the appointment process since the Eisenhower administration when the ABA began the practice of assessing and rating all judicial nominees and making these ratings available to the president and the Senate (Goldman 1997, Slotnick 1983). The ABA's unique role in the appointment process is thus better characterized as that of an inside actor.

Outsiders to the Confirmation Process: What They Do

When attempting to influence the legislative process, most lobbying conducted by organized interests occurs at the committee level (Wright 1996). Most of the work done on legislation is done in committee, with committee bills often going unchallenged on the floor, making this stage in the legislative process the most likely arena for organizations to dedicate

---

[30]Members of the House of Representatives routinely participate in a semi-official capacity in the confirmation process by introducing home-state nominees (either in addition to or in lieu of participation by the home-state senators) and are thus more appropriately categorized as quasi-insiders to the appointment process.

their limited resources (Hojnacki and Kimball 1998, Wright 1996). Participation at congressional hearings is a particularly useful tool for those interested in influencing the legislative process, in that hearings "provide a formal opportunity for representatives of organized interests to express their preferences for or against proposed or existing policies" (Wright 1996, 40). Wright (1996) goes on to discuss how interest groups participate in congressional hearings by testifying in person, or submitting written comments to the committee, or both. Testifying in person before the committee is the preferred way for organizations to participate in hearings due to the high visibility and prestige associated with personal involvement in the hearings. However, the ability of outside interests to testify in hearings is limited in that outsiders must be invited to testify by committee members or their staffs.

Confirmation Hearing Testimony

The emphasis on interest group activity in congressional hearings is seen in the literature on group involvement in the judicial confirmation process as well. Although groups attempt to influence confirmation decisions in a number of ways, including joining a coalition, paying for advertisements, or organizing phone calls (Caldeira, Hojnacki, and Wright 2000), most scholarly attention to group activity in the confirmation process has focused on testimony at the confirmation hearings (see, for example, Caldeira, Hojnacki, and Wright 2000; Cohen 1998; Flemming, Rosenstiehl, and Talbert 1997). As with interest group activity in the legislative process more generally, outsider testimony in the hearings provides a public, formal way to attempt to influence judicial confirmations. Hearing testimony provides an additional advantage to outside interests, furthermore, in that this activity is less costly when compared to other

avenues of influence over the confirmation process such as paying for advertisements or organizing phone calls (Caldeira, Hojnacki, and Wright 2000). The opportunity for outsiders to testify at the hearings, however, is costly to those on the Judiciary Committee in that outsider testimony takes up valuable time during confirmation hearings. The opportunity for outside interests to testify at hearings, therefore, may be limited by those on the Committee in order to prevent the hearing process from becoming too dominated by group testimony.

Studies on the prevalence of interest group testimony at the confirmation hearings have found that groups participate in hearings fairly infrequently, especially when the hearings are held for lower court nominations, largely due to the ability of Committee members to prevent groups from participating in this way (Caldeira, Hojnacki, and Wright 2000). Therefore, although hearing testimony is a low cost, public activity that groups may be anxious to engage in, those controlling the ability of groups to do so appear to be reluctant to allow too much involvement by outside interests in the hearing process. Senators rely on outside interests to provide needed information on individual nominees and previous studies have highlighted the ability of groups to influence the confirmation process (see, for example, Caldeira and Wright 1998, Cohen 1998, Segal, Cameron, and Cover 1992). However, the desire of senators to allow groups to testify and provide information on nominees is tempered by time factors that may constrain how much outside involvement is going to be tolerated in the Senate.

A great deal of speculation ensued in light of the role of interest group mobilization in the failure of Robert Bork’s nomination to the U.S. Supreme Court in 1987 that groups would mobilize more frequently in an effort to influence the confirmation process through testimony, advertisements, and lobbying. However, recent studies have concluded that this increase in

group activity has not materialized (Caldeira, Hojnacki, and Wright 2000; Cohen 1998; Flemming, Rosenstiehl, and Talbert 1997). If anything, group participation in hearings through testimony has actually decreased since the early 1980s (Cohen 1998; Flemming, Rosenstiehl, and Talbert 1997). Flemming, Rosenstiehl, and Talbert (1997) conclude that this decrease in group testimony may be due to better screening at earlier stages in the appointment process by the White House, the Justice Department, and the Senate, thus reducing the likelihood of unsatisfactory nominees reaching this late stage. Accordingly, groups will attempt to influence the appointment process at earlier stages and utilize hearing testimony as a last ditch effort rather than a routine activity.

Another explanation for the reduction in group testimony in confirmation hearings is that members of the Judiciary Committee have become less receptive to public involvement in confirmation hearings. After all, groups must be invited to testify, and the decrease in participation may reflect a decrease in how often groups are invited to participate, rather than a decrease in how often groups want to participate. Cohen (1998) finds some support for this conclusion. She found that since the late 1970s, groups participated most frequently during the 96th Congress, when Ted Kennedy (D-MA) chaired the Judiciary Committee. Kennedy made a concerted effort to open the hearings to more outside participation and to invite more groups to participate more often (O'Brien 1988). After Kennedy's brief reign as Committee chair, subsequent chairs have returned to the pre-Kennedy norm of exhibiting more reluctance at allowing their hearings to become "group-dominated forums" out of concern for Committee members' need to ration their time (Flemming, Rosenstiehl, and Talbert 1997).

These previous findings indicate, therefore, that although hearing testimony is a relatively low-cost, public way to participate in one of the formal aspects of the confirmation process, groups appear to be increasingly unlikely to attempt to exert influence in this way. This decrease may be due, furthermore, to a decline in the number of groups willing to expend the resources necessary to engage in even this low-cost activity, a growing reluctance on the part of members of the Judiciary Committee to allow groups the ability to participate directly in hearings, or both.

Submissions on the Hearing Record

Wright's (1996) examination of interest group activity in legislative hearings identifies a second avenue of influence that has previously been ignored in the literature on interest group involvement in confirmation hearings. Namely, outsiders can submit written materials on the hearing record, either in conjunction with or in lieu of witness testimony. This activity allows those outside the legislative process the ability to get information to Judiciary Committee members, but requires less in the way of time and resources on the part of both the outside interest and Committee members. Furthermore, those on the Committee have a greatly lessened ability to limit participation via record submissions when compared to hearing testimony. Once the hearing record has been opened for submissions, any interested party can submit information on the record. Previous research on the role of outside interests in the confirmation hearing process, however, has been silent on this second avenue of access. Although a growing number of studies have found that interest group testimony in confirmation hearings has decreased in recent years, no such investigation has been conducted into trends in

hearing record submissions. A comparison of outsider participation in hearing record submissions and hearing testimony could provide further information on explaining the changing role of outside actors in the confirmation process. For example, if outsiders are less inclined to engage in either strategy, then the decrease in outsider involvement may be because those outside the confirmation process see less utility in participating at the hearing stage. As discussed in the previous chapter, most nominations that proceed to hearings are ultimately confirmed. Possibly, outsiders have decided that the hearing stage occurs too late in the confirmation process to allow for any influence and will accordingly attempt to influence the selection of judges at an earlier stage (Flemming, Rosenstiehl, and Talbert 1997). If outsiders, however, remain likely to submit materials on the hearing record while their participation through hearing testimony becomes less prevalent, the decline in hearing testimony may be due to a growing reluctance on the part of Judiciary Committee members to allow valuable hearing time to be dedicated to outsider testimony.

Two limitations found in the previous studies of outside influence in the confirmation hearing process are rectified in this study. Firstly, the definition of outside involvement in the confirmation hearing process is broadened to include not only representatives of organized interests, but to include the involvement of all interested participants in the hearing process who do not enjoy a formal role in the confirmation process. This broader examination will thus incorporate the involvement of any individual or group who attempts to influence the confirmation hearings. Secondly, outside participation through hearing testimony and hearing record submissions are both examined, rather than focusing solely on hearing testimony. Outsiders can access the hearing process more easily when submitting materials on the record

when compared to hearing testimony. A comparison of trends in these two activities, therefore, will provide a better understanding of when and how outsiders participate in the confirmation process.

Outsider Participation in Confirmation Hearings: Testimony and Record Submissions

Table 5.1 provides information on participation in confirmation hearings for all successful courts of appeals nominations starting with the 96th Congress and ending with the 104th Congress.[31] Table 4.1 includes information on the proportion of confirmation hearings in which any outside actor[32] participated via hearing testimony or the submission of material on the formal hearing record. "Outsider testimony in the hearings" was defined according to whether one or more outside actors participated in person by testifying at the confirmation hearing, regardless of whether the outsider submitted materials on the hearing record or not.[33] "Outsider submissions on the hearing record" was defined according to whether one or more outsiders submitted materials of any sort on the hearing record *in lieu of* hearing testimony.

---

[31]Only successful nominations are examined because most unsuccessful nominations fail without the benefit of confirmation hearings. This examination begins with the 96th Congress because prior to that time hearings were not routinely placed on the public record, and excludes data from the 105th Congress because of the incomplete nature of data gathered from electronic sources for the 105th Congress. Data on outsider involvement in confirmation hearings were collected from the *Hearings before the Committee on the Judiciary, United States Senate: Confirmation Hearings on Federal Appointments*, various years and issues, published by the U.S. Government Printing Office.

[32]"Outside actor" is defined as participation by any person or group, with the exception of current members of the U.S. Congress or the American Bar Association.

[33]As hearing testimony is a more costly activity, outsiders that testify at hearings typically submit materials on the hearing record as well, if only a written copy of their statements made before the Committee.

This definition, therefore, incorporates only the situation when outsiders utilized this as a strategy in itself rather than as a strategy used in conjunction with hearing testimony. Previous studies (Caldeira, Hojnacki, and Wright 2000; Cohen 1998; Flemming, Rosenstiehl, and Talbert 1997) have found that organized groups have participated less frequently via hearing testimony in recent years. However, these findings do not include participation on the part of interested individuals, nor do they account for confirmation participation through less-costly hearing record submissions.

Table 5.1
Outsider Participation in Confirmation Hearings:
Proportion of Hearings with Outsider Testimony and Record Submissions,
Nominations to the U.S. Courts of Appeals, 1979-1996

Congress	Outsider Testimony in Hearings	Outsider Submissions on Record	N
96th	.21	.21	43
97th	.21	.11	19
98th	.25	.17	12
99th	.19	.25	32
100th	.20	.27	15
101st	.20	.30	20
102nd	.06	.12	17
103rd	.06	.44	18
104th	.00	.18	11
Total	.17	.23	187

With respect to outsider testimony in confirmation hearings, the findings in Table 5.1 are in agreement with previous studies of group participation. Outsiders testify in hearings less frequently over time. Whereas others have found that interest group involvement via hearing testimony dropped immediately after Strom Thurmond (R-SC) became chair of the Judiciary Committee, outsider involvement in courts of appeals confirmation hearings did not decrease until the 102nd Congress. Cohen (1998) found that interest group involvement in all confirmation hearings dropped dramatically during Thurmond's years as Committee chair. However, she found that group involvement rose again during the 100th and 101st Congresses to levels nearly as high as was seen during Kennedy's tenure. With respect to courts of appeals nominations alone, the Thurmond years did not see a precipitous drop in outsider participation compared to the Kennedy years. Rather, participation remained fairly consistent up until the 102nd Congress, at which time participation through testimony dropped significantly. Since that time, outsider testimony in the hearings has been very low or even, in the case of the 104th Congress, nonexistent.

A second finding from Table 5.1 is seen through a comparison of outsider testimony in the confirmation hearings with submissions on the hearing record. Although outsiders' use of submissions on the record vary widely from one congressional session to another, there has not been the same substantial decrease in this activity since the 101st Congress as was seen with testimony participation. Through the 98th Congress, outsiders were as likely, if not more so, to testify in hearings than to submit materials on the hearing record instead. In recent years, however, outsiders still submitted materials to be placed on the hearing record as regularly as in previous years, even as they no longer testified as often in the hearings.

The findings reported in Table 5.1 provide some important new information regarding outsider participation in confirmation proceedings. With respect to outside participation in confirmation hearings for nominations to the courts of appeals, there has been a decline in testimony activity, however that decline occurred later than some previous studies indicate. Furthermore, outsiders are still permitted to submit documents on the hearing record, and they continue to utilize this strategy. The lower costs associated with record submissions, on the part of both the outside actors and members of the Judiciary Committee, and the lessened ability of those on the Committee to control hearing record submissions, likely account for the willingness of outsiders to submit materials on the record, even once they became less likely to testify at the hearings. This indicates that outsiders remain interested in influencing the confirmation process on a regular basis, rather than as a last-ditch attempt when earlier efforts fail.

The descriptive analysis suggests that outsiders are increasingly unlikely to testify at confirmation hearings, starting with the 102nd Congress. The increased costs of outsider testimony at hearings is likely responsible for the reluctance of Committee members to allow too much involvement in the hearings by those outside the confirmation process. With more ability to control the participation of outsiders in hearing testimony, this control is utilized in preventing the hearing process from being dominated by outsider testimony.

The relative costs to Committee time of hearing testimony and record submissions are different. Therefore, sometimes outsiders are allowed to testify in the hearings, whereas at other times they must be content with submitting material on the hearing record. Furthermore, although Caldeira, Hojnacki, and Wright (2000) characterize hearing testimony as a low-cost activity, personal participation in the hearings is more costly to the outsiders as well, compared

to record submissions. Due to the relative costs of these two activities, therefore, different factors may account for why outsiders testify at some confirmation hearings, but only submit materials on the hearing record in others. Accordingly, this analysis now turns to an explanation of the factors that influence when outsiders engage in these two activities.

Explaining Outsider Involvement in Confirmation Hearings

Background and Hypotheses

Hearing participation on the part of outside actors requires that the outsiders believe that their participation is worth the effort, in that their information will be useful and influential (Mackenzie 1981). Furthermore, since outsiders can only participate in the confirmation hearings when they are allowed to do so by members of the Judiciary Committee, the presence of outside participation will be affected by whether members of the Committee need and desire such information. When information is needed on a nominee, due to a nominee's lack of previous experience or questionable merit, outsiders may see an opportunity to influence that nominee's chances of confirmation, either positively or negatively. Such a situation may also lead members of the Judiciary Committee to be more willing to allow outsiders to provide much-needed information.

Although hearing testimony and record submissions both provide information to members of the Committee, these two activities do not entail the same costs in terms of time or resources. Hearing testimony requires a cost that is greatly lessened when the participation is in the form of hearing record submissions. Since both activities provide information to members of the Committee, outsiders should be more likely to testify personally at confirmation hearings

when there is a need to do so for reasons beyond basic gathering of information. Therefore, outsiders are expected to testify at the confirmation hearings when information is needed on a nominee, when the political climate dictates that a personal appearance is worthwhile, and when the Committee's workload allows for hearing time to be provided to outsiders. The four hypotheses concerning the likelihood of outsider testimony in confirmation hearings, therefore are:

Hypothesis 1: Outsiders will be more likely to testify at confirmation hearings when the political climate between the president and the Judiciary Committee is hostile than when the relationship is friendly.

Hypothesis 2: Outsiders will be more likely to engage in hearing testimony when the nominee's qualifications or previous experience are weak than when the nominee's qualifications or previous experience are strong.

Hypothesis 3: Outsiders will be more likely to testify at confirmation hearings when workload constraints on the Judiciary Committee are low than when such constraints are high.

Hypothesis 4: Outsiders will be more likely to testify at confirmation hearings when the position being filled is more influential than when the position is less influential.

With respect to outsider submissions on the hearing record, the dynamic between the outside actor and the Senate Judiciary Committee changes in that the Committee is unable to exert as much influence over who submits materials on the record. Therefore, the decision to place materials on the record will be made by the outside actor. Outsiders are expected to be more likely to engage in this activity when their participation may influence the confirmation

process or when the position being filled is of particular salience to them (Mackenzie 1981). Therefore, the three hypotheses concerning the likelihood of outsider submissions on the hearing record are as follows:

Hypothesis 5: Outsider submissions on the hearing record will be more likely when the nominee's qualifications or experience are questionable than when the nominee's record is strong.

Hypothesis 6: Outsiders will be more likely to submit materials on the hearing record when their information is useful due to the Committee's institutional constraints.

Hypothesis 7: Outsiders will be more likely to submit materials on the hearing record when they care about the position being filled.

In order to test these hypotheses, two logistic regression analyses were run assessing the influence of various political, nominee-specific, and institutional factors on dependent variables measuring the likelihood of outsider activity in confirmation hearings via hearing testimony (the Hearing Testimony Model) and submissions on the hearing record (the Hearing Submissions Model). The Hearing Testimony Model will be discussed first, measuring the influence of these factors on the likelihood of outsider testimony in the confirmation hearings.

The Hearing Testimony Model: Dependent Variable and Methodology

To explain some of the factors that influence the likelihood of outsider testimony in confirmation hearings, a logistic regression analysis was conducted measuring the influence of political, nominee-specific, and institutional variables on a dependent variable of outsider

hearing testimony. The ***Hearing Testimony*** dependent variable was coded as a "1" when one or more outsiders were allowed to testify at the confirmation hearings before the Judiciary Committee, and "0" when no outsiders testified. As the dependent variable is dichotomous, a logistic regression analysis was used to gauge the impact of the various independent variables on the dependent variable. Also, as with the previous descriptive analysis, only successful nominations made between the 96th Congress and the 104th Congress were included, leaving a total of 187 cases for analysis.

Independent Variables[34]

A number of independent variables were included in the logistic regression model, measuring political, nominee-specific, and institutional factors. The political variables were aimed at determining whether the likelihood of outside testimony in the confirmation hearings was affected by the political climate between the president and the Senate. Nominee-specific variables were included in order to determine if the background or characteristics of the individual nominee affected whether outsiders were needed to provide further information on the nominee through testimony due to the nominee's background or qualifications. Institutional variables were included to measure any influence of the importance of the position being filled or institutional constraints on the Committee's workload on the likelihood of outsider testimony in the hearings.

---

[34]Unless otherwise specified, the independent variables included in this model are operationalized according to the Table provided in the Appendix A.

Political Variables

Mackenzie (1981, 194) argues that the "shape of the political terrain" affects the opportunity of outside actors to influence the appointment process. With respect to outsider participation in the confirmation hearings, the most crucial relationship governing the political terrain is that between the president and the Senate Judiciary Committee chair. A hostile relationship between these two actors may provide more opportunity for outside involvement as the chair looks to investigate closely nominees selected by his political opponent or wishes to hinder the president's ability to appoint judges easily. Therefore, a ***Presidential Support*** score variable measuring the presidential support of the Judiciary Committee chair during the year of the nomination was incorporated into the Hearing Testimony Model. A low support score, indicating a more hostile political environment between the president and the chair, should increase the likelihood of outsider testimony in the confirmation hearings.

Two presidential cycle variables were also included in the model: ***Election Year*** and ***Honeymoon Year***. Presidents enjoy greater or lesser power and influence during different stages of their administration and these two variables were included to tap changes in presidential power according to these cyclical factors. During a presidential election year, presidents should enjoy less power and influence over the Senate with respect to judicial nominations, with senators of the opposing party possibly looking to stall or harm the president's nominees via outside involvement (Kahn 1995; Maltese 1995; Massaro 1990). Therefore, the election year variable is expected to have a positive influence on the likelihood of outsider testimony. Conversely, presidents typically enjoy more influence during their ***Honeymoon Year*** than later in their term (McCarty and Razaghian 1999). Therefore, there

may be an expected decrease in the likelihood of outsider testimony in hearings during the honeymoon year than during other points in the president's term due to an increase in presidential power. However, as discussed in Chapter 2, new presidents typically usher in new judicial selection agendas and procedures, resulting in a possible increase in the likelihood of outsider involvement during the honeymoon year as members of the Judiciary Committee require more information to be provided by outsiders on the new president's nominees. Therefore, nominations made during a president's honeymoon period are expected to increase the likelihood of outsider testimony in the hearings.

An additional political variable was included in order to gauge the ability of a home-state senator on the Judiciary Committee to guide a nomination through the confirmation process (Cohen 2000). With a home-state ***Insider*** on the Judiciary Committee, other Committee members may be less likely to require additional information on the nominee. Furthermore, due to the collegial deference that may be given to a home-state senator on the Committee, the political climate surrounding a nominee with a home-state ***Insider*** should decrease the likelihood of outsider testimony in the confirmation hearings.

The time period between nominee referral and the initiation of hearings is used to gather needed information on a nominee as well as to delay hearings for political gain. Outsiders may take advantage of the time afforded to them to gather and organize such information (see Hojnacki and Kimball 1998). A ***Prehearing Time*** variable was therefore included in order to determine whether more time prior to the start of hearings both allows and encourages outside testimony in the hearings due to the opportunity that more time affords for information gathering as well as the political hostility associated with increased delay prior to the holding of hearings.

The ***Prehearing Time*** variable, therefore, is expected to have a positive impact on the likelihood of outsider testimony at the hearings.

Nominee-Specific Variables

Outsiders provide information to legislators to assist them in their decision-making process (Wright 1996). With respect to the congressional hearing procedures, hearings are used in order to gather information and communicate between institutions and with the public (Mackenzie 1981). Outsiders may provide useful information to the Senate Judiciary Committee regarding nominee qualifications and abilities. Given the increased expectation that Committee members will scrutinize nominees of questionable qualifications and experience more closely (Mackenzie 1981), outsider testimony in the confirmation hearings may be related to an individual nominee's qualifications and experience.

Therefore, three variables were included in the model to determine the impact of a nominee's merit or previous experience on the likelihood of outside testimony in the hearings. Nominees with previous experience or those who are deemed to be more highly qualified will require less additional information to be provided to members of the Committee prior to confirmation than nominees with less previous experience or whose qualifications are called into question. Therefore, the nominee's ***ABA Rating***, as well as previous ***Judicial Experience*** and ***Prosecutorial Experience*** should affect the likelihood of outsider testimony in the hearings.

When confronted with nominees with weak qualifications, members of the Judiciary Committee will require more information to be provided by outside actors prior to making a

decision regarding confirmation. This situation may be particularly true of nominees with little or no previous judicial or prosecutorial experience, in that such nominees will not have a record to examine, requiring a more in-depth investigation into the nominee's qualifications. Not only will "weak" nominees require more information on the part of members of the Committee, but weak nominees will also provide outside actors with an increased opportunity to influence the confirmation process. Nominees who are clearly well-qualified for the position neither require as much additional information, nor do they allow for as much influence on the part of interested outsiders. Outsiders may, however, be able to make or break a nominee whose qualifications are in question, and when considering where to spend valuable resources on the confirmation process, outsiders are more likely to get involved when they are more likely to be able to make a difference (Mackenzie 1981). Therefore, each of the three nominee-specific variables (***ABA Rating***, ***Judicial Experience***, and ***Prosecutorial Experience***) are all expected to have a negative impact on the likelihood of outsider testimony in the confirmation hearings.

Institutional Variables

The opportunity afforded to outsiders regarding confirmation testimony may be influenced by institutional concerns of those on the Judiciary Committee. The allotting of hearing time to outsider testimony may be limited when the workload of Judiciary Committee members is higher. Therefore, a variable measuring the number of ***Pending Nominations*** before the Judiciary Committee was included in the Hearing Testimony Model. Outsiders are expected to be less likely to testify when there are many nominations pending before the Committee, and more likely to testify when the Committee is less burdened by such a backlog

of nominations. Therefore, a negative relationship is predicted between the number of pending nominations before the Committee and the likelihood of outsider testimony.

Changing procedures on the Judiciary Committee, however, may allow for more participation in the hearings due to an increased need for information to be provided by outsiders rather than Committee members and their staffs. In particular, the reforms associated with a change in the leadership of the Judiciary Committee creates an organizational burden on its members. During these periods of reform, therefore, more participation may be allowed by outside actors to compensate for the instability in the Committee. Therefore, a ***New Chair*** variable was incorporated into the Hearing Testimony Model. During years when leadership of the Committee shifts, outsiders are expected to be more likely to testify before the Committee.

Leadership changes on the Committee in the late 1970's were of particular importance to the hearing process when Ted Kennedy (D-MA) took control of the Committee after James Eastland's (D-MS) long reign as Committee chair ended. The tenure of Senator Ted Kennedy as chair of the Senate Judiciary Committee is regarded by some as providing the most open access to the hearing process by interested outsiders (O'Brien 1988). Kennedy openly solicited input from a wider array of interests than had previously been granted access to the hearing process and instituted reforms aimed at allowing more outside influence. Therefore, a dummy variable was included in the Hearing Testimony Model measuring the impact of the ***Kennedy*** chairmanship to the likelihood of outsider testimony in the hearings. This variable was coded as "1" for nominations made during Kennedy's reign as Committee chair, and "0" otherwise. The expectation is that outsiders were more likely to testify at the confirmation

hearings during the Kennedy chairmanship, indicating that this variable should have a positive impact on the dependent variable.

Two variables were included in the Hearing Testimony Model to determine whether the type of position being filled had any impact on the likelihood of outsider involvement in the hearings through testimony. Mackenzie (1981) argues that outside actors are more likely to get involved in the appointment process when the position being filled is more salient to them. Nominations to the ***DC Circuit*** may be more salient to outside actors due to the policy-making influence of these positions (Banks 1999). Furthermore, Committee members may require more information from outsiders concerning nominations to these positions given the lack of traditional senatorial courtesy norms in the selection process for nominees to the D.C. Circuit (Harris 1953). Therefore, the D.C. Circuit variable is expected to have a positive impact on the likelihood of outsider testimony.

Lastly, a ***New Position*** variable was included in the Hearing Testimony Model to determine if outsider testimony is affected by whether the position being filled was newly created or vacated. Due to the lessened influence of traditional senatorial courtesy norms in the selection of nominees to newly created positions and the importance of these positions to the president's ability to shape the judiciary, outsiders may have an increased opportunity to participate in the hearing process for nominations to new positions (Songer, Sheehan, and Haire 2000). The New Position variable, therefore, is expected to have a positive influence on the likelihood of outsider testimony. Table 5.2 provides a brief description of each independent variable in the Hearing Testimony Model and the expected direction of influence on the likelihood of outsider testimony.

Table 5.2
Independent Variables and Predicted Impact on Outsider Testimony at Hearings for Courts of Appeals Nominations

Variable	Definition	Expected Relationship to Outsider Testimony
Political Variables		
Support Score	The presidential support score of Judiciary Committee chair	Negative
Election Year	Nomination made during an election year	Positive
Honeymoon Year	Nomination made during the first year of a presidential term	Positive
Insider	Presence of a home state senator on the Judiciary Committee	Negative
Prehearing Time	The time (in days) from nominee referral to hearing initiation	Positive
Nominee Variables		
ABA Rating	The nominee's ABA rating	Negative
Judicial Experience	Nominee's previous state or federal judicial experience	Negative
Prosecutorial Experience	Nominee's previous state or federal prosecutorial experience	Negative
Institutional Variables		
Pending Nominations	Number of Nominations pending before the Judiciary Committee	Positive
New Chair	A change in chairmanship of the Committee in year of referral	Positive
Kennedy	Nomination made during Kennedy tenure as Committee chair	Positive
DC Circuit	Nomination for a position on the D.C. Circuit Court of Appeals	Positive
New Position	Nominations for a newly created position	Positive

Results

The results for the logistic regression analysis measuring the impact of the independent variables on the dependent variable of outsider hearing testimony are provided in Table 5.3.[35] The hearing testimony model performs fairly well, with a Chi-Square of 37.357 (p=.0004) and a reduction of error of 23.48%. The findings for the Hearing Testimony Model provide some support for *Hypothesis 1*, indicating that outsiders are more likely to testify at confirmation hearings when the political climate between the president and the Judiciary Committee is more hostile. Both the ***Election Year*** and ***Honeymoon Year*** variables are statistically significant in the predicted positive direction. During presidential ***Election Years***, the lessened power of the president results in a increased opportunity for outsiders to testify at the hearings. During the president's ***Honeymoon Year***, Committee members are more suspicious of the president's nominees and require more information in the hearings.

Table 5.3
Logistic Regression Model for Likelihood of Outsider Testimony in Confirmation Hearings, Courts of Appeals Nominations, 1979-1996

Variables	MLE	Standard Error
Political Variables		
Presidential Support	.0091	.0118
Election Year	2.5496	.7715***
Honeymoon Year	1.3424	.6445*
Insider	.4731	.6182
Prehearing Time	.0145	.0068*

[35]The means of the independent variables are provided in Appendix B.

Variables	MLE	Standard Error
Nominee Variables		
ABA Rating	-.2394	.1547
Judicial Experience	1.0670	.6093*
Prosecutorial Experience	-.6260	.5796
Institutional Variables		
Pending Nominations	-3.6683	1.3671**
New Chair	1.1838	.6454*
Kennedy	.6648	.7862
DC Circuit	2.7712	.7296***
New Position	.6096	.5806
Constant	-3.6683	1.3671**
N = 187 Mean of Dep. Var. = 0.16 Chi-Square = 37.357, df = 13, p = .0004 85.56% Classified Correctly ROE = 23.48%		Significance Levels: (One Tailed Test) * p<.05 ** p<.01 *** p<.001

Neither the ***Insider*** nor the ***Presidential Support*** variables affect the likelihood of outsider testimony at the confirmation hearings to a statistically significant degree. The existence of a home-state senator on the Judiciary Committee does not appear to be enough of an inside advantage to push a nomination through the hearing phase without outsider testimony. Furthermore, the ideological distance between the Committee chair and the president does not influence the likelihood of outsider testimony in the hearings. Confirmation hearing time is limited enough that the relationship of a single home-state senator (even one on the Judiciary

Committee) to the nominee or the connection between the president and a senator (even the Committee chair) is not sufficient to allow for hearing time to be dedicated to outside actors.

The ***Prehearing Time*** variable, however, does have a statistically significant relationship to the likelihood of outsider testimony at the confirmation hearings in the predicted positive direction. The more time that passes between a nominee's referral and the initiation of confirmation hearings, the higher the likelihood that outsiders will testify at the hearings. With more prehearing time, outsiders have more opportunity to gather information on the nominee in order to have an impact on hearing outcomes. Furthermore, as discussed in Chapter 4, a longer prehearing period is associated with an increase in the controversy surrounding a nominee, due in particular to political factors. A longer prehearing period, therefore, not only allows for more time for outsider investigation of the nominee, but indicates that the political climate is more hostile, providing a possible opportunity for outside involvement to influence the outcome of the hearing process.

Of the nominee-specific variables, only the existence of previous ***Judicial Experience*** had a statistically-significant impact on the hearing testimony dependent variable, although the ***Judicial Experience*** variable is only significant at the $p<.05$ level using a one-tailed test in the positive direction (against the prediction). Therefore, this variable should be viewed as having a statistically insignificant impact on the dependent variable. Although previous judicial experience indicates that a nominee is more qualified, the increase in the likelihood of outsider testimony is possibly due to the ability of those opposed to the nominee to use previous judicial decisions against them, negating the positive influence of being more experienced.

Neither the ***ABA Rating*** nor the ***Prosecutorial Experience*** variables achieved a statistically significant relationship to the hearing testimony dependent variable. The lack of a statistical relationship between these merit variables and the testimony dependent variable provides no support for *Hypothesis 2* (that outsiders will be more likely to testify at confirmation hearings when a nominee's qualifications are weak). This indicates that although outsiders are more likely to testify when the political climate is more hostile, time during the hearings is not allocated for the sole purpose of gathering more information on a nominee's qualifications.

Institutional constraints on the Judiciary Committee appear to have an influence on the likelihood of outsider testimony. The burdens imposed on the Committee by an increase in the number of ***Pending Nominations*** before the Committee lessen the likelihood that outsiders will testify. This provides support for *Hypothesis 3*, indicating that outsiders are more likely to testify when Committee workloads are light than when they are heavy.

The institutional influence of a change in the Committee's leadership, however, results in an increase in the likelihood of outsider testimony in the hearings. The institutional instability associated with the new confirmation reforms associated with a ***New Chair*** creates a burden on Committee members when investigating nominees. Outsiders have an opportunity to fill this gap by providing information to the Committee in the hearing process.

The years during ***Kennedy***'s reign as Judiciary Committee chair, however, did not see a statistically significant increase in the likelihood of outsider testimony in the hearings compared to other years. This is likely due to the continued interest in allowing some outsider testimony in the hearings by subsequent Committee chairs. Although Senator Kennedy was the first chair to

acknowledge an interest in opening Committee proceedings up to outside involvement, subsequent chairs have been somewhat interested in hearing from outsiders as well. Therefore, the conclusions reached by O'Brien (1988) and Cohen (1998) that the Kennedy years should be characterized as a unique period in the Committee's hearing procedures with respect to the prevalence of hearing testimony are not substantiated here.

Finally, the results of the Hearing Testimony Model provide some support for *Hypothesis 4* (predicting that outsiders will be more likely to testify when the position being filled is more influential). Hearings for nominations to the ***DC Circuit*** were more likely to see outsider testimony than nominations to the geographical circuits. The increased salience of these appointments due to the nature of the D.C. Circuit's work on the courts of appeals allows for more outside participation in the hearings. ***New Positions*** created by the passage of a Judgeship Act, however, do not see an increase in the likelihood of outsider testimony. These positions are not sufficiently different from vacated positions in terms of institutional importance to require the allocation of valuable hearing time to outsiders on that basis alone.

The most important factors affecting the likelihood of outsider testimony in the confirmation hearings, therefore, appear to be political consideration, the heightened importance of positions on the D.C. circuit, and institutional burdens on Committee members. The qualifications of the nominee, however, are not significant indicators of whether outsiders will testify at the hearings or not. This finding is interesting in that the existence of outsider testimony at the hearings is not related to the qualifications or experience of the nominee who is the subject of this outside involvement. It appears, therefore, as if outsider testimony is used for something other than the transmission of information to Committee members about the nominee

herself. Rather, outsider testimony is used when the political climate between the president and the Senate Judiciary Committee is more hostile, when the stakes are higher regarding the position being filled, and when those on the Committee have the luxury of dedicating hearing time to outsiders without over-burdening the hearing process.

The Hearing Submissions Model: Dependent Variable and Methodology

Outsiders provide information to members of the Judiciary Committee through both hearing testimony and the submission of information on the hearing record. As the results from the Hearing Record Model indicate, however, outsider participation in the hearings through testimony is dictated by political climate, the importance of the position being filled, and the workload constraints of those on the Committee. The costliness of outsider testimony to both the outsiders and, particularly, those on the Committee prevents this mode of participation from being used as a means to provide information on nominees during less politically-hostile periods or when the position being filled is less influential. Submitting material on the hearings record, however, also allows for the transmission of information to the Committee, but is much less costly to both the outsider and Committee members than formal testimony. Therefore, this activity will be used as a means to forward information on nominees to Committee members, regardless of the political climate surrounding the confirmation. Furthermore, Committee workload considerations are irrelevant to the likelihood of outsider submissions on the hearing record, due to the inability of those on the Committee to exert much control over when outsiders choose to engage in this activity. The lack of control over record submissions may cause the prevalence of hearing submissions to be driven by the expectation of outsiders that

their participation in this capacity will have an influence on the hearing outcome and their desire to influence the confirmation outcome of a particular nomination.

For this analysis, the ***Hearing Submissions*** dependent variable was operationalized as a dichotomous variable, coded as a "1" when one or more outsiders submitted any document on the hearing record in lieu of hearing testimony and "0" when no outsiders submitted materials in lieu of testimony. As with the previous analysis of Hearing Testimony, the model included all successful nominations made to the U.S. Courts of Appeals between the 96th Congress and the 104th Congress, leaving a total of 187 cases for the analysis.

Independent Variables[36]

Some of the same political, nominee-specific, and institutional variables that were included in the Hearing Testimony Model were included in the Hearing Submissions Model as well. However, given the different nature of this form of participation, the models are not identical.

Political Variables

The likelihood of hearing record submissions is expected to be less related to political maneuvering than was the likelihood of hearing testimony, due to the inability of those on the Committee to control record submissions. Therefore, many of the political variables that were included in the Hearing Testimony Model are excluded here for theoretical reasons. Certain

[36]Unless otherwise specified, all the independent variables included in this model were operationalized according to the table provided in Appendix A.

aspects of the political climate between the president and the Senate Judiciary Committee, however, may have an effect on the ability of outsiders to influence the confirmation process. For example, outsiders may think that their ability to influence the confirmation process is improved when Committee members require more information on nominees in the early stages of a presidential administration. The uncertainty associated with a new administration's approach to the judicial selection process may motivate outside actors to participate in the hearing process. Therefore, outsiders may be more inclined to submit materials on the hearing record during the president's ***Honeymoon Period*** than at other times in the presidential term.

The opposite situation may occur, however, when the nominee has a home-state senator sitting on the Judiciary Committee. The likelihood of outsider involvement having an influence over the confirmation hearings of a nominee is lessened with a home-state ***Insider*** on the Committee due to the collegial deference given to the insider and his home-state nominee by others on the Judiciary Committee. Therefore, with the lessened expectation of influence over these nominations, outsiders are expected to be less likely to submit materials on the hearing record when a home-state insider sits on the Judiciary Committee.

Lastly, the length of time prior to the holding of hearings is expected to bear a relationship to record submissions in that a longer pre-hearing delay period allows for the gathering of information on the nominee. Outsiders are likely to take advantage of the opportunity to conduct a thorough check on a nominee's background and subsequently share this information with those on the Committee. Therefore, the ***Prehearing Time*** variable is expected to have a positive impact on the likelihood of record submissions.

Nominee-Specific Variables

Outsider participation via submissions on the hearing record is expected to be utilized to transmit information on a nominee to members of the Committee. Therefore, outsiders are predicted to be more likely to utilize this strategy when a nominee's background or qualifications are questionable. The three nominee-specific variables included in the Hearing Delay Model, ***ABA Rating***, previous ***Judicial Experience***, and previous ***Prosecutorial Experience***, are also included here. Nominee's with higher ABA ratings are less questionable than less highly-rated nominees and are therefore expected to elicit less outsider activity than nominees with lower ratings. Likewise, outsiders are expected to submit information on the hearing record less often for nominees with previous experience than for those without experience. Each of these three variables, therefore, is expected to have a negative influence on the likelihood of record submissions by outsiders.

Institutional Variables

The institutional reforms associated with a change in the leadership of the Senate Judiciary Committee may influence outsiders to participate in the confirmation process. During periods of reform, the institutional instability of the Committee may be a motivating factor regarding hearing participation. Therefore, outsiders may be more inclined to submit materials on the hearing record when a ***Chair Shift*** occurs on the Judiciary Committee.

Outsiders are expected to be more interested in influencing the confirmation hearings for nominations to more influential positions on the U.S. Courts of Appeals than to less influential positions. Therefore, record submissions are expected to be more likely when

hearings are being held for positions on the ***DC Circuit*** or for ***New Positions***. Both of these variables, therefore, are expected to have a positive impact on the likelihood of record submissions by outsiders. Table 5.4 provides a brief description of each independent variable in the model and the expected direction of influence on the likelihood of outsider submissions on the hearing record.

Table 5.4
Independent Variables and Predicted Impact on Likelihood of Outsider Record Submissions

Variables	Definition	Expected Relationship to Record Submissions
Political Variables		
Honeymoon Year	Nomination made during the first year of presidential term	Positive
Insider	Presence of a home-state senator on the Committee	Negative
Prehearing Time	The time (in days) from nominee referral to hearing	Positive
Nominee Variables		
ABA Rating	The nominee's ABA rating	Negative
Judicial Experience	Previous experience at state or federal level	Negative
Prosecutorial Experience	Previous experience at state or federal level	Negative
Institutional Variables		
Chair Shift	A change in chairmanship of the Judiciary Committee	Positive
DC Circuit	Nomination for a position on DC Circuit Court of Appeals	Positive
New Position	Nomination to a newly created position	Positive

Results

The logistic regression results for the Hearing Submissions Model are reported in Table 5.5. The model performs poorly compared to the Hearing Testimony Model, with a Chi-Square of 17.544 and a reduction of error of 10.44%. Furthermore, only two variables in the model achieve a level of statistical significance in the predicted direction. The length of time prior to the initiation of hearings has the effect of increasing the likelihood of outsider submissions on the hearing record, due to the opportunity to gather information afforded to outsiders by a longer period of hearing delay. Furthermore, nominations made during the president's honeymoon year are more likely to see outsider record submissions during confirmation hearings than those made during other stages in the president's term. With changing judicial selection initiatives brought about with a new administration, more information is needed, providing more opportunity for outsiders to influence the confirmation process, providing some support for *Hypothesis 6* (predicting that outsiders will be more likely to submit materials on the hearing record when such participation would be more useful).

Table 5.5
Logistic Regression Model for Likelihood of Outsider Submissions on the Hearing Record, Courts of Appeals Nominations, 1979-1996

Variable	**MLE**	**Standard Error**
Political Variables		
Chair Shift	-.4140	.4242
Honeymoon Year	.9896	.4351*
Insider	.6233	.4392

Variable	MLE	Standard Error
Prehearing Time	.0137	.0048**
Nominee Variables		
ABA Rating	-.1545	.1250
Judicial Experience	.5005	.4365
Prosecutorial Experience	.0239	.4195
Institutional Variables		
DC Circuit	1.0420	.6366
New Position	.2438	.4069
Constant	-1.9570	.7327
N = 187 Mean of Dep. Var. 0.23 Chi-Square = 17.544, df = 9, p = .0409 77.01% Classified Correctly ROE = 10.44%		Significance Levels: (One-Tailed Test) * p<.05 ** p<.01 *** p<.001

None of the other variables in the Record Submissions Model achieve statistical significance. With respect to *Hypothesis 5* listed previously (that outsider submissions on the hearing record will be more likely when a nominee's qualifications or experience are weak), there is no support from the results reported in Table 5.5. None of the variables gauging nominee qualifications or experience have a statistically significant impact on the likelihood of record submissions. Likewise, the importance of the position being filled is not related to the prevalence of submissions, providing no support for *Hypothesis 7* (that outsiders will be more likely to submit materials on the hearing record for more salient nominations).

The poorer performance of the Record Submissions Model, and the statistical insignificance of most of the variables in the model, indicate that the decision by outsiders to place materials on the hearing record is not affected by the qualifications of the individual nominee, the importance of the position being filled, or for the most part, by the political climate surrounding the appointment process. Outsiders place materials on the hearing record when they are afforded the opportunity to do so by a lengthy delay in the hearing process, and in the early stages of an administration when changing nominee selection procedures may require more information on nominees.

Placing materials on the hearing record is a low-cost activity, both on the part of the outsiders themselves as well as on the part of members of the Judiciary Committee. Therefore, engaging in this very low-cost activity appears to be influenced by factors more subtle than obvious concerns over a nominee's qualifications, the harsher political climate associated with a change in control of the Judiciary Committee, or the importance of the position being filled. Possibly, outsiders may engage in this low-cost activity in order to provide some personal insight into a nominee, either in support of or opposition to the nomination. Such minor information would be unworthy of the costs associated with testifying at the hearings, but is worth sending a letter or newspaper article to the Committee. Committee members, furthermore, can regard or disregard such information at will, and entail no costs in time or resources by allowing such materials to be placed on the hearing record. The regularity with which outsiders place materials on the record may as well be influenced by the broader definition of "outsiders" used here (unlike previous studies that only examine the role of organized interests in confirmation hearings). An interested citizen, former colleague of the

nominee, or government official, may not have the resources or the invitation to testify at the confirmation hearings, but are able to send a letter or statement to the Judiciary Committee. Such activity by interested individuals may be less influenced by traditional political or nominee merit considerations, than by more idiosyncratic personal relationships between the individual and the nominee.

Summing up Outsider Involvement in Confirmation Hearings

Outsiders participate in the confirmation hearings in a formal, public attempt to influence the confirmation outcome. While testifying at confirmation hearings may be a preferred activity due to the prestige and visibility associated with such activity, hearing testimony is more costly than simply submitting materials on the hearing record. Those on the Committee, furthermore, have the ability to limit personal involvement in the hearings. The regularity of outsider testimony in confirmation hearings has declined, although this decline has only occurred in the last decade. Furthermore, the likelihood of outsider testimony in the hearings is not associated with the qualifications of the individual nominee, but rather is driven by the political climate surrounding the appointment process, the importance of the position being filled, and the workload of those on the Committee. The lack of outsider testimony in the hearings since the 102nd Congress is likely due to two factors: the increasing proportion of failed nominations during the Clinton administration (see Chapter 2) and the increasing backlog of nominations pending before the Committee due to Committee inactivity (see Chapter 4). With fewer nominations proceeding to the hearing stage, and the increasing numbers of nominations waiting

for hearings due to Committee inactivity, hearing time is at a premium, likely making Committee members less receptive to dedicating precious hearing time to outsiders.

The less-costly use of record submissions, on the other hand, has continued, even with the decline in hearing testimony. Political factors and nominee characteristics, however, appear to have little influence on when outsiders choose to submit materials on the record, indicating that this activity is used to relay information on a less systematic basis. Outsiders can afford to submit materials on the record whenever they choose, whether the nomination under consideration is troubled due to nominee background or political considerations.

A continuing examination of outsider involvement in both selection and confirmation procedures will be of particular importance in the years to come. President George W. Bush is reportedly taking a strong, early interest in positions on the judiciary, and Democrats in the Senate are readying themselves to do battle over some of these nominees (see, for example, Lewis 2001b). Not only will the treatment of these nominees with respect to confirmation rates and delay be important to watch, but the role played by outside actors will warrant further attention. Will the political maneuvering occurring due to a change in partisan control of the Judiciary Committee result in an increased opportunity for outside testimony in the confirmation hearings, or will the recent trend of no outsider testimony continue? Will outsiders continue to attempt to influence the confirmation process by placing materials on the hearing record, or will even this extremely low-cost activity decline in regularity as outsiders are afforded even less influence over the increasingly political confirmation process? Citizen participation in government, including the selection of judges, furthers democratic ideals and increase legitimacy

in government (Sheldon and Lovrich 1991). As such, the role of outside actors in the confirmation process is of on-going concern and interest.

Lastly, the unique role the American Bar Association has played in the selection and confirmation process must be followed. As President Bush's statements concerning the role of the ABA make clear, he has decided to end the long-standing "quasi-insider" role of the ABA in the selection process. This, taken in conjunction with Judiciary Committee Chair Hatch's criticisms of the ABA's role and his attempts to divorce ABA ratings from the Committee's confirmation process, indicate that the ABA's half-century-long privileged position in the judicial appointment process may be over, relegating that organization to outsider status along with any other interested group or individual. The influential void left by the ousting of the ABA may be filled by another interested outsider, however. Members and supporters of the conservative Federalist Society for Law and Public Policy Studies retain important positions in the Office of the White House Counsel and in other executive branch positions (including, for example, Attorney General John Ashcroft and Solicitor General-designate Ted Olson) (Edsall 2001; Lewis 2001a). The Federalist Society's ability to enjoy the unique status in the Bush administration that the ABA enjoyed in previous administrations deserves continuing attention as well.

CHAPTER 6

THE CURRENT AND FUTURE STATE OF THE APPOINTMENT PROCESS

The Current State of the Appointment Process

The appointment process for U.S. Courts of Appeals judges has become more complex since the late 1970's, when President Carter and Senator Kennedy instituted reforms that revolutionized how judges are nominated and confirmed. These efforts have drawn more attention to appeals court appointments, brought more people into the process to investigate nominees, and have increased the political importance of these positions. As a result, judicial appointments have become bogged down in decreasing success rates and increasing delay, allowing appointments to the courts of appeals to become used as pawns in the political maneuvering between the president and the Senate Judiciary Committee.

The Influence of Political, Nominee-Specific, and Institutional Factors on Judicial Appointments

After a careful analysis of the findings addressed in the previous chapters, the appointment process for positions on the U.S. Courts of Appeals can accurately be referred to as a political process from beginning to end. However, it can also be characterized as an institutional process, given the role of various institutional concerns and constraints throughout

the various appointment stages. The appointment of appeals court judges, however, would be least accurately characterized as a nominee-specific process from beginning to end, given the inconsistent influence of nominee considerations to the various stages in the appointment of circuit court judges.

Delay in the referral process, delay in the initiation of hearings before the Judiciary Committee, and the likelihood of outsider testimony in the confirmation hearings are all influenced by political considerations. The relationship between the president and the leadership of the Senate Judiciary Committee influences the actions of both the president and the Committee, with delay at both the nominee referral and confirmation hearing stages lengthened when the relationship between the president and the Committee chair is more hostile. Many have argued that the existence of divided party control between the president and the Senate is of primary importance to various aspects of the appointment process (see, for example, Cameron, Cover, and Segal 1990; Maltese 1995; Segal 1987; and Smith, Stuckey, and Winkle 1998). However, the findings from this study indicate that the relationship between the president and the Judiciary Committee leadership is highly influential to all stages of the appointment process. It is the Senate Judiciary Committee that controls the confirmation process in the Senate, and the relationship between the person who leads the Committee and the president drives appointment politics. Although the Judiciary Committee acts as the gatekeeper to the confirmation process, the authority of the Committee chair may be threatened, however, if the leadership of the full Senate continues to engage in unprecedented delay before allowing a final confirmation vote to occur (Goldman 1998).

Electoral considerations also have an influence on all stages of the appointment process. The uncertainty of a pending presidential election, for example, results in a significant decrease in referral delay as presidents attempt to fill as many vacancies as possible before the election. Nominees referred during election years, however, are more likely to face outsider testimony in the confirmation hearings prior to confirmation. The benefits of a presidential honeymoon period, however, appear to be largely absent with respect to judicial appointments. The institutional burden on a new administration in organizing it nominee selection apparatus negates the boost in power associated with this period in a president's term (Buchanan 1990; MacKenzie 1981; Pfiffner 1987). Presidents are unable to take advantage of their heightened power by referring nominees quickly in the early stages of their term. The honeymoon period, furthermore, is characterized by increased delay prior to the holding of hearings before the Judiciary Committee, as well as the increased likelihood of outsider testimony in the hearings. Those in control of the Judiciary Committee, as well as interested outsiders, appear to be suspicious of a new administration's nominees regardless of partisan considerations. A new administration brings with it changes in nominee selection criteria and procedures, resulting in an increase in nominee investigation and confirmation delay.

Institutional considerations have an influence over aspects of the appointment process as well. With respect to judicial nominations, the institutional burdens imposed by the growing interest in centralizing the nominee selection process within the administration appears to have come to a head during the Clinton administration, where referral delay grew significantly, independent from the political climate at the time. Organizational burdens created by the need

of those in the administration to consider and investigate all potential nominees carefully has seriously limited the president's ability to nominate judges efficiently.

Institutional constraints also influence Senate Judiciary Committee procedures, with increased attempts by members of the Senate Judiciary Committee over time to take an active, serious role in nominee investigation serving to increase hearing delay irrespective of the political relationship between the president and the Committee leadership. Furthermore, an increase in the workload before the Committee serves to lengthen hearing delay and as well decreases the likelihood of outsider testimony in the confirmation hearings. Lastly, the institutional importance of positions on the Court of Appeals for the District of Columbia have a limited influence on the appointment process by increasing the likelihood of outsider testimony in confirmation hearings, while nominations to newly created positions require more time prior to referral.

Whereas political and institutional considerations influence all stages of the appointment process, the characteristics and background of individual nominees have a less consistent effect on the various stages in the appointment process. Nominees rated more highly qualified by the American Bar Association require less time for investigation prior to referral by the president, but this benefit does not translate into speedier confirmations in the Senate or a reduced likelihood of outsider testimony in confirmation hearings. President Bush's reported dismantling of the ABA's role in the nominee selection process may eliminate even this limited influence on the appointment process in the future (Lewis 2001a).

Many recent studies have raised concerns regarding the treatment of "non-traditional" female and minority nominees in the appointment process, particularly respecting confirmation delay (Hartley 2001; Manning 2001; The Century Foundation 2000). With respect to the

courts of appeals nominations examined in this study, however, the influence of nominee race and gender was less obvious. Overall, minority candidates were treated no differently than their white counterparts at any stage in the appointment process. Female nominees did experience more delay in the confirmation hearing process than did male nominees, but were treated similarly to male candidates at other stages in the appointment process.

The behavior of the various actors involved in the appointment process, therefore, appears to be most consistently influenced by political and institutional considerations. Electoral considerations and political hostility between the president and the Senate Judiciary Committee leadership serve to increase delay in both the nomination and confirmation of judges and allow for more outside participation in confirmation hearings. Institutional considerations matter as well in that various stages in the appointment process are affected by the nature of the position being filled, and institutional changes in how those responsible for staffing the judiciary conduct their business. The influence of nominee characteristics appears to be the least consistent throughout the appointment process. Nominees experience referral and hearing delay, as well as outsider testimony, due less to their background and characteristics than the political climate of the day and the institutional constraints surrounding their appointment. Counter to Hamilton's assertion that the appointment process established in the U.S. Constitution would provide a "judicious choice of men for filling the offices of the Union" (*The Federalist* No. 76), judicial appointments in the modern era appear to be driven by political and institutional concerns.

Appointment Delay and the Staffing of the U.S. Courts of Appeals

In *The Federalist* No. 77, Hamilton contended that the judicial appointment process was best suited to avoid "infinite delays and embarrassments." However, the nature of the modern appointment process contradicts Hamilton's assertion. The delay associated with the various stages in the appointment process (referral delay, hearing delay, confirmation vote delay) has greatly lengthened the period of time required to fill vacancies on the U.S. Courts of Appeals. Table 6.1 provides information on the time required to complete the appointment process for positions on the courts of appeals. Throughout the time period of this study, vacancies have required an average of 437 days to fill. However, the clear trend since the late 1970s is an increase in the length of appointment delay. Vacancies that arose in the 95th Congress took an average of 332 days to fill. By the 104th Congress, however, vacancies required more than 621 days, on average, to be successfully filled.

Table 6.1
Appointment Delay - U.S. Courts of Appeals Vacancies, 1977-1998

Congress/Year	Mean Days to Fill Vacancy	Std. Dev.	N
95th Congress	**332.00**	**172.39**	**45**
1977	*218.83*	*153.74*	*6*
1978	*349.41*	*170.20*	*39*
96th Congress	**368.82**	**232.83**	**11**
1979	*353.25*	*245.85*	*8*
1980	*410.33*	*236.53*	*3*
97th Congress	**257.00**	**192.79**	**18**
1981	*261.64*	*176.29*	*11*
1982	*249.71*	*231.11*	*7*

Congress/Year	Mean Days to Fill Vacancy	Std. Dev.	N
98th Congress	**397.38**	**296.59**	**32**
1983	*158.50*	*50.20*	*2*
1984	*413.30*	*299.58*	*30*
99th Congress	**331.06**	**289.03**	**18**
1985	*336.00*	*202.29*	*6*
1986	*328.58*	*332.39*	*12*
100th Congress	**484.58**	**307.28**	**12**
1987	*406.29*	*323.60*	*7*
1988	*594.20*	*277.20*	*5*
101st Congress	**601.31**	**496.99**	**26**
1989	*546.60*	*476.11*	*10*
1990	*635.50*	*521.94*	*16*
102nd Congress	**665.30**	**440.81**	**20**
1991	*708.00*	*455.42*	*11*
1992	*613.11*	*443.47*	*9*
103rd Congress	**562.93**	**448.95**	**15**
1993	*358.33*	*148.27*	*6*
1994	*699.33*	*535.40*	*9*
104th Congress	**621.80**	**291.25**	**10**
1995	*606.75*	*400.09*	*4*
1996	*631.83*	*237.36*	*6*
105th Congress	**323.00**	**165.03**	**7**
1997	*436.00*	*98.98*	*4*
1998	*172.33*	*86.12*	*3*
Total	***437.69***	***339.87***	***219***

The findings reported in Table 6.1 may provide cause for optimism in that appointment delay during the 105th Congress (at 323 days) is shorter than at any time since the 97th Congress. This result, however, is misleading in that only 7 vacancies that arose during the 105th Congress had been filled by the close of that congressional session. As vacancies originating during the 105th Congress continued to languish into the 106th Congress and

beyond, the length of appointment delay for vacancies from the 105th Congress will increase dramatically.

The increase in appointment delay, furthermore, is attributable to institutional changes within the nomination and confirmation processes, and an increasing political hostility between the president and the Senate Judiciary Committee leadership. Appointment delay, however, is largely unrelated to nominee characteristics. The nomination of highly qualified nominees with previous experience does little to expedite the appointment process. This conclusion is strongly supported by the recent work of Goldman, et. al. (2001), who find that Clinton's judicial nominees were ideologically moderate, highly qualified, and very diverse. Even with such qualified and noncontroversial nominees, however, appointment delay increased dramatically during the Clinton administration. As Nixon and Goss (2000, 19) recently stated, "[t]he Constitution provides opportunity and incentive for the president and Senate to conflict over judicial appointments at all levels." This is certainly true of appointments to the U.S. Courts of Appeals, regardless of the qualifications and background of those placed on the bench.

The "modern" appointment process was ushered in when those responsible for nominating and confirming federal judges began to alter appointment procedures to allow for more control over the selection of judges. Although this has increased the status and visibility of positions on the courts of appeals, it has also allowed them to be used for political gain. This, furthermore, has had implications for the ability of those responsible for the appointment process to staff the courts of appeals sufficiently. The increasing delay in the appointment process for federal judges prompted Chief Justice William Rehnquist to characterize the situation as a crisis (Rehnquist 1998). The inability of the president and the Senate to appoint

judges expediently has ramifications for the judiciary's ability to handle its caseload, especially with the compounding influence of the increasing caseload of the judiciary at all levels (Goldman 1998). Increasing workload coinciding with inadequate staffing creates a crisis for the institution (Smith, Stuckey, and Winkle 1998).

The Appointment Crisis and the 106th Congress

In his 1999 *Report on the State of the Federal Judiciary*, Senate Judiciary Committee chair Orrin Hatch (R-UT) noted improvements in the handling of judicial nominees by the Committee, stating that action by the Committee in the First Session of the 106th Congress had decreased the number of judicial vacancies to 6.6%, "the second lowest vacancy level since the expansion of the Judiciary in 1990" (Hatch 1999, 2). This optimism, however, appears to be premature at best, and misleading at worst. Although the percentage of vacant positions on the federal judiciary may have declined early in the 106th Congress, the actual number of vacancies on the courts of appeals increased between the 105th and 106th Congresses. At the end of the 105th Congress, 14 vacancies remained to the courts of appeals. By the end of the 106th Congress, however, the number of vacant appeals court positions had jumped to 23.[37]

A closer examination of courts of appeals appointments in the 106th Congress is illustrative here as well. In the 106th Congress, President Clinton had referred 33 nominations

---

[37]Data on vacancies in the 105th Congress and nomination statistics from the 106th Congress were gathered from the official web page of the United States Senate Committee on the Judiciary at www.senate.gov/~judiciary/nominate.htm.

to appeals court vacancies to the Senate, leaving 7 vacancies on the circuit courts without nominations. Of the 33 nominations, Clinton's nomination success rate was an abysmal 45% in the 106th Congress, with only 15 nominees successfully confirmed by the full Senate (see Table 6.2). This is a dramatic drop from Clinton's success rate of 68% in the 105th Congress (see Table 2.4).

Table 6.2
Status of Nominations Made in the 106th Congress, U.S. Courts of Appeals

Nomination Status	N	Proportion of 106th Nominees
Confirmed by Senate	15	.45
Recess Appointment	1	.03
Nomination Withdrawn	1	.03
Returned pending hearing	14	.42
Returned pending report out of Committee	2	.06
Total	33	.99

Furthermore, one of Clinton's nominees (Roger L. Gregory to the U.S. Court of Appeals for the Fourth Circuit) was relegated to a recess appointment after Judiciary Committee inaction on the nomination. Another nominee (Barbara Durham to the U.S. Court of Appeals for the Ninth Circuit) was withdrawn after Committee inaction. Of the 16 remaining nominations, 14 were returned to the president awaiting confirmation hearings, while the last two were returned after hearings, but before a Committee report to the full Senate.

Therefore, the status of nominations made to the courts of appeals in the 106th Congress provides little evidence that the trend in appointment politics changed at all since the close of the 105th Congress. The Clinton administration was unable to forward nominations to seven vacancies on the circuit courts. Of the nominations that were forwarded, most failed to be confirmed by the full Senate. Furthermore, Senate inaction in the 106th Congress was completely attributable to Judiciary Committee inaction in failing to hold hearings on nominees or, in two cases, failing to report nominations out of Committee.

The tension between the president and the Judiciary Committee regarding judicial appointments appears to have only intensified in the 106th Congress. Although reasons for this can only be speculated upon here, the anticipation of the 2000 presidential election and the continued political hostility between Clinton and Hatch is likely responsible. Rather than provide grounds for optimism, a cursory analysis of judicial appointments in the 106th Congress indicates that the gridlock and lack of successful nominations not only continued, but intensified.

The Future of the Appointment Process

The findings in this study provide a number of avenues for prediction about the future of the appointment process for courts of appeals judges in the 107th Congress and beyond. With the new administration of George W. Bush, new judicial selection initiatives are being put into place. Already, the indication is that President Bush has altered the nomination process by reportedly removing the American Bar Association's rating system from consideration, and is instead lending his ear to the Federalist Society for advice on judicial appointments (Edsall 2001, Lewis 2001a). How the judicial selection apparatus within the White House is further

altered remains to be seen, but Bush's early interest in appointing judges to all levels of the judiciary will likely result in continued efforts to maintain control over the nomination of judges with nomination procedures centralized within the White House.

The ability of Bush to appoint judges to the courts of appeals, however, took a dramatic turn with the shift in party control of the Senate. With a Judiciary Committee now controlled by Democrats, the care with which Bush will have to conduct his selection of nominees should further increase the amount of delay seen in the nomination process. Furthermore, the treatment of his nominees before the Senate Judiciary Committee is likely to be much less friendly due to the change in party control. According to the treatment of nominees in previous administrations, Bush's nominees should expect to face lengthy delays in the Senate, particularly prior to the initiation of hearings by the Judiciary Committee. The institutional confusion created by a change in party control of the Senate in the middle of a congressional session, furthermore, will likely amplify the delay even more, at least during the First Session of the 107th Congress. Once hearings are initiated, Bush's nominees may expect to be confronted with hearing testimony by outside actors due to a change in Committee leadership and a new presidential administration. However, the growing backlog of vacancies waiting to be filled may prevent outsider participation in hearings due to Committee workload considerations.

After Committee hearings, some of Bush's nominees should expect to languish further in the Committee waiting to be reported to the full Senate. Those that do reach the full Senate, however, may experience further delay prior to the holding of a confirmation vote, dictated by whether the new Democratic leadership of the full Senate continues the trend of delay prior to

final confirmation vote. All of the delay expected in the confirmation process will likely result in a continuing of the trend of decreasing nomination success. President Bush's efforts to ameliorate controversy surrounding judicial appointments by nominating well-qualified and diverse candidates will unlikely be effective. Clinton's nomination of well-qualified, ideologically moderate judges could not overcome the political and institutional influences in the appointment process (Goldman et. al. 2001). The characteristics of Bush's nominees will likely be of similar influence to the behavior of others in the appointment process. This situation may result in a continued increase in the number of vacancies waiting to be filled on the courts of appeals in future years, continuing the problems created by the appointment crisis of recent years.

The findings of this study portend problems for the staffing and administration of the courts of appeals well beyond the current administration and today's political climate, however. The growing influence of the policy-making role of the courts of appeals makes appointments to these positions more politically salient and useful for political gain. These positions are now worth fighting over, creating a "battlefield" that may not rival the political importance of appointments to the U.S. Supreme Court, but is political nonetheless. As a result, the institutions responsible for staffing the courts of appeals have changed to reflect a growing need to investigate and scrutinize nominees with an independence from other appointment actors. These institutional reforms have affected the appointment process by serving to increase delay at all stages along the way, regardless of the political climate of the day. Even when relations between the president and the chair of the Senate Judiciary Committee are more positive, therefore, appointment delay will unlikely return to that of the pre-reform era. The current

situation regarding appointments to the courts of appeals has its origins in reforms initiated in the late 1970's. Therefore, only a serious reassessment of the institutional and political approaches taken by those responsible for staffing the U.S. Courts of Appeals will likely divert the appointment process from the path it has taken over the last 25 years.

REFERENCES

Abraham, Henry J. 1999. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*. New and revised edition. Lanham, MA: Rowman & Littlefield Publishers, Inc.

Allison, Garland W. 1996. "Delay in Senate Confirmation of Federal Judicial Nominees." *Judicature* 80:8-15.

Associate Press. 2001. "Bush Making 1st Judicial Picks." *The New York Times*. http://www.nytimes.com/aponline/national/AP-Bush-Judges.html (9 May 2001)

Banks, Christopher P. 1999. *Judicial Politics in the D.C. Circuit Court*. Baltimore: The Johns Hopkins University Press.

Barrow, Deborah J., Gary Zuk, and Gerard S. Gryski. 1996. *The Federal Judiciary and Institutional Change*. Ann Arbor: The University of Michigan Press.

Berkson, Larry C., and Susan B. Carbon. 1980. *The United States Circuit Judge Nominating Commissions: Its Members, Procedures and Candidates*. Chicago: American Judicature Society.

Bond, Jon R. and Richard Fleisher. 1990. *The President in the Legislative Arena*. Chicago: The University of Chicago Press.

Buchanan, Bruce. 1990. "Constrained Diversity: The Organizational Demands of the Presidency." *Presidential Studies Quarterly* 20:791-822.

Caldeira, Gregory, Marie Hojnacki, and John R. Wright. 2000. "The Lobbying Activities of Organized Interests in Federal Judicial Nominations." *The Journal of Politics* 62:51-69.

Caldeira, Gregory A., and John R. Wright. 1998. "Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate." *American Journal of Political Science* 42:499-523.

Cameron, Charles M., Albert D. Cover, and Jeffrey A. Segal. 1990. "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model." *American Political Science Review* 84:525-534.

Cannon, Lou. 1991. *President Reagan: The Role of a Lifetime.* New York: Simon & Schuster.

Carp, Robert A., and Ronald Stidham. 1998. *Judicial Process in America*. 4th ed. Washington: CQ Press.

Century Foundation, The. 2000. *Justice Held Hostage: Politics and Selecting Federal Judges*. Report of the Citizens for Independent Courts Task Force on Federal Judicial Selection.

Chase, Harold W. 1972. *Federal Judges: The Appointing Process*. Minneapolis: University of Minnesota Press.

Cohen, Lauren M. 1998. "Missing in Action: Interest Groups and Federal Judicial Appointments." *Judicature* 82:119-123.

Cohen Bell, Lauren. 2000. "Senatorial Discourtesy: The Senate's Use of Delay to Shape the Federal Judiciary." Presented at the annual meeting of the Midwestern Political Science Association, Chicago.

Dean, John W. 2001. "Why Democrats Shouldn't Imitate Republicans on Court Nominees." *CNN*. http://www.cnn.com/2001/LAW/05/columns/ fl.dean.court.changes.05.02/index.html

Deering, Christopher J. 1987. "Damned if You Do and Damned if You Don't: The Senate's Role in the Appointments Process." In *The In-and-Outers: Presidential Appointees and Transient Government in Washington*, ed. G. Calvin Mackenzie. Baltimore: The Johns Hopkins University Press.

Deering, Christopher J. and Steven S. Smith. 1997. *Committees in Congress*. 3rd ed. Washington: CQ Press.

Early, Stephen T., Jr. 1977. *Constitutional Courts of the United States: The Formal and Informal Relationships between the District Courts, the Courts of Appeals, and the Supreme Court of the U.S.* Totowa, NJ: Littlefield, Adams & Co.

Edsall, Thomas B. 2001. "Federalist Society Becomes a Force in Washington: Conservative Group's Members Take Key Roles in Bush White House and Help Shape Policy and

Judicial Appointments." *The Washington Post*. http://washingtonpost.com/wp-dyn/articles/A30099-2001Apr17.html (18 April 2001).

Evans, C. Lawrence. 1991. *Leadership in Committee: A Comparative Analysis of Leadership Behavior in the U.S. Senate.* Ann Arbor: The University of Michigan Press.

Flemming, Roy B., Michael C. MacLeod, and Jeffrey Talbert. 1998. "Witnesses at the Confirmations? The Appearance of Organized Interests at Senate Hearings of Federal Judicial Appointments, 1945-1992." *Political Research Quarterly* 51:617-631.

Flemming, Roy B., Michael Rosenstiehl, and Jeffrey Talbert. 1997. "Witnesses at the Confirmations? The Appearance of Organized Interests at Senate Hearings on Federal Judicial Appointments, 1945-1992." Paper presented at the annual meeting of the Midwest Political Science Association, Chicago.

Fowler, W. Gary. 1984. "Judicial Selection under Reagan and Carter: A Comparison of Their Initial Selection Procedures." *Judicature* 67:265-283.

Goldman, Sheldon. 1965. "Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts." *The Western Political Quarterly* 18:755-762.

Goldman, Sheldon. 1989. "Reagan's Judicial Legacy: Completing the Puzzle and Summing Up." *Judicature* 72:318-330.

Goldman, Sheldon. 1991. "The Bush Imprint on the Judiciary: Carrying on a Tradition." *Judicature* 74:294-306.

Goldman, Sheldon. 1993. "Bush's Judicial Legacy: The Final Imprint." *Judicature* 76:282-297.

Goldman, Sheldon. 1995. "Judicial Selection under Clinton: A Midterm Examination." *Judicature* 78:276-291.

Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven, CT: Yale University Press.

Goldman, Sheldon. 1998. "The Judicial Confirmation Crisis and the Clinton Presidency." *Presidential Studies Quarterly* 28:838-844.

Goldman, Sheldon, and Elliot Slotnick. 1999. "Clinton's Second Term Judiciary: Picking Judges Under Fire." *Judicature* 82:264-284.

Goldman, Sheldon, Elliot Slotnick, Gerard Gryski, and Gary Zuk. 2001. "Clinton's Judges: Summing up the Legacy." *Judicature* 84:228-254.

Goodwin, George, Jr. 1970. *The Little Legislature: Committees of Congress*. Amherst: University of Massachusetts Press.

Groseclose, Tim, and David C. King. 1998. "Little Theatre: Committees in Congress." In *Great Theatre: The American Congress in the 1990s*. Ed. Herbert F. Weisberg and Samuel C. Patterson. New York: Cambridge University Press.

Grossman, Joel B. 1965. *Lawyers and Judges*. New York: Wiley.

Flemming, Roy B., Michael C. MacLeod, and Jeffery Talbert. 1998. "Witnesses at the Confirmations? The Appearance of Organized Interests at Senate Hearings of Federal Judicial Appointments, 1945-1992." *Political Research Quarterly* 51:617-631.

Flemming, Roy B., Michael Rosenstiehl, and Jeffrey Talbert. 1997. "Witnesses at the Confirmations? The Appearances of Organized Interests at Senate Hearings on Federal Judicial Appointments, 1945-1992." Presented at the annual meeting of the Midwestern Political Science Association, Chicago.

Hamilton, Alexander, James Madison, and John Jay. 1961. *Federalist Papers*. Ed. Clinton Rossiter. New York: Penguin Books USA, Inc.

Harris, Joseph P. 1953. *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate.* Berkeley, CA: University of California Press.

Hartley, Roger E. 2001. "Senate Delay of Minority Judicial Nominees: A Look at Race, Gender, and Experience." *Judicature* 84:190-197.

Hartley, Roger E., and Lisa M. Holmes. N.d. "An Invigoration of 'Consent?' The Increasing Senate Scrutiny of Lower Federal Court Nominees." *Political Science Quarterly*, forthcoming.

Hatch, Orrin C. 1999. "A Report on the State of the Federal Judiciary." http://www.senate.gov/~judiciary/yr1999.htm (8 June 2000).

Hearings before the Committee on the Judiciary, United States Senate: Confirmation Hearings on Federal Appointments. 96th Congress through 104th Congress. Washington: Government Printing Office.

Hojnacki, Marie, and David C. Kimball. 1998. "Organized Interests and the Decision of Whom to Lobby in Congress." *American Political Science Review* 92:775-790.

Holmes, Lisa, and Roger Hartley. 2001. "Confirmation Delay and Appointment Eras: The Impact of Carter and Hatch." Manuscript in Authors' Possession.

Holmes, Lisa, and Roger E. Hartley. 1998. "The Changing Role of Political and Institutional Factors in Judicial Confirmation Hearings from 1969 to 1996." Presented at the annual meeting of the American Political Science Association, Boston.

Howard, J. Woodford, Jr. 1981. *Courts of Appeals in the Federal Judiciary System: A Study of the Second, Fifth, and District of Columbia Circuits.* Princeton, NJ: Princeton University Press.

Kahn, Michael A. 1995. "The Appointment of a Supreme Court Justice: A Political Process from Beginning to End." *Presidential Studies Quarterly* 25:25-41.

Kemper, Mark, and Steven R. Van Winkle. 1999. "A Duration Model of Lower Federal Court Vacancies and Nominations." Presented at the annual meeting of the American Political Science Association, Atlanta.

Krutz, Glen S., Richard Fleisher, and Jon R. Bond. 1998. "From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate." *American Political Science Review* 92:871-881.

Legislative and Executive Calendar: Senate Committee on Judiciary. 95th Congress through 105th Congress. Washington, DC: Government Printing Office.

Lewis, Neil A. 2001a. "Lawyers' role in Screening Judges is Reviewed." *The New York Times*. http://www.nytimes.com/2001/03/20/politics/20JUDG.html (20 March 2001).

Lewis, Neil A. 2001b. "Bush to Reveal First Judicial Choices Soon." *The New York Times.* http://www.nytimes.com/2001/04/24/politics/ 24JUDG.html?searchpv=site01 (25 April 2001)

Mackenzie, G. Calvin. 1981. *The Politics of Presidential Appointments.* New York: The Free Press.

Maltese, John Anthony. 1995. *The Selling of Supreme Court Nominees*. Baltimore: The John Hopkins University Press.

Manning, Kenneth L. 2001. "A Color Blind Senate?: Race, Gender, and Senate Delay in Confirming Clinton's Judicial Nominees." Presented at the annual meeting of the Midwest Political Science Association, Chicago.

Massaro, John. 1990. *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations*. Albany: State University of New York Press.

McCarty, Nolan, and Rose Razaghian. 1999. "Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996." *American Journal of Political Science* 43:1122-1143.

McFeeley, Neil D. 1987. *Appointment of Judges: The Johnson Presidency*. Austin, TX: University of Texas Press.

Mendenhall, William and Terry Sincich. 1993. *A Second Course in Business Statistics: Regression Analysis*. 4th edition. NY: Dellen Publishing Company.

Miller Center Commission. 1996. *Report of the Commission on the Selection of Federal Judges*. Charlottesville: The University of Virginia.

Moraski, Bryon J. and Charles R. Shipan. 1999. "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices." *American Journal of Political Science* 43:1069-1095.

Murphy, Walter F. 1990. Reagan's Judicial Strategy." In *Looking Back on the Reagan Presidency*, Ed. Larry Berman. Baltimore: Johns Hopkins University Press.

Nixon, David C. and David L. Goss. 2000. "Confirmation Delay for Vacancies on the Circuit Courts of Appeals." Manuscript under review, *American Politics Quarterly*.

O'Brien, David M. 1988. *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection*. New York: Priority Press Publications.

O'Brien, David M. 2000. *Storm Center: The Supreme Court in American Politics*. 5th ed. New York: W.W. Norton & Company.

Pfiffner, James P. 1987. "Nine Enemies and One Ingrate: Political Appointments during Presidential Transitions." In *The In-and-Outers: Presidential Appointees and Transient Government in Washington*, ed. G. Calvin Mackenzie. Baltimore: The Johns Hopkins University Press.

Rehnquist, William H. 1998. "The 1997 Year-end Report on the Federal Judiciary." *The Third Branch*. http://www.uscourts.gov/ttb/jan98ttb/january.htm (5 June 2001)

Schuck, Peter H., and Martha Joynt Kumar. 1975. "Judicial Nominations: Whither 'Advice and Consent'?" In *The Judiciary Committees: A Study of the House and Senate Judiciary Committees*. Dir. Peter H. Schuck. New York: Grossman Publishers.

Segal, Jeffrey. 1987. "Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics." *Journal of Politics* 49:998-1015.

Segal, Jeffrey, Charles M. Cameron, and Albert D. Cover. 1992. "A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations." *American Journal of Politics* 36:96-121.

Sheldon, Charles H., and Nicholas P. Lovrich, Jr. 1991. "State Judicial Recruitment." In *The American Courts: A Critical Assessment*. Ed. John B. Gates and Charles A. Johnson. Washington: CQ Press.

Shipan, Charles R., and Megan L. Shannon. 2001. "Delaying Justice(s): An Analysis of Supreme Court Confirmations." Presented at the Annual Meeting of the Midwest Political Science Association, Chicago.

Silverstein, Mark. 1994. *Judicious Choices: The New Politics of Supreme Court Confirmations*. New York: W.W. Norton & Company.

Slotnick, Elliot E. 1979. "The Changing Role of the Senate Judiciary Committee in Judicial Selection." *Judicature* 62:502-510.

Slotnick, Elliot E. 1983. "The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment." *Judicature* 66:349-385.

Slotnick, Elliot E. 1988. "Federal Judicial Recruitment and Selection Research: A Review Essay." *Judiciature* 71:317-324.

Slotnick, Elliot E. and Sheldon Goldman. 1998. "Congress and the Courts: A Case of Casting." In *Great Theatre: The American Congress in the 1990s*, ed. Herbert F. Weisberg and Samuel C. Patterson. Cambridge: Cambridge University Press.

Smith, Charles E., Jr., Mary E. Stuckey, and John W. Winkle, III. 1998. "Executive-Legislative Conflict and the Nomination-Confirmation Controversy in the Lower Federal Judiciary." *Presidential Studies Quarterly* 28:832-837.

Solomon, Rayman L. 1984. "The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R." *American Bar Foundation Research Journal* Spring, No. 2:285-343.

Songer, Donald R. 1991. "The Circuit Courts of Appeals." In *The American Courts: A Critical Assessment*, ed. John B. Gates and Charles A. Johnson. Washington: CQ Press.

Songer, Donald R., Reginald S. Sheehan, and Susan B. Haire. 2000. *Continuity and Change on the United States Courts of Appeals*. Ann Arbor: The University of Michigan Press.

Wagner, David. 1997. "Senate Committee Bars ABA from Vetting Judicial Picks." *The Washington Times,* April 21:15.

Watson, George, and John Stookey. 1988. "Supreme Court Confirmation Hearings: A View from the Senate." *Judiciature* 71:186-193.

Wright, John R. 1996. *Interest Groups and Congress: Lobbying, Contributions, ans Influence.* Boston: Allyn and Bacon.

APPENDIX A

INDEPENDENT VARIABLES: LABELS, OPERATIONALIZATION, AND DATA SOURCES

Variable Label	Variable Operationalization	Data Source (If applicable)
ABA Rating	6-point scale: 6=wq, ewq, or combination, 5=wq (maj)/q (min), 4=q/wq, 3=q (unanimous), 2=q/nq, 1=nq/q, or unanimous nq	Garland Allison; Dr. Sheldon Goldman; Irene Imsellum (ABA); Lower Federal Court Confirmation Database (Wendy L. Martinek, Chief Investigator)[38]
Committee Insider	1=home-state senator (either party) on Judiciary, 0=otherwise	Congressional Staff Directory and CQ Almanac, various years and issues
DC Circuit	1=position on DC circuit, 0=otherwise	The Senate Committee on the Judiciary Calendar of Nominations, various years
Election Year	1=nomination made in election year, 0=otherwise	N/A

[38] At www.ssc.msu.edu/~pls/plip/ConfirmationData.html

Variable Label	Variable Operationalization	Data Source (If applicable)
Gender	1=female nominee, 0=male nominee	Dr. Sheldon Goldman; Lower Federal Court Confirmation Database (Wendy L. Martinek, Chief Investigator)[39]
Honeymoon Year	1=nomination made in 1st year or term, 0=otherwise	N/A
Judicial Experience	1=existence of experience at state or federal level, or both, 0=otherwise	Dr. Sheldon Goldman
New Chair	1=nomination made in year with new Judiciary Committee chair, 0=otherwise	N/A
New Position	1=position created by Judgeship Act, 0=position vacated by sitting judge	The Senate Committee on the Judiciary Calendar of Nominations, various years
Pending Nominations	Number of nominations pending before Judiciary on day of referral	Lower Federal Court Confirmation Database (Wendy L. Martinek, Chief Investigator)[40]
Prehearing Time	Number of days between referral and initiation of hearings	The Senate Committee on the Judiciary Calendar of Nominations, various years
Presidential Support	Presidential support score of Judiciary Committee chair in year of referral	CQ Alamanc, various years and issues

---

[39]Ibid.

[40]Ibid.

Variable Label	Variable Operationalization	Data Source (If applicable)
Prosecutorial Experience	1=existence of experience at state or federal level, or both, 0=otherwise	Dr. Sheldon Goldman
Race	1=African-American, Hispanic, Asian, or Native American nominee, 0=otherwise	Dr. Sheldon Goldman; Lower Federal Court Confirmation Database (Wendy L. Martinek, Chief Investigator)[41]
Senatorial Courtesy	Number of home-state senators of the president's party	CQ Almanac, various years and issues
Time	0=1977, 1=1978, etc.	N/A

[41]Ibid.

APPENDIX B

INDEPENDENT VARIABLE MEANS:
ALL NOMINATIONS AND SUCCESSFUL NOMINATION

	All Nominations			**Successful Nominations**		
Variable	**Mean**	**Std. Dev.**	**N**	**Mean**	**Std. Dev.**	**N**
ABA Rating	4.78	1.51	265[42]	4.86	1.49	219
Clinton	0.25	0.43	271	0.22	0.41	219
Committee Insider	0.27	0.44	271	0.26	0.44	219
DC Circuit	0.08	0.28	271	0.08	0.28	219
Election Year	0.18	0.39	271	0.14	0.34	219
Gender	0.17	0.38	271	0.17	0.38	219
Honeymoon Year	0.27	0.44	271	0.30	0.46	219
Judicial Experience [43]	-----	-----	-----	0.60	0.49	219
Kennedy	0.18	0.39	271	0.20	0.40	219
New Chair	0.26	0.44	271	0.28	0.45	219
New Position	0.30	0.46	271	0.32	0.47	219
Pending Nominations	23.74	15.45	271	22.31	15.71	219

[42]ABA Ratings were unavailable for 6 unsuccessful nominees.

[43]The previous judicial experience variable was incorporated in models of successful nominations only.

Variable	Mean	Std. Dev.	N	Mean	Std. Dev.	N
Prehearing Time [44]	-----	-----	-----	54.22	49.59	213[45]
Presidential Support	58.68	26.35	271	62.08	25.42	219
Prosecutorial Experience[46]	-----	-----	-----	0.30	0.46	219
Race	0.14	0.35	271	0.13	0.34	219
Senatorial Courtesy	1.03	0.73	271	1.03	0.74	219
Time	10.21	6.37	271	9.44	6.30	219

[44]The prehearing time variable was only used in models or successful nominations.

[45]Mean shown is exclusive of the six cases where hearings were held in a previous, unsuccessful nomination.

[46]The previous prosecutorial experience variable was included in models of successful nominations only.

APPENDIX C

UNSUCCESSFUL NOMINATIONS TO THE
U.S. COURTS OF APPEALS, 1977-1998

Nominee	Circuit	Referred	Hearing	Report	Final Disposition
Arnold, Richard W.	8th	12/14/79	-----	-----	Withdrawn 12/19/79
Bua, Nicholas J.	7th	9/10/80	-----	-----	Returned 12/16/80
Jefferson, Andrew L., Jr.	5th	10/11/79	11/8/79	-----	Returned 12/16/80
Nickerson, Eugene H.	2nd	8/28/80	9/15/80	-----	Returned 12/16/80
Sachs, Howard F.	8th	7/30/80	8/20/80	-----	Returned 12/16/80
Bator, Paul M.	DC	8/1/84	-----	-----	Withdrawn 9/6/84
Brunetti, Melvin T.	9th	10/5/84	-----	-----	Returned 10/18/84
Easterbrook, Frank H.	7th	8/1/84	9/5/84	9/28/84	Returned 10/18/84
Jones, Edith H.	5th	9/17/84	9/26/84	-----	Returned 10/18/84
Starr, Kenneth W.	DC	7/13/83	7/22/83	-----	Returned 8/8/83
Wilkinson, James H., III	4th	11/10/83	11/16/83	-----	Returned 11/18/83

Nominee	Circuit	Referred	Hearing	Report	Final Disposition
Boggs, Danny J.	6th	12/9/85	-----	-----	Returned 12/20/85
Fernandez, Ferdinand F.	9th	9/16/88	-----	-----	Returned 10/22/88
Hope, Judith Richards	DC	4/14/88	-----	-----	Returned 10/22/88
Hurlbutt, Guy G.	9th	8/11/88	-----	-----	Returned 10/22/88
Rymer, Pamela Ann	9th	4/26/88	-----	-----	Returned 10/22/88
Siegan, Bernard H.	9th	2/2/87	11/5/87 2/25/88	-----[47]	Withdrawn 9/16/88
Summit, Stuart A.	2nd	9/23/87	4/21/88 6/21/88	8/10/88	Returned 10/22/88
Treen, David C.	5th	7/22/87	-----	-----	Withdrawn 5/10/88
Wiener, Jacques L., Jr.	5th	6/27/88	-----	-----	Returned 10/22/88
Ryskamp, Kenneth L.	11th	4/26/90	-----	-----	Returned 10/28/90
BeVier, Lillian R.	4th	10/22/91	-----	-----	Returned 10/8/92
Boyle, Terrence W.	4th	10/22/91	-----	-----	Returned 10/8/92
Fitzwater, Sidney A.	5th	1/27/92	-----	-----	Returned 10/8/92
Keating, Francis A., II	10th	11/14/91	7/22/92	-----	Returned 10/8/92

[47]By a vote of 8 to 6, the Committee disapproved of the Siegan nomination and did not send the nomination on to the full Senate.

Nominee	Circuit	Referred	Hearing	Report	Final Disposition
Moreno, Federico A.	11th	3/10/92	-----	-----	Returned 10/8/92
Roberts, John G., Jr.	DC	1/27/92	-----	-----	Returned 10/8/92
Ryskamp, Kenneth L.	11th	1/8/91	3/19/91 3/20/91	4/11/91[48]	Returned 8/2/91
Smietanka, John A.	6th	1/27/92	-----	-----	Returned 10/8/92
Van Antwerpen, Franklin	3rd	9/11/91	-----	-----	Returned 10/8/92
Waldman, Jay C.	3rd	7/26/91	-----	-----	Returned 10/8/92
Wilson, Justin P.	6th	3/20/92	-----	-----	Returned 10/8/92
Dennis, James L.	5th	6/8/94	9/14/84	-----	Returned 11/14/94
Lynch, Sandra L.	1st	9/19/94	-----	-----	Returned 11/14/94
Moore, Karen Nelson	6th	9/14/94	-----	-----	Returned 11/14/94
Beaty, James A., Jr.	4th	12/22/95	-----	-----	Returned 10/4/96
Clay, Eric L.	6th	3/6/96	3/27/96	4/25/96	Returned 10/4/96
Fletcher, William A.	9th	4/25/95	12/19/95	5/21/96	Returned 10/4/96
Garland, Merrick B.	DC	9/5/95	11/30/95	12/14/95	Returned 10/4/96

[48]The Ryskamp nomination was disapproved by the Committee and reported unfavorably.

Nominee	Circuit	Referred	Hearing	Report	Final Disposition
Leonard, J. Rich	4th	12/22/95	-----	-----	Returned 10/4/96
McKeown, M. Margaret	9th	3/29/96	-----	-----	Returned 10/4/96
Paez, Richard A.	9th	1/25/96	7/31/96	-----	Returned 10/4/96
Stack, Charles R.	11th	10/27/95	2/28/96	-----	Withdrawn 5/13/96
Beaty, James A., Jr.	4th	1/7/97	-----	-----	Returned 10/21/98
Berzon, Marsha L.	9th	1/27/98	7/30/98	-----	Returned 10/21/98
Goode, Barry P.	9th	6/24/98	-----	-----	Returned 10/21/98
Gould, Ronald M.	9th	11/8/97	-----	-----	Returned 10/21/98
Paez, Richard A.	9th	1/7/97	2/25/98	3/19/98	Returned 10/21/98
Rangel, Jorge C.	5th	7/24/97	-----	-----	Returned 10/21/98
Raymar, Robert S.	3rd	6/5/98	-----	-----	Returned 10/21/98
Ware, James S.	9th	6/27/97	10/9/97	-----	Withdrawn 11/7/97
White, Helene N.	6th	1/7/97	-----	-----	Returned 10/21/98