THE POWER OF FOOTDRAUGHT: BARGAINING AND DELAY IN THE
FEDERAL CONFIRMATIONS PROCESS

DISSERTATION

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By

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* * * * *

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ABSTRACT

Scholars of the federal confirmations process have noted that the Senate is taking longer to confirm the president’s nominees, and confirming fewer of them, than ever before. The existing theories of the confirmation process have not entirely explained the Senate’s increasing delay, primarily because the existing theories make a number of assumptions that limit their usefulness. Current models assume a single-shot, complete information environment, and focus almost solely on the filibuster and majority voting as means of stalling or defeating nominations. They also explore only ideological incentives and ignore other motivations described in the literature. The result is that our current theories all predict either too many failures or none at all, and none explicitly envisage delay.

In this project, I first demonstrate that confirmation delay is not the province of institutionally-empowered senators, such as the median senator or the pivotal vote for invoking cloture on a filibuster. The Senate’s rules provide ample parliamentary power to every senator to stall or even defeat a nomination without a majority or super-majority vote. I then argue that repeated interaction between the president and the Senate and some uncertainty about preferences is a more realistic view of the confirmation process.
Finally, I argue that senators have several motivations when stalling or defeating a nomination, including partisanship and hostage-taking, and not just ideological goals.

With this new framework, I describe a new model of confirmations that not only allows for delay, but also describes the interaction between ideology and partisanship that produces it. Three predictions of the model are tested in several models of nominations to the federal bench and find broad empirical support.

The implications for nominations have wide ranging consequences, especially for the importance we give to informal institutions, mixed motivations, and divided government in explaining national politics. Most significantly, the model shows that nominees that are ultimately confirmed bear much less ideological resemblance to the president than current theory predicts. This suggests that the president has substantially less impact on the executive and judicial branches than previously thought.
To Unisia
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CHAPTER 1
INTRODUCTION

The method for appointing Supreme Court justices, lower federal court judges, and most high-level executive branch officials is described in the Appointments Clause of the Constitution. Article II, Section 2, clause 2 provides that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint…” these judges and officers.

The simplicity of these words belies the importance of the confirmation process. Tens of thousands of nominees are confirmed every year, filling thousands of positions at all levels of the federal government. A large proportion of these nominations are military promotions, while thousands of others staff the Foreign Service, the Public Health Service, and the National Oceanic and Atmospheric Administration. The upper echelons of independent agencies and boards are filled by the confirmation process as well, including bodies as diverse as the Federal Reserve and NASA, as the Environmental Protection Agency and the Federal Election Commission. All federal law enforcement, national defense, and cabinet departments depend on the confirmation process.

The confirmations process also selects the federal judicial branch. The great majority of judicial work is found at the District Courts and Courts of Appeals, where the
legal and ideological tenor of the judicial branch is realized in the day-to-day operation of the courts. Though the scope of a District Court, for example, is limited in geographical extent, these courts are the frontlines of federal adjudication, and the sheer volume of decisions they produce affects an enormous number of people. The Supreme Court, on the other hand, has national sweep and acts as the final arbiter on issues as seemingly mundane as maritime and patent law to those as salient and controversial as abortion and religious expression. Appointments to the Supreme Court are therefore as important as the vacancies are rare.

Thus, much of the executive branch and the entire judicial branch are filled by the men and women chosen by the president and the Senate. The majority of federal law is created, executed, enforced, or adjudicated by these appointees. It comes as little surprise, then, that nominations have become a primary means by which the president “politicizes” the executive branch and maintains control of bureaucratic policy (Moe 1987). Furthermore, appointments to many of the federal agencies, and especially to the federal bench, can survive the term of the administration by years or even decades. Careful nominations to these positions can promulgate the president’s agenda long after the president has left office. The importance of the nominations also means that the Senate has a vested interest in performing its “advice and consent” role, to make its presence felt across such a wide sphere of influence for such a long time (Binder 2003; Binder and Maltzman 2004; Bell 2002).
Changes in the Confirmation Process

As important as the confirmation process is, and perhaps because of its importance, in recent decades it has become much more ideological, more partisan, and much slower (McCarty and Razaghian 1999). Many scholars have noted the steep increase in the time the Senate takes to confirm a nomination. This trend is perhaps most obvious among nominations to federal district and appellate courts. In the 80th Congress, the mean time in days that such a judicial nomination waited for confirmation was almost zero – most nominations were confirmed the same day they were submitted. By the 108th Congress, the mean time from nomination to confirmation had climbed to 182 days for district court nominations and 331 days for appellate nominations (Binder and Maltzman 2005; Martinek 2005).

Scholars have documented similar increases for nominations to executive branch offices and to the Supreme Court. During Johnson’s administration, executive branch nominations waited an average of 33 days to be resolved, whether confirmation or failure, while during his second term, Clinton’s nominees waited 185 days on average (Bond, Fleisher, and Krutz 2002). Supreme Court nominations have not fared much better. From 1900 to 1980, the median time between nomination and final Senate action was 28 days, while from 1981 to 2005, the median time climbed to 51 days (Garrett and Rutkus 2005; see also Shipan and Shannon 2003).

Not only is the average time to confirmation climbing, but the rate at which nominations are confirmed is simultaneously declining. In the 79th Congress (1945-46), 100% of district court nominations and 87.5% of circuit court nominations were
confirmed, or 97% of the total. In contrast, Clinton had 68.7% of his district court nominees and 44.1% circuit court nominees confirmed, for 61.5% of his total in the 106th Congress (1999-2000). Bush had 70.3% of his district court nominees and only 27.9% circuit court nominees confirmed, for 55.9% of the total in the 107th Congress (Rutkus and Sollenberger 2004; Sollenberger 2003). For nominations to other offices, the decline in confirmation rates is not as sharp but still quite profound. The rate of executive branch confirmations fell from 99% in Johnson’s second term to 77% in Clinton’s second term (Bond, Fleisher, and Krutz 2002).

In short, nominations are failing more often now than in recent decades, and those that do not fail are often taking much longer to be confirmed. Furthermore, these trends are not isolated to a particular office or even to a particular branch of government. Rather, every office that confirmation scholars have examined has been affected.

**Explaining Confirmation Delay with Senate Priorities**

The fact that nominations are taking longer to be confirmed and that fewer of them are being confirmed is incontrovertible. But an increasing average confirmation time is one thing; where that extra time comes from is another. Students of the process have universally attributed the increase to purposeful actions on the part of a nominee’s opponents. The Senate’s open and loosely restricted parliamentary procedures create many opportunities, including filibusters and blocking unanimous consent, to delay the president’s nominations. Thus, as the functions of the federal government have grown, as divided government has become more common and as the parties have become more
ideologically polarized (Poole and Rosenthal 1997; Rohde and Shepsle 2007; Sinclair 2007), the president’s opponents are making ever more frequent use of these opportunities to stall or defeat his nominations.

An obvious alternative hypothesis, however, is that such tactics have little to do with the trend of increasing confirmation time. Rather, the Senate may simply taking longer to do everything, whether it is holding committee hearings, bringing up bills for votes, or considering the president’s nominations. As a result of increasingly frequent divided government in the post-war decades, the Senate may find other priorities than the president’s agenda, including his nominations. When the Senate does get behind the president’s agenda, ideological polarization may make timing and coordination difficult, even if the president’s opponents are not attempting to use the Senate’s many parliamentary powers to slow implementation of the president’s agenda. Rather, the president’s opponents and supporters may not be able to reach agreement on the Senate’s agenda, resulting in the sluggish consideration of all of the Senate’s business, including pending nominations.

This hypothesis would also do much to explain the increasing failure rates of the president’s nominations. All nominations begin on a tight clock, with only a limited amount of time during which they may be confirmed. The Senate’s Rule XXXI specifies that nominations not confirmed by the beginning of a recess or adjournment fail without a vote on the Senate floor. Exactly how much time a nomination has depends on how many recesses Congress takes during session and whether nominations are exempted from Rule XXXI by unanimous consent. Yet the time is always finite, and increasing
time to consider nominations likely leads to greater failure rates (Bond, Fleisher, and Krutz 2002; Shipan and Shannon 2003). The Senate may be taking systematically longer to do everything, without any purposeful action on the part of the opponents of a nomination. Put differently, and to paraphrase Bond, Fleisher and Krutz (2002), there is a difference between neglect and “maligned neglect” of the president’s nominations. The increasing time (resulting from any number of sources) may not be indicative of increasing delays (resulting from the actions of senators to intentionally increase that time). The possibility that confirmation delay is in fact only a consequence of a systematically slower Senate is one that has so far not been examined in the literature.

If we examine only the time a nomination takes to be resolved, we would have little evidence to distinguish between intentional delay and a systematic slowing of the confirmation process. However, the number of days between nomination and resolution is not the only data we may examine, and this additional evidence supports the prevalence of delay.

**Explaining Confirmation Delay with Changing Rules**

For example, and perhaps most obviously, motions to invoke cloture can indicate whether the increasing time that nominations are facing are the result of filibusters or threats of filibusters. Cloture motions do not perfectly coincide with filibusters (e.g. Binder and Smith 1997), and therefore the presence of a cloture motion does not necessarily guarantee that a filibuster occurred. Conversely, the presence of a filibuster does not always induce a cloture motion, but cloture motions likely at least indicate that
the supporters of a nomination have come to believe that time has become a factor and that the nomination may fail without their intervention. With that caveat, we may ask whether the number of cloture motions, successful or not, increased during the period that confirmation time has increased.

The answer to the question is decidedly affirmative; cloture motions have indeed increased substantially during the post-war period. From 1949 to 1967, no nominations saw a cloture motion, while from 1968 to 1992, eight judicial nominations and four executive nominations saw cloture motions. After 1992, the increase is even more striking. Between the 103rd and the 108th Congresses, 21 judicial nominations and 16 executive nominations experienced a cloture motion (Beth and Palmer 2005). In other words, there were three times as many cloture motions in the last five congresses than in the previous 43 years combined.

The Senate’s rule on cloture, Rule XXII, has changed several times during this period, with respect to both what matters allow cloture and what size the majority must be to invoke cloture (Binder and Smith 1997; Beth and Palmer 2005). Yet, these changes seem to explain very little of the increase in cloture motions. For example, Rule XXII did not allow cloture on nominations until 1949, but the first cloture motion made on a nomination was not until 1968, during the nomination of Abe Fortas to be Chief Justice (Beth and Palmer 2005).

In 1975, the Senate lowered the majority needed for invoking cloture from two-thirds of senators present and voting, or a maximum of 67 senators, to three-fifths of the chamber, or 60 senators. Only two nominations saw cloture motions before 1975, and
both cloture attempts failed. This decrease in the maximum threshold for invoking cloture would seem to make successful filibusters more difficult and invoking cloture much easier.

Belying this intuition, however, is the fact that more than five years passed before these reduced requirements were utilized for a nomination. Not until 1980 did the president’s supporters invoke cloture under the new rule, for two nominations to the National Labor Relations Board and for Stephen Breyer’s nomination to be circuit judge. Cloture motions then saw several more dry spells – no cloture motions on nominations were made between 1981 and 1983, in 1985, and between 1988 and 1991. Thereafter, the number of motions increased precipitously, with at least one nomination seeing a cloture motion in every year. In the 108th Congress alone, 14 nominations had cloture motions (Beth and Palmer 2005). Thus, cloture motions have increased in a rather fitful manner, and did not dramatically increase immediately after the rule change.

Furthermore, while cloture was in principle easier to invoke after 1975 than before, the success of a cloture motion has been by no means certain. In the 96th Congress, three nominations saw eight cloture motions. Cloture was eventually invoked in each case, and thus an average of just under three cloture motions was required to invoke cloture. Contrast this figure with those of the 108th Congress, where 14 nominations saw 26 cloture motions, and not one of these motions were ultimately successful\(^1\). The ratio of cloture motions to cloture invocations has therefore fallen

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\(^1\) The cloture motions on three nominations, Michael O. Leavitt to the Environmental Protection Agency, Marcia G. Cooke to be a district judge, and Victor J. Wolski’s to the Court of Claims were withdrawn by unanimous consent before cloture was invoked.
dramatically since 1980, with a mean of almost three to one (Beth and Palmer 2005). The lowering of the threshold in 1975 may have made invoking cloture possible in some cases, but it has never been easy, and cloture still fails much more often than it is invoked.

Changes in Rule XXII therefore do not convincingly explain the increasing use of cloture motions. The Senate changes its rules for political rather than procedural reasons (Binder and Smith 1997, 1998), and cloture is no exception. Cloture, however, is not the only procedural feature of the Senate that may distinguish a general slowing of the process from intentional delay. Other motions can indicate where a nomination has been stalled by some action taken by a senator. First, motions to recommit a nomination to committee, if successful, necessarily mean a longer consideration by the committee, and therefore imply that the nomination will take longer to resolve. Second, motions to postpone are exactly that – motions made to delay consideration of a nomination to another time. Finally, motions to proceed can indicate delay. The Senate usually proceeds from one matter to another by unanimous consent. Motions to proceed require a vote, and therefore a quorum (and ultimately more time); thus, these motions are generally used only when unanimous consent has failed.

Besides motions, two other procedural features of confirmations can signify greater durations. First, most nominations are confirmed with unanimous consent rather than recorded vote. Recorded votes, like motions to proceed, provide an opportunity for opponents of a nomination to ask for a quorum. Furthermore, recorded votes require some amount of scheduling after the majority has established a quorum.
Second, the majority of confirmations see no debate on the Senate floor. Rather, most nominations are brought up for a vote and confirmed with one or two unanimous consent agreements. Every minute spent in floor debate is a minute in which the nomination debated is not confirmed. Moreover, debate on a nomination interferes with the Senate’s previously scheduled business, and the Senate’s rules place limits on when the debate on a nomination may take place. For these reasons, debate on a nomination is usually scheduled for several days after the motion requesting it passes or the unanimous consent to proceed to a vote without debate fails. Finally, debate opens the possibility of a filibuster in the classic sense – literally a senator who begins to speak and does not stop. Debate thus consumes more time than that spent in discussion of the nomination, possibly much more, and the supporters of a nomination have every incentive to avoid it if possible.

These four features of the confirmation process – cloture motions, the other motions described, recorded votes, and debate – may indicate purposeful delay, rather than systematically but unintentionally increased confirmation time. For nominations to lower federal courts from the 100th to the 108th Congress, I record the presence of each of the four procedural features described above – cloture motions, additional motions, recorded votes, and additional days scheduled for debate. Table 1.1 presents the correlations between the proportions of nominations with these motions, as well as the average nomination duration, with the number of the Congress.

2 In chapters two and six, I discuss in more detail what procedures can and cannot be used to determine whether a nomination has been delayed.

3 From Martinek 2005 and Thomas (http://thomas.loc.gov); see chapter six.
Consistent with previous studies of the process, the correlation for nomination duration is large and positive, indicating that the time a nomination waits for resolution has increased during this period. As implied by the discussion above, the correlation for cloture motions is quite large as well, and the increase in cloture motions reaches statistical significance. Finally, the correlations for other motions, recorded votes and days debated are all quite large and in the neighborhood of the nomination duration. Thus, in the past two decades, the numbers of motions to recommit, postpone, and to proceed have increased, as have the numbers of recorded votes and the nominations that have days scheduled for debate.

These correlations are only for judicial nominations in nine recent congresses, but the trends extent back into the 1950s and across many offices (Bond, Fleisher, and Krutz 2002; Rutkus and Sollenberger 2004; Sollenberger 2003). The evidence is clear that senators are intentionally stalling confirmations through dilatory motions, extended debate, and other parliamentary tactics. Confirmation delay is not a byproduct of a general slowdown of Senate work. It is done on purpose.
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</tr>
<tr>
<td>Cloture Motions</td>
<td>0.75*</td>
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<tr>
<td>Other Motions</td>
<td>0.71*</td>
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<td>0.88**</td>
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<tr>
<td>Days Debated</td>
<td>0.88**</td>
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<td>N</td>
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Note: Entries are Spearman’s correlation coefficients.

* p < 0.05       ** p < 0.01

Table 1.1: Increasing Nomination Duration and Delay Tactics, 100\textsuperscript{th} – 108\textsuperscript{th} Congress
Confirmation Delay as a Shot across the Bow of the Administration

Not all nominations are delayed to the point of failure, and some nominations are confirmed almost immediately. Others hover in between, delayed for a period of time, but eventually proceeding to confirmation. Ideological polarization between the Senate and the president, or the modern prevalence of divided government, would both seem poor explanations for this kind of variation given the consequences for the president and Senate for persistent confirmation failure.

While there is obviously some element of obstructionism to confirmation delay, there may well be much more. Specifically, ideological and partisan motivations may spur a senator to delay a nomination he or she dislikes, but the delay also gives that senator a chance to communicate his or her displeasure to the president. The president, after observing this message of displeasure, may take heed and choose a different sort of nominee next time, or may ignore the message entirely. The fact that delay allows the president and the Senate to communicate in a credible, meaningful way means they can attempt to alter each others perceptions and choices.

If delay can be a signal, it is likely to be a rather threatening one, since too much of it has the effect of defeating the nomination. The president ignores such signals at his peril, since even if a majority of the Senate might vote to confirm a nominee, a small minority of senators can make good on a threat to delay a nomination to expiration. These senators know this, and can try to threaten the president into offering “better,” more compromising nominations. Yet, there will be other senators who will be tempted to bluff the president – those who have no intention of delaying a nomination to death,
but still want the compromise. The president, in turn, must parse out who is serious and who is not, and then use this knowledge to fill executive and judicial vacancies with nominees who match him ideologically.

Judging from the variation in confirmation times and failure rates, delay can be a potentially rich language for communication. More importantly, it is a credible language. A senator who says “I would like something different in a nominee” during a phone call to the White House is merely speaking words; a senator who bottles up the confirmation of the next associate justice of the Supreme Court demands to be taken seriously.

Richness and credibility set the stage for strategic interaction, where the president and Senate both attempt to gain the most from the confirmations game through communication, threat, and possibly compromise.

The scholarly work on confirmation delay and failure has not considered the informational and strategic value of delay, but interestingly, journalistic observers and political leaders have noted that same value often. For instance, the confirmation of George W. Bush’s first Attorney General, John Ashcroft, is both a recent and well-publicized example of the threatening value of confirmation delay. The case is instructive, both because it demonstrates that even without a failed nomination, delay can be a credible threat, and that the people making the threat understand it to be one.

On January 21, 2001, the Senate confirmed seven of President Bush’s cabinet nominees in a voice vote, including the secretaries of State, Defense, Treasury, Education, and Agriculture. Conspicuously absent from the list of confirmations was John Ashcroft. At that time, journalists were predicting that Senate Democrats would
“hold up action by the full Senate at least briefly to continue their protest against Ashcroft’s record on race relations, abortion, gun control and other sensitive issues.”

In fact, Ashcroft was confirmed on February 1. Although the confirmation was only 11 days longer than that of Colin Powell’s, for example, the two confirmations were markedly different. Powell’s confirmation hearings were considered deferential, and he was confirmed very quickly, during a special Saturday session of the Senate, only three hours after Bush took the oath of office.

Ashcroft’s confirmation, on the other hand, ended the most contentious fight over a cabinet nomination since John Tower’s for secretary of Defense in 1989. The confirmation took almost two weeks, including four days of highly publicized confirmation hearings where Ashcroft was extensively questioned about his views toward minorities, abortion, gay rights, and his ability to enforce laws as attorney general that he was thought to disapprove. The climax of the hearings came with the testimony of Ronnie White, an African-American Clinton nominee to the Federal Circuit Court. During the floor debate for White’s confirmation in October 1999, Ashcroft, then a senator from White’s home state claimed that White had a “pro-criminal” voting record on Missouri’s Supreme Court. White was subsequently defeated on the floor, after which a number of Democrats in Congress openly accused Ashcroft of racism.

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During Ashcroft’s hearings and well after, the fight became only more public. Several interest groups began a grass-roots campaign to either support or denounce the nomination. The Christian Coalition began a phone campaign to convince its members to call on their senators to support Ashcroft, while the National Abortion and Reproductive Rights Action League ran radio ads in seven states, aimed at both moderate Democrats and moderate Republicans.

Senate Democrats made a number of statements at press conferences that publicly stressed their opposition to Ashcroft, including Senator Ted Kennedy, who threatened to filibuster the floor vote. The Republicans retorted that the Democrats only opposed Ashcroft because of his deep religious convictions. The Democrats eventually decided against a filibuster, and following two full days of rancorous floor debate, Ashcroft was confirmed by a 58-42 vote.

Throughout the confirmation, the press widely reported that, among the number of reasons why they opposed Ashcroft, the Democrats also wanted to send a signal to the Bush administration about what would be acceptable in future nominations, where filibusters or other obstructionist tactics are more prevalent. Senate minority leader Tom Daschle said that the Democrats had sent “as clear a message as we can,” and that although they had not filibustered Ashcroft’s confirmation, “we retain our right to use those options available to us if somebody from the… extreme right would be nominated for an important and sensitive position.” Democrat Charles Schumer “called the vote ‘a shot across the bow’ of the administration.”

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6 Mitchell, Alison, “Senate Confirms Ashcroft as Attorney General, 58-42, Closing a Five-Week Battle,”
At least according to some Democrats, then, the fight over Ashcroft, with all its delay and stalling, was intended to serve as a warning to Bush that although Ashcroft may be confirmed, the minority party will only bend so far. Though Ashcroft’s nomination was atypical in many respects, it does demonstrate that the confirmation process can create signals from the Senate to the president. The time it takes to confirm a nomination is a very visible signal, conveying potentially valuable information about the preferences of the Senate. Though the Senate typically defers to the president on his cabinet choices, small minorities can and will effectively obstruct later nominations, especially to the judicial branch. In Ashcroft’s case, while Senate Democrats were gathering nay votes, the confirmation not only slowed down, but became much more contentious and much more public.

Not all nominations slow down because the minority is gathering votes for a cloture-proof margin. William Weld’s nomination for ambassador was held in committee, and Abe Fortas passed committee, but his nomination to Chief Justice was filibustered and never reached a floor vote (Binder 2001). Confirmation struggles may take many forms and involve a number of different players, but the difficulty of the battle is not necessarily indicated by the final vote. Rather, the depth of the struggle is best indicated by the time it takes to fight. The time itself is a signal of protest, and it may carry quite a threat.

Scholarly work has not developed the notion that delay can be a signal. Numerous studies have described the nomination and confirmation process, including why so many nominations are eventually confirmed, and still others have investigated the causes of delay in the confirmation process. However, none so far so as to consider the possibility that delay is anything more than mere obstructionism – that it may be a powerful strategy to influence the president’s later choices.

In the pages that follow, I trace the confirmation process from beginning to end, detailing the operations and tactics necessary to delay a nomination. This discussion tells us what players are important in the confirmation process and why, and what players can delay the process, even indefinitely. Next, I examine what the literature says about why a senator would delay the process and review the theoretical and empirical work on confirmations, looking for clues as to how the Senate might communicate through delay and what the president might do in response. Then, building on previous game-theoretic models from a number of literatures, I formalize a new model of the confirmation process. This new model generalizes over features unique to both executive and judicial nominations, and therefore applies to both kinds. Analysis of the model shows that it fits well with our intuition of inter-branch bargaining and the stylized facts of confirmations. Finally, I test the empirical implications of the model in two chapters.
CHAPTER 2
THE CONFIRMATION PROCESS

The process of confirming a nominee is both convoluted and porous – it has many steps and many points of access where individual senators, even those not directly involved in the process, can affect the outcome. This chapter describes the process with an eye toward the impact that a very small number of senators can have on the timing and disposition of a nomination. In fact, although the filibuster is the best known parliamentary device for stalling or defeating any business in the Senate, it is by no means the most common. While 40 senators are required to sustain a filibuster, one senator is quiet capable of slowing the confirmation process to a crawl, beginning with the first day that the nomination is submitted to the Senate.

**Receipt and Referral**

The confirmation process begins with the president’s submission of a nomination\(^7\). These submissions are sent in writing to the Senate, and automatically received by the Senate’s executive clerk. By precedent, receipt of the nomination occurs

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\(^7\) A number of excellent descriptions of the rules and procedures of the confirmation process are available. The most general of these are Senate’s Rules and Riddicks’s Senate Procedure (1992). See also Beth and Palmer (2006), Rybicki (2005) and Steigerwalt (2004) for more detailed discussions of particular parliamentary tactics. This section also leans on the rules of the Senate’s committees, which are available on the various committee websites.
whether the Senate is in session or not, though no further progress can be made toward confirmation if the Senate is not in session. The Senate’s Rule XXXI prohibits confirmation of a nomination on the same day it is received except by unanimous consent.

Most nominations are immediately referred to a committee upon receipt. Although the presiding officer is formally responsible for choosing which committee receives the nomination, normally the executive clerk makes the referral according to the committees’ legislative jurisdictions defined in Rule XXV. A few nominations are referred to particular committees by statute; for example, the Committee on Finance, as opposed to the Committee on Foreign Relations, considers nominations of the United States Trade Representative. Rule XXXI provides that all nominations are referred to a committee, though some nominations, typically nominees that are former or current senators, have been exempted from committee referral by unanimous consent (Rybicki 2005).

Nominations may also be referred to more than one committee. These referrals may be either joint referrals or sequential referrals. In a joint referral, a nomination is referred to two committees simultaneously, usually when the committees in question have equal jurisdictional claims to a nomination. When two committees have recognized but unequal jurisdictional claims, nominations may be referred to committees sequentially according to the strength of their claims. Thus, Comptrollers and General Council to executive offices are often referred first to the committee with jurisdiction over the executive office, and then to the Committee on Government Affairs. The first
committee must report the nomination before it is referred to the second committee, and the second referral usually made has a time limit attached. In both joint and sequential referrals, both committees must report the nomination before the Senate may confirm the nomination unless the Senate discharges the committees. Rule XXXI makes no provision for joint or sequential referrals, and so such referrals are typically made by unanimous consent.

Committee Procedures

Once a nomination is referred to a committee, that committee begins gathering information about the nominee. Committees differ in the amount of information they require from a nominee and the methods by which they acquire it. Most committees require a biographical resume, and most nominees are required to complete a financial disclosure form. Some committees, including Foreign Relations and Judiciary, may also request a summary of FBI reports from the White House for nominations to particular offices. Committees may also require nominees to complete written questionnaires on background and substantive information. Generally, committees require that these questionnaires be returned before hearings are scheduled (Sachs 2001).

Whether the committee holds hearings is left to the committee to decide. Rule XXVI allows a committee to report (that is, vote on) any measure or matter, including nominations, by a majority vote or by unanimous consent, with or without a hearing. Some committees have slightly stricter rules; the Committee on the Judiciary, for example, requires a majority vote with at least one minority party member.
Most nominations are confirmed without hearings, and so senators seem to largely agree on which nominations should require hearings and which do not. Within particular jurisdictions, however, committees vary considerably in the number of hearings they hold. The Committees on Armed Services, Judiciary, and Foreign Relations receive the largest number of nominations in a given Congress. These committees do not hold hearings for the great majority of nominations they receive, but are almost certain to hold hearings for the most important offices. For example, the Committee on the Judiciary does not generally hold hearings on nominations to United States Marshals, but does for nominations to the United States Supreme Court. The Committee on Energy and Natural Resources, by contrast, receives far fewer nominations, but holds hearings for most of them, often en bloc.

If no member of the committee moves to report a nomination without a hearing, or if the motion is defeated, then a hearing must be scheduled before the committee will report the nomination. Hearings, like any other matter considered by the committee, occur during regularly scheduled meetings or during specially scheduled meetings. The Senate’s rules (XXVI) require that standing committees meet at least once per month, though committees vary in how often they convene. The Committees on the Judiciary and Foreign Relations meet at least weekly, the Committee on Environment and Public Works meets at least bi-weekly, and the Committee on Energy and Natural Resources meets on the third Wednesday of every month. Obviously, the more time between regular meetings of the committee, the more time a nomination waits for a hearing. Furthermore, because the chair controls the agenda at committee meetings, the chair
determines whether a regular meeting involves a hearing. The alternative to conducting a
hearing during a regular meeting is to convene a special meeting, which is scheduled by
the chair. The chair thus determines whether a hearing is scheduled and when.

In addition, the chair calls witnesses to testify, and so he or she can determine
much of the hearing’s content. Witnesses always include the nominee, who reads a
prepared statement and answers questions from committee members. In most cases,
nominees must also submit written copies of their prepared testimony to the committee
prior to the hearing. The witnesses may also include people familiar with the nominee or
even spokespeople of interest groups. Most hearings are routine and serve to collect
additional background information on the nominee. For nominations that are more
controversial or offices of greater policy importance, members may ask questions
designed to elicit information about the nominee’s ideology or stance on particular
concerns to the senators’ constituencies.

Ultimately, because the chair schedules meetings, hearings, and witnesses, the
chair in a strong position to determine whether a nominee receives a hearing, the tone of
the hearing, and how quickly the nominee advances through the process, if at all. Yet,
the chair is not in complete control. First, if the chair decides against holding hearings,
the rest of the committee is not helpless. Senate Rule XXVI provides that three members
of the committee may officially request a meeting from the chair, and a majority of the
committee members may schedule a meeting if the chair will not. Members of the
minority are therefore not without recourse, but circumventing the chair requires the
cooperation of at least some members of the majority party.
This limitation was evident in the case in President Clinton’s nomination of William Weld in 1997 to be ambassador to Mexico. Senator Jesse Helms, then-chair of Foreign Relations, had expressed strong disapproval of Weld’s nomination, and especially of Weld’s support of legalizing marijuana for medical use. Helms publicly vowed to stall the nomination if it reached his committee and to not hold hearings. Although several Republican members of the committee expressed support for Weld, their number was insufficient to compel hearings over Helms’ objection, and Weld eventually asked Clinton to withdraw his nomination.\footnote{\textsuperscript{8} The conflict between Weld and Helms was widely covered in the media. See Steven Lee Myers, "Helms to Oppose Weld as Nominee for Ambassador," \textit{New York Times}, June 4, 1997, p. A1, Andrew Miga, "Helms’ remarks are red flag to Weld nomination," \textit{Boston Herald}, June 4, 1997, p. 23, and Associated Press, "Weld's Nomination is Reported in 'Stall,'" \textit{New York Times}, July 2, 1997, p. A17. Helms’ victory over the near majority of the Foreign Relations committee is discussed in Congressional Quarterly (1998).}

Circumventing the chair’s decision to not hold hearings is difficult for the minority, as it requires members of the majority party to vote against the chair, a powerful member of their own party. On the other hand, if hearings are scheduled, the minority party members have much more control over the witness list. Rule XXVI allows a majority of the minority party members to call witnesses during the hearing. Some committees have even more lax requirements. The Committee on Foreign Relations, for example, allows the ranking member to call as many witnesses as the chair without the request of a majority of minority party members. The Committee on Energy and Natural Resources allows any member to call a witness.

Opponents of a nomination may thus schedule a witness hostile to the nominee, or to provide information about scandals or a particular ideological bent. The Senate’s rules provide no provision for preventing such testimony, by the chair, the majority members...
or by the minority members. The result is that if the chair wishes to prevent the nomination from proceeding, he or she is usually able to do so, but if the chair wishes to proceed with hearings, then the chair loses some control over their content (Davis 2007).

This fact may make the process very difficult for the nominee, regardless of whether his or her opponents are a majority or a minority on the committee. For example, the Republicans were the minority of the Committee on the Judiciary in 1991, while they held majority control during the first months of 2001. Yet, in both years the Republicans on Judiciary would have been powerless to prevent the testimony of either Anita Hill during the Clarence Thomas hearings or of Ron White during the John Ashcroft hearings. These two visible, controversial witnesses make clear that if a nominee is to proceed to hearings, then opponents can create a very public battle whether those opponents are a majority or not.

Besides hearings, other formal features of committee consideration may slow the confirmation process. Committee rules contain schedules requiring a certain number of calendar days to elapse between the receipt of the nomination and the scheduling of a hearing. Judiciary and Foreign Relations use a one week layover; other committees use two weeks. Some committees also require time between receipt of the nominee’s questionnaires and financial forms and scheduling of a hearing, and between the hearing and the committee vote.

Some committees also have idiosyncratic rules that may prolong the time until the committee reports the nomination. The most obvious of these is Judiciary’s Rule 1.3, which allows any member to hold over any matter, including nominations, until the next
meeting of the Committee or for one week, whichever occurs later. This rule provides an opportunity for members to collect more information before a hearing or vote, but it also clearly works to the advantage of a member wishing to delay the Committee’s report.

Thus, even with the support of the committee chair, the committee’s treatment of the nomination may not be either swift or easy. The other members of the committee have the means to slow the process and to make it difficult for the nominee and the administration. Furthermore, senatorial courtesy allows other senators besides those on the committee to stall a nomination before the committee reports it to the floor.

**Senatorial Courtesy**

Senatorial courtesy refers to the tradition that a senator may block a nomination to a federal office in his or her home state. The home state senator need only object, and often the nomination proceeds no further. Generally, senatorial courtesy is exercised by home state senators who are members of the president’s party. Yet, members not of the president’s party, during both divided and unified government, have successfully stopped confirmation proceedings through senatorial courtesy (Palmer 2005a).

The deference the Senate shows to home state senators is not found in the Senate’s rules, and is supported only by tradition. On the other hand, that tradition is very old, dating from the first session of the first Congress, when a naval officer nominated was defeated by objection. Since then, senatorial courtesy has blocked the confirmation of internal revenue collectors, officers in State and Justice, federal judges, and members of executive advisory councils (Jacobi 2005, Palmer 2005).
Because senatorial courtesy has no basis in the Senate’s rules, its power rests entirely with the support of other senators. Typically, this means that the relevant committee chair must defer to the home state senator, since senatorial courtesy is usually exercised before the nomination is reported to the floor. Although senatorial courtesy may be invoked for any federal office in principle, in practice it is most strongly associated with those reported by the Committee on the Judiciary. Judiciary has institutionalized the process more than any other committee has, and has developed a routine for sounding out home state senators on its nominations. When considering nominations to lower federal courts, U.S. district attorneys and U.S. marshals, the committee sends forms to the home state senators called “blue slips,” which contain boxes for the senators to simply check off their support or objection to the nominee. Judiciary’s rules make no mention of senatorial courtesy or blue slips, and the chair determines how much consideration to give to objections and from whom (Binder 2001, 2004). The consistency of the recognition given to blue slips, and exactly who can use them, has changed several times as well. Judiciary chairs have recognized blue slips from any home state senator, only those from the president’s party, or required both senators to agree (Palmer 2005a).

Blue slips, and senatorial courtesy more generally, represent a potentially powerful and non-majoritarian obstacle for confirmations, and thus presidents are well advised to consult with home state senators before choosing nominees. Senatorial courtesy is often considered leverage that home state senators have to ensure some role in the selection process. In the past, this leverage amounted to patronage, so that president’s
nominated the selections of the home state senators. The process has had less to do with patronage in recent decades (e.g. Binder and Maltzman 2004; Scherer 2005), but its continued importance is difficult to quantify. Until the 106th Congress, blue slips were anonymous, and therefore most studies of the process have been limited to anecdotal evidence (e.g. Goldman 1997). Still, that anecdotal evidence suggests that senatorial courtesy remains an important determinant of confirmation success, a conclusion reinforced by formal arguments about the reciprocal benefits to senators for enforcing the tradition (e.g. Jacobi 2005).

**Reporting**

After the home state senators have registered their approval or disapproval and the committee has held its hearings (or not), the final step in the process for the committee is its report on the nomination. A report consists of a vote on the nomination, usually a recommendation of some kind, and sometimes a summary of the objections raised by committee members. The recommendations are either favorable or unfavorable, though unfavorable recommendations are very rare. Committees are more likely to report nomination without recommendation than to report it unfavorably, and they are still more likely to not report the nomination at all.

The Senate does not consider nominations that are not reported, although nominations, like any other business a committee considers, may be discharged under Senate Rule XXVI. However, there are two notable differences between legislative business and nominations with respect to discharge motions. The first is that motions to
discharge nominations must be made in executive session, a parliamentary device the Senate uses to consider nominations, treaties, and other business from the executive branch. Executive session is otherwise like regular, or legislative, session, and the Senate moves to executive session by motion or unanimous consent. If a senator objects to the discharge motion, it must lie over until the next executive session. When that occurs is largely determined by the majority and minority leadership, and it can take a considerable amount of time. Thus, even if the discharge motion passes, one objection can delay confirmation by however long the Senate needs to schedule another executive session.

The second difference with the discharge of legislative business is that discharging nominations is actually quite common. Non-controversial nominations are often discharged in large blocs by unanimous consent to save a committee the trouble of hearings and votes on hundreds or thousands of routine nominations. Of course, nominations that are more contentious may take much longer to discharge, or, more likely, not to be discharged at all, if only because a single objection to the motion can consume so much time in either executive or legislative business (Oleszek 2001a).

**Executive Session and the Executive Calendar**

Once a committee reports a nomination or it is discharged, the executive clerk assigns that nomination a number on the executive calendar. The executive calendar lists items of business from the executive branch, specifically nominations and treaties, which are eligible for consideration by the Senate. The calendar items are numbered in the order they are reported or discharged, so nominations that are reported earlier receive
lower numbers than nominations reported later. This sequential numbering is automatic. By precedent, no motion to postpone assignment of a number or to change a number already assigned is in order, nor is a motion to consider an item not on calendar. As noted earlier, Senate Rule XXXI also prohibits a floor vote on a nomination on the same day that it is reported by the committee, except by unanimous consent (Oleszek 2001b).

Technically, the Senate considers all executive business in executive session. This includes the receipt of a nomination, motions for joint or sequential referral to a committee or for discharge, taking up the nomination for consideration, any debate, and the final vote. In practice, however, most of this business is conducted “as if” the Senate is in executive session. For example, the Senate adopts a motion at the beginning of every Congress that nominations will be received and referred to committee regardless of whether the Senate convenes an executive session. Motions for joint or sequential referrals are often prefaced with “as if in executive session,” and by precedent, such motions carry executive business in legislative session.

The consideration of nominations after the committee report, such as debate and votes, are more likely to be conducted in actual executive session. The Senate typically begins the day in legislative session and moves to executive session by unanimous consent. Unanimous consent is the norm, as motions to enter executive session are privileged and non-debatable. The majority leader will also routinely ask for time limits on debate with the unanimous consent agreement to schedule a nomination. Such time limits may only be imposed by unanimous consent before consideration of the nomination or cloture after consideration has begun (Palmer 2005a; Rybicki 2005).
Once in executive session, the first item for business is the first item remaining on
the executive calendar, although motions to consider other items are in order. The
presiding officer customarily recognizes the majority leader to speak first, which means
the majority leader effectively determines which nominations are considered and in what
order. The majority leader often consults with the minority leadership in this
determination, since once the Senate is in executive session motions to consider
executive calendar items out of sequence are debatable.

The Senate may move “as if in executive session” to debate or vote on a particular
nomination at a particular time. By precedent, such motions constitute a motion to enter
executive session and are therefore not debatable. Thus, with sufficient support, the
majority leader can circumvent some amount of resistance to considering a nomination,
including objections to considering a nomination.

However, while opponents cannot filibuster such motions to consider a
nomination, they may still filibuster the vote itself. In addition, the precedent may not be
used to consider multiple nominations by motion. Consideration of multiple nominations
can occur only through unanimous consent. Any objection therefore prevents the
consideration of nominations en bloc. The process may be further slowed by objections
to unanimous consent agreements to set time limits on debate, even if opponents of the
nomination do not filibuster. The result is that while the majority leader can succeed in
scheduling a nomination for consideration, at worst he can only do so with one time-
consuming nomination at a time, and he still may not succeed in getting a vote.
Consultations with the minority leadership are therefore critical. Because an individual senator may create so much difficulty for the leadership in scheduling and securing a vote for confirmation, the majority and minority leaders routinely “skip” the contentious nominations by scheduling the less objectionable nominations for consideration first. Of course, a senator who wishes to stall a nomination will not object to unanimous consent or a motion to skip the nomination and consider other nominations listed later on the executive calendar, and the leadership can get on with the business of the Senate. The leadership will therefore pay close attention to signals of potential objections, such as holds and dilatory motions, which can indicate a difficult scheduling challenge.

Holds

One of the means through which Senators notify their party leaders of their objections is through holds, which are requests to postpone or prevent the consideration of legislative or executive business. Holds are entirely informal, and are not mentioned in the Senate’s rules or precedents. As such, whether holds are honored and for how long is entirely left to the party leadership to decide.

In other words, holds by themselves have no teeth except through their effect on the agenda-setting decisions of the party leadership. However, by placing a hold, a senator not only signals his or her objections to the matter, but also issues a warning to the leadership that the matter may be stalled by other means. If the leadership ignores the hold and seeks unanimous consent on the matter, the senator can enforce his or her hold
by objecting. In the context of nominations, this means that the senator can delay the scheduling, debate, and ultimate vote on the nomination. The party leadership can circumvent these tactics with majority support, but this requires time that the leadership may not want to spend.

A more profound threat is that the senator placing the hold may filibuster the nomination. Again, filibusters can be overcome with cloture, but this too requires time and sufficient support. In fact, even if the nomination’s supporters believe that they have sufficient votes for cloture, the leadership may not schedule consideration to avoid the scheduling and filibuster fights. A hold is therefore no idle threat – they have been used to defeat nominations before reaching the floor.

Typically, senators will place holds on nominations to gain time to learn about the nominee, but senators have used holds either to stall nominees with whom they object on ideological grounds. Holds have also been used to extract concessions from the administration on matters entirely unrelated to the nomination (Oleszek 1999; Rybicki 2005). Customarily, holds are kept anonymous by the leadership, so they are extremely difficult to track. However, senators have admitted publicly to using holds for partisan and ideological reasons, and even more commonly, for gaining concessions from the administration (Steigerwalt 2004).
Motions, Quorums and Roll Calls

Senators have still other means at their disposal to stall confirmation proceedings. Although a motion to enter executive session is privileged, most of the motions that are in order for legislative business are also in order for executive business (Rybicki 2005; Saturno 2003). Once in executive session, a senator who wishes to stall the process may move to recess or adjourn, these are themselves privileged motions. A senator may also move to table the nomination, to postpone consideration of the nomination to a later date, or to take up consideration of another nomination entirely. Additionally, a senator can move to have the nomination recommitted to committee, which would essentially start the confirmation process over at the committee stage. If these motions are made in order by the senator with the floor, then the Senate must either dispose of the motions through unanimous consent, or more realistically, through a vote. In either case, the delaying senator will have stalled the process by however long the leadership needs to dispose of the motions.

Should these motions fail, a delaying senator has yet more options. One of these is to suggest the absence of a quorum. If the presence of a quorum (a majority of the senators) has not already been established by a previous roll call, under the Senate rules, the presiding officer must direct the clerk to call the roll before the Senate can conduct any business. These roll calls suspend business on the floor, which creates an opportunity for senators to discuss routine procedural concerns or to wait for other interested senators to arrive. Normally, the roll call is then waived by unanimous consent.
On the other hand, if the reason for the delay is not to resolve some routine matter, but rather to stall the confirmation process, then a senator need only object to any unanimous consent agreement waiving the roll call. If so, the roll call will usually demonstrate the absence of a quorum, as a majority of the senators are usually not in the chamber during regular business. The Senate then has only two options. The first is to take measures to secure a quorum, which means the majority leader or his surrogate moves that the sergeant at arms collect absent senators. Usually, any senators who missed the first roll call for a quorum will return to the chamber for the roll call on this motion, and so this roll call will often establish a quorum without the need for compulsory attendance. A senator may therefore stall the process by suggesting the absence of a quorum, objecting to unanimous consent to waive the roll call, and requesting a roll call on the leader’s motion to secure absent senators. If the motion to secure absent senators fails, or if it passes and sufficient senators cannot be collected, the Senate is left with no option but to adjourn until a quorum can be established (Bach and Beth 2003).

How long a quorum call can delay the process depends on how quickly the clerk reads the roll, once for the quorum call and once for the motion to secure absent senators, how much time passes for absent senators to return to the chamber, and whether a sufficient number can be secured for a quorum. For the opponents of a nomination, the best-case scenario may be forcing an adjournment of the Senate rather than consideration of the nomination. If they cannot force an adjournment, these opponents may still delay the process for up to 15 minutes per roll call, the minimum time allowed for a roll call.
under Senate rules, plus any additional time required spent securing absent senators. Thus, half an hour may be consumed for both the roll call and the vote to secure absent senators. While this may not seem long, the only restriction on how often the absence of a quorum may be suggested is that, by precedent, some business must intervene between quorum calls, including some other dilatory motion like postponement or adjournment. Opponents can therefore take up a large portion of the floor time in a calendar day, and prevent the Senate from doing anything other than continually establishing the presence of a quorum. For this reason, the Senate routinely allows senators to suggest the absence of a quorum in lieu of extended debate, because quorum calls may at least be directed toward stalling a particular nomination or other business objectionable to a senator (Palmer 2005a). Filibusters, on the other hand, put all Senate business on hold.

Once a quorum has been established, the Senate can proceed to the confirmation of a nominee. Like any decision the Senate makes, confirmation requires a vote. Votes can occur by unanimous consent, motion, or roll call. Motions and requests for unanimous consent are quick compared to roll calls, which require a minimum of 15 minutes. Roll calls can be sped up, but only if the Senate allows less time for the vote by unanimous consent. Eleven senators are sufficient to request that a question be put to a roll call vote.

Furthermore, Senate Rule XXXI allows any senator voting in the majority to move to reconsider the vote. These motions are in order for up to two days after the original vote, but they can only be made once. For most nominations, the motion to reconsider is tabled by unanimous consent immediately after the vote. However, the
opponents of a nomination (or another nomination scheduled later) may request a roll call on the motion to reconsider or the motion to table. This second roll call, together with the vote on confirmation, means that the opponents of nomination can consume at least 30 minutes of floor time to confirm that nominee.

A minimum of half an hour sounds like a short time, but in fact, it is quite long. The opponents of the president’s nominees can extract a disproportionately large transaction cost on the Senate for confirming those nominees. The opponents can first object to the consideration of several nominees en bloc, and then object to any requests to hasten roll calls for confirmation. They can then begin calling for roll calls for establishing a quorum. If a quorum is eventually established, the opponents can force roll calls on the confirmation vote and the motion to table the motion to reconsider. By forcing two roll call votes on every nominee, another half an hour (and probably more) has been used for voting for confirmation. In the best case scenario, the Senate has wasted an hour on nothing but voting, which a unanimous consent agreement could have accomplished in a few minutes. In something less than the best case scenario, a quorum may not be established, forcing an adjournment, or one of the many roll calls may fail. Furthermore, this cost in time is for only one nomination, and a stubborn minority can repeat this process as often as they wish. The Senate may spend an entire day to confirm only a handful of nominees, during which time no other legislative or executive business is addressed. Senators have full agendas of their own, and many would be understandably tempted to let an objectionable nomination fail through some procedural tactic rather than waste so much time on confirming so few nominations.
Filibusters and Cloture

While debate is addressed in the Senate’s Rules, these rules are notoriously thin. Rule XIX states that senators cannot speak until recognized by the presiding officer, will not interrupt each other, and cannot speak twice on the same subject in the same legislative day. The Rule makes no provision for the presiding officer selectively choosing which senators he or she will recognize, and no provision for ending debate.

Senators opposed to a particular item of business or a nomination are therefore assured that they will eventually be able to speak, and once they start, there is little the chamber can do to stop them. This fact is the basis of filibusters, which means, in the oldest sense, delaying the legislative process through extended debate.

In fact, filibustering means more than simply debate. Senators have other methods of delaying confirmation besides holding the floor, even after the Senate has taken up consideration of a nomination. Suggestions of the absence of a quorum can serve this purpose as well. In addition, any number of motions may indicate an attempt to stall the process, including motions to postpone, reconsider, recess and adjourn. In principle, the same procedural tactics opponents use to stall a nomination may also be used for other legitimate purposes. Filibusters therefore cannot be identified by the tactics they employ. Rather, “filibusters are matters of intent; any course of action by opponents of a matter may be a filibuster if it is undertaken with the purpose of blocking or delaying a vote (Beth and Palmer 2005, p.2).”
This point is especially true in contemporary congresses. As recently as the 1960s, filibusters often involved a senator speaking long into the night. Sessions that last around-the-clock placed significant demands on the supporters of a measure, as they had to ensure that at least a majority of the chamber could respond to a quorum call for the entirety of the filibuster. Otherwise, the Senate would adjourn, which would only aid the filibustering senators.

In recent congresses, however, filibusters have become much more common, and the Senate has responded by separating its business around filibusters. Whatever item is being filibustered no longer necessarily postpones the Senate’s entire agenda, but is often put on hold so the Senate can turn to other business. As a result, the Senate may not change its schedule at all during a filibuster, though it will not reach a vote on the item being filibustered (Beth and Bach 2003; Binder and Smith 1997).

The Senate, unlike the House, has no means besides unanimous consent and cloture to place time limits on debate, and has no previous question motion to bring about a vote after debate has begun (Binder 1996). Consequently, absent unanimous consent or a super-majority, the Senate can do nothing to limit debate before debate begins. The only remaining recourse available to senators wanting to end extended debate is a motion to table. A motion to table removes an item from consideration, stopping debate by defeating the item and so ends a filibuster by concession (Beth and Bach 2003; Davis 2005).
If the supporters of an item want to end debate without conceding defeat, then cloture is their only option. According to Senate Rule XXII, cloture requires 16 senators to move to bring debate to a close on the current question. A senator reading the motion does not need recognition by the chair and can interrupt the senator with the floor. However, even though the motion can be read at any time during debate, cloture does have a few limitations. First, a cloture motion is not in order for any item, including nominations, which the Senate has not yet brought up for consideration. Second, the motion must be read in session and while the question is pending, and thus senators can only seek cloture during a putative filibuster (Davis 2005). These two requirements may be waived by unanimous consent (Rybicki 2005).

Third, the Senate does not vote on a cloture motion immediately after it is presented. Rule XXII requires that the Senate cannot decide on cloture until two calendar days after the motion has been read. During these two days, the Senate may turn to other business, but at this point the Senate must either allow more debate if the filibuster continues or else recess or adjourn. On the second day after the motion is read, Rule XXII requires the presiding officer to call for a vote on the question, “is it the sense of the Senate that the debate shall be brought to a close.” This question interrupts whatever business the Senate is currently considering. Furthermore, while this question is not debatable, it does require a roll call to establish a quorum and another to vote on the question of cloture. The quorum call is often waived by unanimous consent (Beth and Bach 2003).
Approving cloture requires a three-fifths majority of the entire chamber, meaning 60 senators if there are no vacant seats. This is, of course, a more stringent requirement than a simple majority, and cloture does sometimes fail. However, if the Senate does not approve cloture, a motion to reconsider the vote is in order. Senators seeking to end a filibuster will often move to reconsider the vote rather than move for cloture again.

If cloture is approved, the filibuster does not end immediately. Rule XXII allows no more than 30 hours for consideration after cloture. This time for consideration includes all the time that the Senate spends in session after cloture, including time spent in debate, for quorum calls, motions, and for voting. At the end of 30 hours of consideration, supporters of the nomination are guaranteed a final vote by Rule XXII.

Before the 30 hour cap expires, the Senate is highly constrained in the consideration it can undertake. Rule XXII requires that after cloture, the nomination “shall be the unfinished business to the exclusion of all other business until disposed of.” That is, the nomination takes priority over all other business until the final vote, and Rule XXII makes no allowance for the consideration of any other business but the nomination in question. Thus, for 30 hours after cloture is imposed, the Senate cannot consider any other business, except by unanimous consent (Davis and Oleszek 2003).

The total time a filibuster can therefore vary, depending on how long into the filibuster a cloture motion is presented, whether cloture is successful, and whether the entire 30 hour cap is consumed. Even if supporters of a filibustered nomination are quick to act with a cloture motion and have sufficient support to have that motion approved, they may have paid a high price to ensure a final vote.
Consider, for example, a nomination that supporters bring up for consideration on Monday. Opponents may indicate a potential filibuster by placing hold, introducing a number of motions, or some other signal. If the nomination’s supporters act immediately and move for cloture on Monday, the vote on cloture is not held until Wednesday. Assuming that vote is successful, the next 30 hours in session are taken up with consideration of the nomination, and finally an additional 30 minutes is consumed with the final quorum call and vote. If the Senate convenes every day for eight hours per day, the final vote is not taken until late Saturday (Beth and Bach 2003).

However, the major problem with this scenario, especially for the scheduling and agenda-setting duties of the majority leadership, is not that a final vote on the nomination takes a week to complete. Rather, the problem is that this week may be spent only on consideration of that nomination and little else. By unanimous consent, the Senate may shorten this time by taking a vote earlier than the 30-hour limit, or by waiving the final quorum and roll call. Similarly, the Senate may consider other business during the 30-hour limit by unanimous consent, and the filibustering senators can always relent during the two days between the reading and vote on cloture. However, if the opposition is sufficiently determined to take up these two days with dilatory tactics, then all the remaining relief for the Senate can be prevented merely by objecting to unanimous consent agreements.

This means that even if supporters of the nomination act immediately to end a filibuster and they have the votes to do it, the Senate must still spend an entire week considering the filibusted nomination, and nothing else. If the opposition chooses, they
can prevent the Senate from considering literally any other executive or legislative business, including emergency bills and budgeting activities. A week removed from the session certainly poses problems for effective scheduling and floor management by the leadership.

More importantly, near the end of a session or the adjournment of Congress, time becomes increasingly valuable as senators rush to pass dozens of bills and confirm remaining nominations. If they do not, these items automatically fail, and so every minute not spent on these items is a minute that brings them closer to failure (Beth and Bach 2003; Binder and Smith 1997). A week spent considering a nomination, to the total exclusion of all other priorities, may be simply too high a price for the leadership to bear. Furthermore, because opponents can force nominations be considered separately by objecting to unanimous consent agreements to consider them en bloc, filibusters can waste this precious time on a single nomination. The leadership may therefore have to choose between losing a number of legislative priorities on the one hand, and losing just one nomination on the other. Small wonder, then, that the leadership so often chooses not to even schedule consideration of a nomination under the threat of a filibuster.

**Confirmation and Return to the President**

For all of the parliamentary tactics that opponents may use to stall a nomination, the vast majority of nominations are confirmed. Numerically, most nominations are military or Foreign Service promotions, and are usually confirmed in large blocs by unanimous consent. More contentious nominations and nominations to higher profile
offices are more likely to see a floor vote, but floor votes, too, are overwhelmingly affirmative. There are well-known examples where the Senate has rejected a nominee by a floor vote, especially the nomination of Robert Bork to the Supreme Court in 1987. However, while a few nominees are “Borked,” they are the rare exceptions; the rule is that floor votes always confirm the nomination. Since 1965, only 17 nominations have been defeated by recorded or voice vote; less than one nomination per congress (Bond, Fleisher, and Krutz 2006).\(^9\)

Generally, nominations that fail do so because they never receive consideration by the Senate. Most often, they are not scheduled for debate or vote, or are sometimes tabled to avoid potential or actual filibusters. If a nomination has not received confirmation whenever the Senate adjourns or recess for more than 30 days, then according to Rule XXXI, the nomination automatically fails and is officially returned to the president unconfirmed. The Rule does not exempt any recess for this purpose, including the recess between sessions, any midterm recesses, and the sine die adjournment of Congress at the end of its term. The president must resubmit returned nominations if they are to be confirmed. Unanimous consent cannot waive the Rule at the sine die adjournment of the Senate, so that nominations that are stalled until the end of the Congress fail and may only be resubmitted at the beginning of the next Congress. On the other hand, for other recesses, the Senate often waives the Rule by unanimous

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\(^9\) These included Clement Haynsworth, Jr. (1969), G. Harold Carswell (1970), and Robert Bork (1987) to the Supreme Court, Ronnie L. White (1999) to be a district judge, and John Tower (1989) to be Secretary of Defense. Other recent defeats of highly visible nominations were not the results of recorded votes. Mickey Kantor, Clinton’s second nominee for Secretary of Commerce in 1996, was returned to the president by unanimous consent. Alberto Gonzales’ first nomination to be Attorney General was returned to the president in December 2004, as the Senate had taken no action on the nomination.
consent for many nominees, and thus nominations that have not been considered by the recess can survive until the Senate resumes session. No motion is in order to waive the Rule, and so unanimous consent must be reached for any nominations to survive a recess.

For that reason, the majority and minority leaders normally exclude any nominations that have significant opposition when crafting the unanimous consent agreement. In this manner, the leadership ensures that the confirmable nominations survive by allowing the contentious nominations to fail. The alternative is to see all the pending nominations automatically fail. Prior to the August 2001 recess of the 107th Congress, for example, the Senate could not reach unanimous consent on which nominations should survive the recess. The result was that all 162 pending nominations failed and were returned to the president (Rybicki 2005). Although most of these nominations were resubmitted to the Senate, they had been significantly delayed. Of course, if the nomination is not resubmitted or it isn’t confirmed by the sine die adjournment, then it has been defeated without a vote. This is the method by which most nomination failures occur (e.g. Bond, Fleisher, and Krutz 2002).

The Power of Unanimous Consent

A recurring theme in the confirmation process is the centrality of unanimous consent, which has for decades been the primary means by which the Senate leadership schedules and defines the rules for consideration for all executive and legislative business (Sinclair 2007; Oleszek 2001a; Beth and Palmer 2005). Consider the number of points in the process were a single senator can hold up confirmation merely by objecting:
• Prevent consideration of a nomination on the same day it is submitted
• Force motions to jointly or sequentially refer nominations to different committees
• Prevent consideration of a nomination on the same day it is reported by the committee
• Prevent the consideration of nominations en bloc, but rather one at a time
• Force motions to enter executive session
• Force motions to consider nominations out of order from the executive calendar
• Force debatable motions to proceed to consideration of another nomination if the Senate is in executive session
• Force motions to schedule debate or a vote on a nomination as if in executive session
• Prevent any time limitations on debate absent cloture
• Prevent the filing of a cloture motion before the nomination is scheduled for debate or a vote
• Prevent the reading of a cloture motion in legislative session or before debate has begun
• Force a roll call following the presiding officer’s reading of a cloture motion or at the suggestion of the absence of a quorum
• Force 30 hours of consideration on one nomination if cloture is invoked
• Ensure that a nomination fails at a recess if it has not yet been confirmed

In some of the cases listed above, objections to unanimous consent agreements may not amount to much more than a nuisance to the leadership. Objections to considering nominations on the day they are submitted and on the day they are reported, of course, delay the process for only a day. Similarly, forcing a non-debatable motion to enter executive session may not in itself present much of an obstacle to the leadership.

On the other hand, both debatable and non-debatable motions are susceptible to suggestions of the absence of a quorum. More seriously, if a senator objects to considering nominations en bloc or to any agreements to speed up debate, then the leadership must accept a slower process and adjust the schedule accordingly, or else relent and not schedule the nomination. If a senator objects to waiving a nomination’s failure at a recess, then the leadership has no recourse at all.
The point is that only one senator can delay the process and compel the leadership to change its schedule. Many nominations may see such objections, so the scheduling changes can accumulate and change necessarily consumes some amount of time. Furthermore, even if the scheduling changes are only a few days each, this time may be very inefficiently spent from the leadership’s point of view. The reason is that the leadership must accommodate a large number of executive and legislative items. Each of these items will become available for consideration at different times, and the leadership will place different priorities on different items. Objections that force a schedule change for considering a nomination pose no difficulty if the leadership has other items of equal or higher priority and that are waiting consideration. The leadership can simply schedule this other important business in lieu of the nomination.

However, if these items are not yet available for consideration or will not fit precisely in the gap in the schedule created by the objections, then the leadership must turn to the lower priority items instead. The scheduling gap, in turn, necessarily means that there is less time available to schedule both the important business and the nomination in question. The result is that objections to unanimous consent have extensive spillover effects in the schedule, with the consequence that the high-priority business of all kinds is handled in less time. Moreover, recalcitrant opponents to the nomination will likely know when a few scheduling changes will “hurt” the most. The leadership may have little choice but to put off scheduling a nomination and turn to important legislative priorities, or even to take no action and allow the nomination to fail.
This is the difficulty a single senator can cause by doing absolutely nothing to delay confirmation but objecting to unanimous consent agreements. The difficulties multiply enormously when we consider more than one senator and more than one parliamentary tactic. The most obvious example is that objections to unanimous consent create scheduling conflicts and consequently less time to consider the same amount of business. Less time to consider business, in turn, means that the threat of filibuster becomes much more serious. Similarly, unanimous consent is required to place any time limits on debate without cloture, and should the Senate invoke cloture, unanimous consent is required to allow the Senate to consider any other business. If scheduling conflicts create inefficient uses of time, such objections create severe wastes of it, especially as time becomes scarcer as result of those conflicts. The result is that one or very few senators can create massive difficulties for the leadership, and the leadership is often best served by postponing consideration of the nomination or else letting it fail completely.

Summary

This chapter has outlined the confirmation process from submission of the nomination to final action on the floor. It has described the “how’s” of nomination delay and failure – the various tactics and parliamentary devices that even one senator can bring to bear against a nomination he or she opposes. Institutionally-empowered actors like the party leader or a committee chair often find less of a headache by acquiescing to delay rather than fighting it despite their special parliamentary positions.
The scheduling situation facing the leadership is like that of a shopper in a busy
grocery store. The shopper wants to check out as soon as possible, but has one too many
items in her cart to use the express check out line. The longer the wait to use the other
checkout lines, the greater the shopper’s temptation will be to simply discard the
additional item and do without.

Senators can make the checkout lines much longer through obstructionist tactics,
and often the leadership finds it prudent to let the nomination die rather than force a
confrontation and loose a great deal of precious time in the process. The objections have
thus made the nomination more trouble than it is worth to the leadership.

The use of these tactics brings up a set of obvious questions. What would
individual senators hope to gain from delaying a nomination, especially to the point of
failure? How does the president respond to these goals, and what effect do these
responses have on the confirmation process? These are the “why’s” of nomination delay
and failure, and I turn to them in the review of the confirmations literature in the next
chapter.
CHAPTER 3
THE LITERATURE ON CONFIRMATIONS

Chapter two detailed the mechanics of the confirmation process, and showed that delaying or even defeating of nomination does not actually require anything as extravagant as a filibuster. Rather, a single senator can become enough of a nuisance that the party leadership simply lets the contentious nomination remain stalled indefinitely, or else die at the next recess of the Senate.

The next question to answer is why a senator would want to be such a nuisance. What do they have to gain from the exercise? How does the president respond? In this chapter, I review the literature on confirmations, looking for the answers that a new theory of the confirmation process must provide. At its core, the model must deal with three empirical regularities that scholars have noted:

- Nominations receiving a floor vote are nearly always confirmed
- Nominations vary considerably in the time they take to reach a vote on the floor
- Not all nominations receive such a vote, and those that do not, fail.

Students of the confirmation process have recognized these patterns and have produced a number of explanations for them. Unfortunately, these explanations do not speak to each other and generally split along several lines. The first such line, both in terms of chronology and volume of work, is on the confirmation decision of the Senate.
The Confirmation Decision

Although the Senate has the constitutional authority to reject the president’s nominations, it does so very infrequently. The fact that defeats of nominations by a vote of the Senate are so rare has produced two lines of thought in the literature.

The first is that the Senate defers to the president’s judgment on filling the executive, and to a lesser extent, the judicial, branches (Fenno 1959; Fisher 1991; Harris 1953). According to this view, the Senate allows the president to choose nearly whomever he wishes to staff his administration, and a norm has developed in the Senate against interfering with the president’s choices. A desire to keep the federal judiciary politically independent may create a similar norm against Senate rejection on ideological grounds (Deering 1987; Moe 1987). Ideological or partisan concerns are therefore not legitimate grounds for objecting to the nomination, so the Senate must closely examine a nominee’s qualifications or personal history for some reason to reject the nomination (e.g. Krutz, Fleisher and Bond 1998; Nokken and Sala 2000). If such an examination turns up no scandals or obvious lack of qualifications, the Senate will confirm the nomination.

A norm of deference must be supported by the voting decisions of individual senators. A number of studies have therefore investigated the determinants of these individual decisions, most focusing on Supreme Court nominations. These studies have produced a long list of variables that may influence a senator’s vote on confirmation, including, as is usually the case in studies of roll-call voting, party and ideology (e.g. Segal, Cameron, and Cover 1992). Interest groups may also play a significant role, in
that they can mobilize constituents either for or against a nominee and communicate information about constituency preferences to their representatives in the Senate (Caldeira and Wright 1998; Caldeira, Hojnacki, and Wright 2000; Segal, Cameron, and Cover 1992). Other considerations for the Senate include how the nominee will change the ideological makeup of the Court, the race of the nominee, the timing of the nomination in the election cycle, divided versus unified government, and the approval rating of the president (Cameron, Cover, and Segal 1990; MacKenzie 1981; Overby, et al. 1992; Ruckman 1993; Segal 1987). While these studies have examined nominations to the Supreme Court, some of the conclusions extend to other contexts as well. Studies of nominations to the executive branch have found that concerns over qualifications are important for these appointments as well, but ideological effects and divided government are not consistently influential across nominations (Krutz, Fleisher, and Bond 1998; McCarty and Razaghian 1999).

This inconsistency aside, that party and ideology have any effect at all on confirmation voting for executive nominations, and a substantial effect for nominations to the Court, makes a putative norm of deference difficult to explain. In fact, the norm relies on senators ignoring these concerns to support the nomination. Furthermore, the norm is difficult to explain on theoretical grounds as well, especially because the norm puts restrictions on the confirmation behavior of the Senate but not on the nominees chosen by the president.
Anticipating the Senate’s Decisions

Other scholars have therefore studied the process from a different angle – how the president chooses nominees with the Senate’s confirmation decision in mind. The studies in this vein consider the process as an interaction between the president and the Senate, so that the Senate does not actually defer to the president, but rather constrain the president’s choice of nominee. Calvert, McCubbins, and Weingast (1989), for example, present an appointments model in which the president and Senate cooperatively bargain over a nominee who will set policy in an executive office. The nominee chosen in equilibrium is a weighted average of the president’s and Senate’s preferences, so the Senate’s preferences pull the choice of nominee away from the president and thus constrain his choice. Because neither the president nor the Senate places any value on a vacant office and because the bargaining is cooperative, nominations do not fail in equilibrium.

A more common approach is a spatial model where the president and Senate play non-cooperative games (e.g. Chang 2001; Hammond and Hill 1993; Nokken and Sala 2000; Snyder and Weingast 2000). These studies use some variety of Romer-Rosenthal agenda setting game (Romer and Rosenthal 1978). These models are often couched in terms of nominations to the judiciary, especially the Supreme Court (e.g. Moraski and Shipan 1999) though their assumptions hold equally well for nominations to executive offices as well. In these models, the president chooses proposals (nominees) and the Senate can accept or reject them. Typically, the Senate is modeled as a unitary actor, the median senator. With complete information about the Senate’s preferences, the president
can avoid rejection by choosing a nominee that makes the Senate just indifferent between confirming and rejecting the nomination. According to this view, the president is so often successful because he can correctly anticipate the Senate’s reactions to his nominees.

One of the most widely cited studies of this sort is Moraski and Shipan’s (1999) analysis of the confirmation process using a straightforward application of the Romer-Rosenthal (1978) framework. The game begins with a vacancy on the Supreme Court. The president nominates a replacement, and the Senate’s median voter chooses whether to accept or reject that replacement. If the Senate rejects the nominee, a reversion policy is chosen by an eight-member Court, and if the Senate accepts the nominee, the newly constituted nine-member Court chooses policy. The Senate median’s choice is therefore between the two policies that would result after accepting or rejecting the nominee. The president’s task is to choose a nominee that will create policy that the Senate median prefers (at least weekly) to the reversion policy from the eight-member Court. Were the game to be applied to executive nominations, the reservation policy might be made by existing political appointees or civil servant directors.

Because the game assumes prefect information, the president knows precisely both the Senate median’s preferences and the policies that will result from any choice of nominee. The result is three “regimes,” summarized in Moraski and Shipan (1999, 1077), which are defined by how the preferences of the president and Senate median interact to produce different nomination and confirmation decisions. Essentially, where the president’s preferred outcome is between the Senate median’s preferred outcome and
the reversion policy, the Senate medians’ preferences do not constrain the president’s choice of nominee. Rather, any move away from the reversion policy and toward the president’s most preferred position benefits the Senate median. On the other hand, if the reversion policy is between the president and Senate median, then no confirmation occurs, since any movement in policy toward the president is necessarily movement away from the Senate median. The Senate median thus never confirms any nominee that improves the president’s position. Finally, if the Senate median’s preferred position is between the president’s and the reservation policy, then movement is possible. However, this movement will be limited, because the Senate median will not want policy to move as far as the president prefers. The president must therefore choose a nominee that makes the Senate median no worse off, though perhaps no better, than she is with the reversion policy. The result of these regimes is that where any policy movement is possible, given the preferences of the president and Senate median, then the president’s nominee is confirmed, but sometimes the choice of nominee is constrained by the Senate median’s preferences.

Moraki and Shipan (1999) find empirical support for two of these three regimes, but a median-centered view of the Senate is not likely to offer the complete story. A super-majority is required to overcome a filibuster, so the decision may rest with the 60th senator across the aisle from the president, rather than the 50th, the median Senator. Furthermore, as the last chapter made clear, the filibuster is only the most prominent tip of a large parliamentary iceberg. Opponents of a nomination have a wide variety of options at their disposal to stall or defeat a nomination. The difficulty here for the
median-centered view is that while a majority of the Senate is required to confirm or reject a nomination, one senator may be sufficient to defeat a nomination through delay. Indeed, by the time the nomination receives a vote on the floor, the outcome is usually a foregone conclusion.

A median-centered, straightforward Romer-Rosenthal (1978) application has empirical difficulties as well. The ideological values of many Supreme Court nominees show “frequent anomalies,” in that they are not located between the president’s and Senate median’s estimated ideal points, and are thus suboptimal according to the model (Bailey and Chang 2001, 501). Also, the simple assumptions of the model hold for executive nominations as much as they do for nominations to the Supreme Court. However, in nominations to executive offices, the constraining effects of the Senate median’s preferences have been found to be weaker than the model predicts (Nixon 2004). Furthermore, median-centered regime effects explain less variation in lower court confirmation rates than models that include additional senators like the party mean or the 60th senator (Primo, Binder, and Maltzman 2008).

Institutional Features and Over-Predictions of Confirmation Failure

More recent models have relaxed the unitary actor assumption of median-centered games such as Moraski and Shpan’s (1999). All of these models are couched in terms of nominations to judicial posts, though nothing in their assumptions prevents their application to executive nominations as well. The exception is Jacobi’s (2005) model of the process, which includes the home state senator with a veto over judicial appointments.
to benches in his or her state. Because of this veto power, the president must accommodate the preferences not only of the Senate median, but the home state senator as well. The model shows that the norm of senatorial courtesy can be reinforced through reciprocity, and that all senators, including the median, can gain in the long run by allowing a few nominations to fail. Mathematically, this argument should apply to any norm enforced through reciprocity (e.g. holds), and is therefore applicable to executive as well as judicial nominations for nominations outside the Judiciary committee. Although Jacobi’s is the only model of confirmations to date to incorporate the possibility of blue-slipping, it does not include any formalization of a filibuster or the other parliamentary features of the Senate’s confirmation process.

A different approach incorporates the filibuster by including the 60th senator as an actor, in a pivotal politics framework applied to confirmations (Law and Solum 2006; Primo, Binder, and Maltzman 2008; Rohde and Shepsle 2007; Krehbiel 2007; Krehbiel 1998). Rohde and Shepsle (2007) model confirmations to the Supreme Court as a game between the president, Senate median, and filibuster pivot, which choose a new nominee to fill a vacancy on the Court. Like Moraski and Shiplan (1999), Rohde and Shepsle model the process with a one-shot game of complete information, so that all players interact only once and every player knows every other player’s preferences with certainty. Also like Moraski and Shiplan, the game has equilibria where no policy movement is possible and no nominee can be confirmed, a situation called gridlock, to borrow from Krehbiel’s (1998) legislative context. The primary difference in the results is not the existence of gridlock but the frequency with which it occurs. Because the
median and the filibuster pivot must both prefer the Court with the new nominee to the Court without the nominee, there are more combinations of preferences that produce gridlock than with the median alone. Holding the ideal policies of the president and Senate median constant, there are now much larger ranges of reversion policies that allow no movement once the filibuster is included.

Krehbiel (2007) shows that many of the newly gridlocked policy ranges are special cases of the same underlying disagreement between the players. That is, when any of the filibuster pivot’s, Senate median’s, or president’s ideal policies are too widely spaced, gridlock is the only result. Krehbiel’s model also suggests that nominations may also be confirmed despite the wide gridlocked regions only because these nominations are known by all players to produce no change between the new Court’s policy and the reversion policy. In other words, these nominees are only confirmable because everyone knows they will not make a difference. Thus, even if many of Rohde and Shepsle’s (2007) gridlocked regions can be shrunk to allow more confirmations, these confirmations are not necessarily influential, and the meaningful gridlock remains.

This abundance of gridlock appears to be a weakness of a straightforward pivotal politics application. Rohde and Shepsle (2007) argue that gridlock is common in judicial confirmation politics, yet of the 20 equilibria that they describe, fully 14 allow no policy movement. With some minor modifications, these results will also hold for nominations to offices that do not make decisions as a body – they will hold for executive offices and district courts as well as the Supreme Court. Yet empirically, the majority of nominations to either judicial or executive offices are confirmed, so while one can argue
that gridlock is a common feature of the process, it would not appear to be quite as
dominant a feature as the model suggests. Furthermore, Rohde and Shepsle have
equilibria where a nomination survives a potential filibuster only to be rejected by a
majority vote of the Senate, which is exceedingly rare in practice for nominations to any
office. To be more technical, in Rohde and Shepsle’s model the escape from so many
failing nominations due to gridlock is that the nominations are never made at all. Thus,
the president never even names a nominee to fill a gridlocked vacancy. The frequency
and duration of vacancies on the Supreme Court or anywhere else certainly varies, but to
have no replacement named at all is extremely rare.

Console-Battalina and Shepsle (2007) attempt to overcome the over-prediction of
gridlock in the pivotal models by allowing the president to make side payments or
concessions to various senators. Senators who would otherwise be indifferent between
voting for confirmation or rejection can be compensated on some other unrelated issue,
and thus be induced to form a winning coalition for the president. Interestingly, their
game has equilibria where the president wins confirmation without actually having to
make any concessions, but the model still over-predicts rejection without such
concessions occurring in equilibrium. Furthermore, whether the president makes
concessions and who he makes them to is unobservable, making the model very difficult
to test empirically.

Gridlock aside, the pivotal models include more of the Senate’s parliamentary
features by incorporating a filibuster, but like the Romer-Rosenthal (1978) applications,
too much of this parliamentary richness may still be lost. The filibuster is not the only
feature that may require a new player. Although holds and senatorial courtesy are usually thought to signal a potential filibuster (e.g. Rybicki 2005), Jacobi’s (2005) model shows how these norms can be self-reinforcing, and therefore may not require the backing of a filibuster threat for their effectiveness (see also Alter and McGranahan 2000).

More standard parliamentary tactics can be used to stall or defeat a nomination as well, such as quorum calls, additional motions, roll calls, and objections to unanimous consent. With skillful timing, a single senator can delay a nomination to the point where that nomination is no longer worth the trouble of confirming as far as the party leadership is concerned. If the Senate has already waited to confirm a nominee until a recess or adjournment, only one senator is required to cause that nomination to fail. None of this requires a filibuster, and no single senator is pivotal in this delay and failure.

The larger point is that the filibuster pivot is not the sole holder of some very long veto power. Rather, the filibuster pivot represents the key voter in a cloture motion, and a great many parliamentary traps can befall a nomination before cloture is ever involved. Many of these traps will delay a nomination for a period of time; others may cause the nomination to fail without a floor vote or a filibuster. Modeling the effects of a filibuster pivot (or any other additional pivot) in a one-shot game with perfect information certainly increases the range of gridlock, but gridlock is not the same thing as delay. Gridlock is the absence of policy alternatives that a few, specially empowered players can agree they prefer to the status quo. Delay is the result of actions taken by one, few, or many senators who are not specially empowered at all, but who are exercising universally available parliamentary rights to stall a nomination. Sometimes such stalling is
extensive; sometimes it leads to the failure of the nomination. In either case, the effect is that delay has, on who the president nominates or whether the Senate confirms is difficult to address in either a straightforward Romer-Rosenthal or in pivotal politics applications. What is even more difficult to study in these applications than the effects of delay is that any senator, not just a few select members, can create that delay. Delay is a resource universally available to senators, and what that means for the confirmation process, the players involved, and who ultimately sits on the federal bench or staffs the executive branch, is not addressed at all by the formal theory to date.

Motivations for Delaying Confirmation

There is little variation in the Senate’s confirmation decision if a nomination reaches the floor for a vote, but a examining the outcome of a floor vote masks much larger variation in the process leading to that vote (Goldman 1997; Goldman and Slotnick 1999; McCarty and Razaghian 1999). A number of scholars have therefore focused less on the outcomes of confirmation decisions and instead studied the time incurred during the confirmation process (e.g. Allison 1996; Bell 2002; Martinek, Kemper, and Van Winkle 2002; Shipan and Shannon 2003).

As was detailed in chapter one, the time from nomination to confirmation has multiplied in recent decades, and delay is now the primary means by which nominations fail (e.g. Binder and Maltzman 2002; McCarty and Razaghian 1999). Some authors argue that the increasing time and failure rates are the “result of a purposeful strategy to defeat presidential nominees by preventing them from getting to the floor – a strategy of
maligned neglect” (Bond, Fleisher, and Krutz 2002, 2). That is, opponents of nominations are making more frequent use of the numerous opportunities for obstructionism, evidently in an effort to either stall or defeat these nominations before the floor vote. The result is that although defeats by vote are extremely rare, failures are not.

As McCarty and Razaghian (1999, 1125) put it, the Senate’s rules “[give] opponents of a nomination the power to defeat a nomination without it being considered by the full Senate.” When we observe “fatal” delay, it is because these opponents have actively chosen to create that delay. Nominations expire at a recess or adjournment because an opponent of the nomination has effectively used his or her obstructionist privileges to act as gatekeepers to confirmation.

Yet, if delay were only a means to defeat a nomination, it would act only as a lengthy veto. If this were the case, a pivotal politics model of the process may provide a more complete picture, as delay would only represent a slow form of gridlock. But delay is not simply a form of gatekeeping. Although failures due to delay are far from uncommon, many more nominations experience durations of ever-increasing length but are still eventually confirmed (Bond, Fleisher, and Krutz 2002; Binder and Maltzman 2002). Such cases do not fit a gatekeeping explanation, as they are not delayed to death, but neither are they confirmed without resistance. The failure of Abe Fortas’ nomination may be gatekeeping, but the confirmation of Clarence Thomas must be something else.

The motives ascribed to the delaying senators are open to debate (Rybicki 2005; Steigerwalt 2004). Perhaps the most obvious incentive to delay a nomination is ideological disagreement between the nominee and the nominee’s opponents in the
Senate (Bond, Fleisher, and Krutz 2002, 2006; Law and Solum 2006). If a nominee’s ideology is objectionable, opponents have the tactics to kill the nomination like filibusters and blueslips. However, other tactics, like holds, objections, and motions, can be used to temporarily delay confirmation. Ideological disagreement does little to explain why some tactics are chosen over others. If opponents are ideologically displeased with a nomination, why do they not simply defeat the nomination, rather than delaying the nomination for a period of time before letting it proceed to confirmation?

Another motivation is partisan, which may cause the president’s opponents to delay to intermediate times while not stalling the nomination completely (McCarty and Razaghian 1999). The president’s opponents stall his nominations, either to embarrass the president politically (e.g. Groseclose and McCarty 2001), or to prevent the president’s agenda from being implemented by his nominees for as long as possible (e.g. Shipan and Shannon 2003). Partisan-motivated opponents would therefore value greater delay to less delay, or at least enough to cause the embarrassment or agenda-stalling they seek. However, if opponents value more delay for its own sake, why do they allow the confirmation to take place at all?

Finally, delay has also been described as hostage-taking. Nominations may be delayed so that members of the Senate may extract some concession from the president in disputes totally unrelated to the nominee. In fact, delaying senators have publicly admitted to holding up nominations precisely for this reason (Rybicki 2005; Steigerwalt 2004), but the number of admissions is far short of the number of delayed nominations. Unfortunately, if a senator does not admit to delaying a nomination in exchange for
concessions, instances of hostage-taking may be impossible to identify empirically. However, the more important problem with delay being motivated by hostage-taking is that so many of the hostages are delayed to death. If the president can make concessions relatively easily, as Console-Battalina and Shepsle’s (2007) model would suggest, why do so many nominations fail due to delay? Perhaps concessions are not so easy, and senators must delay some nominations to death to reinforce the credibility of their threat. Even if this were the case, the 32% failure rate of courts of appeals nominations since 1977 would seem excessive to the task (Rutkus and Sollenberger 2004; Scott 2006; Sollenberger 2003).

A final difficulty shared by the partisan and hostage-taking motivations is that neither explains why presidents withdraw nominations. Withdrawals are rare, but not quite as rare as rejection. From 1945 to 2003, 49 of 2756 (1.8%) nominations to district and appellate courts were withdrawn, while only 5 (0.2%) of these nominations were defeated by a committee or floor vote (Rutkus and Sollenberger 2004; Sollenberger 2003). Of the 2,201 judicial and executive nominations between 1965 and 2000 studied by Bond, Fleisher, and Krutz (2006), 52 (2.4%) were withdrawn, while 17 (0.8%) were rejected by a vote.

These withdrawn nominations are an anomaly for the partisan and hostage-taking motivations, since if these motives were behind the delay a nominee experienced, a different nominee should experience the same delay. Why would the president withdraw his first choice if his second will not improve the situation? Perhaps some withdrawn nominations are plagued by scandals or lack qualifications, but many are not (Krutz,
Note that an ideological motivation for delay has no particular difficulty with withdrawn nominations. That is, if the first nominee’s ideology is unsuitable to a delaying senator, the president can withdraw that nomination and make another with ideology closer to the senators. Of course, the partisan and hostage-taking motivations have the benefit that unlike the ideological argument, all delayed nominations are not defeated.

Thus, none of the motivations are in themselves seamless explanations of the patterns of delay and defeat observed. The picture is complicated further by the fact that each has found some degree of empirical support. Ideological polarization between the president and the Senate’s majority party has been found to both slow down the confirmation process and to increase the probability of failure (e.g. Binder and Maltzman 2002; Bond, Fleisher, and Krutz 2002, 2006). Claims of ideological extremism on the part of the nominee have become more common in committee hearings during the period that confirmation delay has increased so radically (Krutz, Fleisher, and Bond 1998). Yet, while divided government does not significantly predict nomination failure (Krutz, Fleisher, and Bond 1998; Shipan and Shannon 2003), it has been consistently shown to greatly slow down confirmation (e.g. McCarty and Razaghian 1999). Also consistent with the partisan explanation, electoral politics are often found to slow down confirmation, as the president’s opponents attempt to wait out his term (e.g. Derouen, Peake, and Ward 2005). Finally, at least in cases where a senator has openly admitted to taking a nomination hostage, partisan and ideological divisions appear to be insignificant factors in either the duration or result of the confirmation process (Steigerwalt 2004).
An additional complication is that many studies of the confirmation process rely on estimates of the nominee’s ideology (e.g. Binder and Matzeman 2002; Moraksa and Shipan 1999; Nixon 2004). Most of these estimates are Giles, Pepper, and Hettinger scores (n.d., 2001), a transformation of first-dimension DW-NOMINATE scores (see Poole and Rosenthal 1997) which incorporate the ideological score of the home state senators. Another estimation technique places the nominee in a common ideological space based on confirmation roll-call votes (Bailey and Chang 2001). Fundamentally, these or any potential estimate of nominee ideology relies on a model (usually implicit) of the confirmation process to adjust nominee ideology away from the president and toward another member of the Senate.

Yet our theoretical models of the process are inadequate to determine which senator, if any, the scores should move toward. We do not know who the president must compromise with if ever, or under what circumstances, as the theoretical models to date have made empirically flawed predictions about exactly this kind of compromise. Furthermore, though the empirical literature on delay suggests that several motivations are important for senators, including ideology, we do not know what effect this has on the president’s choice of nominee. If the formal models of confirmation suggest anything, it is that to get his nominees confirmed he should compromise in his choices. However, we do not know the extent of the compromises or with whom such compromise is to be made because there is no model of the process that explicitly incorporates delay (either temporary stalling or delay to failure). The result is that many studies of delay use ideological estimates that are likely themselves affected by delay, and in ways that we
cannot currently predict. Thus, without an understanding of delay and its effects our understanding of the confirmation process is hampered. This applies not only to the length and result of the confirmation process itself, but also to the policy positions of the nominees that are confirmed, and by extension, to our understanding of ideology and decision-making of appointees in the judicial and executive branches.

**Toward a New Model of Confirmations with Delay**

The study of confirmation and delay has therefore left us with a number of theoretical and empirical puzzles. Why are some nominations delayed to death, while others are delayed for a shorter period or not at all? What does a senator or group of senators hope to gain from delaying a nomination? What effect does this delay or failure have on the president’s choices? The literature has addressed each puzzle in different threads of research lines of research, but the problems are clearly interrelated. The actions taken to delay a nomination must interact somehow with the president’s choices if the delay is to produce any benefit to a delaying senator, whatever his or her motivation may be. And the president’s choice of nominee must have something to do with the chances of that nominee’s confirmation or failure.

Determining how these puzzles are interrelated requires a theoretical approach that not only allows the Senate to accept or reject nominations, as current models do, but also allows senators to choose to delay nominations to varying lengths of time, not just to filibuster them. Such a model must also allow varying motivations or utilities to the senators, and allow the president to adjust his choices accordingly.
The confirmation literature has no such model, and so we must turn to other literatures for examples. Romer-Rosenthal and pivotal politics models have been widely applied in broader research on presidential-congressional relations (e.g. Kiewiet and McCubbins 1998; Krehbiel 1998; Ferejohn and Shipan 2000; Groseclose and McCarty 2001; see Cameron 2000a for a number of applications). While none of the existing applications incorporate delay, a number of models have features that will be useful in creating such an application.

One especially relevant empirical study is McCarty and Razaghian’s (2000) work on the president’s anticipation of confirmation delay of transitional nominations to executive offices (on transitions and nominations more generally, see Pfiffner 1988). Using a two-stage approach, they find evidence that the president engages in “rational anticipation” of the Senate’s strategies when he makes a nomination. Transitional nominations are especially important, as they set the first tone for the administration and establish the president’s control over the executive branch. The president will choose nominees that will generate as little opposition as possible, since opposition produces delay and delay – or worse rejection – in this early period may be a severe blow to the administration. McCarty and Razaghian find that during the transition period, the president chooses nominees that will placate not only his allies but as many of his opponents as possible, both with nominee characteristics (race, gender, etc.) as well as with the nominee’s policy and ideological preferences. Later, after the transition, the president will turn to the nominations that will be more controversial, for ideological or nominee-centered reasons, and will therefore generate opposition. The result appears to
be a honeymoon effect, but is not; if the president meets less resistance to his early nominations, it is because he successfully anticipated the Senate’s reactions and postponed the more contentious nominations, not because the Senate is going easy on the new administration.

McCarty and Razaghian’s (2000) rational anticipation argument introduces two new ideas to the literature that also point toward features necessary in a new model of confirmations. The first is that a great many offices must be filled in any administration, involving repeated interactions between the president and Senate. Current models of the process (e.g. Moraski and Shipan 1999; Rohde and Shepsle 2007) have studied confirmations with one-shot games in which there is no repeated interaction. This implies that the president never looks ahead to subsequent nominations and the Senate allows acts sincerely, since without repeated interaction there is no incentive to behave otherwise. Yet, the evidence shows that presidents do look ahead, and that nominations made earlier can set the stage for later confirmations.

The second idea is incomplete information. The president estimates the Senate’s reactions to a nominee and makes his nominations accordingly. This would not be necessary if the president were completely informed about the Senate’s preferences. Rather, he would simply choose the nominee that creates the least delay in much the same he makes various pivots indifferent between confirmation and rejection in the current models.
Without these two ideas, the current models produce either no confirmation failures or copious gridlock, and no delay. Examining formal model in other contexts shows that repeated interaction and incomplete information can have a substantial effect on outcomes. These are usually agenda-setting models where Congress is the agenda-setter and the president is the veto-player, but the applications to confirmations are immediate.

Perhaps the best known is Cameron’s (2000b) model of sequential veto bargaining. In this model, Congress makes a proposal to replace a status quo, which the president can either accept or veto. Congress knows the president’s preferences only with uncertainty. If the president vetoes, Congress may offer another proposal to replace the status quo, which the president can again accept or veto.

A primary result of Cameron’s (2000b) model is that the president may strategically veto the first proposal so that Congress will offer a second, more favorable proposal. The president capitalizes on Congress’ uncertainty about his preferences to build a reputation for “toughness” on the policy in question, by vetoing proposals that less extreme types would accept.

Note that although Cameron’s (2000b) model makes use of resubmitted proposals on the one issue, it does not extend to multiple issues. McCarty’s (1997) model involves multiple issues, but not resubmittal. Congress makes a proposal to replace one status quo, which the president can accept or veto. Following the president’s decision, Congress makes a proposal to replace a second status quo. Here, too, the president uses his veto for reputation building – moderate types may veto the first proposal, deciding to
live with that status quo in order to build a reputation for toughness when the second proposal is made. Also, a honeymoon effect is possible. Congress recognizes the president’s incentive to reputation build, and under certain circumstances, Congress will make a generous fist proposal in order to prevent a reputation-building veto.

The primary lesson of these models for our theory of the confirmation process is that incomplete information and repeated interaction create opportunities for reputation-building. The veto-player’s strategy on the first proposal or first issue constitutes a signal to the agenda-setter, which is used to update the agenda-setter’s beliefs about the veto-player’s preferences. In the context of confirmations, the Senate may behave differently on early nominations to build a reputation for extremism or toughness, and so receive a more compromising nomination later. The Senate can thus maximize its utility over a portfolio of nominations, rather than over one office and one nomination at a time.

Unlike models of vetoes in legislative bargaining, however, a veto or rejection of a nominee is not the only means the Senate has at its disposal for reputation-building. Rather, the time spent confirming the nomination can also serve as a signal. The delay chosen can be used to separate the types of senators who will confirm some nominees and not others. With repeated interaction with the president, some senators may delay a nomination for a period of time, while other senators confirm the nominee quickly. If the president has uncertainty about the preferences of the delaying senators, he could infer some information from the amount of delay. Different delay times could therefore inform the president about the preferences of the senators, in effect to say “we like this nominee,” or “we will take this nomination now, but we will need something more
compromising in the future.” Such a model could combine reputation-building opportunities with varying delay times, in much the same way that the confirmation of John Ashcroft was used as a “shot across the bow” of the Bush administration described in chapter one. This would allow us to study not only how the threat of defeat but also delay affect the president’s nomination choices and the Senate’s reactions.

A remaining question is exactly which senators are delaying the nominations and which senators’ preferences are known to the president only with uncertainty. While a model that adds uncertainty about a filibuster pivot or home state senator would be possible, this would not reduce the large number of predictions of gridlock common in pivotal models. Furthermore, such a model would not better reflect the underlying reality that the filibuster pivot or home state senator (or the Senate median for that matter) does not have a monopoly on delay. Any senator can delay a nomination, perhaps to the point of failure, not only the filibuster pivot, home state senators, or committee chairs. Even if the president were perfectly informed about every senator’s preferences, he may still not know exactly which senators will use their parliamentary privileges to delay his nomination. For example, the president may not perfectly predict which interest groups, if any, will voice opposition to a given nominee, and so provoke a hostile response with the group’s allies in the Senate (e.g. Caldeira and Wright 1998; Scherer 2005). The most parsimonious solution is therefore not to add more pivots, but rather to create a range of senators that can delay a nomination. These delay pivots may be known to the president, but he may not know in advance who would wish to stall or defeat his nominations.
Lastly, the model should allow delaying senators to have different, possibly competing motivations for their actions. Previous models of the process have assumed that senators evaluate nominees on ideological grounds alone, but the persistence of empirical results demonstrating the importance of divided government and electoral politics cannot be ignored even when controlling for ideological differences. Thus, partisan motivations must be incorporated by making the delay pivots value delay for its own sake. Such would be the case if delaying senators are all of a different party of the president, and want to slow the nomination regardless of the nominee’s ideological preferences.

Ideally, the model would also incorporate hostage-taking incentives as well as ideological and partisan motivations. However, a repeated game with uncertainty and with utility over both ideology and partisan delay is already quite complex, especially compared to the relatively simple pivotal models. Cooperative bargaining (e.g. Calvert, McCubbins, and Weingast 1989) and side payments over portfolios of players (e.g. Console-Battalina and Shepsle 2007) are a very different class of game than Cameron’s (2000b) and McCarty’s (1997). Combining these different classes of games would be technically very difficult, and even if it were not, empirically identifying nominations that were actually taken hostage is a substantial challenge (Steigerwalt 2004). Given the thorniness of creating and testing a model with hostage-taking motivations, I abstract away from this goal and concentrate instead on ideological and partisan motivations and their effects on presidential and senatorial strategy. I will discuss possibilities for hostage-taking and side payments in greater detail in the next chapter.
All told, then, we have the outline of a new, richer model of the confirmation process, one which departs from the current theoretical work in the literature in several respects: Like McCarty’s (1997) model of legislative bargaining, this model would involve repeated interactions between the president and the Senate, in that the president must fill multiple offices. Like Cameron’s model (2000b), it would incorporate the potential for multiple nominees for the same office, reflecting the president’s option to withdraw one nomination to make another. The president would not know the preferences of the delaying senator or senators with certainty, but would instead know only a range of ideological values for many delay pivots. Finally, these delay pivot senators would be motivated by both ideological and partisan goals, and could choose a range of delay times to attempt to influence the president’s future nomination decisions. I turn to constructing this new model in the next chapter.
CHAPTER 4
A NEW MODEL OF THE CONFIRMATION PROCESS

The last chapter argued that our understanding of the confirmation process has been hampered by theoretical models that do not explicitly incorporate delay as a tactic or the fact that essentially any senator may utilize it. Filling this hole in our knowledge requires a model in which the president and Senate must negotiate to fill multiple offices, with a potential for multiple nominations for each office, and to do so in an environment of uncertainty. This chapter describes such a model and presents the analytic results; however, the presentation in this chapter is informal, and the technical details of the model assumptions and results are presented in the appendix.

Broadly speaking, the results show that delay can be used as a signaling tactic by interested senators. In equilibrium, the president will often attempt to accommodate delaying senators with nominations that are ideologically closer to these senators in order to avoid further delay or even defeat of his nominations. Furthermore, senators are allowed to value delay for partisan reasons, and the results show that a great deal of delay arises for exactly this reason. Both nominee ideology and confirmation delay are shown to be a mix of ideological and partisan compromises, and the threat of delay or failure can pull nominee ideology away from the president and toward the delaying senator. Finally,
I compare these results with the literature’s existing theoretical work and derive hypotheses for empirical testing of the model. In keeping with the tone of the previous theories, I will often couch this model in terms of judicial appointments, but the predictions should hold equally for most executive branch offices.

**Assumptions of the Model**

The model involves a president and a Senate, comprised of a median voter and a set of senators that can delay the confirmation process. One of these senators will choose to do so, and this player I call the delay pivot. These players must bargain to fill two offices. The game begins with the president, who decides when and if he will withdraw the first nomination, and then makes the nomination itself. The delay pivot then chooses an amount of delay before the nomination reaches the floor for a vote. Specifically, the delay pivot chooses a time period in which the median is allowed to decide whether to accept or reject the nomination. If the delay pivot chooses a later time then when the president has elected to withdraw, the president withdraws the nomination and then makes another nomination, and the process starts again. On the other hand, if the delay pivot chooses an earlier time than the president has set for withdrawal, then after that delay, the median chooses whether to accept or reject the nomination. Once the nomination is resolved, either with confirmation or failure, the game is repeated in a second stage.
I assume that the players have single-peaked and symmetric preferences about ideal points on the real number line, similar to those used in Cameron (2000b). The real line is used here to represent the space of possible ideological or policy preferences, and the distance between two players’ ideal points on the line represents the ideological difference between those players. I normalize the president’s ideal point to be 0, while the ideal points of the Senate median and delay pivot are greater than 0.

While the president’s and median’s preferences are common knowledge, I assume that the president is uncertain about the delay pivot’s preferences. The president’s uncertainty is modeled by the president’s belief that the delay pivot’s ideal point is uniformly distributed over an interval. The delay pivot’s ideal point is also referred to as her type. This uncertainty reflects the fact that no particular senator is uniquely empowered to stall a nomination. Rather, all senators have parliamentary privileges that can create delay, and the president is uncertain about which senator will do so. Thus, the number of possible types represents the fact that a number of senators are allowed to delay a nomination, while the player designated as the delay pivot is the senator who actually chooses to delay. The important feature is that while there are many possible delay pivots, the president does not know a priori which delay pivot will pose a problem for his nominations.  

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10 Thus, the president knows the identity of all possible delay pivots, but not their types. An alternative but mathematically identical interpretation is that the president knows the type of all delay pivots, but not their identities. This interpretation would make sense when the delay tactics can be employed anonymously.
The players must fill two offices, which are represented by two status quos on the real line. If the players cannot agree on a nominee to fill an office (that is, if the delay pivot chooses too much delay or the median rejects the nomination) the status quo remains in place. Like McCarty (1997), I assume that the players’ preferences are stable across both offices, and thus what the players want does not change, but the office they are filling does. This assumption is intended to capture the repeated interaction between the president and the Senate alluded to in the last chapter.

The process is “timed” with a discrete set of time periods, so that the process begins in period 1 and ends on or before period $n$, where $n$ is a positive integer. The offices are independent and have their own set of time periods, so that nominations to both offices begin in period 1. If a nomination is not confirmed by period $n$, then the nomination fails and the status quo for that office remains in place. One way to approach this timing is that each session of the Senate lasts to time $n$, and so nominations not confirmed by the end of the session time out and fail. Alternatively, one can view each time period as a distinct set of opportunities to fill a vacancy, and so there are a maximum of $n$ opportunities to delay the process. For tractability I assume that the first nomination is resolved before the process to fill the second office begins.

Every nomination experiences a certain amount of delay unrelated to the nominee. I represent his extraneous delay with a predetermined number of time periods that are “eaten up” during the nomination during which none of the players take any action on the nomination. Whenever the president makes a nomination, a number of periods of time are spent after the nomination, and if the president withdraws a nomination to make
another, then the second nomination consumes an additional number of time periods. I assume that the extraneous delay and the time available to an office is the same across offices and nominations.

The president chooses at least one nominee to fill both offices, and will choose two if he withdraws the first nomination to an office and makes another. Nominations are represented as points on the real line like the players’ ideal points. The president also chooses a time period in which he withdraws the first nomination to either office. This time for withdrawal acts like a deadline, so that if the first nomination is not confirmed by then, he withdraws first nomination and makes another. The president may also choose not to withdraw any of the nominations.

The delay pivot must choose if and when the president’s nominations are to proceed to a vote. The delay pivot’s strategy is thus to choose when in the time periods available for confirmation that a nomination will proceed to the Senate floor for a vote. The delay pivot may choose to allow the nomination to proceed to floor immediately after the extraneous delay has expired, in which case the nomination experiences minimal delay. On the other hand, if the delay pivot chooses a later time period, the nomination experiences more delay. The delay pivot can kill the nomination by choosing the last time period \( n \), in which case the nomination does not proceed to the floor at all. Also, if the delay pivot holds up the nomination to a time period after the president’s withdrawal deadline, then the nomination is withdrawn and a new nomination is made, then more extraneous delay occurs. The delay pivot then chooses a delay for the second nomination. Note that earliest time period that the second nomination could be
confirmed is twice the extraneous delay. Once a nomination proceeds to the floor for a vote, the median decides whether to confirm the nomination. Thus, a nomination may fail because it is rejected by the Senate or because it runs out of time.

While the players have preferences over the spatial location of the nominees, they also have preferences over when the nominee is confirmed, if at all. Each player assigns a weight to the time period in which a nomination is resolved, either with confirmation or failure. The time periods and their weights enter directly into the players’ utility functions. The weight for the president is negative, so that the president values shorter delays over longer delays. The weight for the delay pivot is positive, so that the delay pivot values longer delays over shorter delays. Finally, I do not assume a sign for the weight for the Senate median a priori. Thus, the median may prefer faster confirmations like the president or prefer slower confirmations like the president’s opponents. This allows a comparison of the equilibrium results between unified and divided government.

With this setup, the players have two goals to consider – the placement of the nominees’ ideal points and the time taken to confirm or reject the nominees. The first goal depends on the proximity of the nominee to the players in the ideological space. The second depends on whether the player wants faster or slower confirmations for the president’s nominations, entirely independent of the players’ or nominees’ ideal points.

I use the following tie-breaking rules. I assume that when indifferent, the president chooses the nomination closer to his ideal point, the delay pivot choose the lower of two delay times, and that the median chooses accept. I solve the game for Perfect Bayesian Equilibrium.
Before turning to the equilibria of the model, one additional concept will prove useful – the reservation point. This is a common tool in these sorts of models (see Cameron 2000b), and in this context represents the value of the nominee’s ideal point that makes a player indifferent between the nominee and the status quo. To illustrate this concept, consider an example: Suppose that a status quo has a value of 10 on the real line, and that a delay pivot has an ideal point of 8. As far as ideological goals are concerned, the reservation point is the same distance from the ideal point to the status quo, but on the other side of the ideal point. Because there are two units between the ideal point and the status quo, the reservation point in this example is 6. The delay pivot will prefer any nomination between 6 and 10 to the status quo, and an offer of either 6 or 10 will provide the same ideological utility to the delay pivot. For another example, if the ideal point is at 5, then the reservation point is at 0. Note that since the reservation point depends on the distance between the ideal point and the status quo, the greater the distance between the status quo and the ideal point, the further away from the ideal point will be the reservation point. Thus, where the ideal point is 8, the reservation point is 6, and where the ideal point is 5, the reservation point is 0. An important consideration here is that these reservation points satisfy the ideological goals, but not the partisan goals – not only must we consider where the nominee’s ideal point is located, but also when the nominee is to be confirmed. Reservation points will move closer (further) from the delay pivot (president) the later nominees are confirmed.
Maximum Information Signaled by Delay

Since I am primarily interested in the determinants of delay and its relationship to nominee ideology, the central question to be addressed in the analysis is how the delay pivot may use the delay tactics to pull nominees closer to her ideal point. Of course, to induce a nomination at her ideal point, the delay pivot would have to inform the president about where that ideal point is.

Yet, there are no equilibria where the delay pivot truthfully reveals the location of her ideal point to the president. If the president knew the delay pivot’s type with certainty, the president’s best option is to offer a nomination at the reservation point of the delay pivot, such that the delay pivot is indifferent between accepting the nomination now or delaying it to death and receiving the status quo. The president thus gets a nominee as close to his ideal point as possible, given the preferences of the delay pivot, and the delay pivot does not delay the nomination to expiration since she is indifferent between the nomination and the status quo.

Such behavior cannot be supported in equilibrium, however, because delay pivots with two different ideal points have two different reservation offers in the same time period. As the example above demonstrates, the delay pivot with the ideal point closer to the status quo needs a reservation offer that is closer to his ideal point than the delay pivot with the more distant ideal point. The problem is that the delay pivot with the lower ideal point will prefer the reservation point of the other ideal point to her own. To continue the example, the delay pivot with the ideal point of 5 has a reservation point of 0, while the delay pivot with the ideal point of 8 has a reservation point of 6. But the
lower delay pivot prefers an offer of 6 to 0, since the offer of 6 is closer to her ideal point of 5. This delay pivot would therefore prefer to pretend to be the delay pivot with the ideal point of 8. In equilibrium, this means that if the delay pivot with the ideal point of 8 chooses a particular level of delay, then the delay pivot with the ideal point of 5 would have an incentive to choose the same level of delay.

This example illustrates that low types of the delay pivot (those with ideal points closer to the President’s) would do better to pool with a higher type (those with ideal points closer to the status quo) because the low types prefer the minimal offers made to the high types over the minimal offers made to the low types. Complete separation is therefore not incentive compatible (e.g. Myerson 1997), meaning that some types of delay pivots want to pretend to be other types, and the president cannot separate out all of the delay pivots. Some delay pivots will always cluster together, because they have no incentive to communicate enough information to the president to tell them all apart.

Incentive compatibility therefore places restrictions on how much information the delay pivot reveals in equilibrium. Furthermore, because the president learns about the delay pivots from the delay times they choose, incentive compatibility also places restrictions on the number of distinct times to resolution we may observe in equilibrium. Regardless of the ideological value of the nomination, or other factors such as divided government, many nominations will see the same time to resolution.

We must also be cognizant of the delay pivot’s incentives to choose higher delay times early in the process to receive more favorable nominations later. If a delay pivot can convince the president that she has a higher value of ideal point by choosing the same
Delay that those higher ideal points do, the delay pivot has an incentive to build a reputation with the president, and may do so by delaying nominations. Delay pivots can thus seek a honeymoon period like president’s do in McCarty’s (1997) model.

**Delay and the President’s Strategy**

In the analysis that follows, I concentrate on equilibria where the delay pivot reveals as much information as possible. How much information the delay pivot reveals, in turn, comes down to how many types of the delay pivot separate by choosing different delay times for different nominations.

As it turns out, these different delay times are fairly limited. The reason is that, as the appendix shows, the president makes only a few offers in response to different delay times. For example, if the president does not withdraw his nomination for the first office, he will make at most two different offers for the second office following a confirmation. To see why, suppose that the nominee to the first office is confirmed, so that the delay was less than period $n$. If two or more values of delay were chosen by different delay pivot types during the first confirmation, the appendix shows that at least one of the delay values is next to last time period, $n – 1$. Whatever other values of delay are chosen during the first confirmation are therefore less than $n – 1$.

In the second stage, suppose that the president makes one nomination after a delay of $n – 1$, and a different nomination for another delay less than $n – 1$. Call these nominations offer 1 and offer 2, respectively. Delay pivots prefer longer delays to shorter delays, so the delay pivots that elicit offer 2 must prefer offer 2 to either offer 1 or to the
status quo. Otherwise, they would have chosen a longer delay during the first confirmation. But if the delay pivots that elicit offer 2 prefer it to the status quo, they will not delay the offer to death. The president therefore knows with certainty that offer 2 will be confirmed, so he makes the least compromising offer he can – namely the reservation point of the Senate median. A nomination at this point is as close to the president’s ideal point as he can offer still passing the Senate floor. Furthermore, since the president cannot offer anything less than the median’s reservation point, any value of delay less than \( n - 1 \) elicits this offer.

There are two corollaries to this argument. The first is that the president only makes two distinct offers in response to “non-fatal” delays during the first confirmation, one for delays to period \( n - 1 \), and the median’s reservation point for any delay less than \( n - 1 \). Second, any delay less than \( n - 1 \) during the first confirmation elicits the same nomination from the president, so a delay pivot who wants to elicit this offer has no incentive to choose anything less than the maximum such delay – namely \( n - 2 \).

Much the same logic applies when the president will withdraw in the first stage. If the delay pivot has elicited a withdrawal in the first stage, the delay pivot will choose either \( n - 1 \) or \( n \) in response to the president’s second nomination. Any delay less than \( n - 1 \) elicits a nomination from the president in the second stage that none of these types of the delay pivot prefer to the status quo, so they all prefer to choose the greater delay times. Thus, non-fatal delays are all relatively long, and the president responds to them with only two different nominations. Put another way, delay pivots are close to the president ideologically would choose longer delays than necessary, even if they didn’t
value delay for its own sake. Otherwise, the president would infer that he could take advantage of their ideological proximity and submit uncompromising nominations.

Consider, then, the following equilibrium:

Proposition 1. Suppose that \( n \) is not too large, and that the extraneous delay is large relative to \( n \). There exists an equilibrium in which, in stage 1:

1. The president makes one offer and does not withdraw.
2. The delay pivot chooses one of three times, \( n - 2 \), \( n - 1 \), or \( n \). Low types of the delay pivot choose \( n - 2 \), moderate types choose \( n - 1 \), and high types choose \( n \).
3. The median accepts the president’s nomination if it reaches the floor (if the delay is less than \( n \)).

In stage 2,

1. The president responds to delays of \( n - 2 \) with the minimum offer of the median’s reservation point, makes a higher offer for \( n - 1 \), and a still higher offer following an \( n \). The president does not withdraw any of these offers.
2. If offered the median’s reservation point, the delay pivot chooses \( n - 1 \), and if offered the more compromising \( n - 1 \) or \( n \) offers, lower types of the delay pivot choose \( n - 1 \) and higher types choose \( n \).
3. The median accepts all three of the president’s second stage nominations if they reach the floor.
Essentially, in this equilibrium, the president makes one offer for the first office, and different types of the delay pivot separate into three intervals by choosing three different delays, \( n - 2 \), \( n - 1 \), and \( n \). Having observed which level of delay was chosen in the first stage, the president makes a different offer to each interval of delay pivots in stage 2. The median accepts any nomination that makes it to the floor.

The logic of the equilibrium behavior is a consequence of the corollaries discussed above. As the appendix shows, the president will not withdraw in this equilibrium because the extraneous delay is too large. Were the president to withdraw a nomination, it would expire before it would reach the delay pivot’s and the median’s decision nodes. As a result, the corollaries show that the nominee to the first office receives one of three distinct delay times, each of which elicits an associated nomination for the second office. The delay pivots choose among these delay times to elicit the nomination for the second office that they prefer most. The delay pivots “line up” according to their ideal points, with lower values choosing lower delays and higher values choosing higher delays. The lowest delay is \( n - 2 \) and elicits from the president the reservation point of the median. The greater delay, \( n - 1 \), elicits a more compromising offer than the reservation point; the degree of this additional compromise is discussed further below. Finally, the highest level of delay, \( n \), is fatal for the first nomination, but given the results of the corollaries, killing the first nomination is the only way for the highest values of delay pivots to separate from the delay pivots that wish to elicit the \( n - 1 \) offer in the second stage.
Three intervals of delay pivots are the most separation that can occur in this equilibrium, but three intervals is not necessarily fine grained enough to prevent second round nominations from failing. All of the types of delay pivots that elicit the median’s reservation point choose to let the nomination proceed to the floor in period $n - 1$. However, some of the delay pivots that delay to the $n - 1$ and $n$ offers do not accept their second stage offers. Higher types of delay pivots that elicit the $n - 1$ offer do not prefer this offer to the second office’s status quo; they choose $n - 1$ in the first stage because they prefer the first nomination to the first status quo, not because they like the president’s response to $n - 1$. These types will kill this second stage offer.

The lower types that choose delays of $n - 1$ and $n$ in stage 1 do not kill the second stage offers that the president makes in response. In fact, some of these types are bluffing. Some of the delay pivots that delay to $n - 1$ in stage 1 would actually accept the lower $n - 2$ offer of the median’s reservation point. These types bluff the president by pooling with the higher types that will not accept the median’s reservation point by choosing the same delay times in the first stage as the higher types. They can thus elicit the more ideologically compromising offer made to the higher types.

Put differently, the three intervals of delay pivots in the equilibrium choose three different balances of ideology and partisanship that, to borrow from Matthews (1989), we can call accommodating, compromising, and recalcitrant. The accommodating types are those that are closest to the president ideologically and who choose the lowest delay, $n - 2$, and receive the median’s reservation point. The compromising types are those that are further ideologically from the president than the accommodating types, choose $n - 1$, and
receive a compromise offer. The recalcitrant types are the most ideologically distant types from the president – they allow the first nomination to expire with delay \( n \), and require much greater ideological proximity out of a compromise second stage nominee.

Note that some of these recalcitrant types are actually compromising types that are bluffing. They do not necessarily want to delay the first nomination to death, but want to appear to be the recalcitrant types in order to get the ideological compromise made to the recalcitrant types.

The form of that compromise is worth noting. Both of the president’s second stage compromises (one each for \( n - 1 \) and \( n \)) are higher than would be the case if delay were not an issue. If the delay pivot could not delay the nomination to failure, the president would offer only the reservation point of the median to all delay pivots (e.g. Moraksi and Shipan 1999). By contrast, in the present model the president increases the nominee’s ideal point by the weighted average of the president’s and delay pivot’s weights on delay. This term represents the additional ideological compromise that the delay pivot can extract from the president due to her ability to delay the nomination.

Compromise offers therefore represent a particular tradeoff between ideological and partisan concerns meant to appeal to the delay pivot. Accommodating types are the most ideologically similar to the president, and take what is essentially a non-compromise offer, nevertheless delaying it still significantly. These types delay the first round offer to \( n - 2 \) and the second round, non-compromising offer to \( n - 1 \). These delay times are less than those chosen by the other types of delay pivots, but are certainly higher than is absolutely necessary (i.e. no delay at all). The compromising types will
accept some offer in the second stage that is ideologically closer to their types, but will in
any case delay it to period \( n - 1 \). Finally, the recalcitrant types delay at least one, and
possibly both rounds of nominations to death. Even if the president offers a very
compromising, ideologically distant offer, the most extreme of these types will still delay
it to death. The partisan component of their utility that is increased by delaying the
president’s nominations is not enough to persuade them to accept an ideologically distal
nominee.

Thus, the compromising types use delay to elicit a compromise nominee and
compensate themselves for accepting a somewhat distant nominee. The accepting types
have no ideological issue with the nominee, but delay it for a time nonetheless because
they derive utility from doing so. Finally, the more distant recalcitrant types use delay to
defeat the nominations.

Where ideological compromise is unnecessary (for the accommodating types), we
see some delay. Where ideological compromise is necessary and possible, we see higher,
but non-fatal, delay. In both cases, this delay comes from the utility the delay pivot
places on stalling the president. Nominations are delayed to expiration only where no
ideological compromise is possible. The breakdown of ideological compromise, not
partisan stalling, causes the nomination failure. Thus, confirmation delay may be
partisan, but confirmation failure is always ideological.

Finally, the delay pivot engages in some reputation building across offices, but
not across offers. The lower types in the interval that choose \( n - 1 \) prefer the median’s
reversion point to the second status quo, but prefer the compromise that results from
delaying to \( n - 1 \) even more. They thus strategically delay to later times, pooling with higher types that will not accept the medians’ reversion point, and thereby elicit a higher offer from the president. In this way, the delay pivot can pull the nominee’s ideology toward her own and away from the president by strategically delaying a nomination, even if she is a type that would be unwilling to delay the nomination to death.

The delay pivot can employ this reputation building tactic only across offices, because the president only makes one nomination per office in this equilibrium. If the president does withdraw in one or both stages, then the delay pivot will have the opportunity to build reputation across nominations as well as across offices. Consider the following equilibrium:

Proposition 2. Suppose that \( n \) is not too large, and that the extraneous delay is not large relative to \( n \). Let \( t \) denote the time period in which the president withdraws in stage 1, where \( t < n \). There exists an equilibrium in which, in stage 1,

1. The president makes one offer, withdraws that offer relatively late in period \( t \) if the delay lasts that long, and then makes a more compromising offer.
2. The delay pivot chooses one of four delay times; \( t - 1; t; n - 1 \) or \( n \). Delay pivots with higher ideal points choose greater delays.
3. The median accepts either of the president’s nominations if they reach the floor.

In stage 2,

1. The president responds to a delay of \( t - 1 \) by offering the median’s reservation point and does not withdraw this offer. For each of the greater stage 1 delays, the
president responds with a higher offer than the reservation point, with greater delays receiving higher offers. If these offers are delayed past the extraneous delay period, the president will withdraw these nominations and make more compromising offers.

2. If offered the median’s reservation point, the delay pivot delays to period \( n - 1 \). If offered one of the more compromising offers, the delay pivot delays to one of three time periods, the extraneous delay period, \( n - 1 \), or \( n \), and higher types choose greater delays.

3. The median accepts the president’s nominations if they reach the floor.

In this equilibrium, the president will withdraw his first offer in stage 1 if it is delayed past period \( t \), and afterwards makes a higher offer. Lower types of the delay pivot can separate into two intervals by choosing either \( t - 1 \) or \( t \), neither of which causes the president to withdraw. Higher types can elicit a more compromising offer from the president by delaying past the president’s level of patience, \( t \), and the president obliges with an offer tailored to these higher types.

Much the same behavior is evident in stage 2. The delay pivot separates into three connected intervals by delaying to period \( t, n - 1 \), or \( n \), in the first stage, and the president makes a different initial nomination for each interval in stage 2. Higher delay pivot types choose greater delays, so the greater the delay in stage 1, the greater the initial offer in stage 2. The delay pivot has more opportunities for reputation building here than in the equilibrium in Proposition 1, because the president will withdraw each of these
offers as well, and follows with a more compromising offer. The delay pivot with a type in one of these intervals may therefore choose one of three delays in stage 2; the period ending the extraneous delay, which does not cause the president to withdraw, or a higher delay to elicit a withdrawal and a higher offer. After withdrawal, the delay pivot then ultimately delays to \( n - 1 \) or \( n \), with some types that choose \( n - 1 \) preferring the first offer to the status quo, but preferring the second, more compromising offer most. These types are therefore bluffing the president. Thus, in stage 2, like stage 1, the delay pivots split up based on a small number of distinct delay times in order to get the best possible offer from the president.

A noteworthy aspect of this equilibrium is that incentives for low types to pool with higher types are anticipated by the president in two ways. The first is that, like Proposition 1, following a sufficiently long delay of \( n - 1 \), the president chooses his responding offer so that the types of the delay pivot that delay to period \( n \) must sincerely prefer the resulting second stage offer to that from \( n - 1 \). This limits the bluffing incentives for killing the first stage offers.

The second is that the president varies his withdrawal strategy between offices. In stage 2, the president withdraws the initial offer relatively early, in the first period available after the extraneous delay ends. The logic here is that some of the types that elicit a particular stage 2 offer will not be too ideologically distant from the nominee, and will therefore not need to compensate themselves with higher delays. The president forces these types to separate from the types that will require higher delays (and some that are bluffing), by withdrawing relatively early. As a result, at least some types will let
the nomination proceed without additional delay, whereas in Proposition 1, all second
stage nominations were delayed to periods $n - 1$ or $n$.

Conversely, in stage 1, the president withdraws the first offer relatively late. The
president encourages low types of the delay pivot to let the less compromising first
nomination proceed by letting them wait longer to do so. While some of these types will
still pool with types that require a more compromising offer post-withdrawal, the
president can “bribe” others to not choose such a higher delay. We can see, then, that the
president recognizes the delay pivot’s incentives to build reputation through higher delay,
and offers a combination of greater ideological compromise and varying withdrawal
times to blunt these incentives.

Both propositions show that while the delay pivot has strong incentives to delay
all nominations for as long as possible, the president can mitigate these incentives with
ideological compromise. Yet to do so, there must exist sufficiently compromising types
of the delay pivot to prefer the lower offers, and to be willing to sacrifice delay to get
them. The results are somewhat unusual in this sense, in that the “good” types (from the
president’s perspective) are forced to separate from the “bad,” more ideologically distant
types by accepting a less compromising offer (though see Matthews 1989).

This is an interesting interaction, because it shows that the Senate’s reputation-
building can be a powerful influence on the president’s choices, even when that
reputation-building does not actually take place. Shortened delay times to confirmation
are a result of ideological compromises on the part of the president that have forestalled
both the delay pivot’s need to reputation-build through delay and the partisan benefit
from doing so. Conversely, longer delay times are either a reputation-building bluff by the delaying senator to receive a greater compromise later, or else a partisan-motivated self-compensation for accepting an ideologically imperfect nominee. The president’s strategies are quite effective at limiting the most extreme reputation-building, by forcing delay pivots that do not actually sincerely prefer to kill a nomination to stop short of doing so and letting the confirmation continue. Thus, nomination failures are seldom the result of reputation-building or partisan delay, but rather insufficient ideological compromises with more extreme types of delay pivots who sincerely prefer the status quo to the nominee.

The Benefit but Rarity of Withdrawal

A number of scholars have suggested that the president can do little to speed up the confirmation process after he has made his nomination (e.g. Binder and Maltzman 2002), though the model presented here argues that the president’s withdrawal strategy does exactly that. The model also provides two arguments for the empirical rarity of withdrawals. The first, and simplest, is that if $n$ is not sufficiently large, or if the extraneous delay is too large (specifically, greater than $\frac{n+1}{2}$), then a withdrawal takes too much time. Thus, if the withdrawal is made too late, or if the Senate is proceeding too slowly on confirmations, then a withdrawal is impossible.

A more interesting reason for the rarity of withdrawals is that once president is willing, and time permitting, able to make them, they are often unnecessary. Because a withdrawal results in a new nomination with a greater ideological value, the president can
force some of the delay pivots who do not prefer the greater ideological value into letting the nomination proceed to the floor at an earlier time. This strategy limits the impact of reputation-building on the part of the delaying senators, and when the president can withdraw his first nomination, the greatest benefit to the president, both in terms of nominee ideology and confirmation time, comes when he does not withdraw.

The strategy thus creates what seems to be an observational paradox. The reason we do not observe more withdrawals may be that the benefits to president of doing so are realized before, not after, the withdrawal. The president’s “threat” of replacing the first nominee with one that is even further away from the most compromising types of delay pivots is sufficient to prevent them from delaying long enough to provoke a withdrawal in the first place. Of course, this means that if the president does withdraw the first nomination, the second nomination will be delayed either as long as possible or will fail, since most of the compromising types of delay pivot will not have provoked the withdrawal and only the ideologically distant types remain. Thus, the delay-reducing benefits of withdrawal are observed without observing withdrawals, and once a withdrawal has occurred, it is already too late for the president to reduce delay any further.

**Less Gridlock but More Delay than in Previous Models**

Another theoretical technique used to analyze the president’s nomination strategies and the Senate’s confirmation decisions is the regime (e.g. Moraski and Shipan 1999, Shipan and Shannon 2003). A regime is one of three arrangements of the
president’s and the Senate median’s ideal points and the status quo in a Romer-Rosenthal context with complete information. The two equilibria presented here take place in regime 2, where \( p < m < y \), where \( p \) is the president’s ideal point, \( m \) is the median’s ideal point, and \( y \) is the status quo for office \( i \). In such a regime, the literature suggests that the president should make a nomination at the reversion point of the Senate median, \( x_i = 2m - y \). In this way, the Senate median’s preferences constrain the president’s choices.

However, a model incorporating the delaying powers of non-median senators shows that the median’s preferences constrain the president’s lowest nomination only when some types of delay pivots are willing to take a nomination at that constraint in lieu of the status quo. If no type of delay pivot will accept such a low offer, then the median’s preferences are non-binding. Outcomes in both cases may be non-median, but in response to delay, they move away from, not toward, the president, as the regime approach suggests (Shipan and Shannon 2003).

That the median’s preferences may not constrain the president is more evident in regime 1. If the parameters are arranged so that \( m < p < y < z \), where \( z \) is the lowest type of delay pivot, then the Senate median accepts the president’s ideal nomination in lieu of the status quo. However, such an offer never reaches for the floor once delay is included, as no type of delay pivot will accept a nomination less than the status quo. On the other hand, even though the president would be willing to make a nomination greater than the status quo, the median will not accept such an offer in many equilibria. No nomination acceptable to the delay pivot is acceptable to the median, and vice versa. Thus, if the president proposes his ideal nomination, it will not pass the delay pivot, but a nomination
that passes the delay pivot will fail on the Senate floor. Furthermore, this stalemate occurs regardless of the sign of the median’s weight on delay. The presence of divided government will therefore not predict confirmation failures, a hypothesis supported by a number of studies (e.g. Krutz, Fleisher, and Bond 1998; Shipan and Shannon 2003).

Note, though, that while divided government does little to explain nomination failures, it does little to explain confirmation delay as well. The median’s reservation point in this model is \(2m - y_i \pm w\), where \(w\) is the median’s partisan weight on delay. The weight is negative if the median wants to speed up confirmations like the president, and is negative if, like the delay pivot, the median wants to slow down confirmations.

Changing the party of the median without changing the identity (and therefore ideal point) of the median only moves the reservation point by \(w\).

While the reservation point is \(w\) units closer to the president under unified government than divided government, this change is completely inconsequential if no type of delay pivot prefers the reservation point to a higher offer. If not, then the reservation point is never offered as a nomination, the president’s offers are all higher, and the median’s preferences do not bind his choices. Whether or not there are delay pivot types that will accept the median’s reservation point depends on the relative arrangement of the ideal points, and is satisfied, for example, if \(z < m\) or \(m < p < z\). The party of the Senate median thus matters little compared to the arrangement of the ideal points.
We thus see that where the regime type would suggest that the median constrains the president’s choices, the median may be no constraint at all in the face of confirmation delay, and outcomes may be realized further away from both the median and the president. Where the regime would suggest that the president chooses his ideal nominee, in the face of delay, his nominee never reaches the floor.

This result speaks to the power of non-median senators to affect outcomes by defeating nominations through delay, a finding also true of pivotal politics models (e.g. Krehbiel 2007; Rohde and Shepsle 2007). Yet, non-fatal delay can actually create a larger set of confirmable nominations than these models suggest. A different arrangement of the parameters, like $p < y_i < m < z$, would produce no movement in a regime environment and gridlock in a pivotal politics model. In contrast, in the current model, if the president has a sufficient weight on delay over ideology, he will make an offer that is actually further from his position that the status quo and closer to the delay pivots. The president essentially decides that a bad nominee today is better than a good nominee tomorrow, and submits a nominee that is confirmable, to the benefit of the delay pivot.

This means that many of the gridlock intervals in pivotal politics models are actually narrower when delay is incorporated. The range of configurations of the parameters puts fewer limits on when a confirmable nominee can exist and thus shrinks the gridlock regions, but the price for the president is a more ideologically distant nomination. Sacrificing ideologically agreeable nominees for confirmable nominees is not an option for the president in other models, and when this option is allowed means
that fewer nominees are delayed to expiration, even with comparatively wide gulfs between the president and delay pivots. Compared to both Romer-Rosenthal and pivotal models, the current model predicts less gridlock, because ideologically extreme delay pivots have less incentive to fatally delay any nominee.

Although the current model predicts less gridlock in equilibrium than previous models, gridlock is still possible under a number of parameter configurations. This is partly a result of the assumption that delay is costless to the delay pivot. Of course, a more realistic model would incorporate some notion of the costs of delaying a nomination, especially to expiration. These costs may be electoral (e.g. Groseclose and McCarty 2001), or more likely, institutional – a senator who denies unanimous consent for a nominee may find his or her own unanimous consent agreements blocked later by the nominee’s vengeful supporters (e.g. Krehbiel 1986). Costs that escalate with time would certainly mitigate the ideological incentives to delay, and would obviate much of the partisan benefit as well.

Another significant feature lacking from the model is hostage-taking. Console-Battilana and Shepsle (2007) have shown that side-payments to the delay pivot on matters unrelated to the nomination can shrink the gridlock interval, so that fewer nominations are delayed to expiration. The partisan benefit included in the model acts like a side-payment in a sense; it benefits the delay pivot regardless of the characteristics of the nominee. However, the partisan benefit, unlike side-payments, does not depend in any way on the president. A more realistic model would incorporate not only an option for the president to make side-payments to the delay pivot, but crucially, would also
include some measure of the president’s ability to pay for those side-payments as well. If the president is flush with political capital or favors to call in, the president is a ripe target for extortion, and delay would be a valuable tactic. On the other hand, when the president is struggling and can do little to pay off a delay pivot, delay may not be worth the cost.

Thus, even though the current model predicts less gridlock and nomination failure than previous models, it still probably predicts too much. Two very plausible extensions to the model, costs of delay and side-payments, would reduce the number of failures. These features have yet to be incorporated in any model together, let alone a model that includes ideological and partisan utility, so exactly how much difference they would make is unclear.

However, the fact that the current model reduces the gridlock intervals in previous models, even without costs and side-payments, is quite telling. Essentially, if a model gives senators the option of delaying a nomination without delaying it to death, then the senators will often do so. This means that fewer nominations will fail, but more nominations will experience delay.

While this seems an improvement on previous models, it also leaves us with a question. Specifically, delay results from partisan sources, while failures results from ideological sources. As chapter 1 illustrated, not only have failure rates increased, but so too has delay without failure. The fact that ideological differences between the parties increased during the same period as nomination failure rates climbed is therefore no surprise (e.g. Poole and Rosenthal 1997). What, then, explains the increasing delay
without failure if not ideological differences? The model suggests that increasing partisanship, in addition to and independent of ideological polarization, is at work. Perhaps opposition party members have made more electoral mileage from president-bashing (e.g. Groseclose and McCarty 2001) in recent decades, or more collegially-minded senators have had less successful reelection campaigns than their more overtly partisan colleagues.

Whatever the explanation, the model holds that it is not ideology. Interestingly, this argument can be extended to other areas of executive-congressional interaction, including budgets, treaties, and legislative agendas, or other arenas where partisanship and in-group/out-group dynamics can trump ideological differences. The model suggests that the Senate’s parliamentary behavior before roll call voting ever occurs can indicate the influence of party membership independent of ideology. Roll call voting is the least partisan behavior in the model, since the lowest offer made is the reservation point of the median and, and the median receives the least partisan benefit despite being decisive in the vote. In contrast, the parliamentary activity before the vote is the domain of the delay pivots, who receive the greatest partisan benefit. Such parliamentary activity could therefore provide a line of evidence of partisanship beyond the muddied evidence from analysis of roll call voting (see, among many others, Groseclose and Snyder 2003, Krehbiel 2003a and 2003b). In fact, the analysis presented here suggests that preferences estimation of roll call data will be biased against finding partisanship, since partisanship is then at its weakest influence in the confirmation process.
**Implications for Estimating Senatorial Preferences**

The results here suggest that studies using preference estimation on roll call data to discover evidence of partisanship are likely looking in the wrong place. Other preference estimation techniques are not intended to gauge the ideological disposition of a senator by examining his or her voting record; rather, these techniques are more interested in the nominees than the senators who confirm them. However, the model suggests that some of these techniques, too, may need correction to account for the influence of the confirmation process.

A number of studies have examined the confirmation process as well as other judicial behavior in a wide variety of contexts using Giles, Hettinger, and Peppers (n.d., 2001) scores. This is an estimation technique for judicial preferences that suggests that the president chooses nominees at his own ideal point unless constrained by senatorial courtesy, in which case the president chooses a nominee at the home-state senator’s ideal point. But neither offer can occur in the equilibria presented here. Trivially, the set of delay pivots (or the Senate median if the delay pivot had a negative weight on delay) may be too distant for the president’s ideal point to be an acceptable choice to the Senate. Furthermore, there are few arrangements of the ideal points and status quos that would allow the president to make a nomination at his ideal point.

More importantly, however, due to incentive compatibility, a delay pivot of either party has little reason to inform the president as to her ideal point, and if she did, the president has little reason to offer it. The best a delaying senator could hope for in such a situation is a nominee at least in the neighborhood of her ideal point. To receive a
nomination closer to her ideal point, the home state senator, like any other delay pivot, will either bluff the president into making a higher offer, or else extract that higher offer through higher delay. This suggests that the Giles, Hettinger, and Peppers (2001) method underestimates the ideological differences between the president and his judicial nominees.

In fact, the model suggests that any judicial or executive ideal point estimation technique based on Senate voting behavior (e.g. Bailey and Change 2001; see also Jackman, Clinton, and Rivers 2004) is likely to make the same mistake. The ideological preferences of the confirmed nominees in equilibrium are further away from the president than straight-forward Romer-Rosenthal (Moraski and Shipan 1999), pivotal politics applications (Rohde and Shepsle 2007), or even median-voter based techniques (Bailey and Change 2001) would find. Confirmation votes as a baseline vote for finding common spaces between institutions, for example, will suffer from a selection bias, because in equilibrium, the nomination often does not reach the floor unless the nominee’s ideal point is quite far from the president’s. The power to delay a nomination pulls the nominee’s ideology away from the president and toward the delay pivots by a significant amount, and greater delays elicit greater compromises from the president. This suggests a check on ideal point estimations for appointees – the estimated distance between the president and the appointee should be positively associated with the length of time taken to confirm that nominee.
An important consequence of the influence of delay on nominee ideology is associated with the quantification of the extra bargaining power held by the delay pivots, compared to other models of bargaining in uncertainty (e.g. Cameron 2000b or McCarty 1997). Specifically, in most paths of play, the degree of additional compromise that delay can elicit from the president is positively associated with the weight that both the president and delay pivot place on partisan delay relative to ideology. Ideological distance between the president and delay pivots results in ideological distance between the president and his confirmable nominees, a result found elsewhere in the literature (e.g. Rohde and Shepsle 2007). However, this nominee distance also increases with partisan differences over and above what is created by ideological differences. Thus, rancorously partisan differences between the president and the delay pivots of either party will produce nominees that are more ideologically distant from the president. Conversely, collegial or bipartisan atmospheres will result in nominees that are less distant from the president.

Concomitantly, because the delay pivot’s bargaining advantage is increasing with the president’s weight on delay, the faster the president needs a nominee confirmed, the further ideologically from the president that nominee will be. To ensure that his nomination is confirmed as fast as possible, in most paths of play, the president must make a very ideologically compromising nomination, and should also be willing to withdraw even this compromise to submit an even greater compromise. Furthermore, as the discussion of gridlock showed, in some configurations of the parameters the president may have to name a nominee that is further away from him ideologically than the status
quor if he is to have anyone confirmed at all. Thus, the president can get some speed in
his confirmations, but he pays for it with confirmed nominees that are further from his
ideal point than they would be if he could be more patient. Nominations to important
offices or during the transition period cannot be put on hold (McCarty and Razaghian
2000), and the president must make much greater compromises to these offices than he
would otherwise.

There is thus a counterintuitive corollary to presidential impatience – the more
important or urgent is the office being filled, the less the appointee resembles the
president ideologically. This can create a host of principle-agent problems for the
president (e.g. Fundenberg and Tirole 1991), as his most important agents will have the
least incentive to faithfully represent his ideological and policy views. Exercising control
of the federal bureaucracy (Moe 1987) or utilizing power delegated to executive branch
offices by Congress (Epstein and O’Halloran 1999) may be much more difficult for the
president than has been previously recognized. A far-reaching impact on the judicial
branch is difficult as well, as appellate court judges will resemble the president less than
district court judges, and the justices of the Supreme Court will resemble the president
least of all.

Hypotheses

The relationship between the median’s preferences and the constraint they place
on the president and the delay the president’s nominations receive is thus quite contrary
to what our current theories suggest. Also, while agenda-setting models with uncertainty
point to the importance of reputation-building, they are silent as to the possibility that the agenda-setter may obviate such behavior through withdrawal. These are important, though as yet unaddressed, aspects of the confirmation process, and lead to the following conclusions:

Proposition 3: In equilibrium:

1) The expected time to confirmation is non-decreasing in the average distance between the President and $z$.

2) If the president makes one offer following the confirmation of this first nomination, then the expected time to resolution is non-increasing in the distance between the President and the median. If the president makes two offers following the confirmation of this first nomination, then the expected time to confirmation is decreasing in the distance between the President and the median.

3) The expected time to resolution of a nomination following withdrawal or defeat is weakly greater than if the previous nomination were not withdrawn or defeated.

Proposition 3.1 is straightforward. The greater the ideological distance between the president and the delay pivot, the longer is the time to resolution of a nomination. This follows from the fact that in equilibrium, higher types of delay pivots choose greater values of delay.
Proposition 3.2 is less obvious. Essentially, following a confirmation in stage 1, the president may offer either one or two distinct nominations in stage 2. If the president makes only one offer, then no type of delay pivot will take the constrained offer produced by the median’s preferences in lieu of the status quo – the same situation described above. In this case, the median’s preferences are simply not a consideration for the delay pivot and therefore have no effect on the level of delay.

On the other hand, if a delay pivot indicates a preference for the median’s reversion point over a higher offer, then the president will make a nomination at that reversion point. The higher is the median’s ideal point, the higher is this reversion point, and the more types of delay pivot will prefer this nomination, ceterus paribus. Since eliciting this reversion point involves less delay than eliciting a higher offer in equilibrium, and since once elicited the reversion point is confirmed, the expected delay will be decreasing in the median’s ideal point. Put differently, the types of delay pivot near the median, especially those between the president and the median, are those types that choose the least delay. The greater is the distance between the president and the median, the more of these types there can be, and the expected delay decreases. This leads us to expect that a greater ideological distance between the president and Senate median will not slow down confirmations as our intuition might suggest, and will sometimes actually speed up the process.

Finally, Proposition 3.3 describes the observational paradox noted above about withdrawal and extents the conclusion to defeats of nominations. If the value of the extraneous delay is fixed, then following a withdrawal, the nomination is going to be
delayed until the last possible time period or else defeated. Again, the delay-reducing benefits of withdrawal are already spent by the time the withdrawal is actually observed. A similar conclusion holds for defeated nominations, though for a different reason. The average delay time is correlated across stages, since lower types choose lower delays in both stages and conversely for higher types. Those types that defeat a first round nomination are the types that, on average, are more likely to defeat the second stage nominations. On the other hand, the lowest types in the first stage indicate their position with low delays and without defeating a nomination, and second stage offers are also met with lower delays than for higher types. Defeats of nominations result from insufficient compromises with ideologically distant delay pivots, and defeats therefore signal that additional compromise is needed, or more nominations will be defeated. The result of these two arguments is that following a withdrawal or following a defeat, the expected delay will be longer than in the absence of either. Thus, whether it is across different nominations to the same office or to two different offices, success indicates future success and failure indicates future failure.

Summary

This chapter has presented a formal model based on the outline of missing pieces in our theoretical understanding of the confirmation process in chapter three. The model comports well with the stylized facts of the confirmation process – it predicts no floor rejections, some defeats due to stalling, and a great deal of delay. Furthermore, the model demonstrates how ideological and partisan motivations can interact to create a
forward-looking strategy in the Senate. Delaying senators engage in a fair amount of reputation-building by delaying nominations in order to appear more extreme than they actually are. The president counters this by compromising more on his choice of nominees than previous theory has suggested – in some cases, the confirmed nominee’s policy preferences are very distant from the president, and only get further if the president places a premium on the speed of confirmation. This result has important implications for understanding how the president and Congress share power or influence the executive and judicial branches.

The model also generates three testable hypotheses about the expected delay time, based on the ideological differences between the players and the results of previous nominations. The next two chapters test these hypotheses.
CHAPTER 5
AN EMPIRICAL TEST OF THE MODEL

The last chapter laid out a theory of the confirmation process that described how differing preferences between the president and actors in the Senate interact to produce differing delay times. In this chapter, I first describe three hypotheses derived from the theory. In the next section, I describe the operationalization of these hypotheses and data on nominations to lower federal courts from recent congresses. Finally, I present the results of the tests of the hypotheses and discuss their implications both for the theory and for our understanding of the confirmation process.

Summary of Hypotheses

The final proposition in the last chapter suggests three hypotheses that may be used to test the theory. From Proposition 3.1, the model suggests that differences in preferences between the delay pivots and the president create delay, and the greater those differences, the greater the delay. In equilibrium, delay pivots will divide into segments or intervals, and all the values of the delay pivot within an interval choose the same value of delay. They must choose the same delay in order to maintain incentive compatibility; otherwise the president could infer the delay pivot’s ideal point with certainty. However,
delay pivots in different intervals choose different times, with higher intervals (that is, ideal points at greater distances from the president) choosing greater times on average. As a result, greater ideological distance produces higher average times until confirmation. This leads to the first hypothesis.

H1: The greater the ideological distance between the president and the delay pivots, the slower nominations are confirmed.

Empirically, of course, nominations must pass through many gates to be confirmed and every gate (virtually any interested senator, in fact), could be labeled a delay pivot. I rely on the interpretation of the president’s uncertainty about the delay pivot as uncertainty about the identity, rather than preferences, of a set of senators, all of whom seek to delay or defeat a nomination. I also include the likely candidates for causing nomination failure (e.g. the filibuster pivot, see Krehbiel 2007), as well as those particular senators whose aid or acquiescence is helpful in delaying or defeating a nomination (e.g. the committee chair for blueslips, see Binder and Maltzman 2002).

Next, Proposition 3.2 describes how the differences in preferences between the president and the Senate median produce faster confirmations. On the other hand, the model predicts that the effect on failures for the same difference in preferences should only be non-increasing. The reason for the difference is that while the median’s preferences may elicit greater compromises from the president, if these compromises are still insufficient, they will still be delayed to expiration by the delay pivot. In this case,
the preferences of the median are non-binding and therefore have no effect on the nominations that ultimately make their way past the delay pivot and to the floor for a vote. This leads to the second hypothesis:

H2: The greater the ideological distance between the president and the Senate median, the faster nominations are confirmed.

Finally, a third hypothesis describes how the failure of one nomination relates to the delay of a subsequent nomination. Proposition 3.3 demonstrates that once a nomination has been withdrawn and another is made to replace it, the second of these nominations proceeds slower, either to confirmation or failure, than if the president had been unwilling to withdraw the first nomination. Similarly, following a defeat, the next nomination will take longer to be resolved, either to confirmation or failure, than if the previous nomination had not failed. This provides the third hypothesis:

H3: A previous confirmation failure is associated with increased time to resolution, either confirmation or failure.

In equilibrium, nominations that follow withdrawals or failures take longer than those that do not follow withdrawals or failures. However, what exactly “follow” means empirically depends on whether the president is receiving signals between offices or across offices. If the president has withdrawn a nomination, the delay for that nomination
has informed the president that the next nomination for that office must be more ideologically compromising. On the other hand, a failure, whether following a withdrawal or not, tells the president to compromise on the first nomination for the next office.

A direct test of this argument is impractical for a number of reasons. We would need to distinguish between cases where a withdrawal was impossible from cases where withdrawal was unnecessary. In cases where no withdrawal was made, the theory implies that the extraneous delay term is too large, but extraneous delay is largely unobserved (e.g. Steigerwalt 2004). Even if extraneous delay is correlated with the time into a congress or the number of its session, no obvious yardstick exists against which we can determine that the delay is too large. We must instead rely on differences between cases instead of the absolute standard used in the model.

Also, many nominations fail at a recess, and other nominations are named before the first nomination is replaced or resubmitted. In these instances, we cannot discern whether the first nomination was stalled to send a signal about its replacement or about the other offices (or perhaps both). Furthermore, counting failures of previous nominations will double count replacements for the same incumbent, but examining only the replacements for the same incumbent could miss signaling across offices.

For these reasons, the hypothesis will be tested in two models: the first will look for evidence of signaling across nominations within one office, and the second will examine nominations across offices. Furthermore, withdrawals and failures will be aggregated to avoid distinguishing between unavoidable and impossible delay.
Data

To test my hypotheses about confirmation duration, I use Martinek’s (2005) data on nominations to federal district and circuit courts between the 95th and 108th Congresses. The dependent variable time is the number of days between submission of the nomination to the Senate and the resolution of the nomination, whether by confirmation, withdrawal by the president, or return to the president. Because I want to test the model’s accounts of nominations ending in confirmation or failure, and following the practice in the literature (e.g. Bond, Fleisher, and Krutz 2002; Derouen, Peake, and Ward 2005; McCarty and Razaghian 1999), I combine the withdrawn and returned nominations into a one “failure” category.\footnote{This categorization excludes exactly one nomination – Ronnie White in the 106th Congress – that was defeated on the floor. The fact that only one of the 1681 nominations used as defeated by vote rather than by obstruction lends support to the model’s prediction of no floor defeats.}

To measure the ideological distance between the president and the Senate median, President-Median Distance, I use the absolute value of the difference between the president’s and Senate median’s first dimension DW-NOMINATE scores (Poole and Rosenthal 1997). I hypothesize that the time to confirmation is decreasing in President-Median Distance.

Capturing the preferences of the delay pivot is less straightforward, as a number of gatekeeping points must be considered. To that end, I divide stalling tactics into four broad categories, and represent each category with a different institutional actor. First, nominees may be blueslipped by their senators from their home state. I identify the home state of each nominee using the Journal of the Executive Proceedings of the Senate. I
then code *Homestate* as 1 if either of the nominee’s home state senators are members of
the president’s party and 0 otherwise. Nominees who have no home-state senator, such
as those from the District of Columbia or Puerto Rico, are excluded from the analysis.

Second, assuming nominations are not blueslipped, they still may be held up in
committee. Committees may hold extensive hearings on a nominee, delay voting on the
nomination, or may take no action at all, resulting in either a discharge motion or the
nomination’s failure. Particular committee members may object to the nomination and
therefore wish to stall it, but stalling the nomination through agenda-control requires the
assent of the committee chairperson. Furthermore, the rules of the Judiciary Committee
allow a majority of the Committee to overrule the chairperson’s agenda-control, but this
option is exercised extremely rarely and is unnecessary if the chairperson does not wish
to stall or defeat the nomination. I thus calculate *President-Chair Distance*, the
ideological difference between the president and the Judiciary Committee Chair using the
absolute value of the difference of DW-NOMATE scores between the President and the
Chair of Judiciary.

Third, once a nomination has passed the committee stage, and has therefore
survived blueslip and committee delays, the nomination may still be filibustered.
Although filibusters of nominations to any office are rare this does not mean the filibuster
is an unimportant tactic for a nominee’s opponents. Because filibusters are costly in
terms of time and possibly negative media attention, the potential for a filibuster prompts
other actors to anticipate it. The president may forestall a threatened filibuster by
withdrawing a nomination, or the majority party leadership to use its agenda control to
effectively defeat the nomination and save the majority party the cost of a filibuster. To control for the influence of a potential filibuster, I calculate *President-Filibuster Distance* as the ideological distance between the president and the filibuster pivot, ten senators away from the median on the opposite side of the president.

Fourth, a large number of parliamentary tactics are available to individual senators to stall a nomination, even if they are not uniquely empowered as committee chairs, home-state senators, or filibuster pivots. Holds fall into this category, as do objections to universal consent to schedule executive sessions or to bring up a nomination for a vote, dilatory motions, calls for a quorum, and so forth. Although these tactics can be employed by any senator, they often require the approval of the party leadership to be effective. Otherwise, the party leadership may make a motion for a vote following denial of universal consent or simply ignore a hold. Furthermore, while the approval of the party leadership is not actually required for some tactics, such as objections or quorum calls, the delay tactics will certainly be more effective if the party leadership acquiesces rather than fights the stalling. A reasonable proxy for the potential for parliamentary tactics to obstruct a nomination is therefore the ideological difference between the president and the leader of opposition party, *President-Opposition Distance*.

In equilibrium, greater ideological distance between the president and the delay pivot produces weakly greater delay times. Note that the model used one delay pivot that arose from a set of many possible senators. The analysis here, however, uses four distinct delay pivots. Intuitively, we might wish to somehow identify a single delay pivot from the set of possible protestors to a nomination (whether that is one of the four listed here
or some other senator). However, such a scheme is not consistent with the model – the strategies of the president and delay pivots are predicated on the fact that the president cannot locate the delay pivot’s type with certainty. Empirically, neither can we, which effectively means that we cannot pin down the identity of the delay pivot in every case. The best we can do is to proxy the potential for obstructionism through the opposition leader.

Besides the assumption of uncertainty, however, there are additional reasons for including multiple potential stalling senators in the empirical analysis. First, the confirmation process is highly sequential. An opponent of a nomination does not need to register a hold if the committee does not report the nomination, and if the hold is registered, then the filibuster pivot’s objections are likely obviated in turn. The sequential nature of the process means that a senator who might choose to act as a delay pivot in later stages might not have the chance because a different senator delayed at an earlier stage. The model abstracted away from the sequential nature of the process, but empirically we should not discount the influence of potential pivots later in the process because they were beaten to it by earlier stall tactics.

Second, while the opposition leader, and to a lesser extent the committee chair, are proxies for a number of senators who can potentially delay a nominee, the filibuster and the blue slip are two stalling tactics associated with identifiable senators. In other words, while a nominee may suffer dilatory motions and quorum calls from any number of sources, the filibuster comes from one. Thus, the opposition leader is a proxy for most stalling tactics, but not the two most obvious.
The first hypothesis to be tested is that higher values of all of the four variables described are associated with longer times until confirmation. These variables are centered at their means across congresses to reduce their correlations with each other and with *Divided Government*.

Testing the first two hypotheses also requires a distinction between confirmation and failure, though failure can occur either from withdrawal or the nominations return to the president. As discussed above, the empirical difference between these two types of failures is slight. Furthermore, not all withdrawals are alike. The model addresses nominations made after another has already failed due to withdrawal, but both nominations are made by the same president. Empirically, some nominations are made during a president’s lame-duck session, and are subsequently withdrawn by the next president.

Once we eliminate these cases, the sequence of nomination, withdrawal, and subsequent nomination – all by the same president – are actually quite rare, accounting for less than 1.5% of the nominations in the data. More often, the nomination expires at a recess and it is returned to the president. Presidents likely find this strategy prudent, as withdrawing a nomination and making another before the recess allows the president’s opponents another opportunity to stall his agenda. Better to wait, then, and allow that opportunity for obstruction to pass with the recess. The model does not speak to these multiple opportunities, but fundamentally the logic of a withdrawal and return (except at the end of the congress) is the same. I therefore code *Confirmation* as 1 if the nomination was confirmed and as 0 otherwise.
To test the third hypothesis, I create two sets of variables to account for signaling within and across offices. This separation in signaling accounts for the fact that many nominations are proceeding simultaneously, although the model describes confirmations in a highly sequential manner. For the within-office signals, I code \textit{Previous Failure} as 1 if a nomination follows another for the same incumbent, where the previous nomination failed and where both nominations were made by the same president. This variable will not distinguish cases where a withdrawal was unnecessary or where the president was unwilling to make one. However, the later in the congressional term a nomination is made, the less time it has to be processed, either to success or failure. Thus, the later a nomination is made, the larger any extraneous delay should be relative to the time remaining in the session, which can in turn reduce the withdrawal or re-nomination opportunities for the president. To that end, I code \textit{Month Nominated} as the month into the Congress during which the nomination was submitted.

The second set of variables controls for signaling across offices. For each nomination, I count the percentage of failed nominations that were submitted between one and three months before the current nomination. I use the date these previous nominations were submitted rather than resolved because using the date of resolution would mean that a nomination delayed to end of a congress could contribute no information to any other nominations. The president likely knows a nomination has run into trouble long before then. I choose a one to three month interval because it gives the nominations a sufficient chance to progress toward confirmation (the Judiciary Committee has met at least once, the Senate has entered executive session at least once,
and so on), but without including too many of the prior nominations\textsuperscript{12}. To account for the possibility that different levels of courts are used as signals with different rates, I split the percentage of failed nominations into \textit{District Failures} and \textit{Appellate Failures}.

The vacancy to be filled is also likely to affect the time needed to resolve a nomination. Because circuit judges have appellate jurisdiction over district courts, and have wide latitude within their circuits, these nominations may warrant scrutiny from the Judiciary Committee or interested senators. Thus, the variable \textit{Appeals Court} is coded 1 for nominations to Courts of Appeals and 0 for nominations to district courts. Just as different levels of courts may be delayed or failed to produce a signal, different levels may receive different signals as well. Nominations to district courts may be stalled to force compromises on nominations to Courts of Appeals, or the reverse, or else some combination. I therefore interact \textit{Appeals Court} with \textit{Previous Failure} in the within-office test and with \textit{District Failures} and \textit{Appellate Failures} in the across-office set.

As discussed above, the effects of these two sets of variables are estimated separately. One model will include \textit{Previous Failure} and its interaction with \textit{Appeals Court} to measure within-office signals, while \textit{District Failures} and \textit{Appellate Failures} and their interactions with \textit{Appeals Court} will measure across-office signals.

Most studies of the confirmation process point to the presence of divided government as a strong predictor of delay, as control of the Senate give greater delaying power to the opposition. I therefore code \textit{Divided Government} as 1 where the Senate is controlled by a different party than the president’s, and 0 otherwise.

\textsuperscript{12} In fact, varying the window for counting nominations by 30 days in either direction produces little change in the results.
I include several additional variables to control for nominee and vacancy characteristics that the literature has suggested are important determinants of confirmation duration (Binder and Maltzman 2002; Derouen, Peake, and Ward 2005; Martinek, Kemper, and Van Winkle 2002; McCarty and Razaghian 1999). The variable Minority is coded 1 for minority nominees, and the variable Female is coded 1 for female judges. To account for nominee qualifications, I include the compressed American Bar Association (ABA) ratings for each nominee. This scale ranges from 1 for “not qualified” to 6 for “well qualified”\textsuperscript{13}.

The ideological composition of the court does little to predict delay in the model, as delay is a complex, path-dependent function of the differences in status quos. However, other authors have found evidence that “critical nominations” may slow confirmations (e.g. Binder and Maltzman 2002, 2004). More importantly, the regime (Shippan and Shannon 2003) and pivotal politics (Rhode and Shepsle 2007) models rely heavily on the current composition, or status quo, to make predictions about confirmations, delay, or gridlock. Ideally, a competing test of my model and the regime and pivotal politics models would include the president, Senate actors, and the status quo to be estimated in the same space, and distances between the players and status quos could be compared for increased delay or gridlock. However, a result of my model is that current ideal point estimators based on common spaces produce biased estimates of judicial preferences. To the degree that my model is correct, then, such a test would not be dispositive.

\textsuperscript{13} The ABA issued no ratings for a handful of nominations, especially during the 107\textsuperscript{th} Congress. For these nominations, I use the mean of the ratings of the other nominees submitted by that president.
A cruder but probably less biased approach is to find an indicator of relative distance that allows us to compare nominations, if not distances between the players and the status quo. From the Federal Judicial Center I identified the party of the nominating president of the judges serving in the vacancy’s district or circuit at the time of the resolution of the current nomination\textsuperscript{14}. I then code Status Quo as the proportion of judges in the district or circuit nominated by members of the current president’s party. Holding the distances between the president and the other Senate actors fixed with the Distance variables, the regime and pivotal politics models would hold that the greater the value of Status Quo, the less delay or gridlock a nomination experiences.

Finally, as discussed in the last two chapters, side-payments and quid pro quos from the president to delaying senators may have a significant impact on the pace of the confirmation process. While these kinds of transfers were not incorporated in the theory, controlling for their effects is still prudent. Another complication absent from the model is that delay likely comes with some minimal costs to the delaying senator or senators. In general, the Senate’s workload will affect how efficiently it can process nominations. Also, the busier the Senate, the more expensive delay becomes, since so many tactics that stall a nomination also delay other Senate business. Furthermore, support from the president may be at premium when time is scarce, and hostage-taking may become a more attractive option for senators whose projects are likely to be dropped from a

\textsuperscript{14} Counting the serving judges at the time of the nomination’s resolution, rather than the time the nominee was submitted, avoids two problems. First, this method does not over count the judge who is retiring upon confirmation of the current nominee, and second, this method will include judges who leave the bench before confirmation.
decreasing list of legislative priorities. I therefore code *Workload* as the number of public bills passed by the Senate during the session in which the nomination is submitted.

In addition, I include *Approval*, the percentage of job performance approval for the date nearest the nomination. The more popular the president, the more political capital he likely has, either to grease the confirmation wheels for his nominees or else to be extorted with delay.

Finally, nominees may be more vulnerable if nominated in presidential election years. The president’s opponents may try to wait out the president’s term, and I mark such nominations with the dummy variable *Election Year*. Summary statistics of the variable are listed in table 5.1. The table also lists the number of nominations resulting in confirmation and failure. Note that just over 1 in 5 nominations fail without rejection by the Senate median.

**Methods**

The hypotheses suggest that different effects are operating depending on the way a nomination is resolved. For example, the ideological distance between the president and the Senate median should decrease the duration of confirmations, but the model does
<table>
<thead>
<tr>
<th>Covariate</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time</td>
<td>120.422</td>
<td>122.109</td>
<td>1</td>
<td>710</td>
</tr>
<tr>
<td>President-Median Distance</td>
<td>0</td>
<td>0.131</td>
<td>-0.242</td>
<td>0.172</td>
</tr>
<tr>
<td>President-Chair Distance</td>
<td>0</td>
<td>0.369</td>
<td>-0.502</td>
<td>0.533</td>
</tr>
<tr>
<td>President-Filibuster Distance</td>
<td>0</td>
<td>0.144</td>
<td>-0.278</td>
<td>0.172</td>
</tr>
<tr>
<td>Homestate</td>
<td>0.766</td>
<td>0.423</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>President-Opinion Distance</td>
<td>0</td>
<td>0.082</td>
<td>-0.133</td>
<td>0.120</td>
</tr>
<tr>
<td>Previous Failure</td>
<td>0.134</td>
<td>0.341</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>District Failure</td>
<td>0.137</td>
<td>0.258</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Appellate Failure</td>
<td>0.223</td>
<td>0.352</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Appeals Court</td>
<td>0.235</td>
<td>0.424</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Month Nominated</td>
<td>10.68</td>
<td>5.92</td>
<td>1</td>
<td>24</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.487</td>
<td>0.500</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Status Quo</td>
<td>0.499</td>
<td>0.244</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Minority</td>
<td>0.160</td>
<td>0.367</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Female</td>
<td>0.183</td>
<td>0.386</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>ABA</td>
<td>4.497</td>
<td>1.511</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Approval</td>
<td>54.052</td>
<td>11.982</td>
<td>29</td>
<td>92</td>
</tr>
<tr>
<td>Workload</td>
<td>154.197</td>
<td>43.046</td>
<td>77</td>
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<td>Election Year</td>
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<td>0</td>
<td>1</td>
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<td>Confirmations</td>
<td>1339</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failures</td>
<td>342</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>1681</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 5.1: Summary Statistics for Covariates in Event History Models
not predict a specifically negative effect for failures, only that it is non-positive. For this reason, I use a competing risks approach, which employs two different models of nomination duration – one for confirmations and one for failures. Each model treats the other ending state as censored (Box-Steffensmeier and Jones 2004).

The hypotheses about the effect of previous failures on duration also suggest that nominations are not independent. Indeed, the theory explicitly states that different nominations can be inter-dependent, which will produce heterogeneity among durations if not properly controlled.

For this reason, I estimate a gamma-distributed frailty term with both models. Frailty models capture the heterogeneity among observations by including an extra term, a frailty, in the risk that a nomination experiences (Therneau and Grambsch 2000). This term measures the variation in risk for confirmation or failure among different nominations and so is similar to a random-effects model. According to the theory, the duration of a nomination can depend on the durations of previous nominations. Often, several nominations are submitted on the same date, which makes tracking the effects of one nomination to another all but impossible. I therefore estimate the frailties among congresses, as these nominations must be minimally independent\textsuperscript{15}.

I use a Log-Logistic model for confirmation and failure duration with accelerated failure time parameterizations. The difference between an accelerated failure time model and the proportional hazard model more commonly used in the literature (e.g. Binder and

\textsuperscript{15} In fact, models assuming frailties among nominees and among nomination dates produce substantively similar results. The frailties among congresses produced the best model fit according to likelihood ratio tests.
Maltzman 2002) is that the proportional hazard approach assumes that the hazard varies only by a constant. Thus, nominations would differ from some baseline probability of confirmation or failure at a given time by a proportion described by the covariates. This assumption can be tested using correlations among Schoenfeld residuals. Violations can produce inconsistent estimates, but in many applications violations can be corrected by including a relatively simple model of the dependency of a covariate on time – for example, the covariate multiplied by the natural log of the duration.

With the current data, however, the proportional hazards assumption is badly violated. So many covariates must be modeled as functions of time that colinearity between the covariates and their time-dependency functions is a more serious problem than nonproportionality. Following Therneau and Grambsch’s (2000) advice, I therefore use an accelerated failure time framework. This parameterization models the time, not the hazard rate, of a nomination. I choose the Log-Logistic distribution because it produced the best fit based on their log-likelihoods and Akike Information Criteria (Box-Steffensmeier and Jones 2004, Klein and Moeschberger 2003).

**Results**

Estimates of the two models are presented in table 5.2. The table also reports Spearman’s rank order correlations between predicted and observed survival times as a measure of predictive model fit (Hougaard 2000). For confirmations, both estimations report a coefficient for President-Median Distance is large, negative, and statistically significant, indicating that the greater this distance, the faster a nomination is confirmed.
<table>
<thead>
<tr>
<th>Covariate</th>
<th>Within Offices Model</th>
<th>Across Offices Model</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Confirmations</td>
<td>Failures</td>
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<tr>
<td>President-Median Distance</td>
<td>-2.352</td>
<td>-2.547</td>
</tr>
<tr>
<td></td>
<td>(0.697)**</td>
<td>(1.606)*</td>
</tr>
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<td>President-Chair Distance</td>
<td>0.069</td>
<td>0.366</td>
</tr>
<tr>
<td></td>
<td>(0.212)</td>
<td>(0.360)</td>
</tr>
<tr>
<td>President-Filibuster Distance</td>
<td>0.479</td>
<td>3.126</td>
</tr>
<tr>
<td></td>
<td>(0.822)</td>
<td>(1.847)</td>
</tr>
<tr>
<td>Homestate</td>
<td>-0.098</td>
<td>0.080</td>
</tr>
<tr>
<td></td>
<td>(0.043)*</td>
<td>(0.064)</td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>3.244</td>
<td>-4.351</td>
</tr>
<tr>
<td></td>
<td>(0.918)**</td>
<td>(2.072)*</td>
</tr>
<tr>
<td>Previous Failure</td>
<td>-0.083</td>
<td>-0.313</td>
</tr>
<tr>
<td></td>
<td>(0.072)</td>
<td>(0.099)**</td>
</tr>
<tr>
<td>Appeals Court X Previous Failure</td>
<td>0.543</td>
<td>0.511</td>
</tr>
<tr>
<td></td>
<td>(0.139)**</td>
<td>(0.152)**</td>
</tr>
<tr>
<td>District Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td></td>
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</tr>
<tr>
<td>Appeals Court X District Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeals Court X Appellate Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeals Court</td>
<td>0.210</td>
<td>-0.108</td>
</tr>
<tr>
<td></td>
<td>(0.047)**</td>
<td>(0.077)</td>
</tr>
<tr>
<td>Month Nominated</td>
<td>-0.007</td>
<td>-0.091</td>
</tr>
<tr>
<td></td>
<td>(0.004)*</td>
<td>(0.010)**</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.475</td>
<td>1.484</td>
</tr>
<tr>
<td></td>
<td>(0.168)**</td>
<td>(0.178)**</td>
</tr>
<tr>
<td>Status Quo</td>
<td>-0.121</td>
<td>-0.011</td>
</tr>
<tr>
<td></td>
<td>(0.078)</td>
<td>(0.150)</td>
</tr>
</tbody>
</table>

Table continued on next page

Table 5.2: Competing Risks of Nominations to District and Appellate Federal Courts, 1977 - 2004
Table 5.2 (Continued)

<table>
<thead>
<tr>
<th>Covariate</th>
<th>Within Offices Model</th>
<th></th>
<th>Across Offices Model</th>
<th></th>
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<td></td>
<td>Confirmations</td>
<td>Failures</td>
<td>Confirmations</td>
<td>Failures</td>
</tr>
<tr>
<td>Minority</td>
<td>0.052</td>
<td>-0.041</td>
<td>0.054</td>
<td>-0.029</td>
</tr>
<tr>
<td></td>
<td>(0.051)</td>
<td>(0.079)</td>
<td>(0.051)</td>
<td>(0.078)</td>
</tr>
<tr>
<td>Female</td>
<td>-0.001</td>
<td>0.071</td>
<td>0.001</td>
<td>0.083</td>
</tr>
<tr>
<td></td>
<td>(0.048)</td>
<td>(0.076)</td>
<td>(0.047)</td>
<td>(0.076)</td>
</tr>
<tr>
<td>ABA</td>
<td>-0.048</td>
<td>0.022</td>
<td>-0.052</td>
<td>0.020</td>
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<td>(0.011)**</td>
<td>(0.020)</td>
<td>(0.011)**</td>
<td>(0.019)</td>
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<tr>
<td>Approval</td>
<td>0.000</td>
<td>0.015</td>
<td>0.001</td>
<td>0.023</td>
</tr>
<tr>
<td></td>
<td>(0.002)</td>
<td>(0.004)**</td>
<td>(0.002)</td>
<td>(0.005)**</td>
</tr>
<tr>
<td>Workload</td>
<td>-0.001</td>
<td>0.007</td>
<td>-0.001</td>
<td>0.006</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.002)**</td>
<td>(0.001)</td>
<td>(0.002)**</td>
</tr>
<tr>
<td>Election Year</td>
<td>0.083</td>
<td>-0.076</td>
<td>0.089</td>
<td>-0.064</td>
</tr>
<tr>
<td></td>
<td>(0.069)</td>
<td>(0.115)</td>
<td>(0.071)</td>
<td>(0.112)</td>
</tr>
<tr>
<td>Constant</td>
<td>4.581</td>
<td>4.784</td>
<td>4.608</td>
<td>4.463</td>
</tr>
<tr>
<td></td>
<td>(0.211)**</td>
<td>(0.408)**</td>
<td>(0.212)**</td>
<td>(0.408)**</td>
</tr>
<tr>
<td>Shape Parameter $\gamma$</td>
<td>0.374</td>
<td>0.504</td>
<td>0.372</td>
<td>0.495</td>
</tr>
<tr>
<td></td>
<td>(0.013)</td>
<td>(0.021)</td>
<td>(0.013)</td>
<td>(0.021)</td>
</tr>
<tr>
<td>$\theta$</td>
<td>0.310</td>
<td>5.735</td>
<td>0.292</td>
<td>5.45</td>
</tr>
<tr>
<td>$\chi^2(\theta = 0)$</td>
<td>118.02***</td>
<td>87.45***</td>
<td>110.25***</td>
<td>94.75***</td>
</tr>
<tr>
<td>LL</td>
<td>-1677.73</td>
<td>-747.85</td>
<td>-1671.93</td>
<td>-739.356</td>
</tr>
<tr>
<td>LR $\chi^2$</td>
<td>161.75***</td>
<td>263.45***</td>
<td>173.36***</td>
<td>280.43***</td>
</tr>
<tr>
<td>Spearman’s correlation</td>
<td>0.57***</td>
<td>0.45***</td>
<td>0.57***</td>
<td>0.44***</td>
</tr>
</tbody>
</table>

Note: Entries are Log-Logistic accelerated failure time coefficients, with $\theta$-conditional standard errors in parentheses.

* $p<0.05$    ** $p<0.01$    *** $p<0.001$
This distance also has a negative effect on the duration until failure in the within-office model. Both models also show that increasing ideological distance between the president and the opposition leadership slows down confirmations. Interestingly, the opposition leadership is also the only institutionally empowered senator to have an effect on time to failure, and that effect is to reduce the duration. Thus, the greater the ideological distance between the president and the opposition leadership, the less time a nomination lingers before failure.

The theory only allows the delay pivot to choose the time between nomination and failure (the delay), not the period in which nominations fail (period \( n \)). Empirically, however, once a nomination has passed the committee, it will fail unless acted upon by the next recess or the end of the session. This rule is often suspended, nomination by nomination, through unanimous consent, which puts the opposition leadership in a position to ensure a nomination fails now rather than be potentially confirmed later. This result is not predicted by the theory, but it is consistent with the broader view that the opposition leadership uses its parliamentary privileges to stall and defeat nominations on behalf of party members.

As for the filibuster pivot or the chair of the judiciary committee, President-Filibuster Distance and President-Chair Distance have no statistically significant effect on the time until either confirmation or failure, at least as time is measured here. This suggests that delay is not the result of particular senators institutionally empowered to stall nominations. Rather, given the positive coefficient of President-Opposition Distance in both models, delay is largely the result of parliamentary tactics, employed by
senators without any unique institutional position to stall or defeat nominations. Filibusters and committee rejection may still be important determinants of nomination failure, but less of nomination delay.

On the other hand, where the home state senator is a member of the president’s party, confirmations do not slow down, but in fact speed up. The effect is not particularly large in either model but it is statistically significant. This suggests that, to the degree that home state senators delay confirmations, they must do so by requiring consultation from the president before the nomination is named. Afterwards, they help guide the nomination through the process and reduce delay. “Orphaned” nominations, on the other hand, proceed to confirmation somewhat slower (Bell 2002; Binder and Maltzman 2002, Jacobi 2005).

The results for model 1 show that Previous Failure by itself has no discernable effect on the duration until confirmation, while it has a negative and statistically significant effect on the duration until failure. Thus, the generalized effect would indicate that, contrary to the model, the failure of a nomination has no effect on the time taken to confirm its replacement, and actually speeds up the time taken for a replacement to fail. However, the coefficients for Appeals Court X Previous Failure are positive and statistically significant for both confirmations and failures. Note that these positive effects are in addition to those for Appeals Court, which are positive for confirmations and statistically insignificant for failures.

These results suggest that nominations to the Courts of Appeals may be killed in order to influence the subsequent nomination to the same bench. District Courts,
however, seem not to experience this kind of within-office signaling. Nominations to District Courts may not receive signals from the failure of their direct predecessor, but they may be used to send signals about other nominations to other courts. Model 2 shows no generalized effect for either District Failure or Appellate Failure to either confirmation or to failure. District court nominations are evidently not influenced by failures in prior district or appellate nominations. On the other hand, the case is not so clear for nominations to the Courts of Appeals. The interaction of Appellate Failure and Appellate Court is positive and statistically significant for confirmations but not for failures, while the interaction of District Failure and Appellate Court is positive and significant for failures but not confirmations.

Thus, failures of both district and appellate nominations can affect the duration of later appellate nominations, but in different ways. Nominations to appellate courts that fail produce longer confirmation durations for subsequent nominations to other appellate seats. Failed district nominations produce longer durations for nominations to subsequent appellate seats to fail.

The model does not address differences in the importance of the offices that are used for signaling, but the pattern in the results makes sense if not all signals are created equal. Nominations to district courts cover less geographic area and fewer citizens than appellate courts, are subject to senatorial courtesy, and may be more likely than appellate nominations to be taken hostage (e.g. Steigerwalt 2004). Delays and failures for district nominations therefore may be noisier than nominations for appellate courts. Failures for appellate nominations, on the other hand, are more serious and presidents may heed them
more readily. Alternatively, there may be transaction costs associated with choosing to compromise on nominations. Political capital is finite, and presidents may choose to spend it on appellate rather than district nominations.

Taken together, the evidence from both models suggests that some, but not all, combinations of signals occur within and across offices. Failed nominations to district courts signal the need to compromise with nominations to appellate courts, but not vice versa. On the other hand, appellate nominations can be used to signal the need for compromise for the same vacancy or to other appellate courts. The model does not predict this possibility, since it abstracts away from differences in importance between offices. However, the result comports with our intuition about the relative significance of nominations to district and appellate courts. To provide further interpretation of the results, table 5.3 provides the changes in predicted median survival times associated with changes in some of the covariates. The coefficients from the slightly more conservative estimates in the across-office model are used to illustrate the changes in predicted survival time.

For a two standard deviation increase in the ideological distance between the president and Senate median, the predicted median survival time for confirmations decreases by about seven weeks. A similar change in the President-Opposition Distance covariate slows a confirmation by about the six weeks, but speeds up the time to failure by over 200 days. The effect of a change in this ideological distance is thus highly asymmetric, producing a much greater decrease in the time to failure than the increase in time to confirmation. Parliamentary tactics that produce a failure, such as objections to
Table 5.3: Predicted Median Survival Times For Changes in Covariates

<table>
<thead>
<tr>
<th>Covariate</th>
<th>Δ from → to</th>
<th>Δ Median Survival</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nominations Ending in Confirmation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-Median Distance</td>
<td>-0.131 → 0.131</td>
<td>-51.33</td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>-0.082 → 0.082</td>
<td>42.73</td>
</tr>
<tr>
<td>Homestate</td>
<td>0 → 1</td>
<td>-8.08</td>
</tr>
<tr>
<td>District Failures (for District Courts)</td>
<td>0 → 0.3</td>
<td>3.27</td>
</tr>
<tr>
<td>District Failures (for Appellate Courts)</td>
<td>0 → 0.3</td>
<td>18.47</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0 → 1</td>
<td>37.53</td>
</tr>
<tr>
<td>Nominations Ending in Failure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>-0.082 → 0.082</td>
<td>-200.94</td>
</tr>
<tr>
<td>District Failures (for District Courts)</td>
<td>0 → 0.3</td>
<td>0.45</td>
</tr>
<tr>
<td>District Failures (for Appellate Courts)</td>
<td>0 → 0.3</td>
<td>67.78</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0 → 1</td>
<td>284.24</td>
</tr>
</tbody>
</table>
unanimous consent agreements to carry nominations over a recess, may simply be easier and faster than tactics that prolong the time until a confirmation. As discussed above, a home state senator decreases the time to confirmation. That decrease, however, is not particularly large, resulting in about a week’s time less for nominations with a home state senator from the president’s party.

The failure of a nomination for a district court vacancy decreases the time to confirmation for its replacement by six days. Again, the effect of Previous Failure was not statistically significant for these offices. The effect for an appellate court, however, is much larger and statistically significant. A previous failure for an appellate court nomination increases the time to confirmation of its replacement by 55 days.

The differences between appellate and district nominations in cross-office signaling are even more evident than for within-office signaling. For appellate nominations, the effect of an increase in the rate of appellate failures from 0 to 0.3 (three failures in the last ten nominations) is to increase the time to confirmation by 18 days. The increase in time to confirmation for a later district nomination is only three days. For nominations ending in failure, the same increase in the rate of district failures increases the time for later appellate nominations by almost 68 days, while no effect is observed for later district nominations.

The effectiveness of signaling across and within vacancies is apparently asymmetric when we take into account the differences in importance of district and appellate nominations. The president receives signals that compromise is necessary on
appellate nominations from prior appellate nominations to other vacancies as well as the failure of a previous nomination to the current vacancy. District nominations also signal this need for later appellate nominations, but there is no evidence for signaling about compromise for district nominations, either within districts or across from appellate vacancies.

Also presented in the table is the effect of change from unified to divided government on survival time. Note that divided government slows down both confirmations and failures. Most of the previous studies of the process not used competing risks frameworks, and have therefore only noted the slowing effect of divided government on confirmations. These studies have also generally found that the ideological distance between the president and the Senate median is either not statistically significant or “incorrectly” signed so to produce shorter delays. Together, these two findings have been taken to support the conclusion that divided government confers parliamentary privileges to the opposition party sufficient to stall nominations. Ideology (beyond what is represented by party) has little to do with delay (Allison 1996; Binder and Maltzman 2002, 2005, Derouen, Peake, and Ward 2005; Martinek, Kemper, and Van Winkle 2002).

However, the results presented here contradict that conclusion. As the theory shows, the finding of shorter delay with increasing ideological distance between the president and the Senate median is evidence for, not against, the role of ideology in confirmation delay. Furthermore, controlling for divided government, the ideological distance between the president and the opposition leadership has a significant effect on
both confirmations and failures. Divided government may give the opposition additional opportunities to stall a nomination, but there is no shortage of opportunities during unified government. Also, divided government may simply proxy the increased partisan incentives that the delay pivots have to delay the president’s nominations.

Of course, interactive effects between divided government and ideology may implicate party control over ideology in determining delay (cf. Shippan and Shannon 2003). To address that possibility, table 5.4 presents the predicted median survival times for changes in ideological covariates under unified and divided government. The effects are smaller during unified government, but they are not greatly diminished and they have the same sign as the effects during divided government. For failures, the change in President-Opposition Distance produces a median survival time that is almost six times shorter during divided government than unified government. Still, a relatively small change in this ideological distance produces a six-week decrease in the time to failure. Thus, unified government may attenuate the role of ideology in delay, but this role is far from eliminated. This is consistent with the model’s conclusion that delay has a large element of partisanship, regardless of majority or minority status.

Finally, the results for the control variables deserve discussion: The effect of Status Quo is not statistically significant in either model or for either confirmed or failed nominations. This result is consistent with the model and inconsistent with the regime and pivotal politics approaches, in which a larger status quo should create more room for confirmable nominees and less gridlock.
<table>
<thead>
<tr>
<th>Covariate</th>
<th>∆ from → to</th>
<th>∆Median Survival In Unified Government</th>
<th>∆Median Survival In Divided Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nominations Ending in Confirmation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-Median Distance</td>
<td>-0.131 → 0.131</td>
<td>-41.27</td>
<td>-64.60</td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>-0.082 → 0.082</td>
<td>34.39</td>
<td>53.77</td>
</tr>
<tr>
<td>Homestate</td>
<td>0 → 1</td>
<td>-6.49</td>
<td>-10.16</td>
</tr>
<tr>
<td>District Failures (for District Courts)</td>
<td>0 → 0.3</td>
<td>2.63</td>
<td>4.12</td>
</tr>
<tr>
<td>District Failures (for Appellate Courts)</td>
<td>0 → 0.3</td>
<td>14.85</td>
<td>23.25</td>
</tr>
<tr>
<td>Nominations Ending in Failure</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>-0.082 → 0.082</td>
<td>-116.64</td>
<td>-356.62</td>
</tr>
<tr>
<td>District Failures (for Appellate Courts)</td>
<td>0 → 0.3</td>
<td>39.35</td>
<td>120.30</td>
</tr>
</tbody>
</table>

Table 5.4: Predicted Median Survival Times During Unified and Divided Government
While the Senate’s workload and the president’s approval rating appear to have no effect on confirmation duration, they both increase the time until failure. That the workload should increase the time until failure seems straightforward from an operational perspective. The more the Senate has to do, the less time it has to get around to failing a nomination, or to take recesses that allow a nomination to fail. The slowing effect of presidential approval is less intuitive, but has been found in other studies as well (e.g. Martinek, Kemper, and Van Winkle 2002). It may reflect an attempt by a president’s opponents to reduce his popularity by drawing attention to his less successful nominations (Shipman and Shannon 2003). A simpler explanation, however, is that the more popular the president, the longer his nominees can stand up to a confirmation fight, even if they lose. Higher approval ratings give the president added political capital to muster allies and either bribe or cow opponents, even though such efforts are not always successful (Johnson and Roberts 2004; Holmes 2007). Election years appear to make no difference for either confirmations or failures.

Considering nominee characteristics, the results suggest that highly qualified nominations are confirmed faster than less qualified nominations. This effect is not large, however; a change in the ABA rating from its minimum (1) to its maximum (6) decreases the median survival time by about 22 days. Encouragingly, female and minority nominees are not significantly delayed, either to confirmation or to failure.

Prior studies of the confirmation process have differed in how they treat district and appellate courts; some studies have considered these courts separately while others have analyzed them together (e.g. Binder and Maltzman 2002; Martinek, Kemper, and
Van Winkle 2002). The event history analysis also showed significant differences in signaling opportunities between district and appellate courts, though the model makes no distinction between levels of the judiciary. Tables 5.5 and 5.6 repeat the event history models for district and appellate courts, respectively.

For the most part, the results for both types of court are quite similar. The first two hypotheses are supported for both courts. Confirmations for both courts are sped up by decreasing distance between the president and the Senate median in both models. Likewise, increasing distance between the president and the opposition leadership slows down confirmations for both courts. This distance also speeds up failures for appellate nominations as it does in the aggregated results, but this effect is not found in nominations to district courts.

More interesting than the similarities of ideological effects are the differences. As we might expect, home state senators speed up confirmations for district courts but not for appellate courts. Ideological distance between the president and the Judiciary chair has no effect on the time to confirmation of nominations to either type of court. On the other hand, for nominations ending in failure, president–committee distance slows district nominations but speeds up appellate nominations. The effect is much larger for district nominations but it is still significant in appellate nominations.

The slowing of district nomination failures may simply reflect the gatekeeping role of the committee, in that nominations bound to fail are left to hang on in committee until the next recess. The greater the distance between the president and the chair, the more likely the nomination is to linger in this way. Conversely, the shortening time for
<table>
<thead>
<tr>
<th>Covariate</th>
<th>Within Offices Model</th>
<th>Across Offices Model</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Confirmations</td>
<td>Failures</td>
</tr>
<tr>
<td>President-Median Distance</td>
<td>-3.184</td>
<td>-3.152</td>
</tr>
<tr>
<td></td>
<td>(0.772)***</td>
<td>(1.811)</td>
</tr>
<tr>
<td>President-Chair Distance</td>
<td>-0.152</td>
<td>-1.918</td>
</tr>
<tr>
<td></td>
<td>(0.267)</td>
<td>(0.687)***</td>
</tr>
<tr>
<td>President-Filibuster Distance</td>
<td>1.779</td>
<td>1.478</td>
</tr>
<tr>
<td></td>
<td>(0.908)*</td>
<td>(2.239)</td>
</tr>
<tr>
<td>Homestate</td>
<td>-0.119</td>
<td>0.086</td>
</tr>
<tr>
<td></td>
<td>(0.47)*</td>
<td>(0.095)</td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>2.237</td>
<td>-0.086</td>
</tr>
<tr>
<td></td>
<td>(1.009)*</td>
<td>(2.189)</td>
</tr>
<tr>
<td>Previous Failure</td>
<td>-0.058</td>
<td>-0.388</td>
</tr>
<tr>
<td></td>
<td>(0.070)</td>
<td>(0.119)***</td>
</tr>
<tr>
<td>District Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Appellate Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Month Nominated</td>
<td>-0.007</td>
<td>-0.109</td>
</tr>
<tr>
<td></td>
<td>(0.004)</td>
<td>(0.011)***</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.783</td>
<td>1.994</td>
</tr>
<tr>
<td></td>
<td>(0.228)***</td>
<td>(0.048)***</td>
</tr>
<tr>
<td>Status Quo</td>
<td>-0.115</td>
<td>0.028</td>
</tr>
<tr>
<td></td>
<td>(0.081)</td>
<td>(0.195)</td>
</tr>
<tr>
<td>Minority</td>
<td>0.078</td>
<td>-0.001</td>
</tr>
<tr>
<td></td>
<td>(0.056)</td>
<td>(0.119)</td>
</tr>
<tr>
<td>Female</td>
<td>0.009</td>
<td>0.163</td>
</tr>
<tr>
<td></td>
<td>(0.052)</td>
<td>(0.112)</td>
</tr>
<tr>
<td>ABA</td>
<td>-0.042</td>
<td>0.041</td>
</tr>
<tr>
<td></td>
<td>(0.013)***</td>
<td>(0.029)</td>
</tr>
</tbody>
</table>

Table 5.5 - Competing Risks of Nominations to District Courts
Table 5.5 (continued)

<table>
<thead>
<tr>
<th>Covariate</th>
<th>Within Offices Model</th>
<th>Across Offices Model</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Confirmations</td>
<td>Failures</td>
</tr>
<tr>
<td>Approval</td>
<td>-0.001</td>
<td>0.027</td>
</tr>
<tr>
<td></td>
<td>(0.002)</td>
<td>(0.006)**</td>
</tr>
<tr>
<td>Workload</td>
<td>0.000</td>
<td>0.007</td>
</tr>
<tr>
<td></td>
<td>(0.000)</td>
<td>(0.002)**</td>
</tr>
<tr>
<td>Election Year</td>
<td>0.031</td>
<td>0.009</td>
</tr>
<tr>
<td></td>
<td>(0.073)</td>
<td>(0.163)</td>
</tr>
<tr>
<td>Constant</td>
<td>4.358***</td>
<td>3.660***</td>
</tr>
<tr>
<td></td>
<td>(0.238)**</td>
<td>(0.620)**</td>
</tr>
<tr>
<td>Shape Parameter $\gamma$</td>
<td>0.365</td>
<td>0.551</td>
</tr>
<tr>
<td>$\theta$</td>
<td>0.187</td>
<td>0.800</td>
</tr>
<tr>
<td>$\chi^2(\theta = 0)$</td>
<td>67.77***</td>
<td>35.91***</td>
</tr>
<tr>
<td>LL</td>
<td>-1263.32</td>
<td>-541.13</td>
</tr>
<tr>
<td>LR $\chi^2$</td>
<td>121.39***</td>
<td>186.57***</td>
</tr>
</tbody>
</table>

Note: Entries are Log-Logistic accelerated failure time coefficients, with $\theta$-conditional standard errors in parentheses.

* $p < 0.05$  * $p < 0.01$  * $p < 0.001$
<table>
<thead>
<tr>
<th>Covariate</th>
<th>Within Offices Model</th>
<th>Across Offices Model</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Confirmations</td>
<td>Failures</td>
</tr>
<tr>
<td>President-Median Distance</td>
<td>-3.707</td>
<td>-7.518</td>
</tr>
<tr>
<td></td>
<td>(1.588)*</td>
<td>(1.730)***</td>
</tr>
<tr>
<td>President-Chair Distance</td>
<td>-0.346</td>
<td>0.881</td>
</tr>
<tr>
<td></td>
<td>(0.354)</td>
<td>(0.366)*</td>
</tr>
<tr>
<td>President-Filibuster Distance</td>
<td>0.115</td>
<td>5.500</td>
</tr>
<tr>
<td></td>
<td>(1.827)</td>
<td>(1.891)***</td>
</tr>
<tr>
<td>Homestate</td>
<td>-0.043</td>
<td>-0.036</td>
</tr>
<tr>
<td></td>
<td>(0.106)</td>
<td>(0.091)</td>
</tr>
<tr>
<td>President-OpPosition Distance</td>
<td>4.397</td>
<td>-3.110</td>
</tr>
<tr>
<td></td>
<td>(2.003)*</td>
<td>(1.297)**</td>
</tr>
<tr>
<td>Previous Failure</td>
<td>-0.062</td>
<td>0.148</td>
</tr>
<tr>
<td></td>
<td>(0.156)</td>
<td>(0.113)</td>
</tr>
<tr>
<td>District Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate Failures</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Month Nominated</td>
<td>-0.001</td>
<td>-0.070</td>
</tr>
<tr>
<td></td>
<td>(0.010)</td>
<td>(0.014)***</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.713</td>
<td>1.607</td>
</tr>
<tr>
<td></td>
<td>(0.314)*</td>
<td>(0.177)***</td>
</tr>
<tr>
<td>Status Quo</td>
<td>-0.177</td>
<td>-0.604</td>
</tr>
<tr>
<td></td>
<td>(0.267)</td>
<td>(0.302)*</td>
</tr>
<tr>
<td>Minority</td>
<td>-0.107</td>
<td>-0.125</td>
</tr>
<tr>
<td></td>
<td>(0.119)</td>
<td>(0.012)</td>
</tr>
<tr>
<td>Female</td>
<td>-0.073</td>
<td>0.025</td>
</tr>
<tr>
<td></td>
<td>(0.110)</td>
<td>(0.094)</td>
</tr>
<tr>
<td>ABA</td>
<td>-0.070</td>
<td>-0.005</td>
</tr>
<tr>
<td></td>
<td>(0.029)*</td>
<td>(0.027)</td>
</tr>
</tbody>
</table>

Table 5.6: Competing Risks of Nominations to Appellate Courts
Table 5.6 (continued)

<table>
<thead>
<tr>
<th>Covariate</th>
<th>Within Offices Model</th>
<th>Across Offices Model</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Confirmations</td>
<td>Failures</td>
<td>Confirmations</td>
<td>Failures</td>
</tr>
<tr>
<td>Approval</td>
<td>0.003</td>
<td>0.003</td>
<td>0.002</td>
<td>0.013</td>
</tr>
<tr>
<td></td>
<td>(0.005)</td>
<td>(0.005)</td>
<td>(0.006)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Workload</td>
<td>-0.003</td>
<td>0.010</td>
<td>-0.003</td>
<td>0.010</td>
</tr>
<tr>
<td></td>
<td>(0.002)</td>
<td>(0.002)**</td>
<td>(0.002)</td>
<td>(0.002)**</td>
</tr>
<tr>
<td>Election Year</td>
<td>0.149</td>
<td>-0.235</td>
<td>0.225</td>
<td>-0.222</td>
</tr>
<tr>
<td></td>
<td>(0.189)</td>
<td>(0.168)</td>
<td>(0.185)</td>
<td>(0.174)</td>
</tr>
<tr>
<td>Constant</td>
<td>4.686 (0.528)**</td>
<td>4.275 (0.511)**</td>
<td>4.801 (.528)**</td>
<td>3.970 (0.542)**</td>
</tr>
<tr>
<td>Shape Parameter $\gamma$</td>
<td>0.335</td>
<td>0.359</td>
<td>0.337</td>
<td>0.362</td>
</tr>
<tr>
<td>$\theta$</td>
<td>0.793</td>
<td>2.299</td>
<td>0.721</td>
<td>1.835</td>
</tr>
<tr>
<td>$\chi^2(\theta = 0)$</td>
<td>37.55***</td>
<td>29.71***</td>
<td>37.05***</td>
<td>30.38***</td>
</tr>
<tr>
<td>LL</td>
<td>-391.69</td>
<td>-192.66</td>
<td>-389.21</td>
<td>-189.34</td>
</tr>
<tr>
<td>LR $\chi^2$</td>
<td>39.11***</td>
<td>129.00***</td>
<td>44.07***</td>
<td>135.63***</td>
</tr>
</tbody>
</table>

Note: Entries are Log-Logistic accelerated failure time coefficients, with $\theta$-conditional standard errors in parentheses.

* $p < 0.05$     * $p < 0.01$     * $p < 0.001$
appellate nominations may highlight a different situation whereby nominations bound to be killed are shuttled out of committee, providing one less excuse to exempt the nomination from automatic return to the president at the next recess.

Another interesting difference between the courts’ results is the large and positive effect that the filibuster pivot has on the length of time an appellate nomination takes to fail. Filibusters are a slow way to fail, of course, and we should expect a positive effect from filibusters on the time until failure. However, besides a much smaller lengthening effect on the time to confirmation in the first model, there is little evidence for the intervention of filibuster pivots in nominations to district courts.

The within-office model for appellate nominations shows no significant effect of a previous failure for the vacancy. For district nominations, the only effect is a decrease in the length of time to a failure. This is probably the influence of recalcitrant senators who repeatedly failed nominations to the same vacant district seat. There were 39 failures of district nominations with previous failures for the same vacancy, all of which were for seats in only 22 (of 91) districts. The positive effect on confirmation time for appellate nominations found the aggregate model evidently requires the comparison between district and appellate nominations.

The across-office signaling results for individual courts are largely similar to those in the aggregated model. Failures in appellate courts lengthen the time to confirmation of district nominations. However, this effect is relatively small, and is evidently subsumed by the effect for appellate nominations when the courts are aggregated. For appellate courts, prior failures in district courts extend the time to failure
and prior failures in appellate courts extend the time to confirmation. The same is true in the aggregated results when the failure rates are interacted with the \textit{Appeals Court} indicator variable.

Note also that \textit{Divided Government} slows both confirmations and failures for both district and appellate courts. The effect sizes are quite similar across confirmations and failures in the district, appellate, and combined estimations.

\textbf{Party, Ideology, and Delay}

Nearly every study of judicial confirmations has concluded that the presence of divided government can dramatically slow down the process. However, the interpretation given to that result varies considerably, especially in terms of party control relates to ideology.

Binder and Maltzman (2002, 2005) for example, argue that divided government provides sufficient parliamentary power to a president’s opponents to stall his nominations. The majority party can use its scheduling power, control of the Judiciary committee, and such, to “restrain the president from shifting the ideological tenor of the federal bench against the views of the majority party” (2002, p.198). As such, the differences in preferences between the president and his opponents are necessary for delay, but divided government is as well if president’s opponents are to do anything about their dissatisfaction with the nominees.

Shipman and Shannon (2003), on the other hand, use divided government as a more direct proxy of ideology. Divided government is highly correlated with the
difference in ideology between the minority and majority party, and ideological contention between the president and the Senate leads predictably to slower confirmations.

However, the results presented here suggest that neither interpretation of the effect of divided government is entirely accurate. First, divided government is not a necessary condition for confirmation delay. Confirmation delays tend to be longer during divided government, and the president’s opponents may make use of their greater parliamentary power to stall the president’s nominations. Yet, failure delays are longer during divided government as well. These opponents apparently do not use their parliamentary power to produce faster failures under the necessary condition interpretation. Furthermore, ideological differences have been shown to be sufficient to slow confirmations and accelerate failures. Divided government may help a president’s opponents, but it is not necessary.

Second, in the context of confirmations, divided government can make a rather poor proxy of ideology. Directly controlling for the ideological differences between the president and the relevant players in the Senate shows why. Divided government does not slow down confirmations only during periods of greater ideological separation; it slows down both confirmations and failures regardless of ideological separation. In other words, divided government slows down everything, not just the nominations we would expect under the ideological interpretation. The fact that divided government decelerates all outcomes may reflect the fact that the opposition party is simply more numerous than in unified government, and therefore the president may have more opponents.
Alternatively, during divided government, the opposition party may find other priorities than the president’s nominations and therefore takes longer to do anything with them, whether confirming them or allowing them to fail. Whether divided government represents the number of the president’s opponents, their priorities, or both, it is not an adequate description of ideological difference, nor is it a necessary condition for delay if ideological differences are present.

Note, that either interpretation of divided government is compatible with the model. If divided government means that the president has more opponents, then the number of holds, objections, and other stall tactics funneling through the majority leadership should increase. On the other hand, if divided government implies that the opposition party places a low priority on the president’s agenda, then the value of delaying a nomination in favor of some other business increases. In either case, if the president’s opponents gain utility from slowing his nominations, they should do so regardless of the party of the Senate median. While this is consistent with the model, it is not with either the necessary condition or ideological proxy interpretations.

A larger point of the results presented here is that ideological differences are indeed important, but we must be specific about which differences we mean. Specifically, in the context of the confirmation process, the difference in preferences between the president and the “Senate” is much less meaningful than the difference between the president and specific senators. The Senate is far from a majoritarian institution, and ideological difference measured by the Senate median’s preferences means something very different than that measured by the opposition party’s preferences.
This simple fact provides support for the model’s interpretation of the role of party and ideology in confirmation delay. Few senators, regardless of party, are uniquely empowered in any way to stall or defeat a nomination. Rather, while the consent of the floor median is required to confirm a nomination, nearly any senator can stall a confirmation, at least for a while. Divided government may give some of these opponents more leverage, but they still have sufficient parliamentary power for this purpose under unified government. The president must therefore accommodate the preferences of both the Senate median and various members of the opposition.

The results presented in this chapter support the theory’s contention that these different accommodations have different implications for delay. The greater the ideological distance to the opposition, the more the president must compromise if he wants a speedy confirmation (or a confirmation at all). Yet, the president must also accommodate the Senate median, or else whatever delay the opposition imposes will mean little, as the nomination will fail on the floor. This is also true regardless of the party of the median. The greater the ideological separation between the president and the median, the greater the compromise with the median must be, and the greater that compromise, the fewer of the opposition will have cause to delay the nomination. Again, the result that the ideological distance between the president and the median speeds confirmation irrespective of party is evidence for, not against, the role of ideology in delay.
Summary

In this chapter, I have described three hypotheses derived from the theory. I have also found broad support for two of these hypotheses using data of lower federal court nominations from the 95th to the 108th Congress. The descriptions of the role of ideological difference between the president and the Senate median and between the president and the opposition leadership in delaying nominations were supported by the estimated models. The third hypothesis contended that failures in nominations produce longer resolution times both for the next nomination to the same vacancy and for nominations to other offices. The hypothesis was split into two models to examine the within-office and across-office aspects of this signaling. Both models largely supported the pattern of failures and delay found in the model, but not for all combinations of court nominations. Failures in district courts and appellate courts produced greater times to resolution for later appellate courts. Furthermore, comparing appellate and district courts in an aggregated model showed that a failure for an appellate vacancy produced longer times to resolution for another nomination to that vacancy. Thus, both the within-office and across-office signals were uncovered for appellate nominations, but not for district courts. District courts are apparently used to send signals about appellate courts, but not vice versa. This asymmetry is not predicted by the model, which abstracted away from differences in importance between nominations. Although the results deviate from the predicted patterns, the deviation is quite intuitive given our understanding of the difference of scope and reach between district and appellate courts.
The results for the three hypotheses shed light on the disparate and non-obvious parts that ideology, party control, and the institutional process play in the time for a nomination to be resolved. Still, any study is open to methodological critiques. I have used a latent survivor approach to modeling the competing risks of confirmation and failure, which requires that the risk of confirmation and failure are independent. Although this is true in my theory (the time to resolution is already determined by the value of the delay pivot) different theories of the process may not include this condition. Alternatively, one may argue that I have not specified the duration model or the frailty group correctly\textsuperscript{16}.

These critiques are unique to duration modeling, and essentially revolve around the difficulties of modeling time. The next chapter relies on time-free models of delay to determine whether the hypotheses are supported in contexts other than duration models.

\textsuperscript{16} See Box-Steffensmeier and Jones (2004) and Houggard (2000) on misspecified models and frailty.
CHAPTER 6
TESTING DELAY WITHOUT TIME

The last chapter provided empirical evidence for the theoretical model, presented in Chapter Five. The model posits that senators interested in particular nominations will use their universally available parliamentary privileges to stall or defeat the president’s nominations, so that the president will later choose nominations that these senators prefer. This analysis suggested two hypotheses, that ideological distance between the president and various delay pivots will increase the time to confirmation, and that ideological distance between the president and the Senate median will decrease the time to confirmation. Both hypotheses were supported by event history analyses of the confirmation durations of nominations to lower federal courts.

In this chapter, I extend the empirical tests of the model by turning to more direct indicators of delay than time. I discuss data on the various stalling tactics a senator can employ, and then test the theory against models of these tactics. This is the first time in the literature that actual incidences of purposeful stalling tactics have been used to describe confirmation delay rather than the time between nomination and confirmation or failure. The results suggest that some of the received wisdom about confirmation delay is a conflation of intentional stalling with institutional slowdowns and changing priorities.
Time versus Direct Indicators of Delay

The event history analysis in the last chapter utilized a competing risks approach, estimating different models for confirmations and for failures. Competing risks is an appropriate framework, given that the model hypothesized that some effects should be evident for confirmations but not for failures and vice versa. However, consistent estimation of different risks for confirmation and failure requires that the risks for both are conditionally independent (Box-Steppensmeier and Jones 2004).

One result of the last chapter may point to such violation. The duration analysis indicates that the further the distance between the president and the opposition leader, the faster nominations fail. Yet, the theoretical model posits that this ideological distance will slow confirmations, not speed failures. The difference is that the model allows the delay pivot to choose to delay the nomination to period $n$, but not to choose \textit{when $n$ is}. Delay pivots do not choose when the nomination might fail. In reality, however, a nomination may die at one of at least two (and in some congresses, three or four) recesses or adjournments, and only one objection is necessary to fail an unconfirmed nomination at one of these points. Thus, the opposition leader need only allow a nomination to be stalled to the next recess to cause it to fail.

This fact may indicate that the interpretation of the set of available time periods should be limited at a recess or adjournment, instead of the time remaining in the Congress. An extension of the model could allow a delay pivot to choose not only if a nomination fails, but when. Such an addition would account for differing failure times, and thus the accelerating effect of the opposition leader on nomination failures.
However, an argument can be made that even if the theory can account for the result without serious modification, the event history analysis cannot. If the delay pivots can choose both if and when a nomination fails, then the risks of failure and confirmation are not independent. Conditioning the risks on the ideological distance between the opposition leader and the president may not entirely reduce this dependence, because although the opposition leader funnels the objections of the party, this variable is still only a proxy for a much larger set of delay pivots.

Models of dependent risks are generally difficult to estimate (Box-Steffensmeier and Jones 2004), and in any case, would provide a less-appropriate framework for testing the theory as it now stands. Furthermore, using the actual time a nomination lingers before resolution may be fraught with noise. If we only examine confirmation time alone, it is difficult to determine what part of that time is due to a senator’s intentional stalling tactics, what part is due to changing priorities and agendas, and what part is inefficiency or poor scheduling. Even controlling for covariates such as the Senate’s workload and the time remaining in the Congress, or finding a means to control for the Senate’s legislative priorities, would not completely eliminate the problem. After all, even senators get stuck in traffic from time to time.

Validating the results of the event history analysis thus requires a more direct examination of delay. By looking at the methods a delaying senator may use to obstruct the confirmation process, we can more closely scrutinize the congruence between the theory and delay tactics. So what indicators of delay tactics we should use for this direct examination?
Chapter two showed that nominations can be delayed at a large number of points in the process by denying universal consent. Most of the Senate’s business is conducted by universal consent, and objections take time. If universal consent is denied, the mover must then make a motion, which requires a vote, possibly a quorum call, and likely some nose counting. Three universal consent agreements are usually required to confirm a nominee (entering executive session, bringing the nomination number from the executive calendar, and the confirmation vote). Persistent objections may therefore add considerable delay to the process, and represent a common method for “skipping” nominees – that is, holding off consideration of more controversial nominees to bring up later but less controversial nominees. Consider the following exchange between Senators Trent Lott and Tom Daschle on October 21, 1999 (from the Congressional Record, p. s13,000):

LOTT: Madam President, as in executive session, I ask unanimous consent that on Monday, October 25, it be in order for the majority leader, after consultation with the Democratic leader, to proceed to executive session in order to consider the following nominations on the Executive Calendar: Nos. 253, 254, 255, 257, 278, and 279.

DASCHLE: Reserving the right to object, I ask unanimous consent that Calendar No. 159, Marsha Berzon, and Calendar No. 208, Richard Paez, be added.

LOTT: Madam President, I object to the addition of those nominees at this time, although we are working to see if at some point one or both of these nominees could be considered.

DASCHLE: Madam President, on behalf of a number of colleagues on this side, I will be compelled to object at this time.

PRESIDING OFFICER: The objection is heard.
Marsha Berzon and Richard Paez were two of President Clinton’s courts of appeals nominees, and were especially singled out for delay by the Republicans. Berzon was first nominated on January 27th, 1998 to the Ninth Circuit, and was returned to the president on October 10, 1998. Clinton renominated her on January 1st, 1999, and she was eventually confirmed on March 9th, 2000 after the Democrats mustered the votes for a cloture motion. Richard Paez was nominated January 25th, 1996, returned October 4th, 1996, resubmitted January 7th, 1997, returned again on October 21st, 1998, resubmitted again January 26th, 1999, and finally confirmed on March 9th, 2000. Compare this sequence with Paez’s confirmation to the Central District Court of California, when he was nominated March 9th, 1994 and confirmed June 15th, 1994. Thus, Paez’s first confirmation took just over 3 months, while his second took just over four years.

Lott’s objection skipped Berzon’s and Paez’s nominations, and his motion was to consider a Federal Trade Commissioner, a member of the Surface Transportation Board, two members of the board of directors of the Tennessee Valley Authority, and an Assistant Secretary and Deputy Associate Secretary of Transportation. The fact that Berzon and Paez were Circuit Court nominees does not explain why they were skipped. Executive Calendar numbers 208 and 209, the next two nominations after Paez, were also Circuit Court nominees – Raymond Fischer to the Ninth and Maryanne Trump Barry to the Third. Both Fischer and Barry were confirmed before Berzon and Paez. Lott’s objection was an intentional skip of Berzon and Paez specifically, part of a pattern that would continue for most of the 106th Congress.
Skipping nominations is a primary source of delay. The party leadership will usually respect the objections of party members. Otherwise, the members can make scheduling either executive or legislative business difficult for the leadership, and the leadership must prioritize the efficient operation of the Senate over confirming a troublesome nominee (McCarty and Razaghian 1999; Shipan and Shannon 2003). Thus, Daschle, a Democrat, objected to considering Clinton’s nominees in retaliation for Lott’s objection to considering Berzon and Paez, forcing Lott to reschedule consideration of all of the nominees.

This illustrates a major difficulty with using universal consent agreements as an indicator of delay. Objections are kept in the Congressional Record, but their interpretation is much more problematic than noting their occurrences. Daschle’s objection was in retaliation, not an attempt to delay five of Clinton’s nominees, so in this instance these nominees should not be “credited” with delay. In other cases, objections may not indicate an attempt to delay the proceedings, but rather scheduling conflicts or even miscommunications between the majority and minority leaders. Finally, if the party leaders know through consultation with members that objections to a nomination will be raised, they have little reason to ask for unanimous consent, in which case no objection will be recorded. The leadership may move onto other nominations, skipping earlier nominations without an evident objection.

Other methods that a senator may use to stall the confirmation process are even more difficult to analyze. For example, senatorial courtesy is probably most strongly felt before the nominee is named (e.g. Palmer 2005a; Jacobi 2005). We are not privy to
negotiations between home state senators and the White House or members of the
Judiciary committee, either before or after the nominee is named. Furthermore, the most
overt exercise of senatorial courtesy, the blueslip, has traditionally been anonymous. The
Judiciary committee only began releasing blueslips in the 107\textsuperscript{th} Congress.

Once the Judiciary committee has processed the nomination, it is automatically
placed on the executive calendar by the clerk of the Senate. There the nomination may
remain, especially if a senator has placed a hold on the nomination. Holds are little more
than requests from a senator to his party leadership to not take up a nomination, and
because these requests are informal, we may proxy the frequency with which they are
honored with the ideological preferences of the party leadership. But this is only a proxy
– holds themselves are generally anonymous, and therefore cannot be reliably counted.
Senators are free to reveal their holds, but we have little information about the frequency
with which holds are kept silent (though see Steigerwalt 2004).

Cloture motions have traditionally been used to identify filibusters, though the
mapping of cloture motions onto filibusters is dubious (Binder and Smith 1997, Beth and
Palmer 2005a). In legislative session, cloture may be invoked to prevent, rather than end,
a filibuster, or to guarantee a final vote on the bill if its proponents anticipate significant
resistance. Still, I am not necessarily interested in filibusters per se, but rather indications
of delay. A cloture motion fits this description, as it signifies either a filibuster or
sufficient evidence that one may be coming that the supporters of a nomination feel
cloture is necessary. Furthermore, cloture itself does not mean a final vote is quick in
coming, which may not come from as much as two weeks following the invocation of
cloture (Beth and Bach 2003). Since the 100th Congress, about 3% of nominations to lower federal courts that passed the Judiciary committee saw a cloture motion (Beth and Palmer 2005a). Cloture motions are thus relatively rare, but they are not the only kind of motion that indicates delay.

Motions to proceed may point to delay as well. This is a result of the Senate’s heavy reliance on universal consent to do its business. Every nomination requires a motion to proceed before a confirmation, and almost all of these are approved by unanimous consent. A motion to proceed approved by means other than unanimous consent likely indicates obstruction by objection, and certainly indicates delay, since a vote takes a quorum and both take time.

Two other motions indicative of longer durations are motions to recommit and motions to postpone. Recommitting a nomination means sending it back to the Judiciary committee for further consideration, while motions to postpone are equivalent to requests to table bills in legislative session. Such motions, like motions to proceed and for cloture, are also uncommon, occurring in about 1% of nominations, and are rarely successful.

These four motions, to invoke cloture, to proceed, to recommit and to postpone, are together a solid indicator of a filibuster. This claim is bolstered by the fact that contentious nominations may see more than a cloture motion. Recent nominations widely thought to have been filibustered had several; Marsha Berzon and Richard Paez in the 106th Congress saw three and four motions, respectively, while William Pryor, Priscilla Owen and Miguel Estrada in the 108th Congress saw two, four and seven, respectively.
Cloture is therefore not the only variety of motion that may highlight a filibuster. These motions qualify, as they produce longer duration times and are very clearly the result of overt and conscious choices by players in the confirmation game. However, in the present study, I am less concerned with finding filibusters than finding concrete signs of delay. These motions increased in frequency between the 100th and 108th Congresses, but they still collectively occurred in less than 1% of nominations to lower federal courts. They thus seem much too rare to explain the changes in nomination duration and confirmation rates in the same period. This is not surprising, as a nominee’s opponents have a large arsenal for delaying the process, so something as overt as a motion to postpone is often unnecessary. The four motions may therefore represent a final attempt to stall when other tactics have failed.

As discussed above and in Chapter two, many delaying tactics are anonymous or otherwise invisible to scholars of the process. However, we can see their effects in at least two important steps in the process. Chronologically, the first obstacle a nominee must surmount is passage by the Judiciary committee. Nominees may fail in the committee for a number of reasons, but we can observe whether they pass.

Second, we can observe when a nomination is resolved, if it makes its way out of the committee, without measuring time in calendar days. Every nomination that passes its committee is automatically assigned a calendar number on the executive calendar. These numbers are unique and are assigned in chronological order as nominations are reported by the committees. Thus, Marsha Berzon was the 159th nominee to be reported to the floor in the 106th Congress, while Richard Paez was the 208th.
Numbers on the executive calendar are automatic, but the order in which nominations are resolved is entirely up to the floor. Because the majority and minority leaders are recognized first in every session, they decide whether a nomination is brought up for a vote or whether the Senate proceeds to other business. Thus, Berzon and Paez remained on the calendar while Senator Lott moved to consider seven nominations that were reported later. We may never observe why a particular nominee waits so long for resolution – holds, potential objections, threats of filibusters and the like rarely leave any paper trail. However, we can observe that a nomination is not processed in the order it is reported. In other words, we can count the number of times a nominee was “skipped,” and every such skip necessarily means that the nominee was passed by for another. Moreover, these skips indicate delay without any reference to the time the nomination waits for resolution, and are thus free of much of the noise that using calendar date implies.

Finally, two other phenomena are useful indications of delay. The first of these indicators is the number of days the Senate spends debating a nomination. Debates are usually not scheduled for the same day on which the scheduling motion is made. More often, debates are scheduled for the next day in executive session at the very earliest. Every day scheduled for debate for a nomination is thus at least one more day that the nominee must wait for a vote, and sometimes much more. They also create additional scheduling difficulties for the majority leadership, since time spent in debate is time not spent on legislative priorities. Extra days spent in debate are much more common than cloture or other motions, and vary considerably between nominations. Between the 100th
and 108th Congresses, just over 79% of nominations that passed the Judiciary committee were not scheduled for any debate, and just fewer than 20% were scheduled for an extra day; Miguel Estrada in the 108th Congress was scheduled for 19 days.

The second indicator is the use of a recorded vote. The great majority of nominations to any position, judicial or executive, are confirmed by unanimous consent or voice vote. Recorded votes are relatively rare compared to unanimous consent and voice votes but take considerably more time than either. Recorded votes are another opportunity for a quorum call, and the votes themselves are usually scheduled for the next day in executive session. Senators wishing to delay a nomination may push for a recorded vote by objecting to unanimous consent both to confirming the nomination and to move to a voice vote. Of course, there may be several reasons why these opponents want a recorded vote, including, most obviously, forcing the nomination’s supporters to take a stand on the record that they must defend in the next election. On the other hand, whatever the particular motive that inspires a recorded vote, these votes are a sure sign of longer nomination duration resulting from conscious choices by the Senate.

We have, then, three different indications of delay – the difference in ranks between nomination resolution and calendar number, extra days spent considering the nomination, and finally the use of recorded votes. Unlike senatorial courtesy or holds, these indications are always observable, and unlike dilatory motions, they occur often enough and vary sufficiently between nominations to be useful in testing the theory. Furthermore, and unlike calendar days, these indictors are clearly intentional, and thus reflect the underlying strategies addressed in the theory.
Data

I began with the nominations to the lower federal courts used in the last chapter, to which I added data on these indicators from Thomas, the Library of Congress’s web portal for its presidential nominations database (http://thomas.loc.gov). For nominations between the 100th and 108th Congresses, I recorded whether the nomination passed the Judiciary committee, and if so its executive calendar number. I also recorded the number of days spent debating the nomination, if any, and finally whether the nominee was resolved by a recorded vote, voice vote, or unanimous consent.

From this data, I create three variables. First, Rank Difference is the difference between the rank of the date of resolution of a nominee and the rank of the nominee’s calendar number. These ranks are assigned from lowest to highest, so that higher values of the variable indicate a greater number of skips in the order of processing nominations, while negative values belong to the nominations that are doing the skipping. Second, Extra Days is a dummy variable coded 1 if the nomination had days allocated to debate for a nomination, apart from the day of the recorded vote, and 0 if no extra days were

---

17 Thomas is the best option for this data, and the only option for the difference in ranks. The Senate does not keep a cumulative record of the executive calendar, and the Congressional Record reports the executive calendar number of a nomination only if a senator reads it into the Record. When they are read, the numbers are often read in a series, making assignment of a particular number to a particular nominee impossible. The Record does indicate what motions were made during consideration of a nomination, but the discussion among senators of these motions is very muddled in places, which is only exacerbated when calendar numbers are read in a series without the names of the nominees. Furthermore, the Record indicates little as to what happens to nominees that are never mentioned by senators on the floor (i.e. some nominations which fail in committee). The Journal of the Executive Proceedings lists which nominees pass and fail committee, but does not list the motions made or the calendar numbers. Thomas, on the other hand, lists all the information required for every nomination individually, but the trade-off is that Thomas only records this data back to the 100th Congress.

18 Fourteen nominations were discharged from the Judiciary committee; I impute calendar numbers for these discharged nominations between the calendar numbers for nominations reported by the committee based on the date they were discharged.
assigned for debate. Third, *Recorded Vote* is a dummy variable coded 1 for the use of a recorded vote and 0 for unanimous consent, voice votes, and the absence of a vote. Note that a recorded vote is not confirmation.

Although these variables indicate delay in principle, we should be concerned with how they track with the duration of a nomination in calendar days. Calendar days are by no means a noise-free indicator of delay, but neither are the three variables just described. Obviously, if these indicators do not correlate correctly with confirmation duration, then the validity of the indicators for measuring delay would be put into question. To assess this possibility, I estimated a Cox model of confirmation duration using the indicators as covariates. The results are presented in table 6.1.
<table>
<thead>
<tr>
<th>Covariate</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rank Difference</td>
<td>-0.20 (0.00)**</td>
</tr>
<tr>
<td>Extra Days</td>
<td>-2.53 (1.09)*</td>
</tr>
<tr>
<td>Recorded Vote</td>
<td>10.81 (1.32)**</td>
</tr>
<tr>
<td>X ln(time)</td>
<td>-1.69 (0.15)**</td>
</tr>
</tbody>
</table>

Note: Entries are Cox regression coefficients, with non-proportional hazard correction for Recorded Vote (global $\chi^2 = 20.59$, $p<0.001$)

*p<.05  **p<.001

Table 6.1: Validity of Direct Indications of Delay

The results of the estimation show that Rank Differences and Extra Days have the anticipated effect on confirmation duration, lowering the hazard ratio and producing longer delays. The effect of Recorded Vote, on the other hand, is time dependent – a recorded vote slows a nomination, but only if that nomination has already been delayed for a time. This time-dependency lends support to the idea that these tactics are last-ditch attempts by opponents to stall a nomination.¹⁹

The Somer’s D statistic, a goodness-of-fit measure for Cox models, is 0.36. The fit is respectable but not ideal. Evidently, there is still variation in time not associated with these indicators. This variation may be a result of the many other tactics that can stall a nomination, such as holds or senatorial courtesy, and which cannot be reliably used in estimation. Another possibility is that the variation may be related to Senate workload.

¹⁹ In fact, a nomination’s opponents may not have long to wait. The change in the hazard becomes negative for between the first and second month.
legislative priorities, or noise. Whatever the sources of the variation, the estimation is sufficient to show that Rank Differences, Extra Days, and Recorded Votes reflect behavior that produces greater confirmation delays.

The remainder of the data relies as the last chapter on nominations record between the 100th and 108th Congresses. Summary statistics for the data are presented in table 6.2. Note that table 6.2 shows that about 77% of the nominations in the sample were passed by Judiciary, leaving 255 nominations that failed before reaching the floor. Also, as their means and standard deviations suggest, Extra Days and Recorded Vote are highly correlated, and only about 1.4% of the nominations had only one or the other indicator while 20% had both. Furthermore, all nominations that received a recorded vote in this data set were also confirmed. This small difference is enough to produce noticeable variations in the estimations.

**Methods**

*Rank Difference* is a continuous variable, while Extra Days and Recorded Vote are dichotomous; thus, generalized regression is suggested for the first variable, and probit or logit for the latter variables. A complication arises in that a sizeable number of nominations do not make it to the floor, but instead never pass the Judiciary committee. If a nomination does not pass the committee, it is not assigned a number on the executive calendar and therefore cannot be skipped. Similarly, nominations that do not survive to the executive calendar cannot be brought up for debate or a vote.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rank Difference</td>
<td>5.758</td>
<td>16.750</td>
<td>-102</td>
<td>133.5</td>
</tr>
<tr>
<td>Extra Days</td>
<td>0.161</td>
<td>0.368</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Recorded Vote</td>
<td>0.156</td>
<td>0.363</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Passed Committee</td>
<td>0.768</td>
<td>0.422</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Confirmed</td>
<td>0.745</td>
<td>0.436</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>President-Median Distance</td>
<td>0</td>
<td>0.117</td>
<td>-0.267</td>
<td>0.143</td>
</tr>
<tr>
<td>President-Chair Distance</td>
<td>0</td>
<td>0.314</td>
<td>-0.683</td>
<td>0.352</td>
</tr>
<tr>
<td>President-Filibuster Distance</td>
<td>0</td>
<td>0.107</td>
<td>-0.259</td>
<td>0.117</td>
</tr>
<tr>
<td>Homestate</td>
<td>0</td>
<td>0.731</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>0</td>
<td>0.057</td>
<td>-0.088</td>
<td>0.075</td>
</tr>
<tr>
<td>Previous Failure</td>
<td>0.144</td>
<td>0.352</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>District Failure</td>
<td>0.143</td>
<td>0.232</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Appellate Failure</td>
<td>0.279</td>
<td>0.353</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Appeals Court</td>
<td>0.245</td>
<td>0.430</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Month Nominated</td>
<td>10.364</td>
<td>5.948</td>
<td>1</td>
<td>22</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.743</td>
<td>0.437</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Status Quo</td>
<td>0.494</td>
<td>0.245</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Minority</td>
<td>0.176</td>
<td>0.381</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Female</td>
<td>0.220</td>
<td>0.414</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>ABA</td>
<td>4.528</td>
<td>1.470</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Approval</td>
<td>57.158</td>
<td>11.191</td>
<td>32</td>
<td>92</td>
</tr>
<tr>
<td>Workload</td>
<td>143.012</td>
<td>39.812</td>
<td>77</td>
<td>212</td>
</tr>
<tr>
<td>Election Year</td>
<td>0.162</td>
<td>0.368</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>N</td>
<td>1101</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 6.2: Summary Statistics for Variables in Direct Indicators of Delay
The Judiciary committee is not a random gate-keeper, however. The committee chair, like the filibuster pivot, is institutionally empowered to stall or fail nominations, and according to the theory, can use this power to extract compromises from the president. Senatorial courtesy, too, is exercised through the committee in the form of blueslips, and blueslips are not randomly used by the home state senators. This suggests that those nominations that pass the committee are systematically different from those that do not, producing a selection effect that can bias our estimates of the effects of the variables on the three indicators of delay.

To alleviate this bias, I use Heckman selection equations in the regression for Rank Differences and the probit estimations of Extra Days and Recorded Vote (Greene 2002). These selection equations model the probability of passing the committee as a function of the covariates, and this estimated probability is used to correct the selection bias in the regression or probit. To model committee passage, I use the President-Chair Distance and Homestate variables, as the Judiciary chair and home state senators will have ideological and partisan incentives to affect the pace of the confirmation. I also include the nominee characteristics in the selection equation, Minority, Female, Appeals Court, and ABA. The nominee’s characteristics are examined in committee hearings and sometimes used as rhetorical excuses by delaying senators (e.g. Bond, Fleisher, and Krutz 2002, 2006; Overby, et al 1992).

After the selection equation, the estimations deal with parliamentary action after the committee. Filibusters, objections, motions and the like all occur only after the committee has reported the nomination to the floor. Thus, President-Filibuster Distance
and President-Opposition Distance are entered into the second stage estimates. Confirmation only occurs with a majority vote after the nomination is brought up from the executive calendar, so President-Median Distance is entered at this stage as well. Also, floor action involves more senators with disparate motives. This can include attempting to embarrass the president, or simply wait him out for the next administration. Furthermore, studies incorporating such political incentives have typically found their effects before floor voting (e.g. Derouen, Peake, and Ward 2005). I therefore include Divided Government, Election Year and Approval in the floor estimation.

Finally, the remaining variables studied in the last chapter are not obviously included in only one or the other stage. The failure of a nomination should indicate that a delay pivot has sent a strong signal to the president on the need for compromise, but the homestate senator and committee chair can send these signals as well as a senator on the floor. Thus the within-office signal variables Previous Failure, Appeals Court, and their interaction are therefore included in both equations. Likewise, the across-office variables District Failures, Appellate Failures, and their interactions with Appeals Court are included in both equations. As in the last chapter, I estimate the within-office and across-office models separately to avoid conflating the two types of signals.

Any putative effect of Status Quo should affect both stages. Finally, the Senate’s workload and the time remaining in session will exert pressure on both the floor and committee, so Workload and Month Nominated are included in both equations.
Results

Results of the three Heckman models for within-office signals are presented in table 6.3 and the results for the across-office signals are presented in table 6.4. The coefficients for President-Filibuster Distance and President-Opposition Distance in all models are positive and significant. Greater ideological distance between the president and these senators results in larger skips and a higher probability of both a recorded vote and extra days debating the nomination. The filibuster pivot’s ideological distance to the president does not significantly affect the timing of either confirmations or failures, yet the prevalence of all three delay tactics increases with this distance. The filibuster pivot does not actually create much delay herself. Rather, the other players probably anticipate the filibuster pivot’s preferences and avoid a filibuster but produce greater numbers of skips and days in debate. Indeed, the distance between the president and the filibuster has a substantially smaller impact on extra days and recorded votes than the distance between the president and the opposition leader.

Although Heckman selection equations must be interpreted with caution, the coefficients for President-Chair Distance in the within-office model indicate that greater ideological distance between the president and Judiciary chair reduces the probability that a nominee is selected onto the floor\textsuperscript{20}. On the other hand, the same distance is not significant in the across-office models. The effect is likely absorbed by the negative effects of the failure rates – some of these prior nominations probably failed precisely because the distance between the president and the committee chair.

\textsuperscript{20} Technically, the inverse hazard ratio of selection is decreased, not the probability.
<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Rank Difference</th>
<th>Extra Days</th>
<th>Recorded Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Post-Committee Equation</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-Median Distance</td>
<td>-45.29 (12.03)**</td>
<td>-5.59 (3.46)°</td>
<td>-7.01 (3.53)*</td>
</tr>
<tr>
<td>President-Filibuster Distance</td>
<td>63.99 (9.70)**</td>
<td>5.85 (1.70)**</td>
<td>6.16 (1.66)**</td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>33.64 (12.72)**</td>
<td>20.40 (4.28)**</td>
<td>20.24 (4.44)**</td>
</tr>
<tr>
<td>Previous Failure</td>
<td>1.76 (1.60)</td>
<td>0.19 (0.20)</td>
<td>0.24 (0.28)</td>
</tr>
<tr>
<td>Appeals Court X Previous Failure</td>
<td>-4.38 (3.41)</td>
<td>-0.82 (0.40)*</td>
<td>-0.70 (0.44)</td>
</tr>
<tr>
<td>Appeals Court</td>
<td>6.99 (1.46)**</td>
<td>0.53 (0.20)**</td>
<td>0.42 (0.20)</td>
</tr>
<tr>
<td>Month Nominated</td>
<td>0.93 (0.11)**</td>
<td>-0.03 (0.02)°</td>
<td>-0.03 (0.02)</td>
</tr>
<tr>
<td>Divided Government</td>
<td>4.05 (2.34)*</td>
<td>-0.71 (0.42)°</td>
<td>0.48 (0.41)</td>
</tr>
<tr>
<td>Status Quo</td>
<td>-4.14 (3.28)</td>
<td>-0.13 (0.31)</td>
<td>-0.12 (0.30)</td>
</tr>
<tr>
<td>Approval</td>
<td>0.40 (0.05)**</td>
<td>0.00 (0.00)</td>
<td>0.00 (0.01)</td>
</tr>
<tr>
<td>Workload</td>
<td>-0.15 (0.02)**</td>
<td>-0.01 (0.00)***</td>
<td>-0.01 (0.00)***</td>
</tr>
<tr>
<td>Election Year</td>
<td>0.40 (2.00)</td>
<td>-0.02 (0.31)</td>
<td>-0.03 (0.31)</td>
</tr>
<tr>
<td>Constant</td>
<td>-6.70 (4.79)</td>
<td>0.95 (0.78)</td>
<td>0.40 (0.74)</td>
</tr>
<tr>
<td><strong>Committee Selection Equation</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-Chair Distance</td>
<td>-0.43 (0.16)**</td>
<td>-0.42 (0.16)**</td>
<td>-0.43 (0.16)**</td>
</tr>
<tr>
<td>Homestate</td>
<td>0.25 (0.10)*</td>
<td>0.24 (0.10)*</td>
<td>0.24 (0.10)*</td>
</tr>
<tr>
<td>Previous Failure</td>
<td>-0.24 (0.14)°</td>
<td>-0.24 (0.14)°</td>
<td>-0.24 (0.14)°</td>
</tr>
<tr>
<td>Appeals Court X Previous Failure</td>
<td>0.17 (0.27)</td>
<td>0.17 (0.27)</td>
<td>0.17 (0.27)</td>
</tr>
<tr>
<td>Appeals Court</td>
<td>-0.74 (0.11)**</td>
<td>-0.74 (0.11)**</td>
<td>-0.74 (0.11)**</td>
</tr>
</tbody>
</table>

Table continued on next page

Table 6.3: Three Direct Indicators of Delay with Within-Office Signaling in Nominations to District and Appellate Courts, 1987-2004
Table 6.3 (continued)

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Rank Difference</th>
<th>Extra Days</th>
<th>Recorded Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month Nominated</td>
<td>-0.06 (0.01)***</td>
<td>-0.05 (0.01)***</td>
<td>-0.05 (0.01)***</td>
</tr>
<tr>
<td>Status Quo</td>
<td>0.32 (0.20)</td>
<td>0.31 (0.20)</td>
<td>0.31 (0.20)</td>
</tr>
<tr>
<td>Minority</td>
<td>0.10 (0.12)</td>
<td>0.10 (0.12)</td>
<td>0.09 (0.12)</td>
</tr>
<tr>
<td>Female</td>
<td>0.06 (0.11)</td>
<td>0.08 (0.11)</td>
<td>0.08 (0.11)</td>
</tr>
<tr>
<td>ABA</td>
<td>0.15 (0.03)***</td>
<td>0.16 (0.03)***</td>
<td>0.16 (0.03)***</td>
</tr>
<tr>
<td>Workload</td>
<td>0.01 (0.00)*</td>
<td>0.01 (0.00)*</td>
<td>0.01 (0.00)*</td>
</tr>
<tr>
<td>Constant</td>
<td>0.11 (0.29)</td>
<td>0.10 (0.29)</td>
<td>0.10 (0.29)</td>
</tr>
</tbody>
</table>

\( \rho \) \quad 0.04 (0.16) \quad -0.40 \quad -0.37

\( \chi^2(\rho = 0) \) \quad 0.07 \quad 0.91 \quad 0.78

LL \quad -3955.96 \quad -768.36 \quad -773.48

Wald \( \chi^2 \) \quad 331.72*** \quad 100.23*** \quad 99.97***

Note: cell entries are Heckman regression coefficients for the Rank Difference model and two-stage probit with Heckman selection coefficients for the Extra Days and Recorded Vote models, with Huber/White’s standard errors in parentheses.

\( ^{\circ} p < 0.10 \quad * p < 0.05 \quad **p < 0.01 \quad ***p < 0.0001 \)
### Post-Committee Equation

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Rank Difference</th>
<th>Extra Days</th>
<th>Recorded Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>President-Median Distance</td>
<td>-40.12 (12.05)**</td>
<td>-5.06 (3.04)°</td>
<td>-6.42 (3.44)°</td>
</tr>
<tr>
<td>President-Filibuster Distance</td>
<td>61.53 (10.07)***</td>
<td>4.56 (1.75)**</td>
<td>4.74 (1.73)**</td>
</tr>
<tr>
<td>President-Opposition Distance</td>
<td>26.45 (12.70)*</td>
<td>21.16 (4.15)***</td>
<td>21.37 (4.28)***</td>
</tr>
<tr>
<td>District Failures</td>
<td>7.26 (3.34)*</td>
<td>-0.33 (0.57)</td>
<td>-0.38 (0.57)</td>
</tr>
<tr>
<td>Appellate Failures</td>
<td>1.64 (1.76)</td>
<td>0.58 (0.27)*</td>
<td>0.56 (0.27)°</td>
</tr>
<tr>
<td>Appeals Court X District Failures</td>
<td>13.90 (6.47)*</td>
<td>1.78 (1.08)°</td>
<td>1.97 (1.78)°</td>
</tr>
<tr>
<td>Appeals Court X Appellate Failures</td>
<td>-10.77 (4.19)**</td>
<td>-0.06 (0.64)</td>
<td>0.19 (0.64)</td>
</tr>
<tr>
<td>Appeals Court</td>
<td>7.13 (1.62)***</td>
<td>0.21 (0.23)</td>
<td>0.05 (0.23)</td>
</tr>
<tr>
<td>Month Nominated</td>
<td>0.91 (0.11)***</td>
<td>-0.04 (0.02)*</td>
<td>-0.04 (0.02)*</td>
</tr>
<tr>
<td>Divided Government</td>
<td>2.133 (2.39)</td>
<td>-0.96 (0.44)*</td>
<td>-0.74 (0.43)°</td>
</tr>
<tr>
<td>Status Quo</td>
<td>-3.62 (2.27)</td>
<td>-0.19 (0.31)</td>
<td>-0.21 (0.31)</td>
</tr>
<tr>
<td>Approval</td>
<td>0.45 (0.06)***</td>
<td>0.00 (0.01)</td>
<td>0.01 (0.01)</td>
</tr>
<tr>
<td>Workload</td>
<td>-0.16 (0.02)***</td>
<td>-0.01 (0.00)***</td>
<td>-0.01 (0.00)***</td>
</tr>
<tr>
<td>Election Year</td>
<td>-2.35 (2.10)</td>
<td>-0.03 (0.32)</td>
<td>-0.05 (0.32)</td>
</tr>
<tr>
<td>Constant</td>
<td>-8.71 (4.77)°</td>
<td>1.18 (0.78)</td>
<td>0.69 (0.74)</td>
</tr>
</tbody>
</table>

### Committee Selection Equation

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Rank Difference</th>
<th>Extra Days</th>
<th>Recorded Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>President-Chair Distance</td>
<td>-0.19 (0.17)</td>
<td>-0.19 (0.17)</td>
<td>-0.19 (0.17)</td>
</tr>
<tr>
<td>Homestate</td>
<td>0.24 (0.10)*</td>
<td>0.23 (0.10)*</td>
<td>0.23 (0.10)*</td>
</tr>
<tr>
<td>District Failures</td>
<td>-1.12 (0.22)***</td>
<td>-1.11 (0.22)***</td>
<td>-1.11 (0.22)***</td>
</tr>
<tr>
<td>Appellate Failures</td>
<td>-0.24 (0.11)*</td>
<td>-0.24 (0.15)°</td>
<td>-0.24 (0.15)°</td>
</tr>
<tr>
<td>Appeals Court X District Failures</td>
<td>0.96 (0.48)*</td>
<td>0.97 (0.49)*</td>
<td>0.97 (0.48)*</td>
</tr>
<tr>
<td>Appeals Court X Appellate Failures</td>
<td>-0.28 (0.31)</td>
<td>-0.28 (0.30)</td>
<td>-0.28 (0.30)</td>
</tr>
</tbody>
</table>

Table 6.4: Three Direct Indicators of Delay with Cross-Office Signaling in Nominations to District and Appellate Courts, 1987-2004
Table 6.4 (continued)

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Rank Difference</th>
<th>Extra Days</th>
<th>Recorded Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals Court</td>
<td>-0.80 (0.14)***</td>
<td>-0.80 (0.14)***</td>
<td>-0.80 (0.14)***</td>
</tr>
<tr>
<td>Month Nominated</td>
<td>-0.03 (0.01)***</td>
<td>-0.04 (0.01)***</td>
<td>-0.04 (0.01)***</td>
</tr>
<tr>
<td>Status Quo</td>
<td>0.25 (0.21)</td>
<td>0.23 (0.21)</td>
<td>0.24 (0.21)</td>
</tr>
<tr>
<td>Minority</td>
<td>0.09 (0.12)</td>
<td>0.08 (0.12)</td>
<td>0.08 (0.12)</td>
</tr>
<tr>
<td>Female</td>
<td>0.10 (0.11)</td>
<td>0.12 (0.12)</td>
<td>0.12 (0.11)</td>
</tr>
<tr>
<td>ABA</td>
<td>0.16 (0.03)***</td>
<td>0.16 (0.03)***</td>
<td>0.16 (0.03)***</td>
</tr>
<tr>
<td>Workload</td>
<td>0.01 (0.00)*</td>
<td>0.01 (0.00)*</td>
<td>0.01 (0.00)*</td>
</tr>
<tr>
<td>Constant</td>
<td>0.10 (0.29)</td>
<td>0.10 (0.30)</td>
<td>0.10 (0.30)</td>
</tr>
</tbody>
</table>

\( \rho \)  
0.08 (0.18)  
-0.31 (0.38)  
-0.31 (0.38)

\( \chi^2(\rho = 0) \)  
0.26  
0.59  
0.53

LL  
-3930.54  
-749.45  
-752.75

Wald \( \chi^2 \)  
355.44***  
129.67***  
127.56***

Note: cell entries are Heckman regression coefficients for the Rank Difference model and two-stage probit with Heckman selection coefficients for the Extra Days and Recorded Vote models, with Huber/White’s standard errors in parentheses.

\( ^* p < 0.10 \quad ^* p < 0.05 \quad ^* p < 0.01 \quad ^* * p < 0.001 \)
The coefficients for *President-Filibuster Distance* and *President-Opposition Distance* in all models are large, positively signed, and highly significant. Greater ideological distance between the president and these senators results in a greater number of nomination skips and a higher probability of both a recorded vote and extra days debating the nomination. Interestingly, the filibuster pivot’s ideological distance to the president did not significantly affect the timing of either confirmations or failures, yet the prevalence of all three delay tactics increases with this distance. Likely, the filibuster pivot does not actually create much delay herself, as evidenced by the paucity of cloture attempts discussed in chapter one. Rather, the other players probably anticipate the filibuster pivot’s preferences and work around them, avoiding a filibuster but producing greater numbers of skips and days in debate in particular. Indeed, the distance between the president and the filibuster has a substantially smaller impact on extra days and recorded votes than the distance between the president and the opposition leader.

Although Heckman selection equations must be interpreted with caution, the coefficients for *President-Chair Distance* in the within-office model indicate that greater ideological distance between the president and Judiciary chair reduces the probability that a nominee is selected onto the floor\(^{21}\). On the other hand, the same distance is not significant in the across-office models. The effect is likely absorbed by the negative affects of the failure rates – some of these prior nominations probably failed precisely because the distance between the president and the committee chair.

\(^{21}\) Technically, the inverse hazard ratio of selection is decreased, not the probability.
As was the case in the last chapter, home state senators appear to accelerate the confirmation process, in this case by helping the nomination out of the committee. This effect is consistent across all the models.

The second hypothesis is also supported by these results. The coefficients for President-Median Distance are negative and significant in all models. As the theory posited, increasing ideological distance between the president and Senate median results in less delay, specifically fewer skips and lower probabilities of extra days in debate and a recorded vote. In all, the models supply strong evidence for the varied but powerful effects created by ideological differences between the president and various members of the Senate.

The third hypothesis on the signaling effects of nomination failure is not as clearly supported as the hypotheses about delay pivots and the Senate median. Within-office signals as measured by Previous Failure are not statistically significant in any of the floor stage equations. Furthermore, the failure of a district nomination, but not an appellate nomination seems to affect the tactics employed on its replacement compared to a district nomination in the same situation. The exception is extra days in debate, which occurs with lower probability for appellate nominations replacing a failure than for district nominations. The Senate may find that its time is not well spent in debating these nominations, especially if they are not more likely to fail without a recorded vote. In fact, 12% of appellate nominations that reach this point fail, compared to 3% of district nominations.
Though there is little evidence for signaling within vacancies at the floor stage, there is more at the committee stage. The general effect of a previous failure is to reduce the probability that a nomination is passed by the committee to reach the floor. The size of the effect is nearly that of the homestate senator but negative. Also, there is no significant difference between district and appellate nominations in their propensity to stall in committee if following a failure. Failing a nomination to influence the selection of its replacement seems therefore a strategy employed more often by the committee than players in the post-committee stage.

Signals across offices, however, appear to operate in both the committee and post-committee phases of the process. In the committee stage, failures of both district and appellate nominations reduce the probability of a later nomination being reported to the floor. The reduction in probability is somewhat smaller for appellate nominations than for district nominations following failures of district nominations. However, the cumulative effect of District Failures and its interaction with Appeals Court is still negative, and appellate nominations are themselves less likely than district nominations to be reported. Failures in appellate courts have the same effect on later district and appellate nominations.

There is also evidence of signaling across offices at the floor stage, but with two interesting features. First, failures of district court nominations increase the number of skips for later district nominations and much more so for later appellate nominations. Failures of appellate nominations have no generalized effect on the number of skips of later nominations. For extra days spent in debate and recorded votes, however, the
pattern is reversed. Failures of appellate nominations increase the probability of both extra days and recorded votes more than failures to district courts (though district failures still stall later appellate nominations differentially). The results of the last chapter showed that confirmed appellate nominations take longer when following other failed appellate nominations. The results presented here comport with that finding, since most nominations in this data that receive extra days and all that received a recorded vote were eventually confirmed. Furthermore, the highest numbers of skips are associated with failing, so the same result from chapter five explains why the coefficient of Appeals Court X Appellate Failures for skips should be negative.

Second, failed nominations to appellate courts have no direct slowing effect on later district nominations, but rather only on later appellate nominations. Although the coefficient for Appeals Court X Appellate Failures is negative, the cumulative effect for Rank Difference counting Appeals Court is still positive for most values of Appellate Failures. However, at an appellate failure rate of about 2/3, the cumulative effect becomes negative. In other words, if less than 2/3 of prior appellate nominations have failed, then the current appellate nomination is more likely to be skipped, but if more than 2/3 of prior appellate nominations have failed, the current appellate nomination is less likely to be skipped. This nonlinearity in the effect of failure rate on skipping may mean that the Senate eventually stops stalling and starts confirming nominations if too many have failed in the aggregate. Another, more cynical explanation is that after so many failures, the president is running low on nominees to replace them, obviating the signaling benefit of failing more nominations.
To summarize the evidence for the signaling hypothesis, we see that failures of a nomination to influence its replacement show up only in the committee. Failures of some nominations to influence other nominations are more widespread. As in the last chapter, failed nominations to district courts can influence the fate of later appellate nominations, but the effect of appellate failures on district nominations is weaker. Some of the patterns of cross-office signaling found in the last chapter make more sense in light of the results here, especially why the slowing to confirmation of appellate nominations after failures. However, while some signaling patterns are uncovered again, other patterns possible in the model are still absent.

The coefficient for *Divided Government* is positive and significant in the within-office regression of *Rank Difference*. The effect is substantively quite small, however, amounting to only a fraction of the effect of the ideological variables. Furthermore, the rest of the coefficients for *Divided Government* in all the other models are either not statistically significant or are negative, indicating a lower likelihood of delay tactics. Divided control of the Senate has little discernable effect on the number of the skips and actually decreases the probability of extra days spent in debate and recorded votes. These results strongly suggest that divided government is not a source of delay, at least as delay is measured here, independent of the ideological incentives of the delaying senators.

Turning to the control variables, *Approval* appears to promote some delay, in that the more popular the president is when he names a nominee, the more likely that nominee is to be skipped. As the durations of failed nominations in the last chapter showed, popular presidents are more likely than unpopular presidents to have their nominees
linger for a time before failing. However, the model for Rank Difference suggests that
the lingering time is not part of any last ditch, vain effort on the part of the president’s
allies to salvage the nomination. Rather, the nominees are being actively bypassed for
other nominations, waiting perhaps for when the president is less popular. This idea is
supported by the insignificant effect that the president’s popularity has on his nominee’s
chances for extended debate or a recorded vote, either of which could occur if the
nominee was brought up for a vote. In other words, popularity breeds skipping, but not
actual confirmations. Delay in this case may be an effort by stalling senators to
embarrass the president or to extort concessions on unrelated policies.

As the Senate becomes busier, these three delay tactics become less prevalent.
The results in the last chapter showed that like presidential approval, the Senate’s
workload slowed failures. The same is not true here, were Workload reduces both the
floors propensity to engage in stalling with these tactics as well as, to a lesser degree, the
committee’s probability of failing a nomination. The coefficients for Month Nominated
indicate that as time becomes scarce, the Senate will not become more likely to have
extra days in debate, recorded votes, or failures in committee. Skips become more
common for nominations made late in the Congress, though this is likely only the effect
of the Senate skipping these later nominations to catch up on nominations made earlier
that have yet to be confirmed. Similarly, Election Years do not slow confirmations, and
the results in the models suggest that elections years do not see greater numbers of
stalling tactics. The slowing effects of these variables in the last chapter and in other
studies (Binder and Maltzman 2002; Derouen, Peake, and Ward 2005; Martinek,
Kemper, and Van Winkle 2002) are most likely due to routine changes in the Senate’s priorities as time wanes, workload increases, and an election approaches. There is no evidence that delay, at least as it is measured here, increases under these conditions.

The coefficients for *Status Quo* are all negative in the floor stage equations, but none are significant. Nor are any of the coefficients significant in the committee stage equations. Although an increasing status quo, relative to the president, should generally reduce the number gridlocked nominations (Krehbiel 2007; Rhode and Shepsle 2007), there is no evidence here or in the last chapter that changes in the gridlock region have any effect on delay.

Finally, the effects for nominee characteristics in the committee stage are consistent with the effects found in the literature and the last chapter. Minority and female nominees are not more likely than white males to be selected against by the committee. Nominees with higher *ABA* ratings are less likely to be held up in committee than nominees with lower ratings. Nominations to appellate courts are more likely to be held up in committee than nominations to district courts, a result which comports with the greater scrutiny the committee pays these nominees (e.g. Caldeira and Wright 1998) as well as a long-standing but increasing trend against quick and successful circuit court confirmations (Scott 2006).

**Delay, Delay Tactics, and Party Control**

The last chapter showed that divided government can slow the confirmation process. This result is consistent with essentially the entire empirical literature on
confirmations, and if divided government is a representation of the ideological differences between the president and Senate median, it is consistent with most of the theoretical literature as well. Yet as chapter two made clear, senators have a great many parliamentary tactics at their disposal to stall a nomination, regardless of the party of the Senate median. Chapter four then developed a theory in which partisan differences played a large role, yet divided government had little effect on confirmation delay. The theory was supported by two separate tests, which would suggest a contradiction – how can divided government play no part in delay if it is consistently found to slow the confirmation process?

The results presented in this chapter resolve this contradiction. By focusing on more direct indicators of obstructionism than the number of days between nomination and resolution, we disentangle time from delay, and thereby see that divided government affects the former but not the latter. The presence of divided government does not create partisan-based stalling tactics; such tactics are universally available to any senator who wants them. Nor does divided government create partisan incentives for a senator to delay a nomination. The results here support the theory’s contention that partisan incentives exist as long as there is an opposition party, regardless of whether the opposition party can count the Senate median as one of their own.

The theory predicted that ideologically distant senators will use longer delays to extract concessions from the president or else defeat the nomination. Less ideologically distant senators will be tempted by their partisan motivations to delay a nomination as well, but will delay for shorter times to accept more moderate nominees located closer to
the Senate median. Evidence for the delay pivot and Senate median hypotheses supports
the theoretically described mix of ideological and partisan motivations that create
different amounts of delay, and which leave little room for divided government.

Divided government appears to have much the same effect on confirmation time
as an election year or increased Senate workload. Confirmations and failures may
become slower, but not because senators are more often delaying the president’s
nominees. During divided government, the Senate simply becomes busy doing things
that do not involve promoting the president’s agenda or securing his lasting influence on
the judicial branch. Thus, as Binder and Matlzman (2002, 197-8) put it, “divided
government is a prominent cause of the institutional slow down.” However, it is not the
case that “during periods of divided government, the majority party exploits its
scheduling powers to restrain presidents from shifting the ideological tenor of the federal
bench.” The majority party, acting cohesively, would not need scheduling powers to
restrain the president, but could simply reject by majority vote whichever nominees
threatened to move the courts away from their policy views. A senator who wishes to
stall or defeat a nomination for either partisan benefit or for ideological disagreement
does not need majority status, or in most cases, even need to convince any other senators
of the merits of his or her obstructionism.

Delay is determined by the ideological disagreements and partisan differences of
a few interested senators with the president, not the party affiliation of the Senate median.
Divided government, like an election, a scandal, or a crisis, moves the Senate’s priorities
away from the confirmation process as a whole. However, it has nothing to do with the
prevalence of intentional obstructionism on particular nominations, for the simple reason that intentional obstructionism can be exercised without divided government. Divided government may increase confirmation time, but not confirmation delay.

Summary

In this chapter, I tested the theory against data unique in the literature – indications of obstructionist tactics other than time. The results strongly support the first two hypotheses regarding differences in delay created by ideological differences between the president, the Senate median, and various institutionally empowered senators. This is the second empirical validation of the theoretical perspective that delay is a mix of partisan and ideological concerns on the part of a few delaying senators. These senators are not the Senate median or even the filibuster pivot in particular, but can be any senator with ideological disagreements with the president and a partisan axe to grind.

That the president can anticipate and adapt to these senator’s incentives, and that the senators can, in their turn, force concessions from the president is supported for the most part by the results for the signaling hypothesis. The results of this test, like those in the last chapter, deviate from the models predictions, but in ways that are readily understood once we recognize the differences in scope and power between district and appellate courts.

The results of the chapter have shed light on a seeming contradiction between my model and other theoretical and empirical work in the literature. Namely, so many studies of the confirmation process have shown that divided government slows the
process down, yet the model shows there is little role for partisan control of the Senate in determining delay. The answer is that for confirmations, divided government is a political environment, and it is neither a unique set of parliamentary powers to stall a confirmation nor a new class of incentives for senators to use such powers. Interested senators have all the motivation and power they need to delay a nomination, and they do so purposefully and intentionally. Divided government, on the other hand, seems to slow down the process indiscriminately.

Finally, the results suggest more complicated relationships between the powers senators enjoy and the outcomes they produce. For example, the filibuster pivot promotes the use of stalling tactics, but does not appear to slow confirmations or failures. The opposition leader, on the other hand, promotes tactics and slows confirmations, suggesting that the opposition leader may act to stave off filibusters, perhaps even on behalf of the filibuster pivot. Yet, given the importance of the Judiciary chair, such tactics may represent a failure of the committee’s gatekeeping function, which may let pass nominees ideologically suitable to the chair but not to the floor. Such interactions are crucial if we are to understand the consequences of various reforms of the confirmation process, such as the “Nuclear Option” debated in 2003. These interactions, along with the president, will set the ideological and partisan tone of the process, and according to the theory, will have a major impact on the president’s choice of who to nominate and when. The implications of these results for Senate reform and for the judiciary are discussed in the next chapter.
CHAPTER 7
CONCLUSION

The Senate’s Advice and Consent role in confirmation politics has become increasingly contentious and partisan in recent decades, and marked with inactivity, intentional delay, and failure (e.g. Binder and Maltzman 2002; Bond, Fleisher, and Krutz 2006). This transformation was enabled by the Senate’s relatively lax rules, which give extraordinary power to individuals at the expense of the chamber. As Gerhardt (2000 p. 143) noted, “the combination of the means available to individual senators to delay nominations, including but not limited to indefinite holds, filibusters, and special procedures... provides individual senators with substantial means to impede a president’s nominating authority.”

The confirmation process has in many ways become a struggle between the president and the Senate, or even a small minority of the Senate, to set the national agenda through appointments to the executive and judicial branches. Although intensely studied, much of this struggle is still not well understood. Why do some senators choose to get involved in some confirmation fights and not others? Interest group and electoral pressure are likely culprits (e.g. Caldeira, Hojnacki, and Wright 2000; Scherer 2005), but we do not know what effect the intervention of a friendly senator can have, either on the
current confirmation or on subsequent nominations. Surely the president must respond to these sorts of tactics (McCarty and Razaghian 2000), but the form of his response and its effectiveness, or that of the Senate’s counter response, have not been elucidated. If delay is really an attempt by the Senate to exert some control over appointments (e.g. Bell 2002), does it work? What does this mean for the president’s influence on the executive and judicial branches and for his interaction with Congress more generally?

This dissertation has attempted to answer some of the lingering questions about the changing confirmation process. Through a formal model, we see that small minorities of the Senate can have a greatly disproportionate influence on the president’s choices of nominees through delay. The president, in turn, can mitigate the chances of delay or failure by compromising on nominations and “feeling out” the Senate for signs of obstructionism. Though prior theories of the process suggest that the Senate should be at a disadvantage in bargaining over nominations (e.g. Moraski and Shipan 1999), the current model shows that exactly the opposite is true. The result is that the Senate can shape the judiciary to a considerable extent, which has real implications for the president’s interactions with the executive, judiciary, and the Senate.

The remainder of this chapter first reviews the theory and empirical findings of the study. I then discuss the implications of the theory for our understanding of the president’s and Senate’s role in determining national policy through executive and judicial appointments. Next, I examine the implications for our understanding of the role of divided government in the confirmation process, and for theorizing about the dynamics of ideological preferences with and without accounting for partisanship. Finally, the
model informs us that the Senate’s rules and the incentives of individual senators create delay. I therefore look back at the Senate’s history to briefly discuss the conditions in the Senate that fostered increasing delay. Then, I apply the same sort of analysis forward to discuss some suggested reforms of the Senate’s rules and procedures that would purportedly reduce or eliminate delay.

**Summary of the Theory and Findings**

On a purely theoretical level, the model adds several features to existing models of presidential-congressional interaction and agenda-setting more generally. First, the model allows the president to make multiple nominations to fill an office, and thus integrates repeated play between players both between proposals per round (e.g. Cameron 2000a) and between rounds (e.g. McCarty 1997). Second, these two kinds of repeated play take place under uncertainty because the president does not know what types of senators will delay his nominations. Repeated play and uncertainty mean that unlike current models of the confirmation process (e.g. Krehbiel 2007; Moraski and Shipan 1999; Rohde and Shepsle 2007), the president must learn about his opponents in the Senate through interaction with them. These opponents, in turn, can use this uncertainty to bluff the president and extract concessions on nominations that the president would not otherwise make. Most importantly, however, the model incorporates the ability of non-median senators to not only kill a nomination like a filibuster pivot (e.g. Krehbiel 2007), but also to delay the nomination.
Repeated play with uncertainty and non-median delay provide valuable insights into the increasing delay and failure rates in the confirmation process alluded to in chapter one. The model shows that delaying senators can gain three primary benefits from delaying nomination. First, there is a partisan benefit that explains a great deal of delay. Stalling the president’s agenda by holding up his nominations is an end to itself to delaying senators, and this motive explains a great deal of delay.

Second, senators may stall a nomination for ideological reasons. If a nominee is not sufficiently close in policy preferences to a delaying senator, the senator may stall or kill the nomination. Because the president is uncertain about the preferences of senators who might delay his nominations, a nominee may not be close enough, and the delaying senator may kill the nomination.

A third and closely related benefit to a delaying senator is that he or she can heavily influence the president’s choice of nominee in subsequent rounds. A delaying senator can delay a nomination for a period of time but ultimately let it pass, telling the president that compromise is necessary for future nominations. Otherwise, those future nominations will not reach confirmation. Furthermore, killing a nomination in an early office sends a clear signal to the president that even greater ideological compromise is necessary to future confirmations.

By choosing different periods of delay in early nominations, delaying senators can separate themselves into three distinct groups. The first group, the most accommodating (e.g. Matthews 1989), are ideologically the closest to the Senate median. These delayers do not need great ideological compromise, but delay nominations primarily for the
partisan benefit. Compromising types of senators are ideologically further from the
president and the Senate median, and require more ideological compromise in subsequent
nominations. These types also enjoy the partisan benefit, and are unlikely to kill later
nominations if the president is sufficiently compromising. Finally, the recalcitrant types
are the furthest from the president and Senate median. These types kill early nominations
because of ideological distance, and are most likely to kill later nominations for the same
reason. Because they are so distant, the president has difficulty compromising with
recalcitrant types, which results in failed nominations. The result of these separations
among delaying senators is that partisan benefits may cause senators to delay
nominations, but not to kill them. On the other hand, delay can signal the need for
ideological compromise for future nominations, and ideological distance can cause a
senator to kill later nominations if the compromise is not forthcoming. Thus, nomination
delay is often partisan in nature, but nomination failure is always ideological.

Chapters five and six tested three of the models predictions. First, the greater the
distance between the president and the delaying senators (proxied by the opposition
leadership), the slower a nomination will be confirmed. Second, the greater the distance
between the president and the Senate median, the faster a nomination will be confirmed.
This is because the closer the median is located to the delaying senators the more of these
senators will accept a nomination that is also minimally acceptable to the median.
Finally, earlier nominations ending in failure should be associated with later nominations
taking longer either to be confirmed or to fail.
I first tested these hypotheses using a competing risks model of district and appellate judicial nominations in the 95th to 108th Congresses. The first two hypotheses were supported by this test, though the evidence for the third hypothesis was more mixed. The analyses suggested that nominations to district courts may fail in order to influence later appellate nominations, and failures of appellate nominations can affect the duration of other appellate nominations. Conversely, appellate nominations seem to have no effect on the durations of later nominations to district courts. The theory abstracted away from the differences in importance between district and appellate courts, so the theory did not predict the different signaling propensities between nominations to different courts. However, the difference between the hypothesis and the theory is intuitive given the greater impact of appellate courts as opposed to district courts. Finally, divided government was also found to slow down the process, though its effect was general, affecting both confirmations and failures.

I next tested the hypotheses against a new set of data on actual stalling tactics rather than time. Chapter six lent evidence to the hypotheses on the ideological distance between the president and the delaying senators and between the president and the Senate median. Previous confirmation failures had a small but definite effect on the number of times a nominee was skipped before confirmation. In addition, previous failures also decreased the probability that a nomination passed the committee. The different effects of failures in district and appellate nominations were again observed. Finally, divided government had little if any effect on actual delay tactics, suggesting that while divided government may slow the confirmation process, it does nothing for intentional delay.
Implications for the President’s Influence through Appointments

Terry Moe (1985, 1987) suggested that a necessary condition for a president’s agenda to be successful is the backing it enjoys from those loyal to the president. An effective strategy for achieving this condition places likeminded people in positions critical to the execution of the agenda – what Moe called politicization of the bureaucracy. The same argument applies to the federal judiciary as well, though more aptly. Staffing the judiciary with judges who agree with the president means that the president’s views will be read into the interpretation and adjudication of the law and policy of the United States for decades after the administration has ended. Although diluted by the eight other justices, an appointment to the Supreme Court promises to bear enormous influence on all areas of public policy. Indeed, it is one of the defining events of a president’s administration (Massaro 1990).

The model shows, however, that politicizing the executive and judicial branches is even more difficult than scholars have often claimed. Because non-median senators can kill nominations, nominees that are eventually confirmed must be ideologically proximate to these non-median senators. In equilibrium, these senators may be even further from the president than the filibuster pivot, which is the maximum ideological distance that occurs in equilibrium in most agenda-setting models (e.g. Krehbiel 1998). Even when we do not observe a confirmation failure, the president has often been forced to make ideological compromises to avoid delay and failure. Finally, a corollary to this equilibrium behavior is that the faster the president needs a confirmation, the further from his preferences his nominee will be. Important transitional nominations, including those
to cabinet positions, cannot be put on hold for very long (McCarty and Razaghian 2000), and so the president’s earliest efforts to staff the executive branch with his supporters may not result in closely aligned preferences.

The president’s control over the federal bureaucracy is therefore probably even more tenuous than previously understood – differences in preferences between the president and his agents will create incentives for his agents to buck his agenda where they can (e.g. Fundenberg and Tirole 1991). Current theories of policy making in executive agencies have modeled the preferences of presidential appointees as a kind of weighted average of the president’s and Senate median’s preferences in equilibrium (e.g. Epstein and O’Halloran 1999). However, this approach fails to account for the greater bargaining advantage that delay creates for the Senate. In fact, the preferences of the appointees and the policies they choose are likely to be much closer to the opposition members of the Senate than the president. The president’s influence in executive branch policy-making, and for that matter, the effectiveness of congressional oversight of executive departments, are probably both smaller than scholars have realized (though see McCarty 2004).

Likewise, the president’s influence on the judicial branch may be weaker than long believed. It is not the case that the president can get a nominee confirmed who agrees closely with his preferences (e.g. Moraski and Shippan 1999). As previous models have greatly underestimated the constraints the president faces, they have not understood how little the president is able to propagate his views through the judiciary (e.g. Law 2005; Songer and Ginn 2002) – his appointments are often quite distant from him in
preferences. Also, our understanding of judicial behavior post confirmation may be biased towards the president. As chapter four describes, Giles, Pepper, and Hettinger (n.d., 2001) scores will estimate a judge’s preferences much closer to the president than will generally be the case, and will therefore misplace a location for the judge’s ideology. Thus, a large body of evidence about the interaction of judicial ideology and behavior, including dissenting opinion (Hettinger, Lindquist, and Martinek 2003, 2004), agreement between circuits (e.g. Czarnezki and Ford 2006), and interpretation of doctrine (e.g. Czarnezki 2007), may need to be reexamined.

The gist of the model, then, is that if non-median senators are allowed to delay or kill nominations, the nominees who are eventually confirmed may not resemble the president ideologically. The president’s agenda and legacy are largely realized through people who do not agree with him in important respects, which can do nothing but diminish the influence the president has on national policy. To paraphrase Allison (1996), scholars of the confirmation process have generally believed that the president gets who he wants confirmed, but not when. The results here, however, indicate that the president often does not get who he wants, if he gets anyone at all.

Implications for the Role of Divided Government

Most studies of the confirmation process have concluded that divided government significantly delays confirmations. Different scholars have given different interpretations to this finding. Binder and Maltzman (2002, 2005), for example, argue that divided government gives the president’s opponents more parliamentary power to stall or kill his
nominations (see also Bell 2002; Martinek, Kemper, and Van Winkle 2002; McCarty and Razaghian 1999). Other scholars have argued that divided government represents a divergence of ideological preferences independent of party (e.g. Shipan and Shannon 2003). Some studies have argued a combination view that divided government does slow down nominations, but only in the context of ideological polarization (Bond, Fleisher, and Krutz 2002, 2007).

The results presented here suggest that divided government is not a necessary condition for delay. Theoretically, the model makes clear that the party of the Senate median has little effect on delay compared to the incentives of delaying senators. Empirically, like most previous studies, the event history analyses in chapter five find that divided government produces slower confirmation times. However, most studies of the process have not used competing risk models, which in this case show that divided government also slows down nomination failures. This result would make little sense if divided government provided an opportunity for the opposition to get rid of disagreeable nominations. Furthermore, when examining actual stalling tactics in chapter six, divided government has no effect on nominee skipping and recorded votes, and a small but negative effect on extra days spent debating nominations.

In addition, chapter five shows that when controlling for the ideological differences between the president and relevant senators, divided government slows both confirmations and failures regardless of ideological separation. This result argues that divided government is not an appropriate proxy for ideological dispersion (Shipan and Shannon 2003). However, the interaction between the ideological distance measures and
divided government shows that the effects of ideological distances are moderated by changing from unified to divided government. The effect is greater for failures than for confirmations. This interaction combined with the absence of an effect for divided government on actual stalling tactics suggests that divided government does slow confirmations in the presence of polarized ideologies (e.g. Bond, Fleisher, and Krutz 2006).

The reason for this, however, is not that divided government provides substantially more parliamentary power for the president’s opponents to stall or kill nominations. As chapter two illustrated, these opponents have plenty of resources to obstruct the process even when they are in the minority. One obvious possibility is that because divided government means there are more opposition members, polarized ideologies mean that more of the opposition will have an incentive to use the powers they already wield. Another possibility is that divided government means these opponents have the majority they need to enact their own agenda rather than the president’s, and the president’s nominations take a back seat to the opposition’s priorities. This second possibility is consistent with the results that divided government slows nominations ending either in confirmation or failure, and that divided government had little impact on actual delay tactics.

This is not to argue, of course, that divided government provides no new power to the opposition. It does, including committee chairs, greater scheduling power, a guarantee against cloture, and so on. However, opponents of a nomination do not need to rely on these powers alone, since they have plenty of their own to stall a nomination. The
point is that the story of divided government is not parliamentary privileges. Rather, divided government is about differing priorities and clashing agendas, and the president’s nominees, the standard bearers of his agenda, cannot help but be caught in the crossfire.

**Synthesizing Preferences and Party**

The model presented here joins a short list of formal theories that explicitly incorporate both ideological and partisan motivations (Chiou and Rothenberg 2003; Groseclose and McCarty 2001; Snyder and Ting 2002). As Chiou and Rothenberg (2006) argue, most empirical work on the influence of party on legislative behavior is not theoretically tied to dynamic interactions between party and preferences. On the other hand, the theoretical work on institutions generally and Congress specifically has rejected the relevance of parties (Krehbiel 1998; Brady and Volden 1998).

This is an unfortunate situation, as models that synthesize party and preferences not only perform well empirically (e.g. Chiou and Rothenberg 2006; Primo, Binder and Matlzman 2008), but can also offer unique insight into theoretical anomalies. Perhaps the best known example is Groseclose and McCarty’s (2001) explanation of why Congress would ever pass bills it knows the president will veto. Their answer is that during divided government, Congress sometimes prefers to embarrass the president with an unpopular veto than to compromise to get policy acceptable to both sides. As simple as this answer is, it is difficult to imagine any solution to the anomaly at all that is based on preferences alone.
Ideology alone may adequately explain why the president’s opponents will kill a nomination. If given the opportunity to veto a nomination, a senator with preferences sufficiently different from the nominee will have an incentive to exercise that veto. Yet, as argued in chapter four, in equilibrium, ideological incentives alone will not produce delay, but rather only failures. A partisan motivation independent of ideological preferences is required for nominations to be delayed for a period of time and then allowed to reach the floor for confirmation. Not only does partisanship explain confirmation delays, but also the substantial bargaining advantage that the Senate has over the president. In equilibrium, the president makes compromises on future nominations to avoid too great a delay. As a result, the current model predicts that the president’s nominees will be substantially further from the president’s preferences and closer to a delaying senator’s than models based on ideology alone predict (e.g. Moraski and Shipan 1999). This ideological discrepancy is not created by differences in preferences, but rather differences in party, and it comports with the ideological anomalies uncovered in presidential appointees when they are compared to predictions from preference-only models (Bailey and Chang 2001; Chang 2001; Nixon 2004).

Another implication of the model presented here is that floor voting on confirmations will be lopsided. This is because the president must name a nominee some distance from the floor median to ensure that the nominee reaches the floor at all. The floor median and a substantial number of additional senators opposite the median from the president will therefore vote for the nominee. Note that the added distance from the median is a result of a small minority of senators exercising their parliamentary power,
not pressure from the party leadership. In fact, large voting majorities are here not the result of powerful party leadership, but rather the lack of it. Thus, even if such votes were typically recorded, they would not be well suited for estimation techniques used in House roll calls to uncover party influence (Snyder and Groseclose 2000; Groseclose and Synder 2003).

The Senate is not like the House, of course, and roll calls are likely not the best place to discover the influence of parties in either setting (e.g. Cox and McCubbins 1993). Still, even though the Senate is usually thought to be individualistic and lacking in partisan control, the majority party seems to exert a fair amount of control over the floor agenda (Campbell, Cox, and McCubbins 2002). How parties can exert this control in light of the substantial procedural powers of the minority is unclear, though evidence suggests it is not a simple matter of strategic reciprocity on unanimous consent (Krehbiel 1986; Overby and Bell 2004).

The model presented here suggests solutions to a number of empirical questions that are difficult to answer with theories using ideological preferences and no reference to party. However, there are clearly many questions remaining about the role of party in the Senate, especially about the party’s control of the agenda and the effect of divided government, especially in light of the results in chapters five and six (see also Campbell, Cox, and McCubbins 2002). The answers to these questions may be best answered by theory that incorporates both partisan and ideological motivations, providing novel insights into Senatorial (and probably legislative in general) organization, control, and policy-making that are unavailable with current, preference-only models.
Institutional Changes and Shifting Incentives

The model is intended to explain the purposes and strategies behind the increasing delays and failure rates in confirmations in the last three decades. Clearly, the situation was not always this way. Something about the interaction between the president and the Senate must have changed to produce these phenomena.

At its most fundamental, the model requires that senators other than the median have the power to delay or kill a nomination. By themselves, filibusters are not sufficient for the model. Filibuster pivots are relatively easy for the president to identify uniquely leaving little uncertainty for filibuster pivots to use against the president. Furthermore, filibuster pivots were not always binding even before the establishment of cloture (Wawro and Schickler 2004). Rather, powers for individual senators, too numerous for the president to identify uniquely a priori, must be coupled with an incentive to use those powers. At some point, senators must have gained the ability to stall or kill nominations and used these powers because they could not get what they want in some less costly way. How and when did these changes occur, and when does the model “start”?

The rejection of Robert Bork in 1987 is often cited as the beginning of a new era of contentiousness in confirmation politics (e.g. Goldman 1997; Katzman 1997). Yet at least by the beginning of Carter’s administration, and probably by the end of Nixon’s, confirmation delay and failures were increasing for both circuit and district judicial nominations above any semblance of normal obstructionism (Hartley and Holmes 2002; Goldman 2003; Rutkus and Sollenberger 2004). Simultaneously, failures and delays increased for nominations to cabinet, agency and executive office positions. Conflict was
already common in both judicial and executive nominations at multiple levels by 1987 –
nominees were being “Borked” well before Bork (Epstein et al 2006; Lemieux and
Stewart 1990).

If Bork’s nomination was not the herald of the new era of contentiousness for
nominations, what was? The likely beginning of the increase in delays and failures –
Nixon’s second term – may be telling (e.g. Moe 1975). Nixon’s administration covered
the 91st through the 93rd Congresses. The list of legislative accomplishments during these
congresses includes the National Environmental Policy Act, the Occupational Health and
Safety Act, Title IX, the Consumer Product Safety Act, and the War Powers Resolution.
After Johnson’s “Great Society,” this period was the most productive of significant
legislation since the New Deal (Clinton and Lapinski 2006). Yet more importantly, this
period witnessed the revelations of Watergate, the height of opposition to the Vietnam
War, and a persistent Democrat majority in the Senate despite Nixon’s electoral victories.

While the Senate took center stage in unparalleled conflict with the executive
branch, individual senators found new powers for themselves. Parliamentary activity
increased as senators availed themselves of parliamentary tactics to further their agendas.
Unanimous consent agreements began to cover more and more procedures and situations,
and became indispensable to Senate business to overcome obstructionism. Holds gained
special prominence during this period, as freshmen senators came to see respect for their
holds as a parliamentary right rather than an informal courtesy. Filibusters increased as
well, leading to the lowering of the threshold for invoking cloture in 1975 (Sinclair 2007;
Smith 1989).
As the Senate’s workload increased in size, complexity, and significance, the consequences of obstructionism became increasingly dire. As a result, the effectiveness of procedural powers for obstruction was enhanced. There are many plausible reasons why these new powers would be soon used against nominees. Perhaps it was the widespread distrust of the administration over Viet Nam, electoral pressure to counter the administration in the wake of Watergate, or the continuing rise of individual candidates over the weak parties (Aldrich 1995; Binder 2003; Sinclair 2006). Perhaps senators had always wanted to stall nominations but lacked the power to do so. In any case, failures and delay increased, confirmation hearings became more public and contentious, and allegations of wrong-doing and lack of qualifications against nominees became much more common during this period (Bond, Fleisher, and Krutz 2002, 2006).

Allegations of wrong-doing, however, were soon supplanted by allegations of ideological extremism (Bond, Fleisher, and Krutz 2002, 2006). The selection of judicial nominees became more centralized at the White House under Carter and Reagan, and both presidents consulted much less with senators than their predecessors. Carter eschewed senatorial advice, established nominating commissions to suggest nominees for circuit vacancies, and assumed many of the duties of the Justice Department in all selections. Reagan ventured even further into traditionally senatorial prerogative than Carter. He abolished Carter’s commissions for a single centralized committee, establishing the Office of Legal Policy at Justice for selecting, vetting, and guiding nominees, and expressed a goal of confirming ideologically conservative executive and judicial nominees. Reagan showed his “willingness to subordinate senatorial demands to
his own selection criteria” (Law 2005, p. 157), and a senator had little choice but to fight
the president for a chance to be heard in the process (Allison 1996, Goldman 1997). And
fight they did - although Reagan’s efforts are generally thought to be a success (e.g. Law
2005), they still met with greater delays than any of his predecessors as well as some very
high profile failures (Bond, Fleisher, and Krutz 2006; Rutkus and Sollenburger 2004b).

Thus, the Senate’s relationship with the president began deteriorating over
confirmations and many other issues during Nixon’s administration. Shortly thereafter,
presidents began listening less to senators about nominee selection, even going so far as
to create executive offices and committees to assume the Senate’s traditional advice role.
Reagan went further to explicitly incorporate ideology as a primary selection criterion for
judicial and executive nominees. These changes occurred during a period of increasing
ideological polarization between weak parties. Finally, the powers of individual senators
were enhanced through institutional changes like increasingly complex unanimous
consent and holds. The effectiveness of these new powers was augmented by the
increased size and significance of the Senate’s workload, which raised the stakes for the
Senate for ignoring an individual senator’s complaints. As a result, the Senate
collectively reasserted its influence in the confirmation process (Bell 2002).

At this point, whether confirmation obstructionism increased because of greater
ideological distance, the gradual accretion of party power, a reaction to presidential
strategies to centralize the nomination process, or for some other reason is unclear (Moe
1975; Bell 2002). However, declining relations with the executive branch, the
diminution of senatorial influence on nominations, and the increasingly ideological tenor
of the selection process, all within a few years, are highly suggestive. Senators probably had plenty of incentive during this period to use their new procedural powers to obstruct the confirmation process. In so doing, the model argues that the senators pull the nomination closer to their ideological position and away from the president, force the president to make concessions to the Senate on subsequent nominations, and gain partisan benefit from stalling the president’s agenda. In other words, according to the model, senators could use their new powers to capitalize on three of the major institutional changes in the confirmation process between Nixon and Reagan. This scenario is speculative, but it does fit with the timing of new procedural powers to cause delay, new incentives to create delay, and with the empirical observations of confirmation time during the same period. The interplay of incentives and opportunities also has a great deal to teach us about the possibility of ever reforming the Senate to eliminate delay.

**The Nuclear Option**

For roughly a two year period, from about May 2003 to May 2005, the majority Republicans in the Senate became increasingly frustrated with procedural filibusters that had prevented floor votes on 10 of George W. Bush’s circuit court nominees\(^2\). The threat from the Democrats wasn’t simply to these 10 nominees: the impeding nominations of two Supreme Court Justices in 2005 meant an impasse would be

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especially public and costly for the Republicans. The solution considered by Majority Leader Bill Frist was to do away with filibusters altogether through the “nuclear option.” Essentially, the nuclear option is to modify or reinterpret the Senate’s rules in some way that ensures that filibusters cannot prevent a final floor vote on a nomination. The impetus for the nuclear option was largely obviated when the “Gang of 14” moderate senators reached a compromise allowing some the nominees to proceed to a vote. However, cloture reform and overhauls of the Senate’s rules are a perennial issue (e.g. Binder and Smith 1997), so we may still ask how efforts to blunt or eliminate filibusters on nominations are likely to affect the confirmation process in light of the model.

There are many routes to a nuclear option. The most obvious would be to amend Rule XXII to provide for cloture on nominations with a simple majority rather than a super majority. The Senate’s rules can be amended with a simple majority vote. However, the amendments are subject to a filibuster, and cloture on an amendment to a rule requires a 2/3 majority, rather than the normal 60 votes. Thus, if the majority isn’t large enough to invoke cloture, it isn’t large enough to change the cloture rule.

Another route involves the presiding officer, possibly the Vice President, ruling that cloture can be invoked by simple majority vote. This ruling would be appealed to the full body, which would then uphold the ruling by majority vote. Another scenario would involve a senator raising a constitutional point of order following the failure of cloture, which could then be sustained by the full chamber. In either case, several precedents must be broken – for example, the chair will need to rule against precedent that the appeal itself cannot be filibustered. In so doing, the Senate will have established
a new precedent limiting the required threshold for cloture to a simple majority.
Furthermore, it will have done so by circumventing the rule that changes to the standing
rules effectively require a 2/3 majority vote.

A final possibility for a nuclear option that has received much less attention than
breaking precedent is an expedited procedures statute like “fast-tracked” trade resolutions
or budgetary measures. Expedited procedures generally place time limits for committee
consideration and floor debate, limit amendments, and could even require a final up-or-
down vote on a nominee (e.g. Binder and Smith 1997; Palmer 2005b).

Expedited procedures for nominations may seem like a powerful solution. A
definitive clock would start once every nominee is submitted, and all participants would
know that once that at predetermined time, there will be a vote regardless of any
senatorial courtesy, holds, objections, and filibusters. A required floor vote, however,
would make managing the Senate’s agenda impossible for the party leadership.
Hundreds of thousands of required votes, even if largely handled en bloc, would leave
little time for anything else. Furthermore, even if the expedited procedure only required a
vote for judicial nominations, this would likely still be too many. Fast-track trade
agreements and budget measures consume an inordinate amount of time compared to the
number of times they occur a year – adding judicial nominees would be like adding 50 or
60 little budget cycles a year.

On the other hand, if a floor vote is not required by the expedited procedure, then
the results of the new procedure will probably resemble those we might expect from a
change to Rule XXII or from a change in precedent to allow cloture with a majority vote.
In either case, opportunities for obstructionism will still creep into the process. As long as senatorial courtesy remains an option, judicial nominations may blue slipped. The Minority Witness Rule means that minority party members of a committee may be able to embarrass a nominee and the administration, and the administration may not find it prudent to push the committee to pass the nomination. As long as the Senate allows repeated quorum and roll calls, floor action can be brought to a crawl. Most importantly, while the Senate continues to use unanimous consent to schedule its agenda, the leadership may still be forced into letting nominees fall into scheduling limbo. Otherwise, other items on the agenda may become collateral damage.

In short, neither amending Rule XXII for nominations nor adding expedited procedures is likely to be sufficient. More nominations would pass, and nominations would see less delay, but nothing short of a major overhaul of the standing rules will eliminate the problem. Filibusters are just one of a great many loopholes that allow individual senators to stall the process. The fundamental cause of delay, according to the model, is not the loopholes, but rather the incentives to use them – partisanship, ideological polarization, and disproportionate influence on subsequent nominee selection. The model shows that with these incentives in place, as long as these opportunities to stall or kill nominations remain, so too will delay.

Alternatively, if filibusters were eliminated by reinterpreting precedent, then all bets are off. Dilatory floor procedures, senatorial courtesy, and other stalling tactics may be blunted along with extended debate by a majority vote. Of course, if the Senate can change its rules at any time with a simple majority vote, then essentially any part of the
process can be changed to suit the majority. Perhaps such a change in the Senate’s operations would make it look more like the House; perhaps it would lead to chaos (Palmer 2000b). In any likely scenario, the Senate could not recreate its rules to do without unanimous consent with any regularity, which would leave the majority open to exactly the kind of retaliatory obstructionism the Senate Democrats threatened during the nuclear option debate. Moreover, some theoretical work has shown obstructionist tactics like senatorial courtesy and perhaps even the filibuster (e.g. Alter and McGranahan 2000; Jacobi 2005) may be utility-improving to a majority of senators. Such self-reinforcing institutions may be too useful to too many senators to ever go away completely. Finally, and most importantly, these institutions create opportunities for obstructionism but not the incentives. As the model shows, ideological polarization and partisanship are the root causes, and it is difficult to see how either would be substantially reduced by a majority that can change the rules to suit its needs.
This appendix provides the technical details of the model described in chapter four. The model involves a president P and a Senate, comprised of a median voter M and a delay pivot Z, the senator that can delay the confirmation process. These players must bargain to fill two offices. The game begins with P, who decides when and if he will withdraw the first nomination, and then makes the nomination itself. The delay pivot then chooses an amount of delay, which is modeled in terms of discrete time periods. Specifically, Z chooses a time period in which M is allowed to decide whether to accept or reject the nomination. If Z chooses a later time than when the president has elected to withdraw, the president withdraws the nomination and then makes another nomination. If Z chooses a time less than the president has set for withdrawal, then after that delay, M makes her acceptance or rejection decision. Once the nomination is resolved, either with confirmation or failure, the game is repeated in a second stage.

I assume that the players have single-peaked utilities about ideal points in $\mathbb{R}$. Let $m$, and $z$ denote the ideal points of M and Z respectively, and let P’s ideal point be normalized to $p = 0$. While P’s and M’s ideal points are common knowledge, I assume that P knows the value of $z$ with uncertainty. Let $z$ be uniformly distributed with support $[z, \bar{z}]$ and $z > 0$. 
The players must fill two offices, although their ideal points are stable across both offices. Let \( y_i, i \in \{1, 2\} \) denote the status quo to an office, the outcome that obtains when the players cannot agree on a nominee to fill an office. I assume throughout that \( y_i > 0, z_i, i \in \{1, 2\} \).

The process is “timed” with a set of time periods \( T = \{1, 2, \ldots, n\} \). The process begins with a nomination in period 1 and ends on or before period \( n \). If a nomination is not confirmed by period \( n \), then the nomination fails and the status quo for office \( i \in \{1, 2\} \) remains in place. Every nomination experiences some extraneous delay, denoted by \( e \in T \). Every nomination, including those following a withdrawal, consumes \( e \) time units of \( T \). I also assume that this delay is the same across both offices, and that \( e < n \).

P chooses at least one nominee to replace each status quo, as well as a time \( \tau_i \) in which he withdraws the first nomination in stage \( i \in \{1, 2\} \) and makes another nomination. P may also choose not to withdraw the first nomination; denote the time period in which P withdraws by \( \tau_i \in T \), where \( \tau_i = n \) denotes no withdrawal. The time period \( \tau_i \) is the last period available for a nomination; after \( \tau_i \), the nomination is either withdrawn or fails if \( \tau_i = n \). Let \( x_i \in X \subseteq \mathbb{R} \) represent P’s first nominee in stage \( i \), and \( \tilde{x}_i \) represent P’s second nominee in stage \( i \), given that P withdraws \( x_i \) in period \( \tau_i \). For notational economy, I suppress the dependence of \( \tilde{x}_i \) on the withdrawal decision. A strategy for P in stage \( i \) is to choose the triple \( (\tau_i, x_i, \tilde{x}_i) \), a mapping from the history of play, including all offers \( x_i \) and Z’s and M’s subsequent decisions, into \( T \) and \( X \).
Z must choose when and if to allow each of P’s nominations to proceed to a vote. Thus, Z’s strategy is a mapping $d_i : X \to T$. Note that $\tau_i \neq n$ divides $T$ into times that will elicit a withdrawal and those that do not. Thus, if $d_i \leq \tau_i$, the first nomination proceeds to the floor (M’s decision) in period $d_i$, while if $d_i > \tau_i$, the nomination is withdrawn in period $\tau_i + 1$ and Z receives P’s next nomination $\tilde{x}_i$. Z would then choose another $d_i$. Again, for notational economy, I suppress the dependence of $d_i$ on $\tau_i$, so that $d_i$ represents the total time in $T$ that Z chooses for each office. If $d_i = n$, the status quo $y_i$ remains and all nominations to fill that office fail. Not also that because every nomination consumes $e$ periods of extraneous delay, the earliest that a nomination can reach the floor is period $e$ for $x_i$ and $2e$ for $\tilde{x}_i$.

Once a nomination proceeds to the floor for a vote, M decides whether to confirm the nomination. Let $\alpha_i : X \to \{\text{accept}, \text{reject}\}$ denote M’s acceptance strategy for a nomination in stage $i$. If $\alpha_i = \text{accept}$, then $x_i$ replaces $y_i$, while if $\alpha_i = \text{reject}$, $y_i$ remains in place. Thus, a nomination may fail because it is rejected by the Senate, or because it runs out of time. I restrict attention to pure strategies for all players.

Finally, while the players have preferences over the spatial location of the nominee $x_i$, they also have preferences over when the nominee is confirmed. Let $w_j, j \in \{P, Z, M\}$ be a weight each player attaches to the time taken to resolve the nominations. I assume that all else equal, P values shorter delays ($w_P < 0$) while Z values higher delays ($w_Z > 0$). This captures the partisan components of delay on Z’s part. M may prefer shorter or longer delays.
In stage $i$, for an outcome $o_i \in \{x_i, \bar{x}_i, y_i\}$ resolved in period $d_i$, the utility to P is:

$$U^i_P(o_i, d_i) = -o_i - w_P d_i$$

and the total utility to P is $U_P(o, d) = \sum_{i=1}^{2} U^i_P(o_i, d_i)$. Similarly, the total utility to Z and M, respectively, are:

$$U_Z(o, d) = \sum_{i=1}^{2} -|z - o_i| + w_Z d_i$$

and

$$U_M(o, d) = \sum_{i=1}^{2} -|m - o_i| + w_M d_i$$

I use the following tie-breaking rules. I assume that when indifferent, P chooses the nomination closer to his ideal point, Z choose the lower of two delay times, and that M chooses accept. I solve the game for Perfect Bayesian Equilibrium.

**Results**

Lemma 1: P’s minimum offer in stage $i$ is $2m - y_i + w_M(n - d_i)$. Z prefers P’s offer $x_i$ in period $d_i$ to $y_i$ if $x_i \geq 2z - y_i + w_Z(n - d_i)$.

Proof: Accepting $x_i$ in period $d_i$ gives M $U^i_M(a) = -|m - x_i| + w_M d_i$, while rejecting $x_i$ gives M $U^i_M(r) = -|m - y_i| + w_M n$. Since $p, m < y_i$, and P must prefer $x_i$ to $y_i$ in equilibrium, solving $U^i_M(a) \geq U^i_M(r)$ gives $x_i \geq 2m - y_i + w_M(n - d_i)$. If $z < y_i$, the same operation gives $x_i \geq 2z - y_i + w_Z(n - d_i)$ for Z.

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Lemma 2: Let $d'' = \begin{cases} d_i \leq \tau_i \text{ if } \tau_i < n \\ d_i < n - 1 \text{ if } \tau_i = n \end{cases}$. In equilibrium,

1) if $d_i \leq d''$, P offers either $x_2^0 = 2m - y_2 + w_M$ or $x_2 \geq x_2^0$

2) if $d_i > d''$, Z chooses either $d_i = n - 1$ or $d_i = n$, and P offers only $x_2(d_i) > x_2^0$

3) if $d_i = \delta' \leq d''$ elicits $x_2^0$ and $d_i = \delta'' \leq d''$ elicits $x_2 \geq x_2^0$, then $\delta' < \delta''$.

Proof: 1) This is a variant of Matthews’ proposition (1989). Suppose not, and $\delta'$ elicits $x_2^0$, $\delta''$ elicits $x_2$, and that $\delta^* \in [\delta', \delta'']$ elicits $x_2^* \in [x_2^0, x_2]$. Let $\gamma(x)$ be the largest type that elicits $x$. Since $x_2^0 \leq x_2^* \leq x_2$, and as higher types prefer higher offers, $\gamma(x_2^0) \leq \gamma(x_2^*) \leq \gamma(x_2)$. Note that because $\gamma(x_2)$ is the largest type eliciting $x_2$, after observing $\delta^*$ P believes $z \leq \gamma(x_2^*)$. Type $\gamma(x_2)$ must weakly prefer $x_2$ to $y_2$, or otherwise this type would choose some $d_i > d''$, so $z \leq \gamma(x_2^*)$ must choose $d_i < n$ with probability one. P’s best offer is therefore $x_2^* = 2m - y_2 + w_M(n - d_i)$ since this offer is certain to not be delayed to period $n$. Substituting $x_2^* = 2m - y_2 + w_M(n - d_2)$ into $U_Z(d_2) = -|z - x_2^*| - w_Zd_2$ and given $|w_Z| > |w_M|$ gives $\frac{dU_Z(d_2)}{dd_2} > 0$. Z thus chooses the highest delay less than $n$, $d_2 = n - 1$, and $x_2^* = x_2^0$.

2) If Z has elicited the withdrawal of $x_i$, then P believes $z > \gamma(x_2(d_i \leq d''))$. Suppose that for some $d_i^*$ such that $d_i^* < d_i < n - 1$, P offers some $x_2(d_i^*) \leq x_2(n - 1)$. Following $d_i^*$, P believes $z < \gamma(x_2(d_i^* \leq d''))$, $\gamma(x_2(n - 1))$ and these types must weakly prefer $x_2(n - 1)$ to $y_2$, and so after P offers $x_2(d_i^*)$, these types choose $d_i < n$. Because $z > \gamma(x_2(d_i^* \leq d''))$, by Lemma 1, P offers the smallest $x_2(d_i^*)$ such that $x_2(d_i^*) \geq 2 \gamma(x_2(d_i^* \leq d'')) - y_2 + w_Z(n -
1) If \( e < \frac{n}{2} \), P withdraws in period \( \tau_1 = e \) following any delay, and offers \( x_2 = z' + w_P(n - e) - \frac{1}{2}(w_P - w_Z) \) and \( \bar{x}_2 = z' + (w_P - w_Z)(n - e) + \frac{1}{2}(w_P + 5w_Z) \). Z with \( z \leq z^* \in [z', z''] \) choose \( d_2 = e \), \( z \in (z^*, z'') \) choose \( d_2 = n - 1 \), and \( z > z'' \) choose \( d_2 = n \), where \( z^* = z' + (w_P - w_Z)(n - e) + 2w_Z \) and \( z'' = \frac{1}{2}(\bar{x}_2 + y_2 - w_Z) \). M chooses accept following both \( x_2 \) and \( \bar{x}_2 \).

2) If \( e \geq \frac{n}{2} \), P offers \( x_2 = z' + \frac{1}{2}(w_P + w_Z) \) and does not withdraw, \( z \leq \frac{1}{2}(x_2 + y_2 + w_Z) \) chooses \( d_2 = n - 1 \) and \( z > \frac{1}{2}(x_2 + y_2 + w_Z) \) choose \( d_2 = n \). M chooses accept following \( x_2 \).
Proof: 1) P will not withdraw if $e \geq \frac{n}{2}$, since $2e > n - 1$, and P prefers some $x_2 < y_2$ with some probability to $y_2$ with certainty. Supposing then that $e < \frac{n}{2}$, following withdrawal of $x_2$ in period $\tau$, by Bayes’ Rule P will believe $z \in (z^*, z')$, where $z^*$ is indifferent between $x_2$ and $\bar{x}_2$. These Z then have $U^2_Z(d_2) = -|z - \bar{x}_2| + wzd_2$ for $d_2 < n$ and $U^2_Z(n) = -|z - y_2|$ + $wzn$ for $d_2 = n$. $U^2_Z(d_2)$ is increasing in $d_2$, so choosing $\bar{x}_2$ over $y_2$ means $d_2 = n - 1$.

Given Lemma 1 and the uniform distribution of P’s beliefs, P has:

$EU^P_2(\bar{x}_2) = \left(\frac{z^* - (2e - y_2 + w_M)}{2(z^* - y_2)}\right)(-\bar{x}_2 - w_p(n - 1)) + \left(\frac{2z^* - y_2 + w_M - \bar{x}_2}{2(z^* - y_2)}\right)(y_2 - w_p n)$

which is maximized at $\bar{x}_2 = z^* + \frac{1}{2} (w_p + w_M)$. Type $z^*$ is indifferent between $x_2$ and $\bar{x}_2 > x_2$, and solving $-(z^* - x_2) + wzd_2 = -\left(\bar{x}_2 - z^*\right) + wzn(1 - 1)$ gives $z^* = x_2 + \frac{1}{2} (w_p + w_M (3 + 2 \tau - 2n))$. Before withdrawing $x_2$, P has:

$EU^P_2(\tau, x_2) = \left(\frac{z^* - x_2}{2(z^* - y_2)}\right)(-x_2 - w_p \tau) + \left(\frac{\bar{x}_2 - z^*}{2(z^* - y_2)}\right)EU^P_2(\bar{x}_2)$

which is maximized at $x_2 = z^* + w_p(n - e) - \frac{1}{2} (w_p - w_M)$. Finally, $EU^P_2(\tau, x_2)$ is minimized in $\tau$ at $\tau = n + \frac{w_M(2e)}{w_p - w_M} > n$, and so P’s utility is decreasing in $\tau$ over $[e, \frac{n}{2})$, and P withdraws following $d_2 > e$. Substitution gives the results listed in the Lemma.

2) This is largely the same proof, except that P maximizes

$EU(n, x_2) = \left(\frac{x_2 - (2e - y_2 + w_M)}{2(z^* - y_2)}\right)(-x_2 - w_p(n - 1)) + \left(\frac{2z^* - x_2 + w_M - y_2}{2(z^* - y_2)}\right)(y_2 - w_p n)$

as P will not withdraw $x_2$. The utility is maximized at $x_2 = z^* + \frac{1}{2} (w_p + w_M)$. Note that because $x_2$ (whether P withdraws or not) and $\bar{x}_2$ are greater than $x_2^0 = 2m - y_2 + w_M$ by Lemma 1, so M accepts both offers.
Proposition 1: Suppose \( e \geq \frac{n}{2}, z > 2m - 2y_1 + y_2 + w_M - \frac{1}{2} (w_P + w_Z), z \leq 2m - y_2 + w_M + \frac{1}{2} (w_P - w_Z), \) and \( z < y_1, y_2. \) Let \( t_1 = 2m - y_2 + w_M + \frac{1}{2} (w_P - w_Z) \) and \( t_2 = 2y_1 - 2y_2 + z + w_P + w_Z. \) Then there exists an equilibrium in which:

In stage 1, P chooses \( \tau_1 = n \) and \( x_1 = y_1 - y_2 + z + \frac{1}{2} (w_P + w_Z), \) Z chooses

\[
d_1 = \begin{cases} 
  n - 2 & \text{if } z \in [t_1, z] \\
  n - 1 & \text{if } z \in (t_1, t_2) \\
  n & \text{if } z \in (t_2, \bar{z}] \end{cases}
\]

and M chooses accept. In stage 2, P chooses \( \tau_2 = n \) and

\[
x_2(d_1) = \begin{cases} 
  x_2(n - 2) = 2m - y_2 + w_M \\
  x_2(n - 1) = t_1 + \frac{1}{2} (w_P + w_Z) \\
  x_2(n) = t_2 + \frac{1}{2} (w_P + w_Z) \end{cases}
\]

Z chooses \( d_2 = n - 1 \) if \( z \in [t_1, z] \) or \( z \leq 2y_1 - 2y_2 + z + w_P + w_Z, \) and \( d_2 = n \) otherwise, and M chooses accept.

Proof: The second stage strategies of the players given types \( z \in (t_1, t_2) \) are described by Lemma 3.2. From Lemma 2.1 and 2.3, if \( d_1' \) elicits \( x_2(d_1') = 2m - y_2 - w_M \) and \( d_1'' \) elicits \( x_2(d_1'') = t_1 + \frac{1}{2} (w_P + w_Z), \) then \( d_1' < d_1'' \), and because \( e \geq \frac{n}{2} \), P will not withdraw \( x_1 \). Z’s utility is therefore increasing for \( d_i < n \), and so \( d_i' = n - 2 \) and \( d_i'' = n - 1 \). Type \( t_1 \) is indifferent between \( x_1 \) in period \( n - 2 \), eliciting \( x_2(n - 2) \), and \( x_1 \) in period \( n - 1 \), eliciting \( x_2(n - 1) \). Thus, after simplifying, \( t_1 \) satisfies

\[
-w_Z - |t_1 - x_2(n - 2)| = -|t_1 - x_2(n - 1)|
\]

Solving for \( t_1 \) gives \( t_1 = 2m - y_2 + w_M + \frac{1}{2} (w_P - w_Z). \) Note that unless \( x_2(d_1(t_1)) \) meets its constraint at \( 2t_1 - y_2 + w_Z, \) type \( t_2 \) will prefer \( y_2 \) to \( x_2(d_1(t_1)) \). Thus, type \( t_2 \) is indifferent

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between \(x_1\) in period \(n - 1\) and then \(y_2\), and \(y_1\) in period \(n\) and \(x_2(n) = t_2 + \frac{1}{2} (w_p + w_Z)\) in period \(n - 1\). Given \(\bar{z} < y_1\), \(y_2\), after simplifying, \(t_2\) satisfies

\[-|t_2 - x_1| - |t_1 - y_2| = -|t_1 - y_1| - |t_1 - x_2(n)|\]

Solving for \(t_2\) gives \(t_2 = x_1 + y_1 - y_2 + \frac{1}{2} (w_p - w_Z)\).

Given these strategies, Lemma 2 and Lemma 3.2, \(P'2\) expected utilities in stage 2 are

\[
EU_{P'}^2(x_2(n-2)) = -(2m - y_2 + w_{uv}) - w_p(n-1),
\]

\[
EU_{P'}^2(x_2(n-1)) = \left(\frac{x_2(n-1) - (2t_1 - y_2 + w_Z)}{2(t_2 - t_1)}\right)(-x_2(n-1) + w_p(n-1)) + \left(\frac{(2t_2 - y_2 + w_Z - x_2(n-1))}{2(t_2 - t_1)}\right)(-y_2 + w_p(n))
\]

and finally,

\[
EU_{P'}^2(x_2(n)) = \left(\frac{x_2(n) - (2t_2 - y_2 + w_Z)}{2(\bar{z} - t_2)}\right)(-x_2(n) + w_p(n-1)) + \left(\frac{(2\bar{z} - y_2 + w_Z - x_2(n))}{2(\bar{z} - t_2)}\right)(-y_2 + w_p(n))
\]

Thus, in stage 1, \(P\) chooses \(x_1\) to maximize:

\[
EU_{P'}^1(x_1) = \left(\frac{t_1 - \bar{z}}{\bar{z} - \bar{z}}\right)(-x_1 - w_p(n-1) + EU_{P'}^2(x_2(n-1))) + \left(\frac{t_2 - t_1}{\bar{z} - \bar{z}}\right)(-x_1 - w_p(n-1) + EU_{P'}^2(x_2(n-1))) + \left(\frac{\bar{z} - t_2}{\bar{z} - \bar{z}}\right)(-y_1 - w_p(n) + EU_{P'}^2(x_2(n)))
\]
Substituting the stage 2 expected utilities, \( t_1 \) and \( t_2 \) into this expression gives a maximum at \( x_1 = y_1 - y_2 + z + \frac{1}{2} (w_p - w_Z) \). Substituting \( x_1 \) into \( t_2 \) gives \( t_2 = 2y_1 - 2y_2 + z + w_p + w_Z \).

Proposition 2: Suppose that \( e < \frac{w_p + w_Z}{2} \), \( n < \min\{ \frac{1}{w_p + w_Z} (2(y_2 - z) + e(3w_Z - w_P) + w_P - w_Z), \frac{1}{3(w_p + w_Z)} (2(y_2 - z - 2m) + 5e(w_Z + w_P) + w_P + w_Z - 2w_M) \} \), that \( z < 2m - y_2 + (w_P + w_Z)(n - e - \frac{1}{2}) + w_Z \), and \( z < y_1, y_2 \). Let \( u_1 = 2m - y_2 + (w_P + w_Z)(n - e - \frac{1}{2}) + w_Z \), \( u_2 = z + \frac{1}{2} n(w_P + w_Z) \), and \( u_3 = z + 2y_1 - 2y_2 + \frac{1}{2} (w_P + w_Z)(n - e) \). For \( j \in \{1, 2, 3\} \), let \( u'_j = u_j + (w_P - w_Z)(n - e) \) and \( u''_j = \frac{1}{2} (\tilde{x}_2(d_1) + y_2 - w_Z) \). Then there exists an equilibrium in which:

In stage 1, \( P \) chooses

\[
(t_1, x_1, x_1) = \begin{cases} 
  t_1 = n - 2e - 1 \\
  x_1 = 2z - 2y_2 + y_1 + 2w_pe + w_Z \\
  \tilde{x}_1 = z + y_1 - y_2 + \frac{1}{2} (w_p + w_Z)(3e + 1 - n) 
\end{cases}
\]

\( Z \) chooses

\[
d_1 = \begin{cases} 
  t_1 - 1 \text{ if } z \in [z, u_1] \\
  t_1 \text{ if } z \in (u_1, u_2] \\
  n - 1 \text{ if } z \in (u_2, u_3) \\
  n \text{ if } z \in (u_3, \tilde{z}] 
\end{cases}
\]

and \( M \) chooses accept. In stage 2, \( P \) chooses
\[(\tau_2, x_2(d_1), \tilde{x}_2(d_2)) = \begin{cases} 
\tau_2(\tau_1 - 1) = n \\
\tau_2(d_1 \geq \tau_1) = e \\
x_1(\tau_1 - 1) = 2m - y_2 + w_M \\
x_1(d_1 \geq \tau_1) = u' + w_p(n - e) - \frac{1}{2}(w_p - w_Z) \\
\tilde{x}_1(d_1 \geq \tau_1) = u' + (w_p + w_Z)(n - e) + \frac{1}{2}(w_p + 5w_Z) 
\end{cases} \]

where \( j \in \{1, 2, 3\} \), Z chooses

\[d_2 = \begin{cases} 
e & \text{if } z \in [u_j, u_j'] \\
n - 1 & \text{if } z \in [z, u_1) \text{ or } z \in (u'_j, u'_j) \\
n & \text{if } z \in (u'_j, u_{j+1}] 
\end{cases} \]

and M chooses accept.

Proof. The proof of this proposition is very similar to that of Proposition 1. The players strategies in stage 2, given \( z > u_1 \) are described by Lemma 3.1. Given \( z \leq u_1 \), the players strategies are described by Lemma 2.1.

In stage 1, following P’s offer of \( \tilde{x}_1 \), let types \( z \leq u_3 \) choose \( d_1 = n - 1 \) and \( z > u_3 \) choose \( d_1 = n \). From Lemma 3.1, \( u_3 \) must choose \( d_2 = n \) following \( d_1 = n - 1 \). Type \( u_3 \) is therefore indifferent between \( \tilde{x}_1 \) and \( y_2 \), and \( y_1 \) and \( x_2(n) \). Given the value of \( x_2(n) \) from Lemma 3.1, \( u_3 = \tilde{x}_1 + y_1 - y_2 + \frac{1}{2}(w_p + w_Z)(2n - 2e - 1) \). Also from Lemma 3.1, P offers \( \tilde{x}_2(n) \) following the withdrawal of \( x_2(n) \) in period \( e \). Some type \( u'_j \in [u_3, \overline{z}] \) will be indifferent between \( x_2(n) \) and \( \tilde{x}_2(n) \).

Similarly, let \( u_2 \) be the minimum type eliciting \( \tilde{x}_1 \) in stage 1. Then following \( d_i = n - 1 \), P offers \( x_2(n - 1) \), withdraws in period \( e \), and then offers \( \tilde{x}_2(n - 1) \). Type \( u'_2 \) is the highest type that accepts \( x_2(n - 1) \) over \( \tilde{x}_2(n - 1) \).
Thus, given $d_1 = n$ and a withdrawal in stage 2, P has

$$EU^2_p(\tilde{x}_2(n)) = \left( \frac{\tilde{x}_2(n) - (2u_3' - y_2 + w_Z)}{2(\tilde{z} - u_3')} \right) \left( - \tilde{x}_2(n) - w_p(n-1) \right) +$$

$$\left( \frac{2\tilde{z} - y_2 + w_Z - \tilde{x}_2(n)}{2(\tilde{z} - u_3')} \right) \left( - y_2 - w_p n \right)$$

and for the first offer has

$$EU^2_p(e, x_2(n)) = \left( \frac{u_3' - u_3}{\tilde{z} - u_3} \right) \left( - x_2(n) - w_p(n-1) \right) +$$

$$\left( \frac{\tilde{z} - u_3'}{\tilde{z} - u_3} \right) EU^2_p(\tilde{x}_2(n))$$

The utilities $EU^2_p(\tilde{x}_2(n-1))$ and $EU^2_p(e, x_2(n-1))$ are defined in much the same way, with $u_2$ as the minimum type choosing $d_1 = n-1$, $x_2(n-1)$ and $\tilde{x}_2(n-1)$ given by Lemma 3.1, and $u_2'$ indifferent between these offers. Following $d_1 \geq n-1$, then, in stage 1 P chooses $\tilde{x}_1$ to maximize

$$EU^1_p(\tilde{x}_1) = \left( \frac{u_3' - u_3}{\tilde{z} - u_3} \right) \left( - \tilde{x}_1 - w_p (n-1) + EU^2_p(x_2(n-1)) \right) +$$

$$\left( \frac{\tilde{z} - u_3'}{\tilde{z} - u_3} \right) \left( - y_1 - w_p n + EU^2_p(x_2(n)) \right)$$

Substitution and taking derivatives gives a maximum at $\tilde{x}_1 = u_2 + y_1 - y_2 + \frac{1}{2} (w_p + w_Z)$.

Type $u_2$ is indifferent between $\tilde{x}_1$ in period $n-1$ and $x_1$ in period $\tau_1$. Type $u_1$ is indifferent between $x_1$ in period $\tau_1 - 1$ and $x_1$ in period $\tau_1$. By Lemma 1 and Lemma 2.2, $x_2(\tau_1 - 1) = 2m - y_2 + w_M$ and $x_2(\tau_1) = u_1 + w_p(n - e) - \frac{1}{2} (w_p + w_Z)$. Similar steps as for $u_3$ give $u_2 = y_2 + \frac{1}{2} (x_1 + y_1 + w_p(e - n) + w_Z(e - \tau_1 - 1)$ and
\[ u_i = 2m - y_2 + w_M + (w_P + w_Z)(n - e - \frac{1}{2}) - w_Z. \] Given the stage 2 strategies of \( z \leq u_i \) and \( z \in (u_1, u_2] \) described by Lemma 3.1, P chooses \( x_1 \) to maximize

\[
EU_P^1(\tau_1, x_1) = \left( \frac{u_1 - z}{z - \bar{z}} \right) (-x_1 - w_p(\tau_1 - 1) - x_2(\tau_1 - 1) - w_p(n - 1)) + \\
\left( \frac{u_2 - u_1}{z - \bar{z}} \right) (-x_1 - w_p(\tau_1) + EU_P^2(e, x_2(\tau_1))) + \left( \frac{\bar{z} - u_2}{z - \bar{z}} \right) EU_P^2(\tau_1, x_1)
\]

where \( EU_P^2(e, x_2(\tau_1)) \) is defined like \( EU_P^2(e, x_2(n - 1)) \) and \( EU_P^2(e, x_2(n)) \). After substituting, \( EU_P^1(\tau_1, x_1) \) is maximized at \( x_1 = 2\bar{z} - 2y_2 + y_1 + w_p(n - \tau_1 - 1) + w_Z \).

Finally, after substituting \( x_1 \), \( EU_P^1(\tau_1, x_1) \) is increasing in \( \tau_1 > e \), so P chooses the largest feasible \( \tau_1, \tau_1 = n - 2e - 1 \).

Proposition 3: In equilibrium:

1) Where P makes two offers in stage 2 for \( d_1 \leq d^w \) and \( n \) is not too large, then the expected time to resolution is decreasing in \( m \).

2) Where P makes one stage 2 offer for a given \( d_1 \leq d^w \), then the expected time to resolution is non-increasing in \( m \).

3) The expected time to resolution following \( d_i = \{ \tau_i, n \} \) is weakly higher than following some other \( d_i \).

Proof. 1) If P makes two stage 2 offers for sufficiently low values of \( d_1 \), then by Lemma 2.1, P offers \( x_2^0 = 2m - y_2 + w_M \) or \( x_2 \geq x_2^0 \). In stage 1, any type indifferent between \( x_2^0 \) and \( x_2 \) must accept the same \( x_1 \), so the type preferring \( x_2^0 \) to \( x_2 \) must be increasing in \( m \).
By Lemma 2.3, the value of $d_1$ that elicits $x_2^0$ is strictly lower than that eliciting $x_2$. Thus, the expected value of $d_1$ is decreasing with $m$.

In stage 2, P will either withdraw $x_2$ or will not. In the case where P does not withdraw, the types that elicit $x_2^0$ all choose $d_1 = n - 1$. Since P will not withdraw, types that elicit $x_2$ all have increasing utility in $d_2$, and so choose either $d_2 = n - 1$ or $d_2 = n$. Let $\eta'$, $\eta''$, and $\eta'''$ exist such that type $\eta'$ is indifferent between $x_2^0$ and $x_2$, given the first stage delays, type $\eta''$ is indifferent between $x_2$ and $y_2$, and type $\eta'''$ is the highest type eliciting $x_2$, so all $z > \eta'''$ choose $d_1 > d''$. Thus, $z \leq \eta'$ choose $d_2 = n - 1$ following $x_2^0$, $z \in (\eta', \eta'')$ choose $d_2 = n - 1$ following $x_2$, and $z \in (\eta'', \eta''')$ choose $d_2 = n$ following $x_2$.

The expected value of $d_2$, given $d_1 < d'''$, is therefore

$$E(d_2) = \left( \frac{\eta' - z}{\eta''' - z} \right) (n-1) + \left( \frac{\eta'' - \eta'}{\eta''' - z} \right) (n-1) + \left( \frac{\eta''' - \eta''}{\eta''' - z} \right) n$$

$$= \left( \frac{\eta'' - z}{\eta''' - z} \right) (n-1) + \left( \frac{\eta''' - \eta''}{\eta''' - z} \right) n$$

Note that $x_2^0$ is the lowest offer made to $z \leq \eta'$, and that P will not offer $x_2 < 2\eta' - y_2 + w_Z$ in equilibrium, since such an offer will receive $d_2 = n$ with certainty. Note also that because type $\eta'''$ is the largest type to choose $d_1 \leq d''$, $\eta'''$ always chooses $d_2 = n$. Finally, because all $z > \eta'''$ choose $d_1 > d''$, they either elicit a withdrawal in stage 1 or kill the stage 1 offers, and P therefore offers some offer $x_2' > 2\eta''' - y_2 + w_Z$ to these types. Thus,
\[ \frac{d\eta'}{dm} = \frac{d\eta' dx_0}{dx_0 dm} > 0, \quad \frac{\partial \eta''}{\partial m} = \frac{d\eta'' dx_2}{dx_2 d\eta' dm} > 0, \quad \text{and} \quad \frac{\partial \eta'''}{\partial m} = 0, \quad \text{so} \]
\[ \frac{dE(d_2)}{dm} = -\frac{d\eta''/dm}{\eta''' - z} < 0. \]

The case where P withdraws the stage 2 offer \( x_2 \) is similar, expect that some type \( \kappa \in (\eta', \eta'') \) will exist such that \( z \in (\eta', \kappa] \) choose \( d_2 = \tau_2 \) while \( z \in (\kappa, \eta''] \) choose \( d_2 = n - 1 \). The expected value of \( d_2 \), given \( d_1 \leq \min \{n - 1, \tau_2 \} \), is therefore
\[ E(d_2) = \left( \frac{\eta' - z}{\eta''' - z} \right) (n-1) + \left( \frac{\kappa - \eta'}{\eta''' - z} \right) (\tau_2) + \left( \frac{\eta'' - \kappa}{\eta''' - z} \right) (n-1) + \left( \frac{\eta''' - \eta''}{\eta''' - z} \right) (n) \]

Similar steps as those above show that if \( \frac{\partial \kappa}{\partial m} \geq \frac{\partial \eta'}{\partial m} \) or \( \frac{\partial \kappa}{\partial m} < \frac{\partial \eta'}{\partial m} \) and \( n \) is sufficiently small, then \( \frac{dE(d_2)}{dm} < 0. \)

2) Where P makes only one stage 2 offer for \( d_1 \leq d'' \), his offer is either \( x^0_2 \) or \( x_2 \geq x^0_2 \).

If P offers \( x^0_2 \), then the types choose the lower values of \( d \) in both stages are again increasing in \( m \). If P offers only \( x_2 \), then no type has elicited \( x^0_2 \), and thus any type eliciting \( x_2 \) is non-increasing in \( m \).

3) In stage 2, if P withdraws \( x_2 \) and offers \( \tilde{x}_2 \), then Z’s utility is increasing in \( d_2 \leq n - 1 \), so that \( d_2 = n - 1 \) or \( d_2 = n \). All types that do not elicit \( \tilde{x}_2 \) must choose some \( d_2 < n - 1 \).

In stage 1, once P offers \( \tilde{x}_1 \), P chooses the same \( x_2(d_2) \) for any \( d_2 < n \) by Lemma 2.2, and so Z again chooses either \( d_1 = n - 1 \) or \( d_1 = n \). If Z does not elicit a withdrawal in either stage, then Z chooses \( d_i \leq \tau_i < n - 1, i \in \{1, 2\} \). If P does not withdraw, then Z may
choose $d_1 < n - 1$ to elicit $x_2^0$, and otherwise $d_1$ and $d_2$ are the same as the case following withdrawal. A similar argument to that of Proposition 3.1 shows that the expected value of $d_2$ is smaller when $d_1 < n$ than when $d_1 = n$. 


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