

# **Prioritizing Judicial Nominations after Presidential Transitions**

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## **Abstract**

*New presidents now commonly inherit a backlog of judicial vacancies. Lifetime judicial appointments provide presidents lasting policy influence, but time and energy are rarely more valuable than after transitions while the selection and vetting of new judicial nominations is costly. Attempting to alter the ideological character of the courts could yield opposition that further increases the cost of each nomination. How then do new presidents prioritize vacancies? We use a unique data set of all district court vacancies that happen to exist at the start of a new presidency since to investigate. We find significant variation in the time to nominate within administrations and that presidents tend to prioritize necessity and expediency when filling transition vacancies.*

After every presidential transition the new occupant of the White House inherits a backlog of judicial vacancies. With few friendly transitions, most new presidents must begin the difficult process of searching for and vetting candidates from scratch. This process is impeded by the fact that presidential transition teams must first focus on staffing key White House and bureaucratic posts (Joynt Kumar et al., 2000; Neustadt, 2000) and furthermore that time is rarely more valuable than immediately after a transition (Burke, 2009; Eksterowicz and Hastedt, 1998; Joynt Kumar, 2008; Pfiffner 1996). Because presidents must balance the value of judicial nominations against many competing demands, including each other, these initial nominations routinely take up to a year to reach the Senate.

Making nominations to inherited judicial vacancies is an increasingly non-trivial consideration. First, given the recent success found in “blockading” an outgoing president's judicial nominees (Slotnick, Schiavoni and Goldman, 2017), we may expect to see an increasing number of vacancies at presidential transitions. For example, President Trump inherited approximately 100 judicial vacancies including a potentially pivotal Supreme Court position after unprecedented levels of obstruction in the previous Congress. Second, transition vacancies may become a more integral part of presidents' judicial legacies because early nominations are more likely to be eventually confirmed. While delay in the Senate has long been noted as a source slowing judicial replacements (Bell, 2002; Binder and Maltzman, 2002), prior research suggests that presidential decision time in making judicial nominations is often much longer than the Senate's consideration for confirmation (Massie, Hansford and Songer, 2004, 152). As such, the timing of presidential nominations meaningfully impacts success. In fact, one criticism of President Obama's first term was that he de-prioritized making judicial nominations to vacant posts and thus diminished his administration's lasting influence on the federal courts (Savage, 2012).

Lifetime judicial appointments are highly coveted by presidents for the policy influence that they carry. Shifting the ideological balance of a court could influence decisions for years after an administration. However, judicial nominations are contentious (Hendershot, 2010; Steigerwalt, 2010) and potentially costly in terms of political capital (Madonna et al. 2016). While presidents could start their term with a list of nominees for all vacant judicial posts, tradition and practicality dictate that presidents work with key members of Congress to determine candidates (Epstein, 2005; Goldman, 1997). Partisanship and ideological disputes (Binder and Maltzman, 2002; Solowiej, Martinek and Brunell, 2005) coupled with the involvement of interest groups (Scherer, Bartels and Steigerwalt, 2008; Steigerwalt, 2010) can further complicate the appointments process. How then do presidents prioritize nominations? Presidents may be forced by structural constraints and time pressures to sacrifice ideological influence for expediency in early nominations.

Prior research provides many insights about whether and how fast nominees are confirmed by the Senate, but we know comparatively less about presidential decisions before the nominee is declared.<sup>1</sup> This paper leverages the unique features of presidential transitions to shed light on the pre-nominations process by investigating the factors influencing the time it takes presidents to make nominations for district court vacancies that they have inherited from their predecessor. Using transition vacancies is interesting for substantive reasons, but it also allows us to focus on questions related to why one nomination was made ahead of another given identical political contexts. In the sections that follow, we first provide an overview of judicial nominations politics generally, changes that have occurred within the past thirty years, and how the process influences presidential incentives. We then outline our strategies for investigating transition vacancies including our expectations as well as introducing our specific data and methods. Ultimately, we

find that presidential decisions are influenced by practical necessity, norms of the judicial confirmation process, and even electoral considerations.

## **Politics & Judicial Nominations**

Lifetime judicial appointments, even for lower federal courts, are a mechanism through which presidents hope to influence future policy and establish a legacy (Goldman, 1997). While attention is often given to the more prominent Supreme Court nominations (Johnson and Roberts, 2005; Moraski and Shipan, 1999; Shipan and Shannon, 2003), the vast majority of decisions made regarding the application of federal law are done so in the lower federal courts (Steigerwalt, 2010). Because of their influence, lower court nominations have become a focal point for partisan conflict within the Senate (Binder, Madonna and Smith, 2007) and between the branches.

Judicial nominations entail strategic calculations. Most famously, presidents are expected to seek judges as close to their own ideology as the requirement of Senate confirmation will allow. A more opaque calculation occurs when presidents are faced with the decision of which vacancies to prioritize when considered against one another. Presidential time and influence is not infinite and prior research has shown that presidents face an opportunity cost for making efforts on behalf of judicial nominees (Madonna et al. 2016). While much of the searching for, vetting, and shepherding of judicial nominees has been delegated to entities such as the White House Counsel's office or the Office of Legal Policy within the Department of Justice,<sup>2</sup> there are limitations in how many nominations such institutions can make or manage at any given time. Administrations must choose between quickly filling easily won seats versus making partisan gains more slowly in difficult districts. Timing is important as early nominations are more likely than later nominations to succeed.

Much of the research on the time that it takes to fill court vacancies focuses on the time between a presidential nomination and eventual Senate confirmation. Deliberate delay of executive nominations in the Senate has been well documented in all manner of judicial (Bell, 2002; Binder and Maltzman, 2002, 2009; Hendershot, 2010; Nelson and Ostrander, 2016; Martinek, Kemper and Winkle, 2002) as well as bureaucratic (Bond, Fleisher and Krutz, 2009; McCarty and Razaghian, 1999; O'Connell, 2009; Ostrander, 2016) appointments. Pure delay may seem innocuous, but it can often lead to failure (Bond, Fleisher and Krutz, 2009) while at the same time exacerbating “emergency vacancies” in courts where there are too few judges on the bench to reasonably meet the demand of filings (Wheeler and Binder, 2011).<sup>3</sup> Confirmation delay in the Senate is common because the ability of senators to obstruct is deeply rooted in the rules and historic norms of the chamber (Smith, 2014).

While senatorial delay of judicial appointments is indeed a critical part of the story about how judicial nominations unfold, prior research by Massie, Hansford and Songer (2004, 152) actually suggests that the bulk of elapsed time in filing vacancies comes from waiting for a presidential nominee rather than the confirmation process. However, while the time that it takes a president to make a nomination for a vacancy may be considered a *presidential* decision, we must also note that during the prenomination stage presidents are often negotiating with key senators over the names that will be advanced (Goldman, 1997). In this sense, delay may not be entirely due to presidential inaction. Regardless of the causes of nomination delay, prior research suggests that examining the time between a court vacancy occurring and the first presidential nomination to fill it is essential to understanding patterns and prevalence of judicial vacancies overall.

When filling district court vacancies, not all senators are created equal. The norm of “senatorial courtesy” provides senators from the state in which a district court resides with the

ability to impede objectionable nominees. Over time, this process has been institutionalized in the form of the “blue slips” process within the Senate Judiciary Committee (Binder, 2007). Importantly, all home state senators are provided the opportunity to fill out blue slips, regardless of their majority status, partisanship, or ideological position relative to a president (Binder, 2007). Senate delegations with members that are extreme ideological opposites of the president are often associated with an increase in negative blue slip implementation (Jaboci, 2005; Black, Madonna and Owens, 2011). While the power of the blue slip is not absolute, the president is incentivized to consult with home state senators to aid in confirmation (Binder and Maltzman, 2004). Ultimately, the tradition of allowing senators to use blue slips on judicial nominations provides an additional institutional check over lifelong appointments (Denning, 2002; Rutkus, 2008) and empowers Congress with respect to court appointments.

## **The Evolving Process**

Structural changes in how judges leave the bench have significantly altered the occurrence and counting of judicial vacancies. Vacancies to the federal judiciary come from many sources: retirement, death, resignation, and elevation to a higher court. By far the most prevalent source of court vacancies that arise today come from jurists taking senior status wherein a pension-eligible judge retires from the bench. Uniquely, senior status jurists continue to serve the court and hear cases but may do so in a decreased capacity. Senior status retirements increased in prominence following the 1984 reform of Title 28 of the U.S. Code, Section 371(c) with the creation of the “Rule of 80” establishing judges aged 65 and 15 years of active service may retire at his or her current salary and take senior status. Senior status is a particularly appealing option for judges as it grants them control over their caseloads (Block, 2007). The contribution of these retired judges

is non-trivial. Currently, senior judges handle 15 percent of the federal courts' workload each year.<sup>4</sup> However, jurists taking senior status are no longer considered active judges and create a vacancy that can be filled through the presidential nomination process.

The political process for filling vacancies has become increasingly contentious and partisan since the Reagan administration, even for lower court nominations. President Reagan is widely considered to have ushered in this era by seeking more ideological correspondence among his lower court nominees than prior presidents (Goldman, 1997). Realizing the influence of these lower courts, presidents have continued to follow President Reagan's example. In response, opposition senators have begun to oppose such nominations. Whereas many lower court nominations were once disposed of through uncontentious voice votes, hardball tactics such as the filibuster have become much more common for lower court nominations (Binder, Madonna and Smith, 2007). This dynamic has also altered the pre-nominations process as the certainty that senators will search for nominee “disqualifications” (Carter, 1994) has led to an increased focus on pre-nomination vetting. In this way, while partisan politics is often blamed for delay in the confirmation process, it may increasingly become a part of the story of why it takes presidents so long to name initial nominations to judicial vacancies.

The battle over partisan obstruction on judicial nominations came to a head during the Obama administration. When the Democratic controlled Senate chose to invoke the “Nuclear” option to reduce the threshold for ending debate (invoking cloture) to a simple majority for all cases except for Supreme Court nominations.<sup>5</sup> While the full implications of this change are still unfolding, it has the potential to speed key nominations (O’Connell, 2015; Ostrander, 2017) and alter the ideological disposition of presidential nominees (Boyd, Lynch and Madonna, 2015). Initially, President Obama was able to gain confirmation for several judicial nominations in the

113th Congress using the new rules to his advantage (Slotnick, Schiavoni and Goldman, 2016). This situation, however, did not last long as the Senate came under Republican control in the 114<sup>th</sup> Congress leading to a “blockade” Obama's judicial nominations (Slotnick, Schiavoni and Goldman, 2017) with the effect that President Trump inherited an unprecedented number of judicial vacancies.<sup>6</sup>

The changing nature of the judicial nominations process has increased the importance of presidential transitions and changed how the process unfolds generally. First, the creation of senior status has created more vacancies in general, many of which become inherited by the following executive. Second, to the extent that the norm of blockading nominations at the end of a term becomes established, it raises the expected number of inherited judicial vacancies while also increasing the value placed on these early nomination opportunities. Third, the simple majority cloture threshold undermines the threat of filibusters as well as related obstruction tactics such as holds (Howard and Roberts, 2015) and potentially blue slips. As such, a president enjoying a unified Senate majority may now find no need to compromise with the minority party on judicial nominations. Without the need to bargain, presidents should be able to make faster nomination decisions and may even re-prioritize which nominations to make first.

## **Transition Vacancies**

The influence of structural changes to the federal courts and the evolution of politics can be observed in the number and disposition of inherited vacancies within recent administrations. Table 1 contains basic information on district court vacancies that exist at the time of a presidential transition from the Reagan presidency through to the early part of the Trump administration (approximately the first 18 months).<sup>7</sup> While initial nominations are not always successful, this



provides a rough means of measuring and comparing how presidents prioritize district court nominations.<sup>8</sup>

Several trends stand out in Table 1. First, we see far more inherited vacancies following the expansion of senior status in the 1980s with presidents after George HW Bush inheriting many additional district court vacancies as compared to earlier years. While senior status created more vacancies generally, the trend is likely to be further exacerbated by the speculative delay (blockading) of judicial nominations before a presidential transition. We do see some early evidence of this increase as the number of district court vacancies inherited by the Trump administration is second only to President Clinton, who had inherited many newly created positions. Next, we see a stark contrast between the relatively fast median time to nomination under the Reagan administration as compared to later presidents. Of the recent presidencies, the Obama administration stands out as taking the most time to make nominations to inherited vacancies in district courts.

**[Insert Table 1 Here]**

We must note that the presidency of George HW Bush stands out for being unique among the recent presidents. First and foremost, his transition was significantly different in that he took office from a copartisan after being a part of the previous administration as Vice President. As such, one could imagine that he was able to inherit lists of vetted candidates for judicial vacancies in a way that other administrations could not. In fact, for many positions George HW Bush could re-nominate pending judicial nominations from his predecessor. Second, George HW Bush was the only one of these presidents to begin his administration with a Senate controlled by his party's opposition. While other presidents eventually lost this advantage, it remains a unique point of

incomparability. The remaining presidencies have many similarities, but we keep in mind the low “N” problem in presidential research that makes generalizations across administrations difficult (King and Ragsdale, 1988).

## **Investigating Transition Vacancies**

While studies of presidential delay in filling court vacancies exist (Massie, Hansford and Songer, 2004), there are several advantages to focusing a study on transition vacancies. Unlike vacancies that occur during an administration, all transition vacancies become available to a president for nomination at exactly the same moment and therefore under identical political contexts. This allows a direct comparison to be made between the prioritization of vacancies in that to work on one nomination implies a tradeoff against all others. Specifically, we examine the differences in the timing of the first nomination to district court vacancies that are inherited at the start of a new presidency. Given the importance of time within the early days of an administration, examining the decisions made on these tradeoffs will shed light on how presidents prioritize judicial nominations more generally.

Using data with this feature of simultaneity has unique advantages. Most importantly, traditional political context variables such as presidential approval at the time of vacancy, partisan balance within the Senate, ideological characteristics of the Senate as a whole or the judiciary committee relative to the president, and time remaining in session, cannot account for the significant variation between nominations to transition vacancies within an administration as such factors are a constant for these data.<sup>9</sup> Using transition vacancies allows researchers to focus on the structural features of the nominations process and the open positions themselves. These include factors such as the composition of the relevant Senate delegations and characteristics of the given vacancies themselves. While using this data frame excludes some traditional political

context measures, it allows for a focus on the substantively interesting question of why presidents seek to fill some vacancies faster than others.

## **Expectations**

One of the most important factors for understanding presidential prioritization of nominations is the inherent need for a replacement to be found. The timing of a vacancy is a key factor related to the underlying need to fill a position. There exists substantial variation in the length of time positions have remained vacant prior to a new president taking office. Some positions may have just recently become vacant while other seats on the bench have been unoccupied for several years. We may expect presidents to prioritize long-term vacancies over more recent ones because such vacancies are much more likely to be judicial emergencies with the given court struggling to meet the caseload demands within their purview. Furthermore, with a longer timeline to consider a vacancy, a list of potential candidates is more likely to have developed. As such, we expect that presidents will nominate judges faster for positions that have been vacant longer.

**Expectation 1:** Presidents will nominate judges faster for positions that have been vacant longer.

Similarly, when a court has a high vacancy rate we may expect that a president would be more responsive to filling these positions because of the underlying need of the court. For example, one vacancy within a large district court system with an allocation of 20 active judges may imply less urgency than a single vacancy in a small district with just three judges. Higher vacancy rates are therefore likely to imply a judicial emergency even with senior judges present.

Because a relatively high rate of vacancies is a powerful signal that a court is shorthanded and the greater the vacancy rate the more likely we expect fast nominations.

**Expectation 2:** Presidents will nominate judges more quickly for courts with high vacancy rates.

We also expect that structural features of the nomination process will influence the speed at which presidents make nominations. This is especially true of district court nominations that fall under the traditions of the blue slip as described above. Research by Massie, Hansford and Songer (2004) as well as Binder and Maltzman (2004) have already noted that blue slip considerations influence the time between an initial vacancy and the eventual presidential nomination with allied delegations in the Senate being predictive of faster times to nomination. It is intuitive that presidents will have an easier time bargaining with allied senators versus delegations composed of opposition senators. We therefore expect that presidents will be able to provide initial nominations to district court vacancies faster in cases where there exists an allied as compared to an opposed delegation of relevant state senators.

**Expectation 3a:** Presidents will nominate judges faster for positions in districts with two allied senators.

**Expectation 3b:** Presidents will nominate judges more slowly for positions in districts with two opposed senators.

The blue slips process implies that home state senators will have a key role negotiating over alternatives in presidential nominations to district courts. However, a president's ability to negotiate with home state senators may vary greatly by political circumstances. In particular,

presidents' electoral performance in a state during the last election should influence their ability to negotiate with home state senators. As noted by Neustadt (1990), presidential popularity provides for greater presidential persuasiveness in negotiating with other political actors. Winning many votes from a state within the prior election, which precedes the transition by just a few months, is a strong signal to senators that the President has influence with their home constituency. Senate elections are also often tied to presidential electoral success (Campbell and Sumners, 1990) which implies that some of the senators may owe their position to the recently successful president. Furthermore one would expect that senators of either party would be weary of attracting the ire of a president who is supported by their own constituency by opposing a judicial nomination.

While we expect presidential electoral performance to be influential in negotiating with senators, we must exercise caution when testing this expectation. As noted, presidential success within a state is linked with elections for Senate. Presidents rarely win in states with entirely opposed delegations and rarely lose in states with entirely allied delegations.<sup>10</sup> Therefore, presidential vote shares within a state are correlated with the composition of the state delegations. We can account for these methodological concerns by testing for the influence of presidential electoral performance in a subset of the data composed of cases having mixed Senate delegations. These cases, which make up just over one third of our data, also are substantively interesting in that the senators in question may be cross pressured coming from an environment in which the other party has proven to be able to win a Senate seat.

**Expectation 4:** In states with a mixed Senate delegation, presidents will nominate judges faster for positions in states where they performed well in the prior election.

As noted above, not all vacancies are created equal. In situations where a court has a vacancy due to a judge entering senior status (thus remaining at least marginally active), the pressure to fill a position might not be as great as under conditions where there exists an entirely empty seat. Presidents may therefore prioritize fully vacant seats when choosing between which nominations to make first. This logic is not without precedent as prior research has noted that presidents are slower to fill bureaucratic posts still occupied in a “holdover” capacity (Madonna and Ostrander, 2017). As such, we may expect that presidents will nominate judges more slowly to positions where the vacancy created comes with a senior judge still serving.

**Expectation 5:** Presidents will nominate judges more slowly for vacancies with a senior judge serving.

Given the recent rules changes, we may expect that presidents will now make judicial nominations faster than their immediate predecessors. Though presidents must still contend with senatorial courtesy, they will not face the threat of a crippling filibuster if their party is both unified and the Senate majority. This implies that presidents may no longer need minority party buy-in to make a judicial nomination as long as they can count on co-partisans in the Senate to approve cloture for a nomination. However, while the primary reason to expect speed is procedural change we cannot disentangle the causal influence of the Trump administration with that of the new rules regime in the Senate. Speed may be expected in the 115th Congress as President Trump campaigned on his potential judicial nominations and later claimed that judicial appointments were key to his victory. While we cannot disentangle the ultimate cause of quicker nominations, we can still test to see if any change has occurred where expected.

**Expectation 6:** Presidents after the 2013 rules change will make initial nominations to inherited district court vacancies faster than previous administrations.

## Data & Methods

In order to investigate how presidents prioritize judicial nominations, we collect data on all district court judicial vacancies that happen to exist at the time of a presidential transition from the beginning of the Reagan administration through the Trump transition. We focus on district courts because there are far fewer circuit court cases (85) and only one Supreme Court observation. Furthermore, while we can test all of our expectations at the district court level, circuit courts do not have the same state-level considerations as circuit boundaries cross state lines. In terms of timing, we begin our study with President Reagan because prior literature notes this as the beginning of the politicization of lower court nominations (Goldman, 1997).

Overall, our process yields just over 300 district court transition vacancy cases for comparison. These cases are identified through an archive of judicial vacancies found on the U.S. Courts website.<sup>11</sup> Data for the most recent transition vacancies under President Trump are almost entirely complete with all but about 10 of these vacancies having received a nomination by June 2019. Where appropriate, we have adjusted our measures and methods in order to make direct comparisons with these partially incomplete data.

For each case, we note several details about the vacant position itself. First, we note the reason that the position has become vacant. While there are several reasons that a position may become vacant (death, elevation, retirement), the most common is that a judge has achieved senior status. These cases account for more than half of transition vacancies. Because senior status allows for judges to continue serving and hearing cases, these vacancies may reduce the pressure

on presidents to immediately fill the vacancy. As such, we have created a dichotomous measure for whether the vacancy was due to movement into senior status. Next, we note whether the seat in question is a part of the D.C. district.<sup>12</sup> The D.C. courts are more likely to hear cases involving government agencies and as such may carry a greater value than other district courts when considering their influence on policy. We also collect information about the vacancy rate of the court itself by dividing the number of vacant positions (defined as positions for which a president may make a nomination) by the total allotment of active judges for a given court.

Most importantly, we gather information about the timing of the vacancy and the eventual first nomination by a new president. Many vacancies that a president inherits upon taking office have existed for months prior to the transition. The timing matters for two reasons. First, upon taking office presidents have plenty of forewarning that they will be able to nominate a judge for a particular position. Names can thus be discussed even before the transition takes place. Second, vacancies that have existed for several months may imply that the court in question is facing an overload of cases and that a replacement is quickly required. We use the number of days that a position has been vacant by the time of transition to test whether the length of vacancies influences prioritization. In addition to collecting data on how long a vacancy has existed before a president takes office, we collect information on the time that it took a new president to make the first nomination to a vacant position. Using data from presidents Reagan through Obama, the average time to the first nomination for judicial vacancies is just under 400 days.<sup>13</sup>

We also code several variables regarding the political contexts of the vacancy. For each district court vacancy we note the partisan breakdown of the state's senators relative to a president in terms of three categories: allied, mixed, and opposed. In this way, allied delegations have only a president's copartisans while opposed delegations contain no members of a president's party and



mixed delegations contain one of each party. Independent senators are treated as members of the party with which they caucus. We use allied delegations as the baseline within the empirical model, meaning that the significance of mixed and opposed delegations is by comparison to presidents who are relatively unconstrained by the blue slips process. Prior research (Binder and Maltzman, 2004; Massie, Hansford and Songer, 2004) has demonstrated that the nominations process moves more slowly in instances where presidents must negotiate with their opposition. In order to further explore this state-level dynamic, we also examine the influence of a new president's electoral success within mixed delegation states. To explore this dynamic, we use raw presidential vote percentages in order to measure electoral success within a state.

As noted above, there have been significant changes that have occurred in the federal court system as well as the nominations process in the past several decades. Knowing that changes have occurred over time, we include within our model fixed effects for presidential administration with the Reagan presidency serving as the baseline for identification. This allows us to both compare presidents against the speed of the Reagan presidency as well as take time and different procedural mixes into account within the model. Furthermore, if our final expectation (6) suggesting that nominations following the recent rules reform will unfold more quickly is correct, this pattern will show up within our empirical model. In general, adding the presidents into the model allows us to account for the influence of individual presidential tendencies towards the prioritization of judicial nominations as well as control for the specific political contexts in which they began their administration.

Because our measure of interest is the time in between events, we use a duration model (Box-Steffensmeier and Jones, 2004) to examine the influence of political contexts on the time to first judicial nominations. Such models are particularly useful for examining the timing of events

and they are a staple of studies looking into both judicial nomination (Massie, Hansford and Songer, 2004; Box-Steffensmeier et al., 2016) and confirmation (Binder and Maltzman, 2002) delay. We make use of a Cox proportional hazard model in accordance with prior studies of judicial nominations (Massie, Hansford and Songer, 2004; Nixon and Goss, 2001) and because as a semiparametric model it has fewer assumptions than alternative, parametric, duration models.<sup>14</sup> Furthermore, while we have complete data for most administrations, we have yet to receive nominations on about 10 of Trump's district court transition vacancies as of the first session of the 116<sup>th</sup> Congress. Duration models are particularly adept at handling such censored observations and thus we can take the information that these cases provide into account when estimating our models. Specifically, we are modeling the time in days between the start of a president's term and the date in which the first nomination was made for an inherited district court vacancy.

## **Findings**

We begin our analysis with a descriptive look at the transition vacancy data for judicial positions. Figure 1 shows Kaplan-Meier curves for each possible blue slips condition: allied delegations with two senators sharing a president's party affiliation, mixed delegations with one senator from a president's party and the other from a president's opposition, and opposed delegations with both senators from the president's opposition. The data generally support our third set of expectations described above. Presidents facing opposed delegations make nominations significantly more slowly than either the allied or mixed cases. While the proportion of remaining vacancies tends to be lower for allied delegations as compared to mixed delegations, these differences are neither consistent nor large. As such, mixed delegations perform more like

allied delegations in practice while completely opposed delegations appear to be the unique condition leading to differential speeds in making nominations.

**[Insert Figure 1 Here]**

Table 2 shows estimates from our Cox models of the time that it took a president to make a nomination for all district court vacancies that happened to exist at the time of a transition.<sup>15</sup> As noted above, we focus on district court nominations because they are tied more closely to the blue slips process. The results of our model are expressed in terms of hazard ratios rather than raw coefficients to ease interpretation. The estimates are compared against a baseline rate of 1 where values less than one represent a slower process or longer wait times for initial nominations while values above one represent faster nominations. Our model estimates for the influence of each variable and their respective confidence intervals can be compared against the baseline hazard of 1 in Figure 2 below.

We first examine the full model of all district court observations. Many of our key expectations do indeed stand out as significant. First, the influence of the court's vacancy rate appears potent with high vacancy rates significantly predictive of faster nominations suggesting that presidents are indeed responsive to higher vacancy rates within the same court and confirming our expectation (2) from above. However, the variable for days pending is not statistically significant, implying that presidents are not necessarily responsive to filling long-vacant positions as predicted in our first expectation. While this finding is somewhat counter-intuitive, it may be due to how vacancies are now defined and the role of senior status judges. One explanation for the lack of findings on the Days Pending variable is that not all long-term vacancies are an issue because there are senior status judges keeping up with the workload.

Similarly, we do not find significant results in the full model for the variable on senior status. This finding does not provide support for our expectation (5) that presidents may be less responsive to vacancies where a judge remains available in a limited capacity. While this finding may contradict intuition, it may be the case that the measure would perform better for vacancies that occur during a presidency rather than vacancies that are inherited. We also find that the measure of D.C. district courts is not a significant predictor of faster times to nomination. As such, the results suggest that presidents are not prioritizing these cases on their potentially greater policy impact due to their D.C. location.

**[Insert Table 2 Here]**

The state-level predictors in the model of all district court transition vacancies provide several interesting insights into the nominations process. In accordance with our third set of expectations as well as prior literature, we find that it takes significantly longer to make initial nominations for vacancies with a state delegation composed of members from a president's opposition party. This implies that presidents wait to fill positions that would require additional negotiation with opposition senators and the threat of negative blue slips. However, mixed delegations are not significantly different from allied delegations. These findings reinforce the intuitions from Figure 1 above. When combined with the lack of significance on the D.C. district court variable, our results suggest that presidents may indeed be reaching for lower hanging fruit in the form of quick victories with allied delegations rather than attempting policy influence by placing judicial nominees into states with opposed delegations. This suggests that presidents look for expediency in their prioritization of initial district court selections.

The findings on presidential effects, in which presidents are compared against the baseline of Ronald Reagan, are interesting. In general, recent presidents have been consistently slower than Reagan in making nominations to inherited vacancies. One very notable exception to this rule, however, is George W. Bush who while not significantly faster than Reagan stands out as equally speedy. This suggests that his administration was able to successfully prioritize the making of judicial nominations and the results comport well with the descriptive statistics shown above in Table 1.. Contrary to our expectations (6) but in line with our findings from the descriptive analysis above, we find no evidence that President Trump, the only president so far to enjoy the effects of the rules change for transition vacancies, has been able to use the rules changes to his advantage when making nominations to the federal bench. However, it must also be noted that President Trump was the only president within these data to also inherit a Supreme Court vacancy, which we know captures time, attention, and political capital from presidents with respect to other priorities (Madonna, Monogan and Vining, 2016).

**[Insert Figure 2 Here]**

The second model in Table 2 shows the estimates for just the mixed Senate delegation cases.<sup>16</sup> As noted above, we examine this subset of the data in order to explore the influence of presidential electoral performance, which cannot be included in the full model as it is correlated with Senate delegations. Beyond methodology, there are strong theoretical reasons to explore mixed Senate delegation cases as they represent states in which both parties have proven able to win statewide races. These are the conditions in which state specific presidential electoral support may be most influential. While the subset reduces our observations in the model, we retain just over one third of the full data set with 119 total cases.

These results are also demonstrated by Figure 2 which portrays the results of both models graphically. The hazard ratio estimates for each model are shown as points with the 95% confidence intervals represented by horizontal lines. Error lines that cross the baseline of one are insignificant with estimates that are significantly above one demonstrating faster times to nomination and estimates significantly below one demonstrating slower time to an initial nomination.

We find evidence to support our expectation (4) that presidents will make nominations faster where they won a greater proportion of a state's vote.<sup>17</sup> This implies that, perhaps especially after a transition, a president gains political capital through electoral performance that can be used to allow faster judicial nominations. One explanation is that senators in such a state are less likely to oppose the judicial picks of a president who has proven to have political clout with their own constituents.

Our findings from the mixed delegation model are similar to the full model with the exception that the senior status variable is now weakly significant in the expected (negative) direction. Alone this finding suggests some small support for the intuition behind our fifth expectation. However, more broadly it may suggest again that presidential priorities are in part conditional on the Senate delegations in question. The other differences in the model are that we must omit the variables for delegation type as well as D.C. district cases because these values do not vary in the subset of mixed delegation cases.

## **Conclusions**

New presidents inherit dozens of district court vacancies with every transition. Though these vacancies are to the less visible lower federal courts, these "lower" courts actually create the

bulk of opinions in force at the federal level (Steigerwalt, 2010) and as such presidents actively seek to influence their composition (Goldman, 1997). The choices that presidents make regarding these transition vacancies reflect the relative priority of the positions as well as the political realities concerning judicial nominations. We choose to examine transition vacancies because they provide advantages for making comparisons and furthermore because shifting Senate norms imply that such vacancies are increasingly likely given the ability of a Senate to effectively blockade a president's judicial nominations in their final years. While transitions may carry unique political considerations, our results suggest several generalizable trends that are of interest to presidential, judicial, and congressional scholars.

Intuitively, we find that presidents are responsive to judicial vacancies where the practical need for a replacement is the greatest. Presidents respond much more quickly with nominations for courts with high vacancy rates. These are exactly the kinds of vacancies where we would expect the relevant courts to be facing overwhelming backlogs of cases. These findings provide evidence that presidents consider the relative necessity of filling a position as they prioritize their efforts to make nominations. Furthermore, when combined with the insignificant findings for the more policy important DC courts, these findings suggest that presidents may begin their terms looking to win easier nominations rather than engage in partisan endeavors to re-make the courts in their own image.

Our findings both confirm old expectations and add nuance to the discussion of how blue slips influence nomination decisions. Much like prior literature, we find that initial nominations to district court vacancies are slowed when presidents are forced to contend with a delegation of opposition senators. Again, this evidence is consistent with the view that new presidents shy away from partisan battles over judicial nominations, though it may merely demonstrate the cost of

bargaining with opposed delegations. We also add to the literature in finding that better presidential electoral performance is predictive of faster district court nominations in mixed delegation states. The results suggest that strong electoral victories within a state may help a president negotiate with cross-pressured senators over district judges. Importantly, these factors are likely to influence the speed of nominations for vacancies that happen to occur in the middle of a presidential administration as well as for transition vacancies.

The executive nominations process will likely continue to adapt in the face of changing strategic circumstances. While it seems that we have entered a new epoch after the “Bork era” (Carter, 1994), it is unclear whether the institutional settings of the Senate have settled down enough to declare the start of or fully describe a new institutional era. In particular, we do not yet know if senatorial blockades of judicial nominations may extend beyond a president’s final Congress or if in fact it will become the norm that judicial nominations only advance in periods of partisan unity between the president and the Senate. Furthermore, while the norm of honoring negative blue slips from home state senators appears to have held during President Trump's first Congress, we do not yet know if it can continue to hold without the procedural threat of an insurmountable filibuster to back up the norm of blue slip prerogatives. Overall, we find no evidence which suggests that the shift in rules and norms have influenced the speed at which presidents make nominations to transition vacancies, but we have too few cases yet to draw a firm conclusion.



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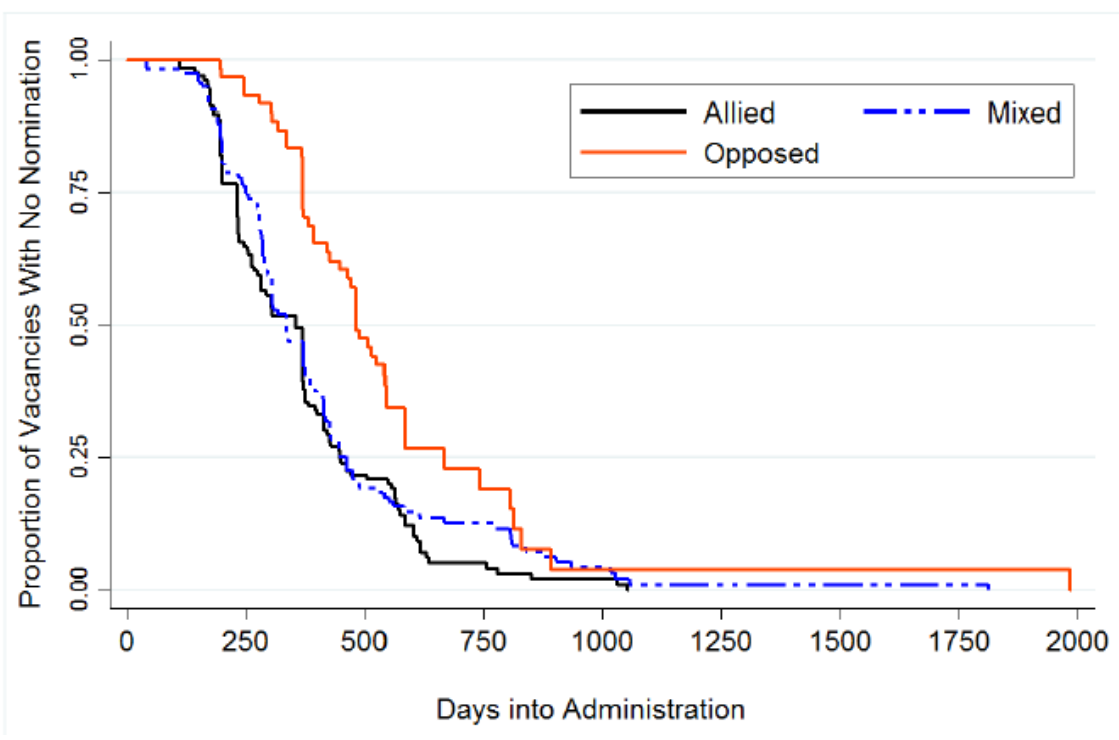
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## Tables and Figures

**Table 1: Inherited District Vacancies and Time to First Nomination by Administration**

	<b>Number</b>	<b>Median Days</b>
Reagan	27	254
GHW Bush	27	370
Clinton	89	385
GW Bush	53	368
Obama	40	421
Trump	85	335

**Figure 1: Time to District Court Nominations by Blue Slip Conditions**



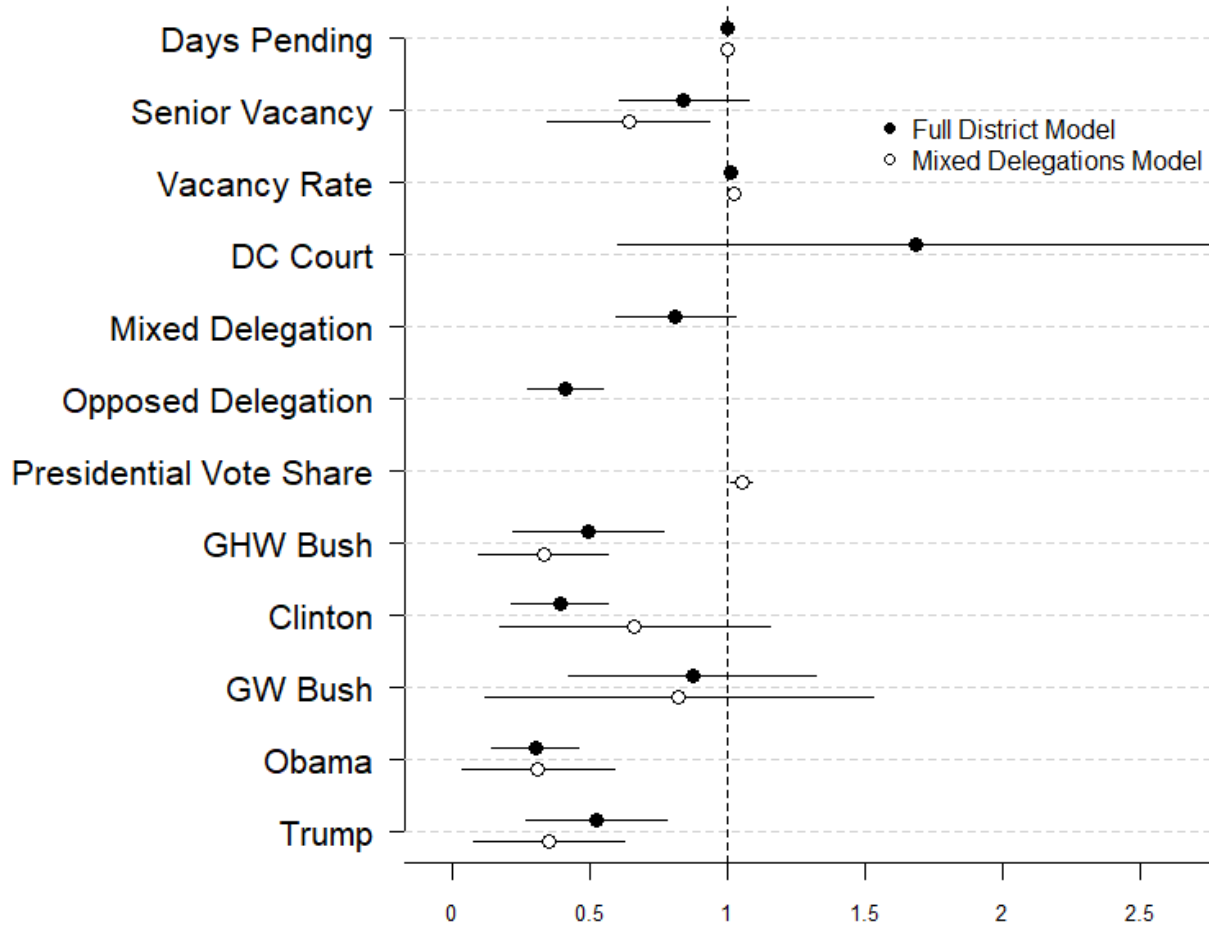
**Table 2: Cox Model on the Timing of Nominations for District Court Vacancies**

Variable	Full District Model		Mixed-Delegations Model	
	Hazard Ratio (S.E)	P >  z	Hazard Ratio (S.E)	P >  z
Days Pending	1.00 (0.00)	0.63	1.00 (0.00)	0.74
Senior Vacancy	0.84 (0.12)	0.21	0.64· (0.15)	0.06
Vacancy Rate	1.01* (0.01)	0.04	1.02* (0.01)	0.01
DC Court	1.68 (0.55)	0.11		
Mixed Delegation	0.81 (0.11)	0.11		
Opposed Delegation	0.41* (0.07)	0.00		
Presidential Vote Share			1.05* (0.02)	0.03
GHW Bush	0.49* (0.14)	0.01	0.33* (0.12)	0.00
Clinton	0.39* (0.09)	0.00	0.66 (0.25)	0.28
GW Bush	0.87 (0.23)	0.60	0.82 (0.36)	0.65
Obama	0.30* (0.08)	0.00	0.31* (0.14)	0.01
Trump	0.52* (0.13)	0.01	0.35* (0.14)	0.01
	<i>N</i>	321	<i>N</i>	119
	LR $\chi^2(11)$	73.29	LR $\chi^2(9)$	31.73
	Prob > $\chi^2$	0.000	Prob > $\chi^2$	0.000

Note: \* and · indicate significance at the p<.05 and p<.1 levels respectively.



**Figure 2: Cox Model on the Timing of Nominations for District Court Vacancies**



## Notes

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<sup>1</sup> See Hollibaugh and Rothenberg (2017) for a notable exception and discussion of this topic.

<sup>2</sup> See <https://www.justice.gov/olp> for more information on the Office of Legal Policy.

<sup>3</sup> The definition of what constitutes an “emergency vacancy” has changed over time. An early definition was any position vacant for 18 months or more. After the introduction of senior status (discussed below), the definition shifted towards measures of productivity and workload. As such, no consistent definition for “emergency” exists going back through the Reagan administration.

<sup>4</sup> For more information, see: <http://www.uscourts.gov/faqs-federal-judges>.

<sup>5</sup> These rules have changed further in the intervening years. In President Trump’s first year in office, the Senate used the nuclear option again to extend the lower threshold requirement to Supreme Court nominations. In the 116<sup>th</sup> Congress, the Senate again used a reform by ruling to lower post cloture debate time in an effort to make it easier to confirm judges quickly.

<sup>6</sup> While Clinton had more district court vacancies at the start of his term, many of these appointments were to newly created positions.

<sup>7</sup> These cases are identified through an archive of judicial vacancies found on the U.S. Courts website as noted below.

<sup>8</sup> As President Trump has not yet made initial nominations to all of his inherited vacancies, we do not report average or maximum times for his nominations.

<sup>9</sup> The downside is that we can not include many traditional variables within the model because they are not identifiable. Any differences in, for example Senate contexts, would be indistinguishable from the differences due to the given presidential administration. However, no pattern is suggested when comparing the strength of presidents’ party in the Senate at the start of an administration to the duration until nominations.

<sup>10</sup> While we do not observe perfect separation within the data, there are so few instances of significant wins in opposed delegation states that we believe modeling would not produce useful results.

<sup>11</sup> See <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> for further information and data.

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<sup>12</sup> While D.C. district court nominations have no Senate delegation, we code these cases as “allied” for the purpose of our analysis as presidents are unconstrained in their choice by the blue slip process. However, results are not altered by alternative specifications that do not make this assumption.

<sup>13</sup> We exclude President Trump's data as his initial nominations were still incomplete as of the 116<sup>th</sup> Congress.

<sup>14</sup> See, for example, the Weibull model as a common alternative. Using Weibull duration models on our data produces similar results for key findings. While there are compelling reasons to believe that our data meet the assumptions of the Weibull model, we opt to present the results of the model with fewer assumptions in order to provide a more conservative test of our expectations.

<sup>15</sup> We use the Schoenfeld residual method to test the proportional hazards assumption both globally and for each covariate within our Cox model of district court vacancies. The global test was insignificant ( $\chi^2(11) p > .84$ ) while none of the variables within our model were significant when tested individually. These results suggest that the proportional hazard assumption is not violated.

<sup>16</sup> The results of the Schoenfeld test on the second model suggest no violation of the proportional hazards assumption.

<sup>17</sup> Running models on subsets of just allied or opposed delegations does not yield significant results for the presidential vote performance variable. This finding is consistent with the intuition that the impact of presidential electoral performance is conditional on the nature of the given Senate delegation.