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Winning the Waiting Game: Senatorial Delay in Executive Nominations

by

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Dedicated to my mother, Linda Ostrander (1959 - 2012)

Chapter 1

Introduction

[Presidents] make few choices that are more important than those concerning the type of people who will serve with them in the administration. In affecting the everyday work of government, these hundreds of personnel selections add up to a cumulative act of choice that may be at least as important as the electorate's single act of choice for president every four years.

– Hugh Heclo, "A Government of Strangers", 88.

[O]ur accumulation of knowledge on how Presidents are chosen vastly exceeds our knowledge of how administrations are chosen.

– Calvin G. Mackenzie, "The Politics of Presidential Appointments", xi.

Politics and Appointments

Executive appointees inhabiting the top ranks of federal agencies are essential for policy implementation and ensuring good governance. These leaders shape the character and capacity of their home agencies through dozens of everyday decisions that make up the workload of government. By comparison, the United States employs a far greater number of such political appointees at a much deeper level within federal

agencies relative to most peer democracies. This difference is non-trivial. The power to appoint key officers for federal agencies allows political actors to indirectly influence the priorities and performance of federal agencies. Because of their potential influence on policy, Hugh Heclo noted the cumulative weight of executive appointments is potentially as important as picking presidents.

The president, however, does not make these top appointments alone and must rely upon the "advice and consent" of the Senate for each nominee's final confirmation. The confirmation requirement allows inter-branch rivalry to creep into the process and creates fertile ground for the continuation of combative legislative politics through other means. In order to thwart a president's ambitions, the Senate – or a sizable minority therein – may deny confirmation to a president's appointees in order to delay or defeat the influence on policymaking that such appointments would create. Political science literature has long supported the belief that political appointments are key to controlling and influencing the policy output of the federal bureaucracy. If this is true, then the delay or denial of such power may be an equally important consideration for understanding politics. While most nominees are in fact eventually confirmed, the failure of presidents and the Senate to fill such top-level agency positions, however, is increasingly common.

The contentious politics of appointments often influence the implementation and execution of public policy. One recent example of this phenomenon is the case of the Consumer Financial Protection Bureau (CFBP). In the wake of the late 2000s' financial crisis, the CFPB was created as a part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and was designed to protect American consumers from the kind of risky financial practices that had led to the recession. The provisions enacted in Dodd-Frank required that the director of the CFPB be appointed before the agency was able to gain much of its new regulatory

power. In response, Republican leaders in the Senate promised to filibuster *any* nomination of a CFPB director until the structure of the agencies were changed so as to dilute its regulatory power. The requirements to staff the agency thus allowed political opponents an additional opportunity to defeat the policy goals of Dodd-Frank post-enactment. Ultimately, the stalemate over the CFPB director was only – perhaps temporarily – resolved with the controversial recess appointment of Richard Cordray. While this specific example is an extreme case, it is only one example of policy-motivated delay occur within the current political environment.

Some nominees, like Cordray, who are facing extreme delay are eventually appointed unilaterally by a president. Far more delayed nominees, however, end up waiting months or even sometimes years for a confirmation vote that never comes. Some of these doomed cases are removed through presidential or personal withdraw. Many more cases are ended by the automatic return of nominations at the end of a Congress. For example, when the 112th Congress came to an end, dozens of nominations that had not yet been voted on were "returned to the President" and the Obama administration would have to renominate these individuals in order to keep them in consideration. The vast majority of failed nominations do so in this quiet manner at the end of a Congress while never having actually received a direct vote. In most cases, the delayed nominees are qualified. The example of the CFPB shows that such cases are being delayed for strategic reasons unrelated to the abilities of the nominee.

Perhaps the best example of a failed but qualified nominee is the recent case of Peter Diamond. Peter Diamond is a professor of economics at MIT and the recipient of a Nobel Prize in economics for work he has conducted on the labor market and unemployment. In April of 2010, he was nominated to be a governor of the Federal Reserve, which was then still at the forefront of efforts to help jump start a broken

economy in the wake of the Great Recession. Despite his clear qualifications, Richard Shelby, a Republican Senator from Alabama and the ranking minority member on the Banking Committee, publicly stated that Diamond was unqualified for the post. Ultimately, Diamond withdrew his own nomination when after many months of waiting it became clear that it had stalled in the face of unbreakable opposition stemming from the *minority* party members on the committee. He attributed the failure to a mixture of partisan politics, a "distorted" confirmation process, and a fundamental lack of understanding monetary policy in the Senate (Diamond, 2011).

The examples of Cordray and Diamond contain several valuable lessons concerning how nominations proceed through the Senate. First, a large minority of senators can effectively block nominations by delaying them to the point of failure. Perhaps the most frequently used mechanism of delay is a hold, or threatened filibuster, which senators can use anonymously as a signal that they intend to object in the event of a unanimous consent agreement (UCA). Because floor scheduling necessarily relies heavily on UCAs, a hold by a single member of the Senate has the power to significantly delay a nominee. While dilatory tactics can be overcome by a super majority with the use of cloture, the time required to call cloture on each nomination far exceeds the time available in a single session of Congress (Millhiser, 2010). Furthermore, majority leaders are responsible for the entirety of a legislative agenda and are unlikely to expend great effort overcoming resistance on individual nominations to lower offices. As such, nominations may effectively be delayed to death by a group smaller than that which would be required to sustain a filibuster by defeating a cloture motion.

Second, partisan delay is often couched in the rhetoric of disqualification. This rhetoric has been noted by prior studies of failure (Bond, Fleisher, and Krutz, 2009; Carter, 1994; Krutz, Fleisher, and Bond, 1998). While allegations of impropriety

have damaged many a nomination, it is important to point out that in many cases these assertions are likely "post hoc rationalizations rather than causes of difficult and failed nominations" (Bond, Fleisher, and Krutz, 2009, 233). It is very likely that such allegations are motivated by partisan interests. Such criticisms and a focus on disqualifications has become more commonplace since the failed nomination of Robert Bork by President Reagan in 1987 (Carter, 1994). Presidents have responded to this trend by increasing the vetting required of candidate nominees over the past few decades. Regardless of actual qualifications, however, the Diamond example shows that any qualified candidate can be successfully accused of lacking necessary qualification.

Third, the examples of Cordray and Diamond demonstrate the importance of impatience on the part of the nominee or the president. Presidential impatience can lead to recess appointments while impatience on the part of the nominee can make delay effective by influencing withdrawal. Many nominees are academics or professionals for whom a nomination to high office requires that regular employment cease in expectation of receiving an appointment. With this in mind, the pressure of enduring perhaps 6 to 18 months of stalemate is more than many nominees are willing to endure. Similarly, presidents who are interested in pressing their policy agendas and controlling bureaucratic output may be equally impatient to see an appointment proceed quickly. Presidents may in fact be willing to withdraw a nominee in the face of delay in order to achieve a quicker confirmation with the second. In either case, the strategic delay of a nominee can succeed in making a confirmable nomination fail even without forcing a nomination to be returned to a president at the close of the Congress.

The cases of Richard Cordray and Peter Diamond are not unique. Many nominations with strong majority support are eventually withdrawn or returned rather

than receive confirmation. Despite the fact that most nominees to executive branch posts are confirmed by the Senate with strong majorities (Krutz, Fleisher, and Bond, 1998), senatorial delay in the confirmation of executive nominees has become a common feature of the contemporary political landscape (McCarty and Razaghian, 1999; O'Connell, 2009). Delay is far from innocuous and often has policy implications. Delay has become a partisan issue with both Democrats and Republicans alternatively accusing each other of using the tactic to deny appointments to key posts. While the high-profile positions such as agency heads are regularly and quickly filled, one scholar has noted that vacancies at lower level leadership posts often mean that bureaucratic agencies are "neckless" (Light, 2004).

Simple delay can have significant consequences and can often lead to the failure of a nomination. While delay may not increase the likelihood that a nominee fails a vote, it can bottle-up a nomination within a committee or deny it from receiving an up-or-down vote on the Senate floor. As noted above, if a nominee fails to receive a vote before the end of a congressional session, the nomination is returned to the president. Functionally this outcome is as much of a failure as a lost vote. Delay can also cause the president or the nominee to withdraw the nomination once it becomes increasingly certain that an individual will not receive enough votes to overcome obstructionism. Overall, Krutz, Fleisher, and Bond (1998) have noted that overt failure are rare in the nominations process and that most failures are quiet and difficult to recognize. Furthermore, Bond, Fleisher, and Krutz (2009) note that most of the failures that do occur are the result of strategic partisan delay rather than a true lack of nominee qualifications.

Why are cases such as Richard Cordray and Peter Diamond so prevalent in the executive nominations process? The most direct answer is that nominations are an important element in controlling the nature of bureaucratic policymaking. Personnel

is policy, and as such nominations are fought over just as legislation is. A secondary, but perhaps more important observation, is that time is a valuable resource politically. To slow down a president's nominees is to slow down the presidential agenda. As more policy is either made or implemented at the agency level, the value of delay to a president's opposition increases proportionally. In this way, the denial or delay of key nominations is just as important politically as making nominations. Furthermore, there is a value for individual senators in opposing a nominee who advocates a particular policy or one who has ethical or other liabilities.

The Nominations Process

Article II of the Constitution provides presidents with the power to appoint individuals to public office. Through the strategic staffing of these posts with like-minded individuals, a president is able to influence policy outcomes vicariously. The power to staff the bureaucracy, however, is not unilateral. Rather, a president can only appoint individuals with the "advice and consent" of the Senate. In this way, while a president is able to appoint officials, these appointees must also be approved by Congress in order for the appointment to take affect. As this is a shared power, it is also, naturally, a source of conflict between the two branches with the competition over who to appoint increasing in proportion to the degree that executive and legislative preferences diverge (Lewis, 2003).

Presidential appointments with Senate confirmation (PAS) comprise a little over one thousand federal employees. This does not include, for example, all military commissions, judicial nominees, or appointments that a president can make without confirmation. While nominees are very rarely rejected by the Senate outright (Bond, Fleisher, and Krutz, 2009; Krutz, Fleisher, and Bond, 1998), there exists wide vari-

ation in the time to confirmation (McCarty and Razaghian, 1999; O'Connell, 2009). If time runs out and a nomination has not been confirmed before a congressional session ends, remaining nominations are "returned" to the President. In order to remain under consideration, these nominees must be re-nominated at the start of the next congressional session. Though not expressly rejected by the Senate, many of these individuals had been under consideration for several months or more and were not re-nominated at the beginning of the following Congress. When nominations that have been delayed for a long time do come up for a confirmation vote, though, most are approved by large majorities. This implies that the delay was caused by minority obstruction rather than widespread disagreement over the nominee in question.

Table 1.1 shows the textbook order that nominations usually take through the Senate. It is important to note that there are multiple pathways from nomination to confirmation. In every case, first stage is pre-nomination vetting at which point a president, or more likely particular members of the executive staff, sort through long lists of potential nominees and narrow the field ultimately to one qualified candidate with a high likelihood of passing Senate confirmation. At this point, names may be "floated" publicly or privately with key members of Congress as well as party leaders. Most potential nominees are weeded out of the process at this early stage, but these failures are only rarely made public. Once a nominee is chosen and agrees to serve, a president will formally nominate an individual for a post by sending the name and position to the Senate for confirmation. At this point, the nomination is immediately referred to the appropriate committee that oversees nominations to the relevant agency or board. After these first steps, nominations can take a variety of pathways to end in either success or failure.

All formal nominations by the president reach a committee for consideration, but not all nominations make it any further. Like laws, most nominations that fail do

Table 1.1: The Executive Nomination Process

Pre-Nomination Vetting
↓
Formal Nomination
↓
Committee Referral
↓
Committee Vote
↓
Senate Floor
⇓
Success, Failure, or
Returned to President
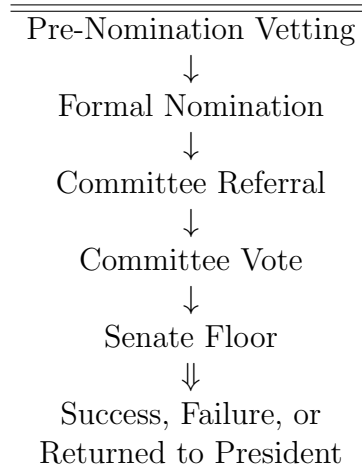
so without receiving a vote in committee. At this stage, the committee may decide to hold a hearing to gather more information or interview the nominee. This step is not required and many nominations succeed without a committee hearing. The standard pathway out of committee is for a nomination to pass a committee vote, either successfully or otherwise. Nominees are discharged from the committee with either a favorable or, more rarely, an unfavorable report. The few nominations that fail to gain support at this early stage and are usually withdrawn by the president due to the unlikely possibility of confirmation. Alternatively, it is also possible to pull nominations out of committee through a unanimous consent agreement (UCA) at which point a direct vote can be taken. The flexibility of using UCAs for scheduling makes this alternative pathway common and it does not imply anything particularly special or distinct about the nomination itself. Once on the floor for consideration, a nomination can: go nowhere and linger without a vote, receive a direct vote and win, or receive a direct vote and lose. Very few nominations come up for a direct vote and lose.

For a variety of reasons, not all nominations are equal in terms of their importance to policy formation as the positions they will fill differ in their scope of authority, public visibility, and capacity for autonomous action. The first major distinction between nominees is the position level to which they are nominated. High-level appointees, such as cabinet secretaries, have broad authority and high visibility. For many of these high-level posts, especially cabinet level appointments, there is a general perception among the public and Congress that new presidents should be able to choose their own people (Mackenzie, 1981). In contrast, low-level appointees, such as members of scholarship boards or assistants to under secretaries, have more narrow authority, low visibility, and there exists far less deference towards the president with respect these choices. It is also the case that higher level nominations have a somewhat greater freedom of action and broader scope of authority than lower level appointments who often serve in a support capacity or on a narrowly defined function. These differences in relative importance imply that varying standards and scrutiny will be applied to nominations depending on their level. As such, the position level to which an individual is nominated is likely to influence the process of confirmation.

The second major distinction between nominations concerns autonomy. Independent regulatory commissions (IRCs), such as the Federal Election Commission, serve fixed terms that are not necessarily co-terminus with presidential administrations. In IRCs, the structure of the institution is designed such that the members are as free as possible from direct executive or legislative influence. This structure can be the result of providing the government with credible commitment (North and Weingast, 1989) or, as with the Federal Reserve Board, the insulation may be due to political compromise aimed at checking competing interests (Jeong and Sobel, 2009). Institutional insulation provides IRCs with greater autonomy of action and independence from other political actors. For example, a president cannot fire a member of an IRC

for casting unfavorable votes but a president can ask for the resignation of a cabinet official who does not support the priorities of the administration. As such, there are important fundamental differences between kinds of nominations.

Presidential appointees may enter office with the president, but they do not always stay the full term. Some offices, such as the chairman of the Federal Reserve Board, serve fixed terms but the majority of nominees serve indefinite terms with boundaries implicitly set at presidential transitions. Dull and Roberts (2009, 436) report that the average nominee lasts approximately 2.5 years in office, although this number varies widely by position. Gill and Waterman (2004) point out the contradiction inherent in staffing the bureaucracy, a key mechanism by which presidents promote their agenda, with staff that leave their offices just as they are becoming familiar with the job at hand. While some nominees may burn out due to the stress of their office (Gill and Waterman, 2004), it is also the case that federal pay is relatively lower than private sector opportunities and that many nominees may leave for greater benefits (Volcker, 2003). In any case, not all nominees serve the same length of time and that many voluntarily leave office before presidential terms are complete.

While the process described above is the normal pathway for an individual to take an appointed position, it is not the only way it may happen. First, the Constitution provides for a mechanism by which presidents can unilaterally fill vacancies in federal bureaucracy during congressional recesses. Recess appointees cannot serve indefinitely, and must be formally nominated and confirmed to stay in office beyond the end of the next session of Congress. Despite these limitations, recess appointments are a means of bypassing the requirement of Senate confirmation (Black et al., 2007, 2011; Corley, 2006). Similarly, a president may use a series of interim appointees who act in an official capacity without having received confirmation. The rules on interim appointees varies greatly between agencies/positions and has evolved over time.

Although presidents do not have complete authority to reorganize executive offices, presidents may seek an alternative to the regular nominations process by creating policy "czars" who wield authority without confirmation requirements (Sollenberger and Rozell, 2012). Examples of such cases are drug or energy czars that are created by presidents to oversee a broad policy area.

While adapting to Senate delay and obstruction, recent presidents have also called for reform of the nomination-confirmation process. Reforms take many forms but in general they are aimed at increasing recruitment and retention of qualified nominees, changing the procedural rules for nominations to make obstruction more costly or less potent, or through shifting the authority to make or confirm nominations. While presidents desire reforms for the benefits of speedier confirmation, senators often prefer reforms that limit the use of recess appointments, policy czars, or interim appointees. Standing in the way of reform is the struggle over power between the two branches coupled with opposing partisan interests. While some proposals may reduce senatorial delay, at least some senators would see this as undermining the Senate's ability to respond to nominations as it wishes. Because reform risks having the effect of advantaging one branch over another it is unlikely to occur. Though reform may be generally unlikely, the desire to reform is still an integral part of understanding the nominations process.

Investigating Conflict in Nominations

Failure to win confirmation in the executive nominations process is the most overt sign of partisan conflict, but such failure tends to be rare (Bond, Fleisher, and Krutz, 2009; Krutz, Fleisher, and Bond, 1998; Mackenzie, 1981). A much more common sign of conflict is delay in Senate action on nominations. Using the procedural advantages

inherent within Senate rules and derived from the filibuster, a determined minority of senators may keep a nominee tied up indefinitely even though the nomination would succeed on an up-or-down vote. Obstruction and the inability to keep leadership posts in agencies filled has led to an increasing number of vacancies (O'Connell, 2009). Delay is not an anomaly, idiosyncratic, or a rarity; rather it is a common feature of the nominations process and a perennial focus of partisan attention. Nor is delay innocuous; rather it has the ability to change the character of an agency by influencing the content of leadership posts. If we believe that nominations are important for controlling bureaucracies or for ensuring the efficient performance of duties, then surely their denial is equally meaningful politically. As such, understanding the motivations for and patterns of delay is an essential component to understanding the nominations process.

While literature on executive nominations has noted the existence of strategic partisan delay in the nominations process (Bond, Fleisher, and Krutz, 2009; McCarty and Razaghian, 1999; O'Connell, 2009), there are several remaining questions as to the motivations behind such strategies. For example, prior research has noted that the vast majority of executive nominations end in a successful confirmation. What, then, is the value in delaying the inevitable? Furthermore, in the case of a nomination that has been delayed for more than a year, why does a president not simply withdraw the nomination and submit a new nomination for an individual who is more likely to be confirmed? There exist a great number of cases where a nominee who is all but certain to win confirmation is delayed or in which a nominee who has been waiting for over a year to receive confirmation is left waiting until the close of a congressional session. Because of the frequency of long delays, they appear to be deliverate and often the product of partisan advantage.

Naturally, the bulk of existent research on nominations is concerned with who is appointed given the preferences of the relevant actors (Chang, 2001; Moraski and Shipan, 1999; Nokken and Sala, 2000). For example, the focus of research on appointments to the Supreme Court and other collective voting bodies, such as the Federal Reserve Board, is usually on median-shifting nominations and their potential effects on policy. Delay is different. Delay is not necessarily about who is appointed but rather when and, more importantly, what occurs while no decision is reached. To understand delay it is just as important to understand the strategic value in delaying an appointee who *will* be successfully appointed as it is to understand delay as a means of forcing a nomination to failure. In this sense, the goal of understanding strategic delay is to find the *intrinsic* value of delay, or the value of delaying a nominee who will win confirmation.

To understand the value of delay, one must consider the value of time to the relevant actors in bargaining over nominations as well as the reversion point of an unsuccessful, or ongoing, bargain. Specifically, the president and members of the Senate are not exclusively concerned with who fills an office. While the actual nominee may be the primary consideration, it is also the case that presidents wish to assemble their staff as quickly as possible because the amount of time nominees are in office is directly related to how much policy they can influence. Hence, presidents care not only about a nominee's ability to receive confirmation but also how fast. For example, a president may prefer a less ideologically allied nominee who quickly passes confirmation over their most favored nominee who is only confirmed after several years of awaiting confirmation. In this way, presidents are motivated by both time and policy considerations and there is a tradeoff between these elements that shapes the strategies of presidents and senators.

As the branches bargain over a nomination, the relevant vacancy within an agency's ranks is usually filled with a career civil servant. As such, the ideological predisposition of agencies and boards serve as a kind of reversion point for stalemates. Recent research by Lewis (2008) has noted the effect of these agency ideological predispositions on politization, with agencies of a disposition opposite to a president being more likely targets for increasing political control. Building on the work of David Lewis, I argue that such agency ideological predispositions should play a similar but opposite role in the strategic delay of nominees by presidential opponents in the Senate. Specifically, senators may find it beneficial to delay the appointment of individuals to agencies that have a disposition *opposite* that of a president. While delaying presidential allies may have no effect on agency output, delaying presidential opponents can have the effect of limiting presidential control and thus preventing a shift policy output. In this way, the delay is likely to be conditional and heavily influenced by the level of convergence or divergence in policy preferences between the given agency and the president.

Within the following chapters, I will investigate the foundation of strategic delay in the executive nominations process. The goal of this research is to provide a theoretically driven account of the intrinsic value of strategic delay and then to test the predictions of such an account empirically. The findings ultimately suggest that delay in executive nominations is patterned, predictable, and partisan in nature. Furthermore, delay in executive nominations is far from innocuous and is likely driven more by strategic calculations concerning policy influence rather than the necessities of vetting candidates for quality control. In this sense, delay is not simply the result of universal minority obstructionism nor is it due to an increasingly stringent vetting process. The influence of delay on the whole of the nominations process is manifold. The immediate effects are to increase and exacerbate existing vacancies and to cre-

ate conditions under which many nominations eventually fail to receive confirmation after never receiving a vote. To counter the deficiencies in the nominations process, a multitude of reform proposals have been forwarded.

Outline of Future Chapters

The following chapter, Chapter 2, provides a brief history of the executive nominations process with special emphasis given to both the constitutional foundations of the nominations process and the practices that have developed within the last few decades. To begin, I provide a historical overview of how the nominations process was codified in the Constitution after much deliberation as well as a discussion of how inter-branch relations and rivalry influenced the development of the nominations process in the early years of implementation. While these precedents continue to influence the nominations process, I stress that the nature of the executive nominations process has changed greatly over time and that each nomination should be considered within the context of its own particular historical epoch.

Chapter 2 emphasizes the changing role of political parties and the growth in power, influence, and size of the executive branch as driving forces leading to change in the executive nominations process. Empirically, this chapter will examine some aggregate patterns in the executive nominations beginning shortly before the modern presidency and extending to contemporary politics. Within the context of contemporary politics, I will explore recent trends in nominations through the description of illustrative cases and examples. In particular, an extended analysis of the recent difficulties of appointing National Labor Relations Board members will be used to illustrate and discuss the present state of nominations politics. In examining the

history of nominations, this chapter will also supply a common basis for future, more empirical, chapters.

In Chapter 3 I provide the theoretical basis and substantive motivation of the project as a whole. This chapter first briefly outlines the motivations behind bureaucratic control and discusses the conflict within nominations as both inter-branch and partisan struggles between presidents and the Senate to control the policy output of executive agencies. In addition to strategic motivations, other sources of delay and failure in the executive nominations process are listed along with some discussion as to the expected patterns of delay that each source would be expected to produce. The result is a description of the possible motives and mechanisms of delay and failure. In creating a broader theory of strategic confirmation delay, I first outline and critique previous models used to understand the nominations process. Using insights from these prior models, I formulate and defend a conditional theory of strategic nominations delay in which I suggest that the most profitable delay will be gained from holding back nominees to those agencies opposed to a president's agenda.

Chapter 4 moves to an empirical investigation of delay in the executive nominations process. The chapter examines the rate, the length, and the distribution of delay across nominations and time in order to present a picture of delay in the context of contemporary politics. To create this picture, the chapter introduces an original data set of policy relevant nominations from 1987 to 2010. Using these data on nominations, I directly test hypotheses stemming from Chapter 3 as well as other expectations found in prior literature concerning when and where strategic delay is expected. The investigation is conducted using a survival model analysis of over 7,000 nominations and the findings are discussed in detail. The results of this investigation support the intuitions developed in Chapter 3 that delay is most profitable, and therefor likely, against nominations to federal agencies that have an ideological

predisposition opposed to that of the president. The results also indicate that mid-level nominations and appointments to IRCs are far more likely to be delayed than other nominations. Together, these results demonstrate that not all nominations are equally targeted for delay and that widespread variation exists in variables at the agency and position level.

Chapter 5 investigates the predictors of failure in the nominations process. In particular, this chapter differentiates and analyses various types of failure in order to discuss the prevelance of nominees being "delayed to death" as opposed to being withdrawn or rejected via a Senate vote. Using the same data introduced in Chapter 4, the prevalence and timing of failure throughout the stages of the nomination process is tracked. Using prior studies as well as the results of Chapter 4, I generate and test hypotheses related to the patterns and likelihood of failure. This chapter provides many new insights into failures within the executive nominations process. Importantly, when failures due to delay are considered alongside withdrawn and explicitly rejected nominees, the actual failure rate in the process is much higher than previous studies would lead one to anticipate. Furthermore, intuitions from previous literature that most failures are the result of strategic delay are supported. Building on these findings, the results of the model suggest that failures can also be predicted by a variety of political and institutional contexts that suggest the presence of strategic considerations. In this sense, failures are not idiosyncratic or innocuous, but rather an integral part of understanding how nominations proceed.

Given the difficulties imposed by recent tends towards greater delay and failure in the executive nominations process, it is unsurprising that a great variety of reform proposals and adaptations have developed in response. Chapter 6 looks at the recent history of reform proposals aimed at streamlining the executive nominations process by increasing recruitment and retention, reducing procedural hurdles, and finally

shifting nomination authority. Both proposed and theoretical reforms are considered on the basis of their advantages and disadvantages as well as their likelihood of implementation. Particular attention will be given to the recently passed Senate proposal to eliminate approximately 200 positions from the list of appointments requiring Senate approval. In addition to these reforms, I will discuss presidential adaptations to a slower nominations process that include using more recess appointments, interim appointees, and policy czars. Given the range of reforms and adaptations, I speculate on the viability of potential reforms and the future of the nominations process as a whole. Ultimately, I conclude that strategic calculations will often undercut reform efforts and furthermore that most reforms will not strike at the true partisan origins behind the difficult nominations process.

Chapter 7 provides an overview of the investigation and discusses the findings of all previous chapters together as a summation. In this chapter I will outline the theoretical and empirical contributions of the work as a whole and describe how these findings address and add to the current literature on executive nominations. Moving beyond the content of this study, I will point out some limitations in the analysis and discuss potential alternative analyses that might be used in future studies to address other interesting aspects of nominations. This chapter will also discuss potential research that is suggested on the basis of the findings in the previous chapters. I will conclude with thoughts on the future of the nominations process and the potential for reform.

Chapter 2

Constitutional Origins and History

[A]ny description of the relationship between the President and the Senate in the exercise of the appointment power must always be regarded as time-bound. Patterns of interaction or influence are rarely stable for long. Only variables in this relationship are constant.

– G. Calvin Mackenzie, "The Politics of Presidential Appointments"

Nominations Over Time

As noted by Mackenzie (1981), the executive nominations process has gone through several divergent historical iterations and, as such, all nominations must be understood within the context of their own political epoch. Beyond its origins in the Constitution, the nominations process has been influenced by the necessities of practical politics, the development and later decline of national parties, the creation and later dismantling of a spoils system, and perhaps most importantly the creation of a modern, institutionalized presidency. Recent trends in the executive nomination process are the offspring of these historical events and many modern conflicts trace their

origins to the Constitution itself. It is important to observe, however, that intuitions developed in a historical study of nominations in one era may not necessarily apply to nominations generally across time. As new precedents are created, other practices may be set aside as the political contexts change. Because of these trends, time is an all important consideration for understanding the nominations process.

In the following chapter I provide a brief history of the executive nominations process from its constitutional origins through early precedents and up to recent trends. First, I explore the early conceptions of executive nominations through the debates that took place at the Constitutional Convention. Next, I outline some of the basic features of the Appointments Clause as adopted for the Constitution. Given this structure, I explore some of the early precedents set in the first presidential administrations that still influence present nominations. When discussing the history of nominations, I place special emphasis on the changing political landscape including the evolving role of political parties, the creation and decline of the spoils system, and the institutionalization of the presidency. Using the prior history as background and a point of comparison, I explore trends in executive nominations over the last 30 years. This chapter will supply a common basis for future theoretical and empirical chapters.

The Early History of Nominations

Between the adoption of the Constitution and the creation of the modern presidency under Franklin Roosevelt, the nominations process underwent significant change in terms of practical politics. The basic structure of the nominations process has its origins in the Constitutional Convention and the institutional compromises leading up to the adoption of the U.S. Constitution. The Constitution, however, is only the

first rather than the final word on how nominations actually take place. Like many other aspects of the Constitution, passages related to the power of nomination and appointment left many details open to future interpretation. Immediately after the Constitution was adopted, the ambiguity of the law left many practical questions unsettled. As such, the actual procedure of nominating officials was fought over and negotiated through a dynamic inter-branch process. The legacy of this dynamic process is a body of precedents settled during these early years. These precedents were the inheritance of future eras and many of them remain in force as rules and norms today. Historical precedents, past and present, set the stage for all of the changes that have taken place in the modern executive nominations process.

Constitutional Origins

The Constitution divides the authority to appoint high officials between the President and the Senate. Article II Section 2 of the U.S. Constitution reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

While the President maintains the sole ability to nominate, these nominees must also face senatorial confirmation before taking office. Like many aspects of the Constitution, this division of authority is the result of a political compromise in which neither side quite gets what they want. Unlike the Great Compromise, the settlement on the

final language of the Appointments Clause was not the result of conflict between large and small states; rather "it was a compromise ultimately between those who believed in and those who feared a strong executive" (Gerhardt, 2000, 27). The delegates were divided between those who preferred presidential predominance over the appointment of officials and others who preferred that this power be bestowed on Congress or the Senate alone. The resulting structure of the executive nominations process was a merging of both groups' concerns.

Delegates to the Constitutional Convention, who supported a strong executive with centralized power, sought a system of appointments in which the President had sole authority to nominate officials. This group – which included Madison, Hamilton, and Gouverneur Morris – "worried that granting the appointment power to the national legislature would produce cabals, intrigue, and faction" (Gerhardt, 2000, 17). Furthermore, as the legislature was an actor with multiple members, the responsibility for the failure of an unqualified appointee would be obscure, and thus each member would be able to deny charges of negligence. Because they found the legislature unfit to make appointments, the group favored more executive authority in selecting nominees. They argued, by way of comparison, that as a unitary actor a president would be free from the temptation to trade votes on unqualified candidates. Furthermore, a president with sole authority over appointments would be forced to take responsibility for each officer and thus would choose only qualified individuals.

In opposition to strong executive control over nominations, delegates who supported a more decentralized government conceived of a system in which the national legislature controlled the appointment of high officials. This group – which included Benjamin Franklin, Elbridge Gerry, and George Mason – "feared that granting the appointment power to the executive would lead to monarchy" (Gerhardt, 2000, 17). Moreover from a practical standpoint, as a single individual it was thought that the

President would not be able to stay "adequately informed" as to the qualifications of so many potential nominees for a great number of offices (Harris, 1953, 18). Due to these considerations, and consistent with their intention of creating a relatively weak executive, this group of delegates proposed that the Senate have the authority to nominate and appoint high officers.

The final compromise expressed in the Constitution, which included both presidential nomination and senatorial confirmation, was created in order to address the concerns of each side. As Hamilton notes in Federalist No. 76, the arrangement would give a president the same motivation to select qualified candidates as the president alone would maintain the responsibility of nomination. At the same time, however, the opportunity to engage in favoritism, corruption, or executive aggrandizement would be checked by the necessity of senatorial confirmation. Hamilton (457) described the requirement of senatorial confirmation as "powerful, though, in general, a silent operation" as the threat of rebuke would be enough to preempt unqualified presidential nominations. Ultimately, the compromise favored stability over efficiency, and the requirement that both branches take part in the nomination process paved the way for future inter-branch rivalry.

Even after a settlement over the appointments process was reached, the exact division of powers between the President and the Senate remained ambiguous. Hamilton, one of the proponents of strong executive power, believed that the President maintained sole authority in the pre-nomination process. In Federalist No. 66 Hamilton wrote that:

> It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There, will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the

Executive, and Oblige him to make another; but they cannot themselves *choose* – they can only ratify or reject the choice he may have made. They might even entertain a preference to some other person at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their favorite, or upon any other person in their estimation more meritorious than the one rejected. (Hamilton, Madison, and Jay, 1961, 405)

In this way, Hamilton viewed the confirmation process as an up-or-down vote with little attention given to the possibility of suggesting nominees or offering alternatives because only a president had nominating authority. Harris (1953, 28) notes, however, that Hamilton "oversimplified the problem" and ultimately failed to predict "the influence which political parties were soon to exert on appointments." Sollenberger (2008) also stresses the point that the Senate, given the language of "advice" and the necessity of senatorial approval, has always played a role in the pre-nomination stage of executive nominations. It is important, however, not to confuse deference to senators as deference to the Senate as members of Congress have often wielded power in nominations primarily through their association with a political party rather than their office.

While the President's power to appoint is checked by the requirement of senatorial confirmation, in very particular circumstances the Constitution gives the President authority to make interim appointments during periods in which the Senate is in recess. Article II Section 2 of the U.S. Constitution states that "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate,

by granting Commissions which shall expire at the End of their next Session."[1] These positions are thus relatively temporary and would be held only until the interim appointee was confirmed by the Senate (in which case the normal term of service would apply) or until the end of the congressional session at which point the office became vacant again. As such, this power does not necessarily provide a means of bypassing the traditional nomination procedure. In an era during which Congress was often out of session for months at a time, the provision for recess appointments was necessary to ensure that vacancies in high offices did not arise and disrupt the functioning of government. In the modern presidency, this power has become one of many unilateral presidential powers that is often the site of conflict between presidents and Congress (Black et al., 2007, 2011).

The Constitution only names a handful of individuals who must be nominated by the President and appointed with confirmation by the Senate. The intention was not to require a president and the Senate to appoint all members of the federal bureaucracy and judiciary, but rather only the high-level offices. As noted in the quote of Article II Section 2 above, it was left to Congress to decide which other offices required senatorial confirmation and which offices could be appointed by the President or relevant high officers such as the head of a department. In this way, many executive nominations require Senate approval because of statute rather than constitutional requirements. This is an important aspect of the Appointments Clause when it comes to understanding the growth of patronage in the spoils system as well as later civil service reforms. While a handful of positions must be Senate confirmed,

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[1]There is some ambiguity as to the meaning of word "happen" with respect to recess appointments. In particular, it is unclear whether the Constitution implies that the vacancy must occur during the recess or whether it must simply exist during the recess in order for the President to make a recess appointment. Through time, the later interpretation of "happen to exist" has been widely accepted in both thought and practice (Harris, 1953, 256).

the Constitution allows for a great deal of variation in how "inferior" officers are created and selected.

Precedents in the Early Presidency

As noted above, the Constitution was far from the last word on how executive nominations should function in practice. As time passed, precedents were set as nomination politics continued to develop. The first precedents were set by George Washington, and perhaps the first precedent set was that nominations were to be sent by a president to the Congress via written message rather than personal communication. More importantly, Washington set the tone for the relationship between the President and Congress by engaging in consultation with legislators while also insisting that that he alone was responsible for nominations and rejecting "any attempt at dictation" (Harris, 1953, 37). In this way, Washington sought a measure of independence from the Congress when making the actual decision. Sollenberger (2008), however, describes how precedents evolved over time in order to allow Congress into the pre-nomination process so as to "trump" the executive's exclusive power to name nominees.

One of the important precedents created in Washington's administration was the practice of senatorial courtesy, which allowed for members of Congress to participate in the pre-nominations process in some cases. Senatorial courtesy is a practice by which the Senate votes to reject nominations for state-based offices to which senators in the relevant state object. Nominations to offices that influence policy within a state, such as customs agents and federal judges, are politically important to the home-state senator. As such, the Senate as a whole has a vested interest in maintaining customs providing for discretionary control over nominations that might influence

policy within a senator's state. So as to protect their own interests through reciprocity, senators will support a colleague in rejecting unfavorable nominations to positions within that colleague's home state. Because of this threat, presidents that are making a nomination within the boundaries of a given state will often consult the co-partisan Senator(s) from that state before making a nomination as to do otherwise might lead to failure on the floor. It is important to point out, however, that senatorial courtesy applies only to those nominations with power confined within a state's boundaries and that more national offices are not generally subject to this practice.

The first instance of senatorial courtesy, and the progenitor of the modern practice, occurred within the first three months of the first congressional session. George Washington had named Benjamin Fishbourn, who had "excellent qualifications," to be the naval officer for the Port of Savannah, but the two senators from Georgia had a candidate of their own in mind for the position and as a courtesy to these senators the Senate voted to reject the nomination of Fishbourn (Harris, 1953, 40). Washington engaged in more consultation after this incident and even went as far as seeking the advice of House members (Harris, 1953, 41). While this level of participation in the pre-nomination process was not envisioned by the Appointments Clause, and certainly not by Hamilton's interpretation, future presidents have followed this practice as a matter of practical politics. Within the realm of judicial nominations, this usually informal practice has been institutionalized in the form of the "blue slip" process.[2] This is a clear example of how the necessity of *ex post* Senate approval can provide *ex ante* bargaining power within the context of executive nominations. Even with the

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[2]The "blue slip" process is a mechanism used by the Senate Judiciary Committee to allow the two home-state senators affected by a U.S. court nomination to communicate their position on the nominee. The actual mechanism is a slip of paper, which tends to be light blue, that asks the senators to check off a box indicating their position – either approve or disapprove – before returning the form to the Judiciary Committee.

relatively institutionalized blue slip process, presidents are not entirely constrained and home state senators do not wield complete authority (Binder and Maltzman, 2004).

One of the next important precedents established was the question of removal power. The Constitution describes how individuals can be nominated and appointed to office, but not how, or when, these same officials may be removed from office. Whereas impeachment provisions were included for judges, the Constitution is silent on the removal of officials such as department heads. Removing an appointee from office may become necessary due to negligence, incompetence, or political expediency but the Constitution does not specify whether a president, the Senate, Congress as a whole, or some combination of these institutions should have removal power. During the first Congress, members fell into roughly four approaches to the question. These "schools of thought" were:

> (1) the Senate, because of its role in appointments, must have equal participation in removals; (2) removals may be made only by the constitutional process of impeachment; (3) Congress, since it creates an office, may attach to it any condition that it deems proper for tenure and removal; and (4) the power of removal belongs exclusively to the President as an incident of the executive power (Fisher, 2007, 48).

Within each of these categories, however, a diversity of opinion may still exist and it is also important to note that many elements of these frameworks are not mutually exclusive.

The ability to fire officials with divergent policy views is important for wielding executive authority. Removal is a choice similar to the ability to nominate like-minded individuals to hold appointments as it ensures that a president can create a team to

their own liking. Generally, removal power implies that a president will not be stuck with holdovers from prior administrations who do not share in the policy goals of a president. In terms of direct political utility, the threat of *ex post* retribution would also provide a strong bargaining chip when interacting with high officials. For example, a president with complete and absolute removal authority could potentially order agency officials to take particular actions or face removal. Removal power can thus create less independent agencies and bring policy closer to the actor possessing the power to fire officials. Because of this potential, the granting of removal power to one branch rather than another could produce substantial changes in the character and responsiveness of a department.

The question of who had the constitutional authority to remove appointed executive officials from office began in the first Congress when the Department of Foreign Affairs was being established. The debate in Congress, which lasted for approximately five days, concerned a provision in the bill that made the head of this new department removable by the President (Harris, 1953, 30-31). The concerns over this provision were manifold. First, if the Constitution already provided for this authority implicitly, then it was redundant for Congress to re-confirm this authority. Second, if this authority had not been granted to the President via the Constitution, then it may be inappropriate to confer it upon executive branch. Third, this question reopened the debate concerning whether presidents or the Senate should oversee nominations, and lines were again drawn between those who supported or opposed a stronger presidency. The ultimate conclusion of this debate was that presidents do hold implicit removal power and the legislation creating executive departments was amended to acknowledge this power (Fisher, 2007, 52). This power, however, was not absolute, and the exact boundaries have been fought over since the first Congress until at present

a president's removal power applies "only to major officials on whom the president depends to carry out policies" (Fisher, 2007, 80).[3]

Removal power was an especially important tool for early presidents after the introduction of political parties. Appointed offices were important to early political parties for two reasons: they wanted (1) policy implementation in line with party goals and (2) offices as sources of patronage for party supporters. As such, John Adams tended to favor his Federalist co-partisans when making executive appointments. After his party's loss in the elections of 1800, Adams attempted to fill as many appointments as possible with these allies in order to thwart the policy efforts of the following administration (Sollenberger, 2008, 35). Faced with this threat to his administration and coupled with the desire to reward political allies with appointed offices, incoming president Thomas Jefferson used his power to remove 106 office holders – which more than doubled Washington and Adams' removal numbers combined – in order to create room for his own co-partisans in the new administration (Sollenberger, 2008, 36). In this way, the character of nominations and the job security of those already appointed officials become tied to the electoral success or failure of the political parties.

The use of party labels to help decide nominations and appointments began under the tenure of Adams, expanded towards a stronger rule under Jefferson, but was refined into an entirely new system under the administration of Andrew Jackson. In winning the 1828 presidential election, Jackson had created the first nationally-based mass political organization, the Democratic party. This new Democratic party was such an expansion over the party practices of Jefferson's era that it was a "difference in degree that amounted to a difference in kind" (Aldrich, 1995, 97). Jackson's

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[3]See Fisher (2007) Chapter 3 for more details on the origins, development, and the present scope of presidential removal power.

approach to nominations may also be perceived as an unprecedented shift. Similar to Jefferson, Jackson had inherited an executive bureaucracy filled with appointments made by a rival party over the course of many prior years. Unlike Jefferson, however, President Jackson used the removal and nomination powers to a far greater depth and degree of penetration into the federal bureaucracy than had ever been anticipated. While previous presidents had tended to use their removal and nomination powers in a limited capacity, Jackson embraced them fully and created an explicit "spoils" system through which rival party members were removed from office and replaced by co-partisans.

The basic elements of the spoils system were simple: many, but not all, political offices were exchanged in return for electoral support. Winning, rather than policy concerns, was the primary motivation for these offices. Patronage offices were given to those who helped organize campaigns and otherwise support the electoral efforts of a particular party. Given these motivations, the requirement that the nominee have actual qualifications for the job at hand was at best a secondary consideration. Because the spoils system was fueled in this way by the distribution of patronage positions, the system required a continuous supply of open offices to fill.

As noted in the examples of Jefferson and Jackson, in order to make room for new co-partisans and weaken their opposition, presidents who took office after the admin-istration of a rival party would make strategic use of their removal and nomination powers. But removals at the time of transition did not always create enough posi-tions to fill the ongoing demand. One cause was that officials were often appointed to office without any statutory limitations to their length of service. To create a greater number of potential patronage positions over time, Andrew Jackson fully embraced the idea of "rotation in office," or the practice of having appointees serve short, four-year, fixed terms after which they would be replaced. Additionally, relatively minor

public offices such as post-masters were also used for patronage so that the number of potential patronage jobs would be maximized. This spoils system created by Jackson often led to the staffing of the federal bureaucracy by relatively unqualified political supporters who remained in office briefly.

While the spoils system may seem to empower the presidency, in practice the presidents of this era were mere distributors of offices to individuals largely chosen by a president's co-partisans in Congress or through deals made while securing the presidential nomination in negotiation with other party leaders. Patronage positions were a vehicle for party success and thus the party took great care in securing and allocating these rewards. As such, not only were members of the Senate suggesting nominees, but members of the House and party officials were as well. Furthermore, the suggestions from members of Congress strayed far beyond state borders into offices of a more national scope. The age of spoils and political patronage can be seen as almost entirely congressionally dominated. Unsurprisingly, presidents did not enjoy their role in this system, and they were often overheard complaining about the incessant necessity to provide patronage posts (Harris, 1953, 65-78). Despite presidential discomfort, the spoils system created by Andrew Jackson remained predominant in national politics for at least the next 40 years.

The spoils system met increasing opposition from both presidents and the public until it was dramatically weakened by a series of reforms beginning in the late 1800s. A reform movement had begun to grow during the 1860s, and various proposals had been considered through the 1870s, but early efforts were often quickly and easily dismissed by the generally pro-spoils members of Congress. Perhaps because of the clear imbalance in the spoils relationship, presidents had always tended to be more in favor of civil service reform than Congress (Schattschneider, 1942). President Hayes, who took office in 1877 in the wake of Grant's particularly scandal-ridden

administration, began cautiously resisting senatorial efforts to dominate the nominations process (Hoogenboom, 1961, 135). Contrary to his recent predecessors, Hayes specifically rejected the notion that the Senate or other political actors could dictate which individuals he could nominate to key posts such as cabinet positions (Harris, 1953, 80). While the Senate opposed these moves, President Hayes was successful in winning some battles and reclaiming a portion of the more independent nominating authority envisioned by Washington.

Support for real civil service reform among the electorate and Congress eventually became unstoppable in 1881 when President Garfield was assassinated by an insane office seeker – Charles Guiteau – who was hoping for a patronage position in the administration. While reformers believed that surviving an office-seeking assassin's bullet might make Garfield more aggressive towards the spoils system, ultimately "Garfield dead proved more valuable to reformers than Garfield alive" as he quickly became a martyr for the cause (Hoogenboom, 1961, 212). Upon taking office after the death of Garfield, Vice President Arthur turned President continued to resist the Senate's influence on nominations and pressed for reform. Ultimately, these events led to the adoption of the Pendleton Civil Service Reform Act in 1883, which created basic protections for civil servants and instituted merit-based selection reforms. These reforms were extended over time as those parties who were on their way out moved to extend civil service protection toward their patronage appointees (Hoogenboom, 1961, 236-237). Each party's desire toward protecting their own recent patronage positions slowly spread reform throughout the federal bureaucracy.

While the reforms of the early 1880s were damaging to the spoils system, the heavy reliance on patronage was slow to dissipate and never fully disappeared. Local party machines continued to use and promote explicit patronage as a basis for party building well into the next century (Riordon, 1963), and at the national level

patronage considerations are still a motivating force for some positions (Lewis, 2009). Even with the decline of direct patronage posts at the federal level, presidents in the late pre-modern presidency still had to rely heavily on congressional and party advice when making decisions on nominations if only because they themselves lacked the resources in staff, information, and time needed to find qualified candidates for the growing number of high-level government offices. Presidents before Franklin Roosevelt tended to have very limited staffs who were almost entirely clerical in nature (Burke, 2000, 4). As such, the political parties and members of Congress nearly always held the initiative in executive nominations with respect to the President. Like many aspects of the nominations process, however, this too would be subject to change.

Changes in the Modern Era

The presidency of Franklin Roosevelt is generally viewed as a turning point in the office, and within studies of the presidency a stark division is often made between those presidents who fell before rather than after this administration (Burke, 2000). The modern era of the presidency is characterized by a massive expansion in resources and responsibility coupled with a tendency towards greater centralization of authority inside the White House. The change from the pre-modern to the modern presidency is in part a transition from a framework of the Executive Branch largely focused on the individual office holder toward an understanding of the Executive as a large bureaucratic institution with a diversity of elements and numerous members in the form of support staff. In transitioning into an institution, the presidency became more organizationally complex, used routine operating procedures, and became more fully differentiated from the larger political environment (Burke, 2000, 27). By increasing

the size and capabilities of the staff centered in the White House, the modernization of the presidency has greatly influenced the executive nominations process.

The creation of the modern presidency may be traced back to the Great Depression. To combat the Depression, President Franklin Roosevelt pushed against institutional boundaries in an effort to increase the authority and capacity of the White House. Finding that the structure and scope of the presidency was not up to the task, Roosevelt brought together a group of experts to devise a solution. In 1937 this group, named the Brownlow Commission after one of its three members, famously issued a report indicating that the President "needs help" (Brownlow, 1937). Specifically, the Brownlow Commission report called for the expansion of support staff and resources centralized within the White House. These reforms did not take place immediately as there was initial resistance from Congress. After expending political energies towards the endeavor, Roosevelt was finally given permission by Congress in the Reorganization Act of 1939 to not only hire more staff but also reorganize the very structure of the presidential office. Roosevelt used the opportunity to radically expand the capacity of the presidency, and as such the Reorganization Act of 1939 served as a springboard for future expansion of the office under later presidents.

During the administration of Franklin Roosevelt the reach of the government into the economy and society grew toward unprecedented levels. The 1930s produced numerous new agencies such as the Works Progress Administration, Social Security Administration, Federal Housing Administration, and Farm Security Administration for just a handful of examples. While most of the agencies from this era were created to blunt the force of the Great Depression, many of these agencies continue to exercise wide authority over policy even today. As the federal bureaucracy continued to grow in scope, power, and size at the beginning of the modern presidency, so too did the need to maintain control over the bureaucracy with agency officials appointed by

elected representatives. While many of these offices are arguably "inferior," these positions were nevertheless deemed policy relevant. This expansion of the federal bureaucracy and the corresponding expansion in the number of nominees requiring senatorial confirmation led to the creation of new institutions and procedures within executive nominations.

Figure 2.1: The Growth of White House Office Staff Between 1924 to 1974
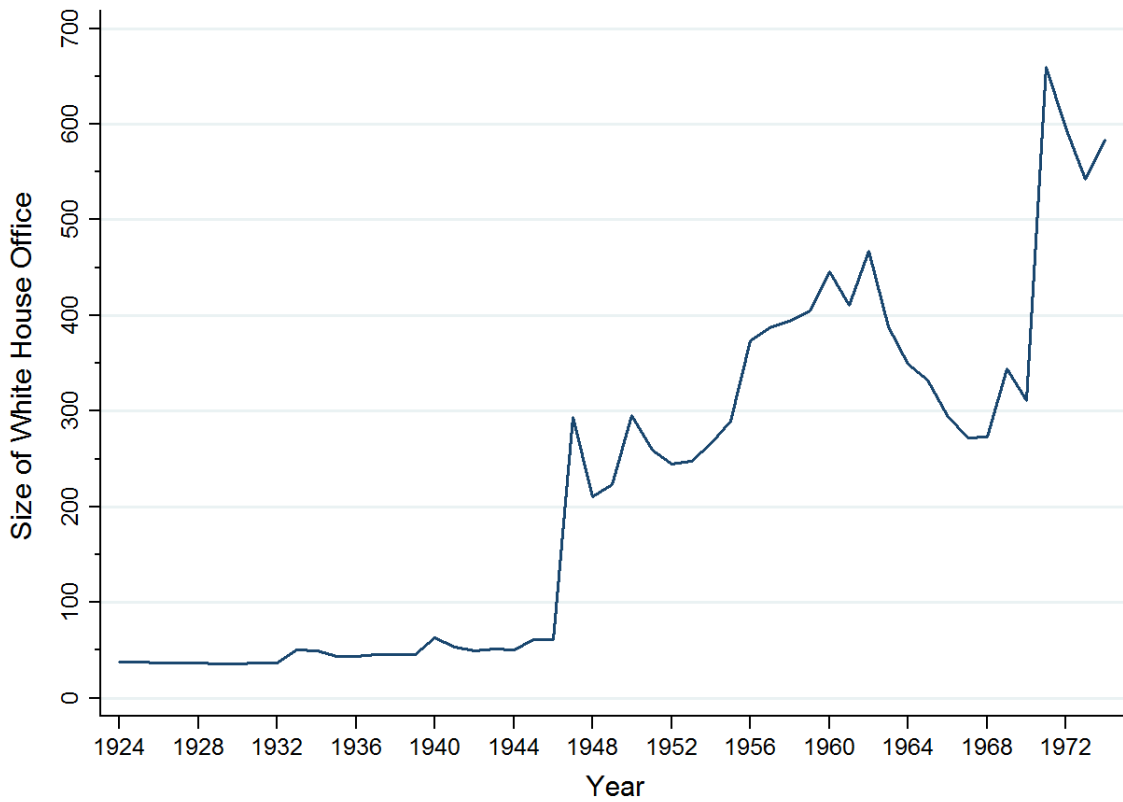
Note: Source is Ragsdale (1996, 257-259).

One of the biggest changes ushered in by the modern presidency was the expansion and specialization of the staff and resources available to a president. After the reorganization of 1939 and the subsequent demands of a presidency in wartime, the total staff within the executive branch was radically increased. After World War II,

total staff levels decreased but never returned to their pre-war levels. One of the most dramatic examples of this expansion is in the White House staff, who are directly answerable to the President. As demonstrated by the 50 year span of staff size shown in Figure 2.1, the White House staff grew slowly until expanding slightly under Franklin Roosevelt and finally exploding in the post-war era even as other executive branch staff was being drawn down. The White House staffers have been critical to the expansion and concentration of presidential power that have defined the modern presidency.

Members of the White House staff were important to the growth of presidential nominations as they could be used to review and research potential nominees, which had formally been such a monumental task as to require significant aid from party organizations and members of Congress. Truman was the first president to task an aid primarily toward organizing the executive nominations process and reviewing candidates (Mackenzie, 1981, 11). The practice of using staff to help review nominations was continued and extended by the Eisenhower administration; however using dedicated staff towards finding and vetting executive nominees was not fully embraced or institutionalized until perhaps the Kennedy administration. The use of dedicated White House staff for the purpose of reviewing and vetting nominees was essential to the centralization of nominating authority in the modern presidency.

While presidents were taking more and more responsibility and initiative with regard to executive nominations, the political parties and, through them, key members of Congress – such as committee chairs and high-ranking co-partisans – were losing power. A large part of this trend may be due to a general decline in party power that resulted from the creation of primary elections and an erosion of partisanship in the electorate (Wattenberg, 1996). Presidential candidates were less beholden to the party for getting the (re)nomination or for getting their message out to voters.

Because political parties were no longer able to punish or reward presidents as they used to be able to, presidents owed far fewer favors and were able to act with increasing independence. With respect to executive nominations, presidents from Truman to Nixon filled the void left by weakening parties by increasingly expanding their ability to independently organize and control executive nominations. By the early 1970s, the balance of power was such that:

> Presidents freely poached on the prerogatives of party officials, ignoring even the smallest courtesies that were once extended to parties, such as notification of pending appointments. Simply stated, in just over two decades party representatives had moved from a position of privileged access to one of insignificance, while the White House appointments staff had come from insignificance to prominence (Weko, 1995, 15).

While political parties may not have held as prominent a role as they once did, the Senate still maintained the ability to block nominees by withholding votes or denying confirmation. Presidents remained at least partially constrained.

With the further expansion of federal government under the ambitious Great Society programs of the Johnson administration, control over bureaucratic agencies became even more important for implementing the policy programs of presidents. Importantly, while Congress passed laws, it was the executive bureaucracy that ultimately would implement the policy. Because the expectations placed on presidents far exceed their capabilities, and given that the President will often be blamed or rewarded for the successes and failures of bureaucratic policymaking, presidents have an incentive to politicize executive agencies in order to control their output (Moe, 1985). To this end, President Nixon created one of the most independent White House organizations compared to the prior administrations in order to exercise more

control over the nominations to executive agencies (Mackenzie, 1981). Furthermore, the policy relevance of nominees was not lost on other political actors or the general public. Attention to key nominees, and especially judicial nominations, became commonplace.

While Nixon sought to expand the presidency's power with respect to bureaucratic nominations, he was also aggressive in using other presidential powers such as impounding agency funds. This aggression ultimately did not benefit future presidents. In its connection to the Watergate scandal and the resulting congressional resurgence, the Nixon administration ultimately weakened the presidency for many years. The scandal discouraged an independently operating presidency. While Ford inherited most of his administration from the ousted Nixon, Carter's role in the executive nominations process was quite conciliatory. For example, Carter attempted to encourage Senators to form nominating commissions for U.S Attorneys that were merit-based rather than partisan (Mackenzie, 1981). Though limited in scope, this was an attempt to make nominations more about qualifications than partisanship or policy outcomes while also showing more deference towards members of Congress.

Any post-Watergate deference towards Congress did not last long, however, as President Reagan openly and actively sought to use the nomination of co-partisans towards political ends. In particular, Reagan pressed for more control over the courts (Carter, 1994, 72) than had been attempted in the past, and this practice also extended to bureaucratic nominations. The Reagan administration believed that "personnel is policy" and as such Reagan was much more inclined to promote ideological candidates as nominees (Burke, 2000). For example, Reagan nominated a controversial figure, Ann Gorsuch, to head the Environmental Protection Agency although she was clearly "antienvironmental" to the point of later being forced out of office (Wood and Waterman, 1993, 505). The practice of making nominations to achieve

policy ends was continued in the administration of George H.W. Bush and has since become common with some variation in degree. Examples, yet again, are most clearly demonstrated within judicial nominations. Judicial nominees are routinely screened using "litmus test" issues such as abortion, birth control, and privacy rights. We can similarly imagine bureaucratic nominees being selected on their orientations towards regulation and the role of government in society.

In addition to stressing the ideological congruence of nominees under the logic that "personnel is policy," Reagan also paid far greater attention to individuals staffing lower-level, sub-cabinet, positions (Troy, 2011, 86). As a result, about 93 percent of Reagan's appointees self-identified as Republican, which was a higher degree of partisanship than prior presidents had been able to achieve (Light, 1995, 56). Future presidents followed the example of Ronald Reagan, and as a result, partisan battles were being fought over nominations that had previously been largely uncontested. Many of these positions are mid-management and, while such positions do not receive much media attention, they remain policy relevant by serving as a link between the leadership of an agency and the career civil servants. Like their high-level counterparts, these nominees are now judged primarily upon their partisan dispositions in addition to their qualifications.

Beyond qualifications and partisan leanings, creating diversity in government became an additional consideration for modern presidents when managing executive nominations. President Johnson in particular sought to increase the number of women and minorities serving in high-level positions and this consideration was reflected by his nominations (Mackenzie, 1981, 38). Future presidents have followed this example. The draw towards increasing the diversity within higher levels of government has also been used by presidents seeking an advantage in confirmation battles with Congress. Asmussen (2011) shows that presidents will often nominate minority or women can-

didates to controversial positions in an attempt to win more votes and overcome opposition. Because of the need for balance within an administration, diversity is a strong consideration in modern executive nominations.

The modern era of the presidency ushered in many new developments with respect to the executive nominations process. The spoils system, which had begun to degrade in the late 1800s, continued to decline throughout the next century via additional reforms. As the power of the political parties waned with respect to bureaucratic as well as presidential nominations, the presidents began to dedicate more time, attention, and staff resources towards the nominations process. In this way, presidents began to reassert ownership over nominations in a manner more closely resembling the nomination process envisioned by Hamilton in the Federalist Papers. This does not imply that presidents now choose high-officers with only an eye toward neutral competence. Free of patronage considerations, presidents were able to begin using bureaucratic appointments with an eye towards influencing policy outcomes. While policy congruence had been a consideration for nomination since the administration of George Washington, the role of policy preferences in the nominations process became even more central after the expansion of the federal government following the New Deal and the Great Society programs of FDR and Johnson, respectively. Most executive nominations are now viewed by the public and members of the government in terms of policy outcomes rather than party patronage.

Recent Trends in Executive Nominations

While examples of intense partisanship, inter-branch rivalry, and personal attacks have occurred throughout the history of executive nominations, many scholars and participants agree that the process has recently become more consistently adversarial

and partisan (Carter, 1994; Mackenzie, 2001; Troy, 2011). The spark that set off a chain reaction of ever-increasing polarization and partisanship on executive nominations is generally agreed to be the nomination to the Supreme Court of Robert Bork by President Reagan in 1987 (Carter, 1994). Judicial nominations, and especially Supreme Court nominations, had been scrutinized over constitutional interpretations with respect to social issues since the controversy surrounding *Brown vs. The Board of Education* and the ideologically motivated scrutiny only grew with intensity after the *Roe vs. Wade* decision. Though much of the controversy in nominations has existed for judicial nominees, executive nominations to bureaucratic agencies are often also controversial, though less often studied. The following section details these recent developments in executive nominations and also details recent calls for reforming the nominations process.

The Birth of "Borking"

While President Carter had attempted to create nominating commissions for some offices in order to provide a kind of merit-based selection mechanism, President Reagan explicitly used nominations to advance ideological policy agendas (Mackenzie, 1981). This switch was less of an anomaly of either Carter or Reagan's governing style or ideological beliefs and more of a reflection of the growing presidential power over and policy importance of executive bureaucratic appointments. Given relative freedom from the demands of political parties and the ability to select nominees using staff resources within the White House, policy had now become one of the President's primary considerations when evaluating a candidate's suitability for serving. Because of the importance of bureaucratic policy-making for the administration's political record, presidents after Reagan have continued to operate in this partisan model

of appointing officials. The drawback to making partisan appointments was that it invited partisan backlash.

President Reagan's nomination of Robert Bork for the Supreme Court is generally considered to be a watershed event due to its partisan intensity and the role of the national media (Carter, 1994). Bork was a controversial choice because of his outspoken viewpoints on law and the Constitution with respect to social issues. For example, Bork did not fully agree with the decision made by the Supreme Court in *Brown v. The Board of Education.* Though his opinion was academically grounded, the position was disastrously unpopular with the majority of the public. Part of what made the backlash so explosive was the extensive media access to the hearings. As the hearings were televised, Senators made a point to posture and confront Bork's views. Because of these views and despite his experience and intelligence, Bork was considered to be unqualified to hold a position in the Supreme Court. In this way, the media brought an ugly government dispute into the living rooms of average Americans and the process was forever changed by the expansion of the conflict to new ground (Carter, 1994).

In order to block the nomination of Robert Bork, Democratic leaders in the Senate successfully characterized him as a radical extremist who would ultimately use his position on the bench to promote these viewpoints. For example, when speaking out against the nomination, Senator Kennedy argued that:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored

> at the whim of the Government, and the doors of the Federal courts would
>
> be shut on the fingers of millions of citizens (Reston, 1987).

While most candidates would have withdrawn their nomination after it became clear that they would not win confirmation, Bork was resolute and decided to force a public debate of the issues. The spectacular failure of the nomination through intense partisan rhetoric and media scrutiny left a lasting impression on politics. By demonstrating the power that attacks on a nominee's character could have in influencing nominations, the phenomenon of "Borking" was born and has remained a part of politics since.

The essential feature of "Borking" is a heavy focus on the "*dis*qualifications" of candidates rather than their ability to serve (Carter, 1994, 9). This practice has extended far beyond judicial nominations and now includes nominees to executive office posts such as agency directors and cabinet secretaries. Zoë Baird, Lani Guinier, and John Tower are just a handful of prominent examples from the many executive nominations subjected to Borking. Issues such as unpaid taxes or the immigration status of domestic nannies have become commonplace and have sunk many candidates in decades since Bork's failed nomination. While these issues are not explicitly partisan, the use of such information often is. For example, in many cases nominees had paid the appropriate back taxes and yet still failed in their nominations due to determined opposition. Importantly, this opposition directed toward a nominee is often party-based, and as such the air of scandal or impropriety often serves as a political excuse for a partisan vote on an otherwise qualified nomination.

New Norms and Developments

While the nomination of Robert Bork serves as a focal point in history, the description of these events demonstrates more broadly the idea that during Reagan's administration a new epoch began within the executive nominations process. Many of the practices developed by the Reagan administration, such as stressing ideological congruence of appointees in even lower-level positions, have been extended and refined by later presidents. In response, the Senate opposition has continued to use the "Borking" model combined with less direct dilatory tactics in order to respond. These norms are self-reinforcing as party transitions simply invite dilatory retaliation in kind. As such, the presidencies of George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama have all participated in the growth and development of new norms and expectations stemming from the Reagan experience.

Combining evidence from conventional wisdom, anecdotal accounts, and a handful of empirical studies suggests that the confirmation process has recently become both more contentious and far slower with each passing Congress. Firsthand accounts of the nominations process, such as those provided by Troy (2011), argue that the partisan polarization surrounding executive nominations has demonstrably made it much more difficult to find, confirm, and maintain qualified individuals for appointment. Empirically, scholars show that vacancy rates are up in both judicial and bureaucratic posts. For example, O'Connell (2009) notes that vacancy rates for appointed positions in executive agencies can often reach as high as 25 percent while Hendershot (2010) has demonstrated an even more devastating pattern of increasing delay and vacancies within the judiciary. While some of this may be the result of difficulties in vetting or recruiting and an overall slower pre-nomination process, much of it is also

due to senatorial delay. Due to delay many nominations never actually make it to a direct vote.

One recent development in the executive nominations process is the willingness of a minority in the Senate to engage in large-scale dilatory tactics such as the filibuster. The filibuster is a strategic exploitation of the Senate's lack of a simple majority rule to end debate in order to kill legislation through delay that would otherwise pass into law by a simple majority vote. Invoking cloture to end debate and vote on a nomination presently requires 60 votes whereas the actual vote on the nominee would require only a simple majority, or 51 votes in the full Senate. While the filibuster was once reserved by Southern Democrats for use on civil rights initiatives, once reform passed, the filibuster was used more frequently and on a greater variety of measures (Binder, 1999). As can be observed in Figure 2.2, cloture votes on executive nominations have been historically few in number but are now increasingly common. While not every filibustered nominee receives an attempted cloture vote, and though not every cloture attempt is indicative of a filibuster, this trend implies that dilatory tactics are increasingly used on executive nominations in addition to legislation.

An example of the prominent role that the filibuster plays in the nominations process is the 2005 showdown between the then majority party Senate Republicans and minority Senate Democrats over the judicial nominees of George W. Bush. Frustrated by numerous Democratic filibusters on key judicial nominees, Senate Majority Leader Bill Frist argued for amending the Senate rules. Such an amendment, however, would usually require a vote that would itself be subject to a filibuster. To bypass this possibility and amend the rules in the face of a determined opposition, Frist suggested using a point of order to provide for a ruling from the presiding officer, at the time Vice President Dick Cheney, that the Constitution requires only a simple majority vote when considering judicial nominees. Proponents called this the "Constitutional

Figure 2.2: Cloture Attempts on Nominations from the 90th to the 111th Congress
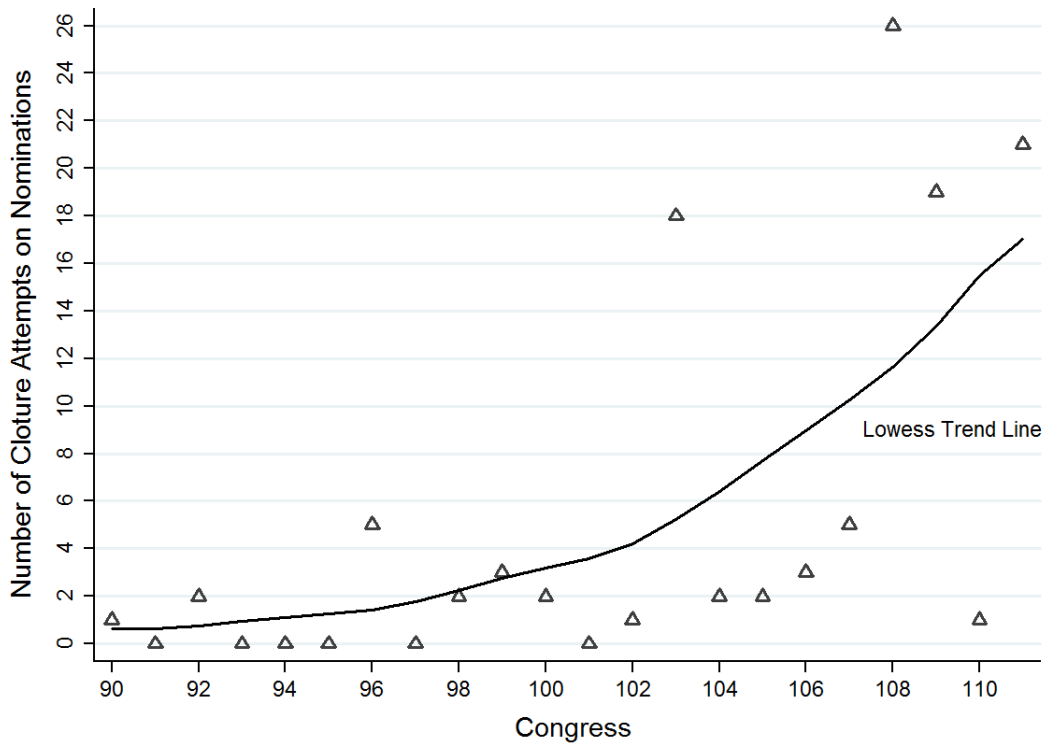
Note: Source is Beth and Palmer (2009, 6-8) and THOMAS.

Option" while others referred to it as the "Nuclear Option" in part because it was a last resort but also because the Democrats threatened dire dilatory consequences in retaliation if this reform were made. Ultimately, the forced reformation of the filibuster was averted through a compromise deal backed by a "Gang of 14" Senators split evenly between centrist members of both parties (Binder, Madonna, and Smith, 2007).

Many scholars have pointed out the tendency of the modern Senate to engage in an extreme amount of delay for judicial nominations (Binder and Maltzman, 2002; Epstein and Segal, 2005; Hendershot, 2010; Shipan and Shannon, 2003). Judicial nominations may be more likely to face delay because of the importance of their posts,

the nature of their lifetime appointment, and the presence of senatorial courtesy. Delay of judicial nominations has become so prevalent that in some years nearly 50% of nominees are "Returned to the President" without receiving a vote. While judicial nominations are often delayed to death, other executive nominations are closing the gap. For example, two years after assuming the presidency, Obama had a vacancy rate of 22 percent of appointed positions unfilled or filled by a temporary placement (Troy, 2011, 83).

Delay of nominations can ultimately lead to failures as promising nominees withdraw in the face of significant opposition and/or delay. In one example, Nobel Prize winning economist Peter Diamond withdrew his nomination from consideration after it became clear that he would face an insurmountable level of delay and opposition in trying to achieve confirmation. While Diamond is an accomplished economist who likely held a simple majority of support in the Senate, he was deemed "unqualified" by Sen. Shelby (R-AL) and faced determined minority obstructionism (Diamond, 2011). While Diamond's case is an interesting example, it is far from anomalous. President Obama's attempt to confirm Richard Cordray to lead the new Consumer Financial Protection Bureau demonstrates the partisan atmosphere that key agency nominations now endure. Because they sought structural changes to the design of the agency, Republican senators claimed that no nominee, regardless their qualifications, would be confirmed. While no nominee was selected, the new agency remained without a head. Ultimately, Obama was forced to use a controversial recess appointment in order for Cordray to begin his duties.

Staffing the National Labor Relations Board

In order to demonstrate the influence of these recent trends on the executive nominations process as well as the affected agencies, one can examine an extended example using recent nominations for the National Labor Relations Board (NLRB). The past six years of nominations to the NLRB have been the site of aggressive and prolonged strategic partisan delay in the confirmation of board members. As such, the NLRB serves as a good example of how delay in the confirmation of nominees is changing the nominations process and affecting the ability of some organizations to fulfill their mandated tasks. Furthermore, this case has the virtue of being a prominent, long-lasting, and ongoing example of inter-branch and partisan conflict over nominations.

The NLRB is a five-member board that was created in 1935 for the purpose of investigating unfair labor practices as well as overseeing union elections to ensure fairness. Given the nature of its mission, the nomination of individuals to the board has almost always been politically charged. To alleviate concerns, the NLRB has a variety of structural features that are designed to limit the power of the board to issue controversial decisions or to make radical changes. First, each of the five members serve fixed terms that are staggered so as not to allow radical change in the composition of the board to occur too quickly. Second, the board by tradition has a party requirement for the members in that no more than three members may be of the same political party. This feature denies a president or party the ability to pack the board entirely with co-partisans. Despite these safeguards, the often controversial nature of its work ensures that the NLRB remains a lightning rod for partisan politics and recently the appointed members who have survived through Senate confirmation have suffered significant delay.

Starting within the administration of George W. Bush, the NLRB has had such difficulty in getting nominees confirmed in the Senate that it has led to problems maintaining enough members on the board to constitute a quorum for the purpose of rendering decisions. Faced with an upcoming presidential election in which the Democrats were likely to win, Democratic senators delayed the nominations perhaps in the hopes that their future co-partisan(s) would be able to nominate more favorable members. By late 2007, the NLRB was faced with an impending crisis because three of its five members had expiring terms that December, which would have reduced the board to less than a possible quorum with only a two-member board remaining. Without a quorum, the NLRB would have been without legal authority to make decisions or perform their duties. In order to avoid this complication, the five members of the NLRB passed a ruling that in the future only two members were required to constitute a quorum. The remaining members – one Republican and one Democrat – agreed to continue operating until more members arrived, but upon entering office President Obama was equally unable to appoint members to the NLRB and the board continued to function with only two members.

The legality of the NLRB to function with a quorum of two board members, however, was ultimately challenged and brought all the way to the Supreme Court. The Supreme Court ultimately ruled against the NLRB in 2009, which had been operating with only two board members since 2007. This decision effectively nullified over 400 decisions made by the board in the absence of a full quorum. Furthermore, this decision effectively brought the NLRB to a standstill as it had lacked enough members to legally function. This deadlock was broken only by an Obama recess appointment in 2009, and not by the NLRB being brought up to full strength by the traditional nominations process. Throughout his first few years in office, President Obama continued to have difficulties getting his nominees confirmed in the Senate.

Importantly, it was not the case that these nominees were brought up to a vote and that they failed; rather it was the case that these nominees were not getting votes in the first place.

As Obama's nominees were not receiving votes in the Senate, the possibility of a lost quorum in the NLRB came up again in late 2011 as the term of one board member who was presidentially appointed during a recess was coming to an end. At this time, the board was again down to three members and about to lose its quorum with the term of Craig Becker, an earlier Obama recess appointment, was set to expire. A recess appointment was likely, but in response to this possibility the Congress had remained in *pro forma* session [4] at the instigation of Republican members. This tactic of remaining formally in session during recesses in order to thwart a president's ability to issue recess appointments was first used by Democrats in the last term of George W. Bush (Black et al., 2011). Despite the efforts of congressional Republicans to prevent recess appointments, President Obama took the unprecedented step of issuing three recess appointments – two Democrats and one Republican – to the NLRB in order to respond to the threat of a second lost quorum and a hamstrung NLRB.

Using recess appointments in the face of *pro forma* sessions was controversial and unprecedented. As such, staffing the NLRB in this manner immediately triggered legal action. The constitutionality of President Obama's actions remains in dispute as Republicans have decried the act as an open defiance of the Congress, contrary to precedents and understandings that have developed over time, and ultimately unconstitutional. On the side of the President, the Office of Legal Counsel (OLC, 2012) issued a statement supporting the recess appointments by arguing that the

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[4]A *pro forma* session is a brief Senate meeting in which no actual business is conducted. If such sessions are held at least once every three days, then the Senate cannot be considered in recess for the purpose of making a recess appointment (Black et al., 2011).

Senate was in fact in recess and not able to conduct business such as the taking up of nominations. Specifically, the agreement that led to the sessions over break called for no action to be taken. Alternatively, an understanding of recess powers that would allow for even small recesses to be used to make appointments without the consent of the Senate might provide a president with the means to essentially circumvent the Senate.

Noel Canning v. NLRB

Legal challenges quickly developed after President Obama's controversial recess appointments to the NLRB. Approximately one year after President Obama filled the NLRB to avoid a shutdown, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in *Noel Canning v. NLRB* concerning the legality of such appointments. Ultimately, the three-judge panel ruled that these appointments were invalid and as such the NLRB did not have the authority to issue decisions while the board lacked a properly appointed quorum. While the ruling itself against the controversial recess appointments may not have been a surprise, the expansive nature of the decision appeared to overturn and contradict several decades of practice and legal precedent.

If accepted as the new legal precedent, the decision rendered in *Noel Canning v. NLRB* would significantly alter the character of the presidential nominations process. First, the ruling suggests that presidential recess authority exists to fill only those vacancies that occur during a recess. This contradicts the prior legal understanding that such appointments can be used to fill vacancies that merely "happen to exist" during the recess. Second, the decision argues that recess appointments are only valid for intersession recesses (or those recesses that occur between the sessions of

Congress). This also overturns decades of common practice as presidents have often made intrasession recess appointments in order to fill key posts (Black et al., 2007, 2011). While the decision also took issue with the fact that Congress was technically in session at the time of the recess appointments, this final point is insignificant when viewed in combination with the broader decision. If presidents are limited to making recess appointments only during intersession recesses, and then only when a vacancy happens to occur during this recess, then the opportunities to legitimately issue recess appointments will become so rare as to render this presidential power non-existent.

The effect of the court's ruling in *Noel Canning v. NLRB* on the ability of the NLRB to function as an independent regulatory board is significant. If the decision stands, it calls into question more than 300 NLRB decisions made over during the first year alone (Greenhouse, 2013*a*). In response to the court's decision, the chairman of the NLRB – Mark G. Pearce – has stated that the board will continue to operate normally while the the ruling is being appealed (Greenhouse, 2013*b*). If the recess appointments are found to be invalid, then Mark G. Pearce will be the last and only remaining NLRB member on the board as the other two individuals were brought onto the board through the controversial recess appointments. As such, every decision that the board makes before the appeal may also be invalidated. Furthermore, if the board does drop down to one member, history suggests that President Obama is unlikely to get *any* nominee passed through the Senate as many senators may actually prefer a world where the NLRB is non-functional.

The policy implications of the Canning decision are not lost on political actors and relevant stakeholders. Without the NLRB in place, labor groups and organizations would immediately lose an outlet to air grievances against employers. Alternatively, while the NLRB is inoperable – potentially for several years – business interests would no longer face the threat of sanction for engaging in many unfair labor practices in-

cluding unlawful terminations of employment. Shortly after the Canning decision, the AFL-CIO immediately began placing heavy pressure on the Obama administration to nominate several new members to the board and furthermore they argued that majority leader Harry Reid should force new Senate rules that would disallow filibusters of nominees (Greenhouse, 2013b).

The Canning decision contains several important elements for scholars of executive branch appointments. Because confirmation rates are so low for many independent regulatory commissions, recess appointments have been filling in for the normal nominations process. Recess appointments have made the difference between functional boards that are capable of legally rendering decisions and crippled boards that lack the authority to operate at full capacity. By making recess appointments all but impossible, the result of the Canning decision may be to increase the number of empty seats on major boards. Ultimately, the case of the NLRB over the past several years demonstrates that the traditional nominations process is unable to provide for the staffing of key governmental offices. As a result, the failures of the executive nominations process now threaten the good governance of the nation.

Conclusions

The structure of the nominations process was a compromise between those favoring and those fearing a strong president. As a result of this compromise, both the President and the Senate play a role in the nomination of judges and high executive officials. Similarly to other aspects of presidential power, however, the exact boundaries between the branches with respect to the nominations process is left vague by the Constitution. This instance of separate institutions sharing powers coupled with ambiguity has been an open invitation to conflict and the history of the nominations

process reflects this tension. Because of this ambiguity and the driving force of inter-branch rivalry, the nature of the executive nominations process has changed over time as politics evolved and new precedents were created.

After setting early precedents, one of the biggest trends in nominations politics was the rise and decline of political parties. While the growth of party-based patronage politics and the rise of powerful political machines led to congressional dominance over most nominations, this system did not last. First, the creation of civil service reforms in the late 19th century began a trend towards fewer presidentially appointed patronage positions. While patronage is still a motivating factor for many nominations (Lewis, 2009), it is no longer the dominant factor in nominations politics and is not likely to be the source of strategic delay. Second, the drive towards primary elections, the advent of TV, and the declining importance of political labels has made presidential elections more candidate centered and presidents more independent of their party. As such, political parties play a much smaller role in the selection of executive nominees than they once did.

An additional trend influencing executive nominations was the rise of the modern, institutionalized, presidency. The beginnings of the institutionalization of the presidency under FDR led to a marked increase in the capacity of president to centralize policy coordination as well as the recruitment and vetting of nominees within the confines of the White House. One of the reasons that Congress had significant influence over the early nominations process is that presidents, as individuals, did not have the connections, knowledge, or means of finding, recruiting, and vetting the increasing number of people required to staff the upper-levels of the federal bureaucracy. But as an institution, rather than an individual, presidents gained this capacity over the course of the 20th century.

Recently, presidents have discovered the value of nominations as a means of making policy. Reagan began using this to his advantage by appointing co-partisans to lower-level positions that before had been either routine or at the discretion of a higher-level official. As presidents have used these appointments to their advantage, however, they have also greatly expanded the scope of conflict over executive nominations vis-a-vis their Senate opposition. If the ability to appoint like-minded individuals to an executive agency gives some measure of control over the policy outputs of that organization, then likewise the denial of that power should change the policy outputs as well. As demonstrated by the case of the NLRB, in extreme situations the delay of nominees can render an organization unable to legally function, which may be a preferred outcome for the opposition party. The expansion of policy-related conflict towards lower-level offices has been one of the important recent trends in the nominations process.

As noted by the Mackenzie (1981) quote opening this chapter, all descriptions of the nominations process are necessarily "time-bound," and as such the history of the nominations process can be divided into historical epochs. Any empirical investigation of the executive nominations process must exist within, or account for the borders between, these historical epochs. Because of the radical changes that have taken place over time in terms of the power of political parties, presidential capacity, and various reforms, intuitions developed in one epoch may simply not apply to another. For example, an analysis of the early nominations process would suggest a level of congressional dominance that is not observed in the present process. Because of these time considerations, the later chapters containing empirical investigations of recent executive nominations must also be considered time-bound.

Just as nominations politics have changed in the past, they are likely to change in the future. In the short term, nominations are likely to remain highly partisan and

prone to delay. As a majority party becomes the minority, they are able to use all of the tactics that they once despised in the minority party against the new regime. The future of nominations is uncertain, but likely inextricably tied to some manner of filibuster reform. While this chapter has set the stage for a discussion of reform proposals, Chapter 7 will take a more direct approach to the outlining and evaluation of potential reforms.

Chapter 3

Theories of the Nominations Process

Federal agencies are not simply neutral implementers of government policy who follow as closely as they can whatever marching orders they get from the President and Congress. Every agency has its own traditions, norms of behavior, and policy predispositions.

– G. Calvin Mackenzie, "The Politics of Presidential Appointments", 200.

[T]he context in which the appointments process came to its current pass: a Senate of a hundred mavericks, bent above all else on self-preservation and self-promotion, for whom any opportunity to broaden a political base, dredge a new channel of campaign contributions, grab a few seconds on the evening news, or pay back a political enemy is not to be missed.

– G. Calvin Mackenzie, "Innocent Until Nominated", 26.

The Puzzle of Executive Nominations

Within the present literature on executive nominations, two facts stand out in stark contrast. First, the vast majority of all nominations are ultimately confirmed by

the Senate. Prior literature has demonstrated that the success rate of presidents with respect to executive nominations is approximately 90 to 95 percent (Bond, Fleisher, and Krutz, 2009; Krutz, Fleisher, and Bond, 1998). Compared with presidential track records on legislative proposals (Bond and Fleisher, 1990), nominations enjoy a surprisingly high success rate. This first fact implies a deferential process or at least one in which presidents are able to anticipate and adapt to the wishes of the Senate such that their nominees are the most beneficial possible to the president while still gaining confirmation. The second fact about the nominations process is that many nominees, even when they are eventually successful, face extreme delay before receiving confirmation (Bond, Fleisher, and Krutz, 2009; McCarty and Razaghian, 1999; Millhiser, 2010; Nixon, 2001; O'Connell, 2009). In contrast to the high success rate, the presence of lengthy delay implies a high degree of partisan conflict and that the nominations process is in fact more of a battleground than an easy bargain.

The puzzle at the heart of these contradictory facts, then, is why effort is so often spent by a president's opposition in delaying executive nominations that *will* eventually succeed. Forcing a rejection of a nominee may potentially lead to a more favorable replacement, but delay more often merely obstructs the inevitable. Given the high confirmation rate, it is possible that delay in itself may provide members of the president's opposition with some benefit beyond the limited opportunity to fail a nominee. Thus one may ask: What is the intrinsic value of delay in executive nominations? Answering this question will provide understanding of the pattern and intent of strategic delay. Furthermore, even if the rate is low, many nominees fail. Explaining which nominations are likely to end in failure is critical to understanding the process as a whole. Prior literature has also demonstrated that there is a clear link between the delay of nominations, and the likelihood of failure in the nomina-

tions process (Bond, Fleisher, and Krutz, 2009). As such, predicting delay is key to discovering which nominees are more likely than others to be delayed to death.

Prior theoretical treatments of the nominations process are intended to shed light on the type of nominees that are selected and successful given the arrangement of institutional actors and their preferences. Such studies do not help answer questions concerning how fast a nominee will be confirmed. For example, if presidents are able to effectively anticipate Senate preferences and choose a successful nominee accordingly, then why is strategic partisan delay observed in the process? Perhaps these delays are due to mistakes or a result of imperfect or incomplete information. But if one assumes that the actors involved in the nominations process have good information about relative preferences and the position of the nominee, which is reasonable given the repeated interactions between the institutions and the ability of the Senate to conduct hearings, then a lengthy confirmation process does not seem to be a likely common outcome. Confirmation times, however, do vary greatly and the lengthy process is a common source of partisan contention. What is missing from prior frameworks is the idea that time is valuable, and thus strategic delay is a valuable alternative to merely voting against a nominee.

The essence of a strategic delay framework is that some nominations are more valuable to delay than others. Based on prior literature and an examination of motives, I argue that the most beneficial nominations for a president's opposition to delay are, among various other characteristics, those nominees to agencies with predispositions in opposition to a president's policy preferences. By delaying these nominees, an opposition party would be able to insulate their co-partisans within a bureaucracy while thwarting a president's attempt to rein in a recalcitrant agency through the appointment of like minded officers. Because time is valuable insofar as control of an agency provides a stream of benefits, the delay of action on nominees who will eventually

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be confirmed is immediately advantageous. Furthermore, while many failures appear to be presidential miscalculations or idiosyncratic errors under prior interpretations of the nominations process, the common outcome of failure by delay is predicted under logic of strategic delay. In this sense, by considering the value of time one can make inferences on both the length of the nominations process and the likelihood of eventual success.

In the following sections, I provide an outline of the literature concerning the executive appointments process and the various theories concerning the strategic choices therein. First, I outline the basis for obstructionism in the nominations process within the context of the value of time in the Senate. These sections explain and evaluate alternative sources of delay within the nominations process as well as describe likely targets of obstruction. After introducing these considerations, I then explore existing theory about strategic considerations within the nominations process. Finally, I provide a theoretical account of strategic delay in the executive nominations process complete with broad empirical predictions. In conclusion, I discuss how the framework and stated expectations will be employed and tested within future chapters.

Obstruction in Nominations

Obstruction and delay are endemic to the nominations process. Though several studies have noted this prevalence of delay in executive nominations (Bond, Fleisher, and Krutz, 2009; Mackenzie, 2001; McCarty and Razaghian, 1999; O'Connell, 2009), many of the logical and strategic underpinnings of this delay may still be profitably explored. In particular, it is unclear whether the delay is designed to slow down the Senate, gain concessions from a president, resist the growth of presidential power as a branch, or to achieve more influence over the bureaucratic policymaking. In

order to begin answering the question of why delay occurs for nominations that will succeed, it is necessary to begin with by describing the benefits of delay as well as the mechanisms through which they work.

Time, Obstruction, and the Senate

Time has become an increasingly rare commodity within the operation of the modern Senate. In the early years and through much of its history, the Senate was a significantly smaller body with little need for procedural options limiting debate or pushing forth an agenda (Binder and Smith, 1997). During the 1970s, however, the Senate endured a shift in the incentives governing senators' behavior and dilatory tactics, obstructionism, and a dramatic increase in amending activity required that Senate leaders adapt to changing circumstances (Sinclair, 1989; Smith, 1989). Given these changes, Oppenheimer (1985) noted that time was increasingly valuable in the modern Senate and that the use of dilatory tactics was strengthened even more by their frequent use. As a result of the changing incentives coupled with the procedural mechanics of the chamber, Senate leaders have adapted to changing circumstances by creating efficiency in lieu of control (Smith, Ostrander, and Pope, 2013). Strong party control over the agenda is simply not possible given the rules and procedures of the Senate.

Time considerations and the mechanisms of delay change depending on the partisan relationship between a president and the majority party in the Senate. When the president's opposition party is in the majority, the pressure to move on key nominations may be dramatically decreased. The failure of a president's agenda under such circumstances would after all be a win for the opposition party. Furthermore, any failure on the part of a bureaucracy that can be traced back to vacancies or poor

management will likely be blamed on the President rather than Senate. This is in part because a president, as a unitary actor, can be held more accountable by the public than the collection of individuals who make up the Senate. As such, majority party delay of an opposition president's nominations can be easily accomplished with little to no consequences. To accomplish delay, a majority party can use its limited scheduling ability to keep nominations bottled up in committees, to hold extensive hearings, and to simply refuse to bring a nominee to the floor or up for a vote. In this way, majorities in opposition to a president will use valuable time promoting their own agenda rather than fighting for a president's nominations when faced with obstruction.

If the opposition party is in the minority, a determined group or individual within the opposition party may still take advantage of Senate rules and resort to procedural tactics to stop a nomination from getting a vote. Senate procedures and practice provide the mechanisms under which a determined minority can cause significant delay in the nominations process. Most notoriously, senators may resort to the threat or practice of filibustering a nomination (Mackenzie, 2001, 31). To bypass this obstruction, a majority party would have to invoke cloture, which is often a costly and lengthy process. First, a cloture petition takes two calender days before it can be voted on. If successful, which requires 60 affirmative votes, a determined minority may still force 30 hours of post-cloture debate. As such, a determined minority could force the majority to expend significant time and energy on what may ultimately be a low ranking nomination. While cloture votes on nominations have increased in the past decades (see Chapter 2), most of the time it is simply not worth a majority party's effort to force votes on nominations.

As a result of the value placed on time and the ever-present risk of dilatory activity, the modern Senate operates largely via the use of unanimous consent agreements

(UCA) that require the permission of all senators to proceed with a given schedule (Oleszek, 2001, 194-195). As the structure of incentives have been changing in the Senate, the use of UCAs has increased over time in response to obstruction (Smith and Flathman, 1989). While the UCA is used in response to obstruction, it is important to note that it does so through avoiding controversial issues and not by overcoming them. As such, a single Senator can delay proceedings through the simple denial of consent. Given the cost of invoking cloture, the majority will only accept this cost when there are significant benefits at stake.

To prevent the denial of consent to a UCA request that would result in derailing the agenda, the leadership in the Senate has resorted to honoring senatorial holds for both nominations and legislation. A hold is simply a means by which a senator can express his or her intention to deny consent to a UCA regarding a specific agenda item. Effectively, a senator may use a hold to block a nomination from even being considered. Because time is scarce, a majority leader cannot afford to battle a minority every time it has an objection. As such, political effort is often triaged towards legislative agendas and high-level or salient nominations. Given these incentives, the objections of just a few – or in the extreme cases one or two – senators can entirely derail a nomination that would otherwise pass the Senate with super majority approval.

While prior literature has demonstrated that time is more limited in the modern Senate, there is less of a debate concerning the value of time itself. I argue that time, like money, may have little intrinsic worth but a high value in trade. Time is primarily, though not exclusively, a benefit to the majority party.[1] In and of itself,

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[1]Time may also provide benefits to a chamber or the legislative branch as a whole by comparison to the Executive. It may also be the case that increasing available time provides more opportunity for deliberation on and minority input in legislation. These alternatives are interesting, but fall beyond the scope of the current study.

time does not provide value; rather the key is what time can be used for. Time is "spent" by majority parties on crafting pro-majority legislation, scheduling key votes that highlight and aid the party brand, and simply for governing. When time is abundant, its value is unseen. When time is scarce, however, the ability of a minority party to delay and obstruct begins to undermine the ability of a majority party to realize the benefits of majority status as well as to govern.

Since the 1970s, it is arguable that time has become even more valuable in the Senate. While this applies equally to all activities undertaken by the chamber, it is perhaps more influential with respect to the executive nominations process. Executive nominations, especially those to less salient positions, are simply not as important to a majority leader as the passage of key legislative proposals. Furthermore, there are literally hundreds of executive nominations that must be acted upon each year. A recent investigation by Millhiser (2010) suggested that if all nominations were to be delayed by the requirements of cloture, it would take more time than available in a congressional session to work through each nomination. With such limitations on the side of the majority leaders, many nominations can be delayed by a few senators. While the structure of the chamber rules and the nature of the Senate provide the opportunity for delay, there are several potential motives.

Strategic Obstruction

Policy is a key motive for strategic delay in the nominations process. The strategic use of dilatory tactics at the party level such as holds or filibusters is likely to occur when there is significant disagreement between a president and at least a substantial minority in the Senate. Importantly, strategic delay from a president's opposition is likely to be patterned and variable over time. Prior research conducted by McCarty

and Razaghian (1999) confirms expectations about partisan sources delay as it finds delay to be significantly related to both the level of polarization and political composition of the Senate. Additional research on executive nominations (Nixon, 2001; O'Connell, 2009) and judicial nominations (Binder and Maltzman, 2002; Shipan and Shannon, 2003) also confirm the pattern and influence of contextual political factors on delay. This growing body of literature suggests that increases in the time it takes to confirm executive nominations is tied to larger patterns in politics tied to policy disagreements and not simply characteristics or qualifications of the individual nominee.

Beyond disagreements over policy, a further partisan use of the nominations process is to make the president, and by association the president's co-partisans in Congress, look bad in the eyes of the electorate. As noted by Lee (2009, 9), party members "have a political interest in tarnishing the opposition party's image" and thus members of the president's opposition will often scrutinize nominees for both "real and imagined" breaches of ethics. While this kind of political maneuvering may be "indistinguishable" from policy based partisan politics, Lee (2009) points out that it is not actually about policy choices at all. Rather, this kind of adversarial relationship is about crafting a party image for use in the following elections. As such, non-policy partisan goals are possible motivations for obstructionist behavior on executive nominations.

In addition to potentially embarrassing the opposition party, a minority party facing a Senate majority allied with the president may find nominations a further means of taking time away from the majority party's agenda. As noted above, time is short in the Senate and the majority party uses its time carefully to govern and create the party's brand. By forcing the majority party to use its time and energy on nominations, either through bargaining or passing cloture votes, the majority party

has less time with which to carry out its own goals. Of course, not all nominations occur when the president's party is the majority in the Senate, but when the Senate majority and a president are co-partisans, increasing the time it takes to govern could be an added incentive for the minority party to delay nominations.

Political parties have both electoral and policy interests that can be influenced by the nominations process. As noted by Lee (2009), nominations can be used as a platform to make one's own party look good and the other party incompetent. To the extent that policy can be influenced by an appointment, it can be similarly influenced by the absence of an appointment. In this way, nominations can be a part of implementing or blocking policy changes. Both partisan and policy goals provide an incentive for the president's opposition to delay action on nominations. Importantly, the two goals are not mutually exclusive. If a handful of senators strategically block a nominee on policy grounds, the work of Lee (2009) suggests that their co-partisans would support this effort as a means of supporting the party brand. In this way the power of a few senators to strategically delay a nominee is magnified.

Such strategic delay may eventually lead to the failure of a nomination. Bond, Fleisher, and Krutz (2009) find that most unsuccessful nominations fail primarily because of "malign neglect", or extreme delay, rather than through being formally withdrawn by a president or directly rejected by the Senate. Furthermore, the study finds that the trend of cases being delayed to death rather than directly rejected by the Senate has been increasing over time. The cases of failure by delay are particularly interesting as one would expect these ultimately failed nominations to have been able to win in a direct floor vote, otherwise the nominating president would have had an incentive to withdraw the nominee in favor of an acceptable replacement. Consistent with their prior study, Bond, Fleisher, and Krutz (2009) find that these failures by

delay are also often accompanied by disqualifying accusations. Such allegations tend to be patterned in expected partisan ways.

Targets of Delay

Not all agencies and PAS offices are created equal. Some offices have much more value to any president seeking greater control over a bureaucratic agency. Examples of such offices include positions of broad power or leadership. Logically, obstructing the staffing of these same offices also holds higher value for those seeking to thwart the presidential agenda. Differences may stem from characteristics of the individual, office, or even the agency that a nominee will join. Because not all agencies and offices are equal, some are more likely to be targets of partisan delay than others regardless of political circumstances.

As discussed by Krutz, Fleisher, and Bond (1998), some individual characteristics of a nominee imply that the Senate will view their nomination with greater scrutiny. Perhaps the most influential of these characteristics is the impression that an nominee is an extremist or an ideological outlier. Qualifications are examined, though it is case that all nominees are now heavily vetted before being nominated. Given that the vast majority of nominees are qualified for their posts, disqualifications are given equal or greater consideration in modern nominations Carter (1994). While such individual characteristics are important, these cases are expected to be largely idiosyncratic.

The ideological predisposition of an agency is one factor that may influence delay time. Bureaucracies are not designed for maximum efficiency in service of the public good, but rather are designed and structured to meet political goals (Lewis, 2003; Moe, 1989). From their very conception bureaucracies are thus not politically inert neutral enforcers of policy. Agencies often have independent preferences formed when the agency was designed and staffed in a strategically partisan manner to encapsu-

late the preferences of the coalition that created it. In fact, bureaucratic agencies are often staffed explicitly through patronage appointments to reward political allies and aid the coalition in power (Moe, 1984, 768). In this way, agencies may be targeted for partisan-based strategic delay on the basis of their historic predispositions. Lewis (2008), for example, has demonstrated that presidents often change their strategies with respect to politization depending on the ideological predisposition of the agencies. One could thus expect the factions within the Senate to obstruct or facilitate these presidential actions depending on their agreement with a president.

Beyond the individual and the agency, the characteristics of the office to which one is nominated are also likely to be influential. For example, the position level of a nomination is likely to be the most important of considerations. High-level nominees are the most influential for directing policy within an agency, but it is also the case that these nominations may be the least prone to delay. Such nominations, by virtue of their importance, are the most visible and thus more likely to be targets of presidential attention and lobbying efforts from his or her co-partisans in the Senate. High-level nominations such as cabinet secretaries have also been viewed as presidential prerogatives, and thus some deference has historically been given towards these positions. As such, high-level nominations are the ideal targets for delay but are the most difficult to obstruct in practice.

In contrast, the motivations surrounding the delay and obstruction of the lowest-level nominees are the reverse of the highest nominations. Such low-level nominations are the least influential for policy-making – and thus they are not the ideal choices for delay – and yet these are the nominations that may be the most easily obstructed. For example, few Senators will expend valuable time working towards the confirmation of an assistant deputy for legislative affairs in a bureaucratic agency. Importantly, mid-level nominations have both policy relevance and at best limited political cover

provided by visibility and importance. These nominees are thus the likely targets for strategic delay. While mid-level nominees may not seem that important, one may effectively decapitate an agency by removing the "neck" and leaving the head (senior officials) removed from the body of civil servants by a barrier of leadership vacancies.

Furthermore, if we consider the power of an appointment, then perhaps the most influential appointments are to IRCs. Given their importance to policy and an administration, delay should thus be even more potent for these positions. For example a five-member commission short a single member and otherwise evenly split between Republican and Democratic appointees. Any appointment to this commission will shift the median and potentially change outcomes. Taken further, nominations to that same commission when it is down two members (ie it has with a 2-1 partisan voting split under the remaining members) could dramatically change the policy decisions of the commission by changing which party has majority control over voting outcomes. Furthermore, while a president may be able to use other entities – such as OIRA – against the policymaking authority of a regular executive agency, IRCs are by definition independent and it is more difficult for a president to overrule, ignore, or obstruct one of their rulings. As such, when we examine delay in the nominations process, we should expect delay to be much more common among IRC nominations than other executive nominations.

Other Sources of Delay

Because of their value to policymaking and ties to the image of a successful party/presidency, nominations are subject to frequent obstruction. Not all delay, however, is caused by partisan obstructionism. First, delay can be systemic, and any widespread increase in delay may be attributable to changes in the structure of the

nominations process rather than an increase in partisanship. Second, delay may be strategic, but limited in intention to the benefit of a single senator and as such not necessarily a party or partisan activity. Each of these cases, along with strategic partisan delay, will be described in detail below. Given the differences between the potential sources of delay, one would expect the patterns of strategic partisan delay to be distinct from other non-partisan or systemic sources.

There are a variety of systemic explanations behind the increase in the time it takes a nominee to become confirmed compared with nominations three decades ago. One of the leading factors may very well be that low government pay coupled with the market value placed on knowledge gained from government service makes leaving public office for outside opportunities increasingly attractive for appointed officials. At the same time that retention levels have been decreasing, Congress has also increased the number and kind of positions that require Senate confirmation (Lewis, 2008). Over the past several decades, government has "thickened" at the top as agencies engage in title proliferation (Light, 1995). Ultimately, shorter tenure lengths coupled with a greater number of positions to fill in turn imply more vacancies, vetting, and nominations, all of which may increase the Senate's workload and cause delays in confirming nominees. This structural source of delay is not necessarily political, but because it is system-wide and generally increasing through time it will influence the nominations process.

Additionally, one of the recent trends in the nominations process is a media fueled focus on nominee *dis*-qualifications (Carter, 1994). There are always instances where the nomination process will uncover evidence of wrongdoing or a scandal. Depending on the severity of the allegations, nominees may be quickly withdrawn (Krutz, Fleisher, and Bond, 1998) or alternatively linger longer in hearings. Affected interest groups or those opposed to the policy implications of a nominee may use such allega-

tions as the basis for opposing a nomination. Institutionally, because of the threat of scandal and given the scrutiny placed on nominees by opposition senators, high-level bureaucrats have been placed under more strenuous vetting processes than ever before (Light, 1995; Mackenzie, 2001). This necessarily increases the time it takes to evaluate a nominee and it also places a heavier burden on the individual nominee. While all nominees may not face the same danger of scandal due to disqualifications, such cases are at least theoretically neither strategic nor otherwise patterned. As such, these cases can be considered idiosyncratic or randomly distributed across cases.

Using the hold, senators often engage in "hostage taking" (Mackenzie, 2001, 33) in which they place a hold on a key nomination in order to gain concessions from the administration or others. These "hostages" are then released after the demands have been met or some other compromise has been reached. In response to such strategies, other senators may issue retaliatory holds on nominees to positions or causes of interest to the hostage-taking senator. Similarly, senators may wish to apply a hold to a nominee in order to gain an interview with or exact promises or concessions from the nominee (Mackenzie, 1981). Other motivations include the desire to make a cause more public through the delay of a related nomination. In this way, senators may be able to use strategic holds to take positions on issues and claim credit. Majorities are able to overcome these holds, but they often do not because time is such a valuable resource in the Senate. While strategic, these kinds of holds stemming from individual senators' motivations are not likely to be patterned; rather, targets are likely to be victims of opportunity depending on who is available on the docket.[2]

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[2]It is important to note that there may in fact be a pattern of increased "hostage taking" over time as the incentive structure in the Senate has changed. However, within a Congress, there is no reason to believe that one nominee is more likely than another to taken hostage.

Differentiating between delay caused by grand party strategy and delay caused by idiosyncratic factors such as opportunistic hostage taking may be difficult. As noted, holds are often invisible and thus the reasoning behind their use may be known only to the senator who issued the hold. However, prior research has uncovered several clear patterns in delay. For example, research conducted by McCarty and Razaghian (1999) notes significant differences in delay due to Congress-level political factors such as polarization, divided government, and party imbalances in the Senate. Additionally, McCarty and Razaghian (1999) find that delay time differs between agencies, the level of appointment, and a variety of nomination specific variables while research from Nixon (2001) and Asmussen (2011) has demonstrated the effect of demographics on confirmation. Understanding these systematic patterns and idiosyncratic sources of delay can ultimately help to uncover the sources of strategic delay.

Competing Theories of the Nominations Process

There are many competing and overlapping theoretical accounts of the nominations process. Given that rates of failure in the nominations process tend to be very low, and given that a formal executive nomination cannot be amended by the Senate once issued, it would seem on the surface that the process is quite deferential. Because the process seems deferential, or at least devoid of active conflict, then the question at the heart of many prior studies is: Which branch influences the decision more? Because success is generally predicted, most accounts are observationally equivalent in their expectations about confirmation. Looking beyond success and failure, however, provides a greater understanding of the process and the degree to which different actors influence outcomes.

One perspective on the nominations process suggests that presidents usually get their preferred nominee. For example, Moe (1987, 489) notes that "the power of appointment is fundamentally presidential" and furthermore that Congress often adheres to a "norm of deference" with respect to nominations. There are reasons for suspecting presidential dominance of the nominations process. When bargaining over a nominee, one of the President's most basic advantages is being a unitary actor (Lewis, 2003). First, as a unitary actor the President is able to make decisions alone with regard to his or her own preference orderings while the Senate must engage a collective action problem each time it wishes to challenge a president. Second, presidents have the power to "go public" with a nomination conflict (Kernell, 1997) or otherwise use their power to persuade (Neustadt, 1990). Presidents may thus be able to take their case public in support of their preferred candidates in a way that the Senate, as an actor with multiple members, internal divisions, and divergent preferences, cannot. Third, presidents have the advantage of being able to actually pick the candidate to be considered, which gives a president a significant agenda setting power and the first mover advantage. Hence, presidents are able to exert a substantial amount of *ex ante* control over nominations by choosing and supporting individuals with similar policy preferences.

Other scholars have noted the historical predominance of Congress within the executive nominations process (Hoogenboom, 1961; Sollenberger, 2008). When compared with presidents, the Senate is not without its own significant advantages. Congress has historically been able to dominate the nominations process through the norm of presidential co-partisans offering names and advice, the threat of non-cooperation if advice is not followed, or other means of directing presidential decisions. This history has led Sollenberger (2008) to declare that Congress dominates the nominations process. One corroborating piece of evidence is that presidents must make hundreds of

nominations to positions and it is unlikely that any single individual would have the personal or professional connections to fill these posts with qualified candidates. Under this framework, presidential co-partisans in the Senate or the House are therefore natural sources of nominations and thus the Senate routinely confirms presidential nominations. It is also the case that the simple threat of non-confirmation can be enough to force a president to choose a more palatable nominee. As such, presidents may defer to the Senate in order to avoid conflict while perhaps counting on administrative powers to keep officials in line with executive priorities. In any case, there is an argument to be made for presidential deference towards the Senate with respect to nominations.

Given that both presidents and the Senate retain advantages when it comes to determining who is nominated for a position, it is likely that the nomination decision is the outcome of implicit or explicit inter-branch bargaining. This framework acknowledges the inherent advantages of each branch and concludes that the likely result of the nominations process is a merging of the two institutions' preferences that depends on the advantages of each. Neither side is likely to be entirely dominant. For example, presidents are expected to better dictate who is nominated when their party controls the Senate and less likely to get preferred nominees when their party is not in the majority. The framework of shared influence guides most scholarship on this subject and the task of many investigations in this field has turned towards understanding the circumstances, place, and degree to which each institution influences the choices and outcomes of the executive nominations process. This literature is described below as it relates to understanding obstructionism in the nominations process.

Prior Investigations of Influence in Nominations

Much of the literature examining which actors most influence the choices and outcomes of executive nominations uses policy-based unidimensional spatial models to examine the process (Calvert, McCubbins, and Weingast, 1989; Chang, 2001; Hammond and Hill, 1993; McCarty, 2004; Moraski and Shipan, 1999; Nokken and Sala, 2000; Semenov, 2008). These investigations, however, often do not consider the influence of time and none of them address delay as an option within the model itself. This is because most prior literature, both formal and substantive, has largely been concerned with what "type" of individual eventually gets nominated and confirmed rather than how long it takes. While not specific to delay, these models are a good place to examine prior theoretical frameworks of the nominations process as a whole. In addition to nomination-specific games, other sources of insight also include models of bargaining in structured environments in general, such as Baron and Ferejohn (1989) and Rubinstein (1982).

In conceptions of the nominations process as a strategic game, there are two essential players: the President and the Senate. Though not consistent with reality, the Senate is often modeled as a kind of unitary actor or as a list of pivotal senators. These kinds of assumptions are a common feature in the formalizations of inter-branch relationships (Cameron, 2000; Krehbiel, 1998) and are almost universally adopted in models of the nominations game. While the Senate is not in fact a unitary actor, and while there are often more important actors than the median senator or the filibuster pivot (such as senators filling leadership posts), parsimony has led previous scholars to not include such features within basic models. Chang (2001, 326-327) discusses these simplifying assumptions including excluding the agenda setting powers of the relevant

committee chair. Each of these actors is assumed to be a rational, risk neutral, utility maximizer with preferences expressed in a simple unidimensional policy space.[3]

The President and the Senate bargain over the position of a bureaucratic nominee on the basis of their respective ideal points. In a simplified game, a potential third actor is the bureaucracy, but it does not necessarily take actions to affect the outcome of nominations so much as its features, such as natural predisposition or existent imbalance, influence outcomes. For example, in an IRC, a five-member board with two Democrats, one Republican, and two open seats will have a natural predisposition towards making pro-Democrat decisions. This predisposition will in turn have an effect on the other player's preferences concerning what kind of nominee they favor as a replacement. In this sense, the bureaucracy or board in question may realistically function more like the reversion point (Romer and Rosenthal, 1978) of a bargaining game.

Perhaps the most basic game conceived to model this interaction takes the form of an ultimatum game for each nominee. First, the President (P) decides who to nominate (on the basis of ideological proximity) and then the Senate (S) chooses whether to accept or reject. The President may decide to nominate someone who is exactly at the Senate's ideal point (action "All", as in all of the pie) or the President may decide to nominate an individual at his or her own ideal point (action "None", as in give none of the pie). The space between these two options is continuous, and the President may choose any allocation (X) to give to the Senate. If the Senate accepts, then payoffs are realized and the game ends. If the Senate chooses reject, however, the

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[3]For a defense of the unidimensional approach to the nominations game, see Nokken and Sala (2000, 97-101).

game begins again and the President chooses another nominee.[4] Without transaction costs or discount factor, the President has no loss of utility due to the rejection and thus no reason not to choose a candidate on the same grounds as the first iteration of the game. For all intents and purposes, the new nominee will thus be an ideological clone of the last nominee.

Figure 3.1: The Simple Ultimatum Model of Nominations Game
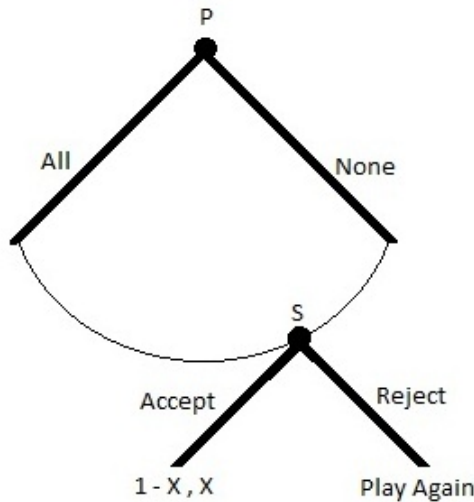
Because the President has the power to nominate the same kind of individual infinitely, this game always ends with the Senate accepting any proposed nominee. For the Senate, any nominee is either better or at least as good as receiving nothing. Because the Senate does not have the power to offer a counter nominee, the only alternative for the Senate is an endless sequence of rejections. As such, the outcome predicted by subgame perfect equilibrium is that the President will always offer the

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[4]See Calvert, McCubbins, and Weingast (1989, 609) for a description of this game where rejections lead to replaying with a new nomination. In the their model however, payoffs are discounted after rejections. The basic "play again" framework comports well with the reality that presidents, upon receiving a rejection, would then be able to nominate a new person for the appointment.

Senate $X = 0$ and the Senate will always vote to accept such a nominee. This outcome is directly attributable to the lack of Senate proposal power when bargaining as well as the absence a punishment to the President for choosing an unacceptable nominee.

This however, is a very simple conception of the game. Models used by scholars such as Calvert, McCubbins, and Weingast (1989) usually provide an extreme reversion point (ie 0 payoff for not reaching a deal), discount factors for each iteration of the game, or transaction costs associated with each nominee. Such additions can mirror the real costs of vetting new nominees and paying the political costs of evaluating these new nominations. In these more nuanced ultimatum games, the President anticipates the responses of the Senate and the ideal point of the resultant nominee becomes a compromise somewhere between the ideal points of each branch (Chang, 2001). Essentially, a president would choose a nominee as close to him or herself as the Senate would accept. Importantly, the focus of these models is the "kind" of nominee who can be successfully confirmed and never the time it will take to do so.

The basic ultimatum game as described above is an unsatisfactory account of the nominations process because it is too static and deterministic. Often the games used to describe the nominations process do not allow for any kind of stalemate to occur, as is frequently observed in practice, and the ultimatum game also cannot take into account presidential impatience defined as the loss in value to the President for a nominee to be confirmed at a later date rather than the current one. For example, transaction costs and discount factors usually operate around rejections and repetitions of the game, and would not account for the extra value lost during a lengthy confirmation period of a single nominee as opposed to faster confirmation. To account for this factor, one would need a conception of time that was continuous. Furthermore, with complete and perfect information any game would predict that presidents – who are anticipating the costs of delay – will compromise with the Senate

at the start of each game. This stark prediction disturbingly contradicts known practices by implying that delay will never occur.

In the case of the nominations game, stalemate leaves both players with their payoffs from the status quo or some similar reversion point. In this case, the reversion point is the natural predisposition of the bureaucracy. This disposition may be a part of the culture of the bureaucracy, such as pro-environmental feelings at the EPA, or it may be a partisan imbalance left in an independent regulatory commission after the sudden departure of a board member. Using partisan imbalance as a measure of the status quo is a familiar technique, and has been used when investigating appointments to the Federal Reserve (Chang, 2001) and the Supreme Court (Moraski and Shipan, 1999; Shipan and Shannon, 2003). Rationally, presidents should be more impatient the further away the bureaucratic reversion point is from their own ideal point as greater separation between the ideal point of the president and the status quo would imply a greater loss of utility, measured in bureaucratic output, due to delay.

The notion of a status quo point has already been introduced into the nominations literature. Starting with Moraski and Shipan (1999) along with the work of Nokken and Sala (2000), we get an image of presidential nominations (primarily in the context of the courts) as constrained by the status quo in relation to the Senate's pivotal member and the President. Their basic model is shown in the figure below. An "Unconstrained" president is free to choose his or her own ideal point. "Partially Constrained" presidents may move policy closer to themselves, but not too far. In these circumstances, the pivotal member of the Senate agrees with the President as to which direction is preferred, but not necessarily how far to go. In a "Fully Constrained" situation, the President is stuck with the status quo point as movement between the two actors is a zero sum game. In this circumstance, the Senate would

veto any movement towards the president's ideal point and so the President must settle on the status quo.

Figure 3.2: Presidential Constraints as a Spatial Model
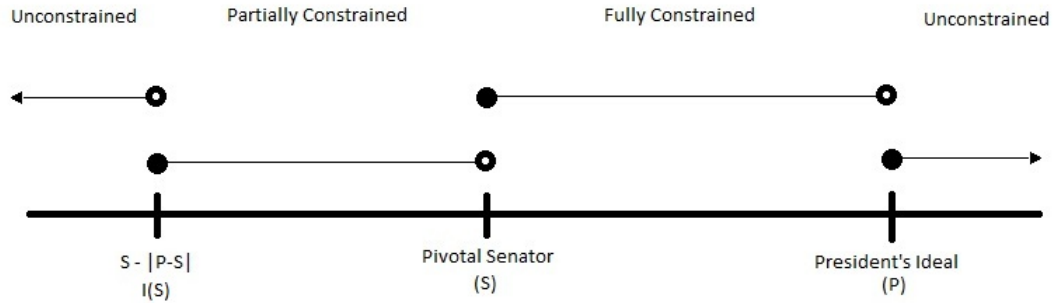
While a spatial model may provide much intuition about where delay is likely to occur, spatial models in general fail to accurately describe the use of "delay" as a strategy because they cannot take time into account. Spatial models are not dynamic and a full treatment of time would likely require the addition of a separate dimension. For example, the model can spot where delay may occur but it is a simple dichotomy; it can never tell one *how much* delay to expect. Furthermore, given a framework of both perfect and complete information, a president and Senate would again always prefer to compromise quickly rather than engage in costly delay. Hence, using backwards induction with a traditional model, the subgame perfect equilibrium would never include delay as an actual outcome of the game.

The fact that delay is never predicted to occur in the nominations game is similar to models of other costly behaviors such as vetoes and filibusters, in which anticipation of punishment leads to early compromise. Cameron (2000, 84) discusses the anticipation of carrying out a veto threat as the "second face of power" in which the actual punishment never needs to be carried out in order to have an influence on

actions. Contrary outcomes, such as the actually carrying out of a threat, are considered as errors or aberrations. Yet delay is not just observed as an occasional feature of the nominations process; rather delay is a commonplace outcome that cannot be easily dismissed as an error. The difficulty of explaining delay in a world of complete and perfect information applies to both spatial models such and the ultimatum game above.

One solution to the problems stemming from complete and perfect information is to relax one or both of these basic assumptions. While it is possible that the President and the Senate are uncertain about each other's preferences, the repeated interactions between these two players makes this assumption increasingly unlikely. Alternatively, we may consider that there is uncertainty over where the nominee resides within the unidimensional policy space. This choice makes sense as it is the president who nominates after careful vetting and the Senate must then find out if the nominee is a fair choice or an individual closer to the President's ideal point than would have been confirmed under conditions of perfect information. Using the spatial model from Moraski and Shipan (1999) in the context of the supreme court, Shipan and Shannon (2003) suggest that the simple spatial model shown above might be profitably amended to include exactly this kind of imperfect information. Specifically, the authors suggest that the Senate may be ill-informed as to the type of nominee proposed by a president. The authors, however, do not actually implement and test such a game. While this approach may yield delay as a predicted outcome, such a game would still not be able to produce estimates of delay length.

Prior approaches to the nominations game may not be appropriate for the study of delay in the executive nominations process. First, most of the prior literature has been developed to examine who is nominated, which may not be directly applicable to how fast a confirmation is achieved. Second, some of the simplifying assumptions, such as

treating the Senate as a unitary actor, are not likely to be justifiable within the context of delay, where a single member or a small group of determined senators can force the majority party to exercise significant effort in order to overcome obstructionism. Third, most prior models or frameworks do not examine, include, or otherwise account for the value of time to either the president or the Senate. As such, many intuitions gained from models of passage may not apply to delay. Nevertheless, some of the insight developed in considering these and other models can help us to understand the dynamics of bargaining between presidents and the Senate.

An Alternative Theory of Delay in Nominations

Any coherent theoretical account of the executive nominations process must be able to predict patterns of delay and stalemate. Models of the nominations process that do not allow for stalemate and failure are so unlike the observed phenomenon as to make any prediction or intuition developed from them highly suspect. Furthermore, a coherent theory also needs to explain why stalemate persists given the possibility of withdrawing a nomination or allowing it to fail and beginning the entire process over again with a new nominee. The key to understanding when delay or stalemate is likely to occur is to examine the value of time to the relevant actors. As described above, the goal is to answer the question of why a nomination may be delayed even if it is likely to win confirmation. This will provide a description of the intrinsic value of delay. To answer, one must explore the value of time for both the president and the Senate.

In addition to being a limited commodity in the Senate, time is also an important consideration related to control of bureaucratic output. Specifically, one can conceive of control over an executive agency or independent regulatory commission as

providing a stream of benefits over time. The longer one controls where the stream flows, the more benefits one is able to receive. As such, each individual nomination decision is not just about winning or losing the battle; rather both sides care about the speed of the process. Presidents thus want to get their nominees in office as soon as possible so that they may begin to realize the benefits of the nominations while the opponents of the president are better off delaying the process as to prevent any adverse change. For example, if a pro-business president is elected, he or she may prefer to immediately place like-minded individuals in charge of the EPA so as to counter that agencies predispositions towards conservation and regulation. Of course, pro-environment senators would benefit from blocking these nominees as a preventative measure.

If one conceives of the nominations game as a bargain, then it is important to consider exactly what the reversion point of the bargain is when no agreement is reached. During delay or a stalemate in the nominations process, the office that would be filled by the nominee stands vacant. This is the status quo while a bargain is being struck and it is the reversion point when a bargain fails. Commonly, the duties of vacant offices are performed by a career civil servant, meaning that the predisposition of the agency in question serves as the likely reversion point. In the case of a regulatory board, the reversion point may be the ideological makeup of the remaining board members. For extreme cases such as occurred with the NLRB, the reversion point may be an ineffective board incapable of legally rendering decisions. Importantly, for each of these cases some in the Senate may prefer this reversion point to the bargaining outcome. Indeed, preferences for the status quo within a given agency may be sufficient incentive to engage in delaying a nominee. If so, then the appropriate measure for the reversion point is the ideological predisposition of the agency in question.

Agency predisposition is an important element in bureaucratic politics. Presidents, for example, have been found to treat agencies differently with respect to nominations given the ideological predispositions of the agency. Specifically, Lewis (2008) finds that presidents are more likely to politicize agencies with an ideological predisposition opposed to their own. The logic of such actions is that by politicizing recalcitrant agencies, a president is able to better maintain control. Given the importance of these actions, a president's opposition in the Senate may do well by thwarting them, and delaying these same nominees. While it is theoretically possible that there may exist agencies so ideologically extreme that both a president and the Senate opposition could agree on shifting the status quo towards a more central position, such cases are likely to be rare. Given that the structure and staffing of bureaucracies is influenced by both Congress and the president, compromises and adjustments over time would tend to moderate outlier agencies so as to make extreme status quo points rare.

Which nominees are likely to be delayed? If we assume that the senatorial opposition is unable or unwilling to delay every nominee due to political costs, then they must target their strategic efforts toward the most valuable nominations. With respect to the reversion point, it is most advantageous for an opposition to protect status quo points far away from a president's ideal point. This implies that agencies with an ideological predisposition opposite to that of a president are more likely to face strategic delay in the executive nominations process. The logic behind the choice is simple. Delaying presidential opponents likely provides the most gain for opponents of the president. Agencies allied with a president's ideological predisposition are likely to implement policy in accordance with the executive's wishes even with multiple vacancies in their leadership structure. Agencies opposed to the president ideologically, however, are not likely to implement policy in accordance with the

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executive's wishes unless the leadership of the agency is firmly under the control of presidential allies. This difference in status quo points provided by who fills vacant offices allows a Senate opposition to realize gains purely from the delay of nominees who will succeed.

Beyond the policy-based motivations for delay, senators are also likely to target nominations on the basis of their value to the president. As mentioned above, not all nominations are created equal and some nominations are going to be of more value to delay than others. Specifically, nominations are likely to be targeted on the basis of their breadth of power, their independence from the president, and the salience of the position. Of course, motivations will not always match perfectly with abilities. Powerful positions with high salience are also likely to be those positions that presidents will fight hard over. Hence, one may expect to see delay occur under circumstances where there exists value in delay but little value in overcoming delay.

If delay is so costly to a president, then it would make sense that ideological concessions would be made in favor of a speedier confirmation. This is, in fact, the intuition provided by many of the formal examinations of the nominations process cited above. Given that presidents can simply withdraw a nomination and make a new one, stalemate is a seemingly irrational outcome. Similarly, the Senate can simply reject a nominee who it feels is not able to meet the standards of confirmation. So why does stalemate occur and persist?

Given that a small minority of Senators can effectively obstruct a nominee, it is often the case that nominees with widespread, virtually super majority, support may be delayed. Party politics lend support to such unbalanced outcomes. Lee (2009) points out that co-partisans are likely to support one another's procedural maneuvers as a part of working as a team. It is important to note that support for a nominee does not directly translate into support for taking a vote on a nominee. In this way,

a super majority of the Senate may support a nominee while not being able to take a vote on it directly. This is why conceptions of the Senate as an individual entity are so problematic. A conception of the Senate as a median ideal point cannot capture the dynamics at play where a significant minority of senators can force delay. As such, the Senate has no incentive to vote down a nominee who it would actually confirm if given a direct vote. Similarly, while presidents can withdraw and replace nominees, they are unlikely to get a better deal by replacing a nominee who would already handily win a direct vote.

One further answer to this puzzle is that any nomination making the obstructionists at least indifferent between the nominee and the status quo would likely leave the president with no real gains between a vacant office and the new nominee. This is not to say that presidents never compromise, but rather there is a point at which presidents may be no better off by compromising further. For example, with the extreme delay faced by the NLRB nominations, some senators prefer the status quo of an ineffective IRC as opposed to *any* nominee. While this is an extreme example, it is illustrative of the fact that compromise may not be a viable option. As such, it can often be the case that any replacement nominee would be equally unlikely break through a stalemate motivated by a handful of Senators protecting a favored status quo. Given these incentives, stalemate would likely continue.

In the face of delay and obstruction, presidents have few tools at their disposal. As noted, presidents can withdraw and replace a nominee. This option, however, is unlikely to break the deadlock and it would also require the president to constantly pay the costs of finding, vetting, and promoting a new nominee. Beyond withdrawing a nominee, presidents can attempt to use recess appointments or maintain some appointees in a holdover or interim capacity. As noted in Chapter 2, these options, while used often, are still quite limited in capacity. For the vast majority of executive

nominees, presidents must win confirmation using the standard process. As a last resort, presidents may bargain with their political rivals to provide incentives for confirming a nominee. Such deals would be similar to log rolling legislation and may entail trading votes on legislation or other nominations. These deals would, of course, be limited to salient nominations and given the nature of the compromises the deals are likely to be non-public. Ultimately, most delayed nominees must endure the long wait.

While some members of the Senate may benefit by stalemate without end, delay does pose some costs and as such it may not be expected to last forever. In the face of super majority support for a nominee, members may be able to delay with reasonable excuses (ie additional paperwork requests, holding a hearing, or asking for answers to hundreds of "questions for the record") before a nominee is simply scheduled for a vote. Members can issue holds, but doing so often on widely supported nominees may lead to retaliation or reputational costs. Other costs on an opposition senator include the staff time and attention as well as the minimal transaction costs used to obstruct a nominee. These costs may be small but it limits the ability of a senator to universally delay.[5]

While the Senate cannot spare the time to fight on every nominee, it can spare it for some nominees. For example, there are often cases where a cloture vote is held on a nominee who then passes with super majority support. Given that not every nomination is a likely target, the scope of conflict is limited to a handful of cases at any given time. As such, stalemate may be broken under the right conditions. Specifically,

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[5]Recent research by Den Hartog and Monroe (2011) has suggested that the minority party in the Senate pays a higher net cost to winning proposals. This is likely to be true for the obstruction of nominees as well. This implies that a senator in the majority will be better able to obstruct than if she were in the minority. As such one would anticipate that divided government could foster greater delay.

when a president is able to rally co-partisans in the Senate to keep supporting a nominee and raise the cost of obstruction, an obstructed nomination may come to a vote. Furthermore, when time is abundant in the Senate, for example in the early months of a session, credible obstruction may be harder to maintain and majority leaders may be more likely to pay the costs of forcing votes. Ultimately, obstruction is a powerful but not insurmountable opponent.

Empirical Expectations

While the delay or failure of a single nomination is unlikely to yield much public attention, the partisan obstruction of many or all presidential nominations is likely to be noticed. Just as presidents may be unlikely to use recess appointments on all nominations, opposition senators may fear a public backlash if their efforts are viewed by the public as too extreme. Delay is thus not universally applied but rather it is likely to be valuable conditional on context. As suggested above, delaying nominees to agencies ideologically opposed to the president is likely to be most beneficial to a Senate opposition. Such a strategy would have the effect of insulating the co-partisans of the opposition senators within agencies. While I argue that the agencies opposed to the president will experience the greatest delay, there exist other possible alternatives that should also be addressed.

First, obstruction may occur because opposition Senators wish to blunt the force of presidential initiatives. For example, a new Democratic president may be expected to work closely with the EPA in strengthening environmental regulations. To oppose movement in this direction, one might seek to delay confirmation of nominees to key posts within the EPA in order to disrupt the chain of leadership and potentially hinder progress at what would likely be a site of presidential interest and activity. In

this sense, the logical target of opposition Senators would be programs and agencies allied to the president ideologically. Such a strategy would have the effect of blocking presidential initiatives.

Second, in an effort to produce stability and neutrality in the executive agencies, it may also be the case that the Senate scrutinizes nominations to outlier agencies, or those agencies that have historically demonstrated an ideological predisposition toward one ideology or another. In a study of failure in the executive nominations process, Krutz, Fleisher, and Bond (1998) find that nominees who are deemed outliers are more likely to be subject to increased scrutiny and ultimately failure. Nominations to agencies known to have an outlier predisposition would likely be heavily scrutinized by the party of the opposing ideology. In this way, outliers of both directions would be held in check. Such a strategy would have the effect of keeping agencies from becoming too extreme and it would lead to a pattern of delay in agencies both allied or opposed to the president.

Third, because of the value of obstructionism to the opposition party with respect to party branding or the value of time, it may be the case that all nominations are equally delayed without particular distinction to the office or strategic value of delaying one nominee over another. For example, if the ultimate goal of delaying nominees is for an opposition party to find evidence fit for a scandal, then one would expect all nominees to be delayed regardless of the ideological predisposition of the agency to which they were nominated. One case of impropriety would likely be as useful as another and one would expect a roughly random distribution. If parties are engaging in universal obstructionism, then agencies that are allied, neutral, or opposed to the president are all likely to face delay. This outcome is observationally equivalent to no strategic delay.

Table 3.1: An Opposition's Predicted Strategies (Normal vs. Delay), by Motivation and Agency Relationship to the President

	Agency Relationship to the President		
Opposition Motivations	Allied	Neutral	Opposed
Insulate Opposition Co-Partisans	**Normal**	**Normal**	**Delay**
Block Presidential Initiative	**Delay**	**Normal**	**Normal**
Scrutinize Ideological Outliers	**Delay**	**Normal**	**Delay**
Universal Obstructionism	**Delay**	**Delay**	**Delay**

Table 3.1 shows the expectations for where delay may occur by agency disposition given a variety of alternative theories of why delay may occur. Because delay can influence failure, these expectations outlined in Table 3.1 may also be applied somewhat roughly to predictions of where failure is likely to occur. As noted above, most alternative accounts of delay or failure as occurring through scandal, disqualifications, or opportunistic hostage taking are unlikely to be politically patterned. As such, Table 3.1 provides a good comparison of rival theoretical accounts of the motivations for delay. Importantly, these rival theories can be evaluated with real data. I anticipate that empirical observations will reveal that opposition senators will opt for the insulation of co-partisans and thus there will be significantly more delay of nominees to agencies with an opposition predisposition of the president as compared with neutral agencies and presidential allies. This investigation will be the subject of the next chapter.

These expectations as to where delay will occur provide a significant advancement over prior theoretical predictions. While most prior studies look at macro-level trends

in obstructionism, such as partisanship or divided government, the expectations listed above allow a researcher to determine why one nominee was delayed to death while another, seemingly similar, nominee from the same Congress was not. Specifically, characteristics such as divided government and partisanship may tell researchers more about the opportunity to delay than the motive. Similarly, expecting that certain key offices are more likely to be delayed can explain what an opposition is attempting to do – cripple an agency – but not why. A conditional theory of delay in the executive nominations process should allow researchers to look beyond larger trends and into the more strategic choices of which nominees are likely to face delay based on the motivations of senators. Expectations concerning agency predisposition allow for such predictions to be made and can significantly improve our understanding of the executive nominations process.

Discussion

Prior literature has mostly been oriented towards discovering what kind of nominee a president may be able to successfully propose. This prior literature is reasonable in its assumptions and accurate in its findings, but it was also never intended or designed to form a complete strategic picture of the nominations process. Importantly, from the viewpoint of this outcome based literature, the timing of the success or failure matters little to either presidents or the Senate. The goal of this chapter was to produce a theoretical framework for understanding the intrinsic value of delay in executive nominations and furthermore, to develop some expectations about how this value may influence the distribution of obstructionism in the executive nominations process.

The value of delay in the executive nominations process hinges upon the reversion point of the bargain between presidents and the Senate. For most nominations, this reversion point is the ideological predisposition of the agency to which an individual was nominated. As noted at the opening of the chapter, agencies are not simply neutral implementers of policy. The predispositions of an agency influence how policy is implemented and political actors must take this into account when they seek control over policy. Agency-level variation in ideological predisposition influences presidential nomination choices, and similarly this variation likely influences strategic delay as well. While there are many possible variations as to where and why a president's opposition in the Senate may choose to delay nominees on the basis of agency predisposition, the most likely choice is to delay nominations to agencies opposed to the president. The intrinsic value in delay then is the benefits gained by an opposition party by strategically delaying nominees in order to preserve favorable status quo points in order to influence policy outcomes for as long as the stalemate continues. As such, some can benefit more from inaction than any possible bargaining outcome.

One of the important suggestions of the framework developed in this chapter is the idea that parties and branches will fight *over* time. If political actors not only care about winning and losing, but also how fast they do so, then their actions will be influenced accordingly in predictable, and policy relevant, ways. It may very well be the case that presidents often nominate an individual who does not represent the president's ideal point, but the nominee is one who is likely to be confirmed quickly. In a sense, time may be traded for policy location. Time is important to the nominations process insofar as control dictates the policy decisions of bureaucratic agencies. As such, it represents a continuous stream of benefits. This observation is also an important consideration for explaining why opposition senators engage in the

strategic delay of nominees who *will* eventually receive confirmation. These ideas will be explored in greater detail in Chapter 4.

A further important concept developed in this chapter is the idea that the denial of confirmation may be as powerful as the ability to nominate. If nominations are important presidential tools for bureaucratic control and policy-making, then their absence must be of equal importance. The value of these positions gives delay its potency and makes cases of failure equally interesting and important to study as those of success. Given the nature of the nominations process, lengthy delay can lead to the failure of a nomination that otherwise would have won a direct vote. In a sense, the failure of a nomination by delay may be the best evidence that delay in the nominations process is the result of stalemate rather than hostage taking or scandal hunting. The logic of delaying a nomination to the point of failure will be explored more in Chapter 5.

Ultimately, this chapter has provided a framework suggesting that there can be an intrinsic value of delay in the executive nominations process. The essence of this argument is that some proportion of the Senate is advantaged by the lack of a successful nomination in such a way that presidents are unable to advantageously respond with a different nominee. In short, this is an explanation for why stalemate is often observed in the nominations process. This theoretical framework discussed within this chapter produces several testable expectations, and these will be explored further in the coming chapters using empirical data.

Chapter 4

Strategic Delay in Executive Nominations

The one thing it's easy to do in the Senate is slow things down. The Senate is 100 human brake pads.

– Sen. Byron Dorgan (ND)

[I]t is the subcabinet that bears the brunt of the frustration and delay. Nominees to the subcabinet, defined as any position below that of secretary, waited almost nine months on average to enter office in Mr. Bush's first term. The federal hierarchy was not so much headless during the period as neckless.

– Paul C. Light, "Late for Their Appointments"

Delay in Executive Nominations

Prior studies have observed that 90 percent or more of all executive nominees are successfully confirmed (Bond, Fleisher, and Krutz, 2009; Krutz, Fleisher, and Bond, 1998), however this high success rate tends to mask wide variation in the length of

time it takes the Senate to make a decision. During the stalemate, delay of critical nominees can influence the character and effectiveness of an agency while hampering the policy ambitions of a president. Within the literature on bureaucratic politics, it is taken as a given that the power of a president to nominate individuals to high office is perhaps the greatest source of a president's influence on policy implementation. If so, then the reality of delay may be an equally important. With a multitude of paths leading to senatorial delay in nominations it is perhaps unsurprising that the process is protracted, but the question of why some nominees are delayed while other, seemingly similar nominees are not remains largely unanswered. The investigation into this question will also provide insight on the intrinsic value of delay, which is the value gained in holding back a nominee who *will* eventually receive confirmation.

Political contexts such as divided government and partisanship are likely to increase delay in the aggregate (McCarty and Razaghian, 1999; Nixon, 2001), but such Congress-level variables do not help predict which individual nominations *within* a given Congress are likely targets for delay. Discovering which nominees are targeted is a key step in better understanding the motivations behind strategic delay. Building on prior literature and the theory developed in Chapter 3, I test a variety of agency-specific hypotheses including whether delay is related to bureau-level ideological predispositions. Using a data set of over 7,500 executive nominations from 1987 to 2010, it is found that, in addition to other important factors, agencies with predispositions opposed to the sitting President are more likely to be targeted for delay. Ultimately, these findings help to explain why some nominees may be more likely to face delay than others.

The following sections contain an empirical investigation of strategic delay over the past several decades within the executive nominations process. First, I outline the exact theoretical and operational conception of delay used within this study as well as

the scope and character of the investigation. Next, I provide a descriptive introduction to these data on delay and demonstrate basic trends over time and in relation to other variables of interest. Using these data, I introduce explicit testable hypotheses and conduct an empirical investigation. In the final section of the chapter, these results are discussed in the broader context of the executive nominations process.

Investigating Strategic Delay

Delay is an inherently subjective term. That some nominations will take longer than others is a given feature of the existent political institutions and not necessarily an indication of strategic action or a failure of governance. Throughout this investigation, the term "delay" is used interchangeably with the phrase "time to decision" and is not intended to be pejorative or imply impropriety in any way. Furthermore, delay is distinct from failure, which may also occur quickly or slowly depending on circumstances. Because delay is subjective, no effort will be made to quantify or otherwise distinguish between cases of "delay" and "not delay"; rather all cases will be compared along a continuum of the amount of time it takes each nomination to reach a final outcome.

The first task in investigating delay is to identify the population of interest and a unit of analysis. Defining these basic concepts in analyses of delay can be a difficult task. Two possibilities stand out and both have been used in prior literature. First, one may use the dates of vacancy with the departure of the prior occupant and the arrival of the new appointee serving as the respective bookends for the time period under investigation. In this sense, the unit of analysis is the time it takes Congress and a president to fill vacant offices. Second, one may use the nomination (as received by the Senate) and confirmation (or last Senate action) dates as the time period of

interest. The unit of analysis in the second option is the formal nomination itself. There are many subtle differences between the two with benefits and drawbacks to each.

Vacancy periods have been used by several scholars (Nixon, 2001; O'Connell, 2009) as a means of analyzing delay in executive nominations. This measure has the advantage of capturing delay that stems from the pre-nomination process from either the Senate or a president. Specifically, while only one individual may eventually be formally nominated, it is often the case that many individuals are considered for a position before any formal nomination is sent to the Senate for consideration. This pre-nomination process takes place in conjunction with advice from key senators and can often be a site of conflict with many nominations "dying" in this phase (Nixon, 2001). Vacancy periods are a good way to estimate the total time it takes for a *position* to be filled. Furthermore, in studying the influence of delay on bureaucracies, vacancy rates must be used because several formal nominations may take place in the span of a single vacancy.

While vacancy periods are often the necessary unit of analysis, there are significant drawbacks for using this measure in some studies. First, one may not use individual-level characteristics (ie race, gender, prior occupation or appointment) when using the vacancy as the unit of analysis because several different individuals may have been considered within the vacancy period. Second, one may not be able to identify or measure the sources of delay. For example, vacancy periods may be due to increased presidential or senatorial delay as well as the lengthening of the recruitment and vetting process. Third, as vacancy periods may stretch between Congresses and administrations it is difficult to identify the important institutional factors, such as divided government or a particular presidency, that are influencing vacancy rates. As such, vacancies may not be the best tool for understanding *senatorial* delay.

For analyses of senatorial delay in the nomination process, prior scholars have tended to use the nomination and confirmation dates from within the U.S. Senate (McCarty and Razaghian, 1999). This measure has the disadvantage of being more exclusive (ie it only counts post nomination delay) but that exclusivity comes with several advantages. First, it allows one to focus on senatorial delay, especially through formal mechanisms such as cloture votes, hearings, and similar institutional features. Second, nominations that are not acted upon at the end of a Congress are "returned to the President", which ensures that nominations will be confined within consistent institutional settings. Third, using formal nominations also allows one to study specific individuals who failed to be confirmed either through a vote, withdrawal, or failure of the Senate to act. These cases are especially important for understanding the inter-branch conflict over nominations as well as delay. Ultimately, using formal nominations allows for the creation of an easily identifiable population of cases that have all passed a similar threshold of consideration.

Given the comparative advantages, this analysis will use the nomination and confirmation (final action) dates from formal nominations made to the U.S. Senate. Rather than produce a definition of delay that produces a hard rule (for example 100 days or beyond the 75 percent mark), this study will simply analyze the time it takes for each nomination to be processed by the Senate. As such, the quantity of interest is the time in between the formal nomination and the decision of the Senate. Even under circumstances in which the Senate makes no decision regarding a nomination, one still has a measure of time that the Senate held the nomination under review before undecided nominations were returned to a president at the end of a session. Nomination and confirmation data is available from the Library of Congress's

website, THOMAS.[1] The population of all nominees (given the restrictions on scope noted above) for this study was gathered from this source. Basic information includes the nominee's name, the agency to which the individual was nominated, the position, and the dates of nomination and confirmation. Additionally, THOMAS contains information as to whether nominees were withdrawn from consideration, failed, or were returned to the president at the end of a session. This measure will allow for a direct comparison of how much time each nomination required. Such a definition is a useful construct and it follows the example similar studies of the nominations process (Bond, Fleisher, and Krutz, 2009; McCarty and Razaghian, 1999).

Scope and Boundaries

Every administration faces thousands of appointments, but only some of these appointments will be considered within this work for reasons of theoretical incompatibility. First, all military officers are promoted by acts of Congress, and these nominations may also be delayed or held hostage by Senators. These positions, however, are often bundled together and voted on as a whole due to the fact that there are thousands of promotions each year. Because they are bundled, and because their policy influence is unclear, these nominations are not theoretically compatible with bureaucratic nominations and are thus not a part of this study. Second, each president makes hundreds of appointments that are not subject to Senate confirmation. As there is no inter-branch interaction to be observed here, these appointments are also not a part of this study. Lastly, some specific positions, such as federal marshals and ambassadors have unclear policy influence and as such are often left out of studies

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[1]http://thomas.loc.gov/.

concerning nomination delay. Following this reasoned tradition, these posts will not be included in the subsequent analysis.

While the process of nomination and confirmation is similar for federal judgeships, it is important to note that the nature of judicial appointments is often quite different. Unlike bureaucrats, judges serve for lifetime appointments and are generally well-insulated from control after taking office. The stark contrast between a bureaucrat with an average life expectancy of just a few years and a judge who serves a life term implies that Senators are likely to be much more cautious about the appointment of judges than they are with any level of bureaucrat (King and Riddlesperger, 1996, 282). Furthermore, while motivations for delay similar to those encountered by bureaucrats have been uncovered for nominations to the judiciary (Binder and Maltzman, 2002, 2004), there exists an entirely different (pre)nomination process for judges. Specifically, the use of the "blue slip" and senatorial courtesy (Binder and Maltzman, 2002, 2004) implies that judges must go through additional hurdles before confirmation is achieved. Therefore, while the literatures on bureaucratic and judicial nominees are linked, questions concerning the delay of bureaucratic and judicial nominations can be profitably separated. As such, I will not include judicial nominations within the empirical analyses ahead.

Many prior studies have used differing populations of cases in their studies of the nominations process. Specifically, past studies have selected cases by choosing only to examine nominations to high-level positions (Bond, Fleisher, and Krutz, 2009; King and Riddlesperger, 1996; Krutz, Fleisher, and Bond, 1998; O'Connell, 2009), nominations within a single agency (Nixon, 2001), or nominations to a handful of key agencies (McCarty and Razaghian, 1999; O'Connell, 2009). Often many such filters are used to select cases for studies of the nomination process. While these studies provide accurate accounts within context and have all significantly advanced our

understanding of the nominations process, there are difficulties involved in narrowing case selection. First, restrictive case selection comes at the price of generalizability. For example, because cabinet level nominations are treated differently than lower-level appointments, an estimate of either the time from nomination to confirmation or failure rates based on cabinet nominations is unlikely to be accurate for members of minor commissions. Such data biases must be acknowledged. Second, because each of these studies uses a different population, it is difficult to compare results across similar studies. As such, our knowledge about the nominations process accumulates without significantly growing.

Given the potential dangers of a narrow study, I strive to be as inclusive as possible in selecting cases. Even though few senators or constituents may care who sits on an inconsequential advisory board or fills the role of a low-level agency position, the time it takes to fill these offices is still important for understanding the delay of high-level officials if only by comparison. It is also the case that narrow interests do not necessarily translate into weak interests. Those affected by the decisions of smaller boards may be just as motivated to lobby the Senate as interests influenced by the decisions of major boards. The Constitution, after all, would suggest that each office requiring Senate approval is a principal rather than an "inferior" position. Collecting a greater depth of data on the outcomes of executive nominations facilitates a greater degree of comparison between types and levels of nominations than has previous studies have allowed.

The last issue of scope to be discussed is the time frame of the investigation. The time period in which I will investigate strategic behavior within the executive nominations process is 1987 to 2010. While delay, success, and failure all occurred previously to this period, there are substantive reasons to support this choice. As discussed in Chapter 2, Mackenzie (1981) has noted that all nominations must be

understood within their own historical epoch, and according to Carter (1994) our current epoch began in 1987 with the nomination of Robert Bork and the ensuing shift in how nominations are viewed politically. Given the current state of the nominations process as described by the participants and observers, the present nominations process has changed perhaps in degree but not kind since 1987. As such, this study evaluates nominations within the Bork epoch. It is important to point out, however, that intuitions gained from studying the Bork era are not likely to be generalizable to nominations in previous epochs.

Trends in Delay

Using the above definition of cases and delay, the following tables and figures describe elements of delay in nominations between 1987 and 2010, or the 100th to the 110th Congress. These data are provided in several different aggregations: pooled across time, by Congress, and by presidential term. Each of these levels of aggregation can provide meaningful, and different, insight into the nature of the nominations process. As not all nominations are considered equal in the eyes of the Senate, there is also a breakdown of delay by office level. It is important to note however, that the analysis provided in this section is purely descriptive in nature.

Pooling all cases across time, Figure 4.1 shows the proportion of nominees between 1987 and 2010 who remained under Senate consideration after a given number of days. A Kaplan-Meier curve is used to show these data because just a simple portrait of the mean or median time to decision would be dramatically skewed given the presence of censored cases that never reached a decision. Because nominations not confirmed by the end of a congressional session are returned to presidents, the maximum number of possible days that an individual could be delayed is just about 730 days. By the shape

Figure 4.1: Kaplan-Meier Survivor Function for Executive Nominations, 1987 to 2010
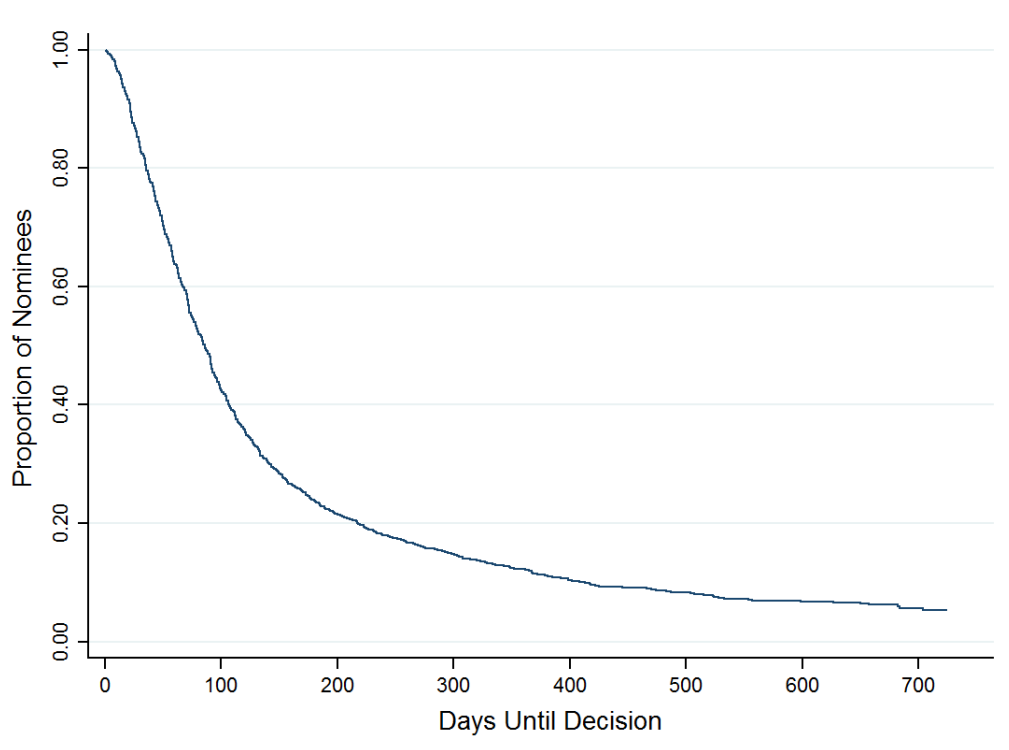
of the curve, one can see that many nominees are confirmed quickly, with only about 40 percent of nominees remaining after about 100 days. After 100 days, the process slows considerably as the changing slope of the curve indicates. By 200 days after a formal nomination, there remain approximately 20 percent of cases without a decision. The fact that the curve never touches 0 indicates that there are many individuals whose cases were still pending by the end of a congressional session. In general, these data indicate that there is significant delay occurring with some nominees waiting as long as five or six hundred days for confirmation.

Figure 4.2 represents the distribution of decision times for nominations within each Congress between 1987 and 2010. The horizontal line within the box for each Congress shows the mean for delay within that Congress while the upper and lower

Figure 4.2: Box Plot of Decision Times by Congress (1987 – 2010)
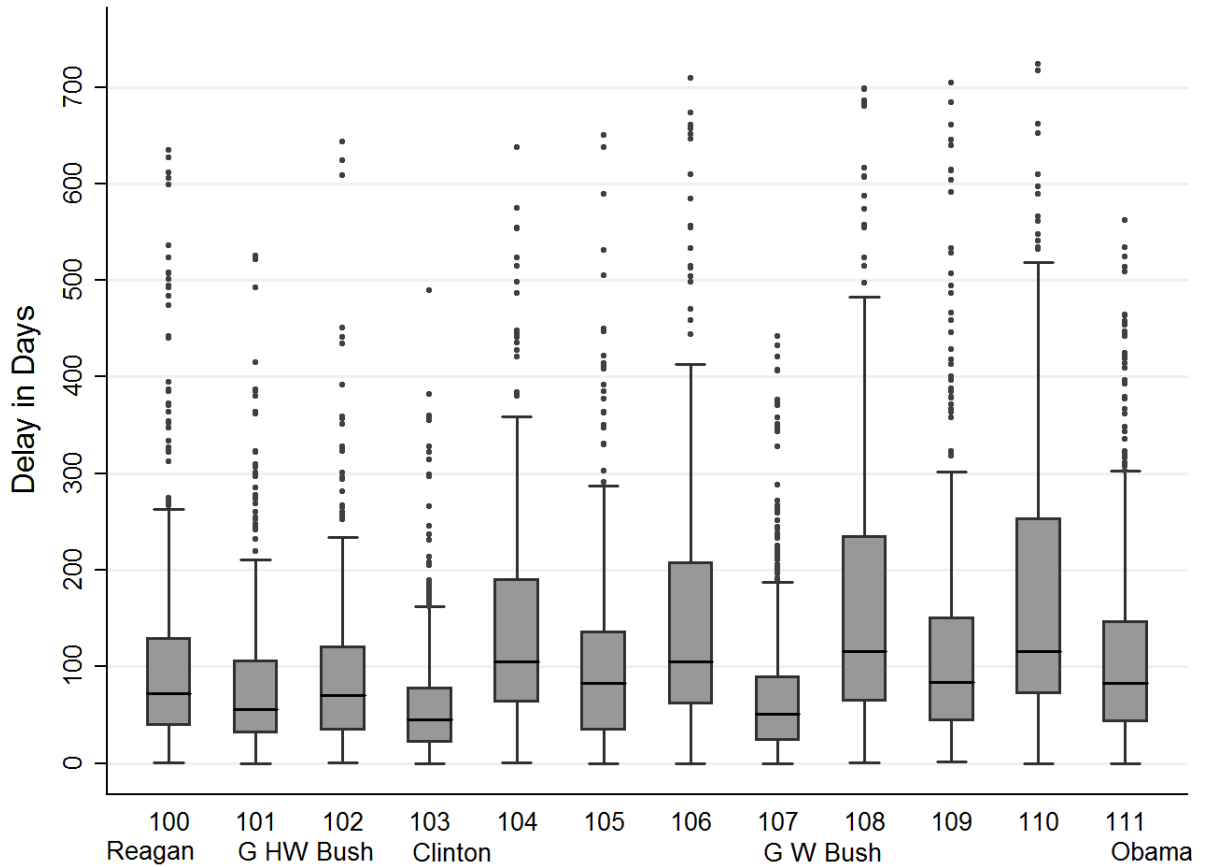
bounds of the box show the inner quartiles (25 − 50 percent of the data). The outer lines, whiskers, represent a distance of 1.5 times the length of the inner quartile range. Beyond the range of these whiskers, outliers are plotted with dots to represent extreme cases within each Congress. While the presence of censorship skews these estimates, the plot is revealing. First, there is some indication of periodicity in levels of delay over time with alternating periods of higher and lower delay. Importantly, Congresses with higher delay tend to match well with the presidential electoral cycle. In short, presidents in their first Congress appear to enjoy quicker confirmation periods while Congresses containing a presidential election tend to be slower. Second,

there does appear to be a slight pattern of increasing delay overall, but there are too few Congresses within these data to comfortably test this relationship.

Table 4.1: Time to Decision in Days by Presidential Term: 1987 – 2010

President	Average Delay	Total Nominations
Reagan ('87-89)	109	626
H.W. Bush	90	1,186
Clinton I	90	1,279
Clinton II	142	1,043
W. Bush I	115	1,488
W. Bush II	152	1,217
Obama ('09-10)	109	766

Table 4.1 shows these same data aggregated to the level of each presidential term. At this level of aggregation the periodicity shown at the congressional level is somewhat muted. The data do suggest, however, that presidents tend to experience more delay in their second term than in their first. Furthermore, when comparing the Clinton terms to the terms of George W. Bush, there does appear to be some increase in the amount of delay over time. Unfortunately, there are too few presidencies with complete data to make a strong case for change over time. Of course, the inability to compare across all too few presidents is a common difficulty for the empirical study of executive politics (King and Ragsdale, 1988) and as such most future analysis will take place at a finer level of aggregation.

Hypotheses

Based on prior literature and the nature of the Senate, there are a variety of political and institutional contexts that we would expect to influence delay in executive nominations. A study by McCarty and Razaghian (1999) has already shown that

nominations made within the first 90 days of an administration tend to proceed more quickly while those made under conditions of polarized or divided government tend to proceed more slowly. Similarly, one would expect that lame duck presidents would be less able to find and support nominees and as such delay would be more likely. In the following analysis, I anticipate these variables conforming to the findings of prior studies. The expected influence of factors found in previous literature as well as the hypothesized relationships enumerated below are all listed in Table 4.2. The expected relationships all convey directionality and significance, but not relative strength or magnitude.

Under the framework and theory described in Chapter 3, one would also expect that agency predispositions can influence strategic delay. This relationship, however, is not straightforward. The influence of agency ideology should be important in relation to the President's ideology. As noted in Chapter 3, prior research has demonstrated that presidents attempt to exert greater control over agencies with an opposing ideology. Given their respective incentives, one would expect that a president's opposition within the Senate would attempt to thwart these presidential ambitions and thereby also protect a more favorable status quo point. As such, delay is predicted to be targeted towards nominations to agencies with a disposition in opposition to the President. Alternatively, delaying a nomination to an agency allied in ideology with the President will yield no differences in policy or enforcement and are thus these nominations are not predicted to be different from appointments to neutral agencies.

H_1: Delay will be greater for nominations to agencies with ideological dispositions opposite to the President.

Prior studies (Black et al., 2007, 2011; Nixon, 2001) note the importance of being able to choose a member of a major independent regulatory commission (IRC). These positions are influential because the decision-making body is usually very small, they cannot be removed from office easily, and they serve long terms that are not affected by changes in administration. Furthermore, a vacancy on a major IRC cannot be filled by a career civil servant; rather the reversion point is an empty seat. Delays to IRCs may be aimed at blocking the establishment of a quorum, retaining the party balance of the status quo, or of attempting to delay choice until after a presidential transition. Due to these factors as well as the large influence of being able to place one member onto an independent regulatory commission, it is expected that these positions will be more likely to be delayed when compared with other agency nominations.

H_2: Delay is significantly greater for nominations to major independent regulatory commissions.

As Paul Light (2004) has pointed out, delay in the nominations process has led to "neckless" agencies. Given the relative inability to presidents to "go public" for minor officials combined with the policy relevance that mid-level positions still hold, it would be natural for these mid-level positions to be the primary targets of strategic delay. This pattern is suggested by a variety of anecdotal accounts (Light, 2004; Troy, 2011) and comports well with intuition about how senators may balance the value and vulnerability of positions for delay. As such, when compared with high-level positions such as cabinet secretaries or to the lowest-level positions with little policy relevance, one would expect delay to be significantly greater in mid-level appointments.

H_3: Delay is significantly greater mid-level appointments.

In addition to other factors of political context, the nature of the electoral cycle should also have an influence on delay. Specifically, partisan expectations as to the

outcome of an election, whether founded or not, can influence the desirability of delay. As an election nears, it may be useful for one side or another to delay nominations until a new Congress or president is in office with the expectation that outcomes will be better under the new government. This is especially true for positions on commissions or other offices in which the term of office transcends administrations. Further adding to the prediction of delay is the informal Thurmond Rule, which is a Senate practice wherein no nominations are decided within the last few months of a presidential election-year. While the very existence and practical details of the Thurmond Rule have been questioned since the 1980s, and though there is little evidence to support the assertion that no nominations are decided upon at the end of a term, the Thurmond Rule is still widely discussed in election years (Binder and Maltzman, 2009, 88). As such, one would expect nominations to slow during presidential election years.

$\mathbf{H}_4$: Delay is significantly greater for nominations within the year of a presidential election.

The popularity of a president has long been noted to be a source of bargaining power (Neustadt, 1990) as well as an opportunity to take matters "public" (Kernell, 1997). Within the topic of nominations, studies of presidential recess appointments such as Black et al. (2007, 2011) and Corley (2006) find public approval of presidents to be a significant factor in making these nomination decisions. Public approval of a president may therefore provide the executive with more political capital, and thus aid in bargaining efforts with the Senate. Conversely, unpopular presidents may have proportionally less bargaining power. As such, one would expect that more popular presidents will suffer significantly less delay on their nominations.

$\mathbf{H}_5$: Delay is significantly lower for nominations made by popular presidents.

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Table 4.2: Expected Relationships of Key Variables on Decision Time

Factor	Expected Influence
Political Contexts	
Divided Government	**Slower**
Start of Term	**Faster**
Presidential Election	**Slower**
Lame Duck Presidency	**Slower**
Polarization	**Slower**
Presidential Approval	**Faster**
Agency Traits	
Allied Agency Ideology	**None**
Opposed Agency Ideology	**Slower**
Defense	**Faster**
Appointment Level	
Cabinet Level	**Faster**
High Level	**Faster**
Major Commissions	**Slower**
Low Level	**Slower**

Furthermore, not all agencies take on the same kinds of policy. For example, if politics in fact ends at the water's edge, then the Senate may give presidents more latitude, and hence less delay, with agencies related to national defense. The idea that a president may be advantaged in areas of foreign policy has been advanced by Wildavsky (1966) and it may be possible that this deference would extend to executive nominations. As such, one would expect significantly less delay in defense related nominations.

$\mathbf{H}_6$: Delay is significantly lower for nominations made to defense related agencies.

Data Operationalizations

One of the most important variables under consideration, agency ideological dispositions, has been studied by Clinton and Lewis (2008) for the purpose of examining executive agencies and these data are now publicly available.[2] Using expert opinions, Clinton and Lewis (2008) develop an estimate of relative agency ideology for 82 executive agencies in existence between 1988 and 2005.[3] While Lewis (2008) used these data to evaluate bureaucratic performance based on the predisposition of agencies and other institutional characteristics, these data can be readily adapted to examine whether particular agencies are targeted for delay on the basis of their predispositions and characteristics. Furthermore, a recoding of this variable from the raw scores into a measure of either opposition to or agreement with the President will allow one to test the conditional effects of agency predisposition.[4]

Of course, ideology is not the only factor in nominations. It is also theoretically important to consider what these nominees will be tasked with. Given the importance of national security, it can be assumed that these appointments may be treated

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[2]These data are available at David Lewis' webpage: https://my.vanderbilt.edu/davidlewis/data/.

[3]When using ideological scores for agencies, approximately 20 percent of the cases within the data set cannot be given a score because the agency or board ideology was not measured in the Clinton and Lewis (2008) data set. All models were run with and without this measure and were found to be robust. See Appendix for details of how this variable was coded.

[4]Agency ideology scores are recoded from Clinton and Lewis (2008). Specifically, these scores were categorized in reference to each president as: Neutral, Allied, or Opposed. Scores within the inner quartiles of the original Clinton and Lewis (2008) data were coded as neutral in all cases. Allied and Opposed agencies were calculated in reference to presidential party and are comprised of the outer quartiles. In the following analysis, the "Allied" and "Opposed" categories are identified in relation to "Neutral."

differently. As such, agencies concerned with matters of national defense and security are coded from the Clinton and Lewis (2008) data set.[5]

Furthermore, not all nominations are created equally and as such each nomination may differ with respect to importance. While there are a great variety of different job titles that have proliferated throughout the executive bureaucracy (Light, 1995), several types of positions are directly comparable and several prior studies have profitably grouped offices into categories for the purpose of investigation (McCarty and Razaghian, 1999). As such, nominations will be divided into tiers: Cabinet Level, High-Level, Major Commission, Low-Level, and Lowest-Level. The exact operationalization for each of these categories can be found in Table 4.3 below. The category of "Lowest-Level" will serve as the baseline factor for comparison in future analyses.

The highest tier of offices includes cabinet secretaries and the attorney general. Below this tier are other high-level nominations such as deputy cabinet secretaries, department/agency directors, and under secretaries. In the third level, the tier listed as "Major IRC Board/Commission Member", includes all members of major IRCs.[6] While it is true that there are other commissions and boards, these other entities are often purely advisory and have far less policy influence than these major boards. In the fourth tier, "Low-Level" nominations include members of non-major commissions, counsel technical positions, and U.S. Attorneys. Last, the fifth tier, "Lowest-Level"

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[5]Where no measures were present, the author's discretion was used to approximate the Clinton and Lewis (2008) coding scheme. The exact coding for this variable can be found within the Appendix.

[6]Following the coding scheme of Black et al. (2007, 2011); Nixon (2005), this list includes members of the: Consumer Product Safety Commission, Equal Employment Opportunity Commission, Federal Communications Commission, Federal Election Commission, Federal Election Commission, Federal Energy Regulatory Commission, Federal Reserve Board of Governors, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, National Transportation Safety Board, Nuclear Regulatory Commission, and the Securities and Exchange Commission.

nominations, contains a mixture of administrative titles such as "deputy undersecretary" or "special assistant" as well as other offices which defy categorization.

Table 4.3: Operationalization and Sources of Key Variables

Variable	Operationalization & Source(s)
Political Contexts	
Divided Government	Senate majority not co-partisan with president
Polarization	Distance between party mean DW-NOMINATE scores
Presidential Approval	Average presidential approval in month of nomination
Start of Term	Was nomination within first 90 days of first term
Presidential Election	Was nomination within a presidential election year
Agency Traits	
Allied Agency	Quartile closest to president (Clinton and Lewis, 2008)
Opposed Agency	Quartile furthest from president (Clinton and Lewis, 2008)
Defense Related	Was agency defense related (Clinton and Lewis, 2008)
Appointment Level	
Cabinet Level	Cabinet Secretaries and Attorney Generals
High Level	Deputy/Under/Assistant Secretaries, Agency Heads
Major Commission	Nominations to IRCs from Nixon (2005)
Low Level	Minor commissions, Inspectors, Technical Positions
Lowest Level	Scholarship Boards, Deputy Undersecretaries, All Others

Several contextual variables are also necessary to test hypotheses. Divided government, for example, is measured based on whether a president's party affiliation differs from that of the majority party in the Senate. Additionally, I code nominations for whether they take place during a presidential election year. To measure the relative distance between the two parties, I include a measure of the difference between the party mean scores within the first dimension of DW-NOMINATE.[7] To account for

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[7]These data can be found at http://voteview.com/polarizedamerica.asp.

public opinion, the average public approval of the president during the month of the nomination can be found using the American Presidency Project.[8] Next, an "early" nomination in a president's administration is coded as the first 90 days after the first inauguration. This measure is not recalculated for a president's second term. As it is also possible that presidents with a known expiration date may have a disadvantage in nominating, I account for lame duck presidencies by including a measure of whether a nomination occurred within a president's second term.

The variables described within this section as well as in the sections above are listed along with their operationalization and source within Table 4.3 for easy reference. Throughout the remainder of this chapter as well as in future chapters, unless otherwise explicitly stated, the operationalization of the key variables will be as described in this section.

Modeling Delay Time

The dependent variable of interest when testing the above hypotheses is the length of time it takes to confirm a nominee. The standard method employed in studying delay times is a duration or survival model.[9] While a measure of time in days seems like it could be a good candidate for Ordinary Least Squares, using OLS would ignore problems of left and right censorship (due to the beginning and end of sessions). As such, duration models have been used by McCarty and Razaghian (1999) as well as others in the study of confirmation delay.

Survival models are capable of taking into account the extra information available in censored observations, of which there are plenty in any data set of nominations.

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[8]http://www.presidency.ucsb.edu/data/popularity.php.

[9]See Box-Steffensmeier and Jones (2004) for details on various approaches to duration models.

Nominations are "censored" when the Senate returns the nomination to the President at the end of a Congress without a decision. Theoretically, these observations would have ended in success or failure on an infinite time line, but the end of a Congress artificially ends the period of observation. These observations are important in helping to estimate the duration of nominations as they provide additional information to the model. Furthermore, censored observations tend to be patterned (ie they occur much more often in the second session) and thus their exclusion may significantly bias any analysis.

While the most common approach to survival data is perhaps the Cox proportional hazards model, the data for nominations do not meet several of the basic assumptions inherent to a Cox proportional hazards framework. Most importantly, the data contains a high proportion of tied cases, which poses a difficulty for Cox models (Box-Steffensmeier and Jones, 2004). Evidence from Kaplan-Meier survival plots, as well as a variety of other tests, suggest the Weibull model as a good alternative. As such, the following analysis of nomination delay will employ a parametric duration model, the Weibull. This model has been used by McCarty and Razaghian (1999) in their study of nominations delay and has several beneficial characteristics.

Findings

Many of the hypotheses and expectations listed above can be examined by looking at descriptive statistics and the relationships within the data. This section will provide both descriptive analysis and empirical modeling to examine the hypotheses.

Table 4.4 shows average time to congressional decision in days aggregated by the the position level of the appointment using the sequence of tiers described above. The resulting description indicates that delay is more pronounced in middle-tier positions

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Table 4.4: Delay Time in Days by Level of Position, 1987–2010

Nomination Position by Tier	Average Delay
Cabinet Secretary & Attorney General	27
High-level Nomination	91
Major IRC Board/Commission Member	132
Low-Level Nomination	131
Lowest-Level/Other Nominations	98

and less likely to be observed in either the highest or lowest tiers. Intuitively, this may suggest that high-level nominations such as cabinet secretaries are more difficult to delay while the lowest-level nominees may not be valuable enough to delay for reasons of policy. The data trend also comports well with the quote from Paul Light (2004) that delay has led to "neckless" rather than headless agencies. While seemingly more innocuous, delay of such mid-level appointments is likely to significantly hamper agency performance and disrupt executive control over policy implementation. Furthermore, these data indicate that the highest average delay comes from appointments to major IRC boards or commissions. Such positions, even when they are not immediately median-shifting, are still quite valuable as these decision-making bodies are usually composed of just a handful of voting members. As such, the pattern of delay within position levels comports well with intuitions of strategic delay.

Figure 4.3: Average Committee Delay in Days, 100th - 111th Congress
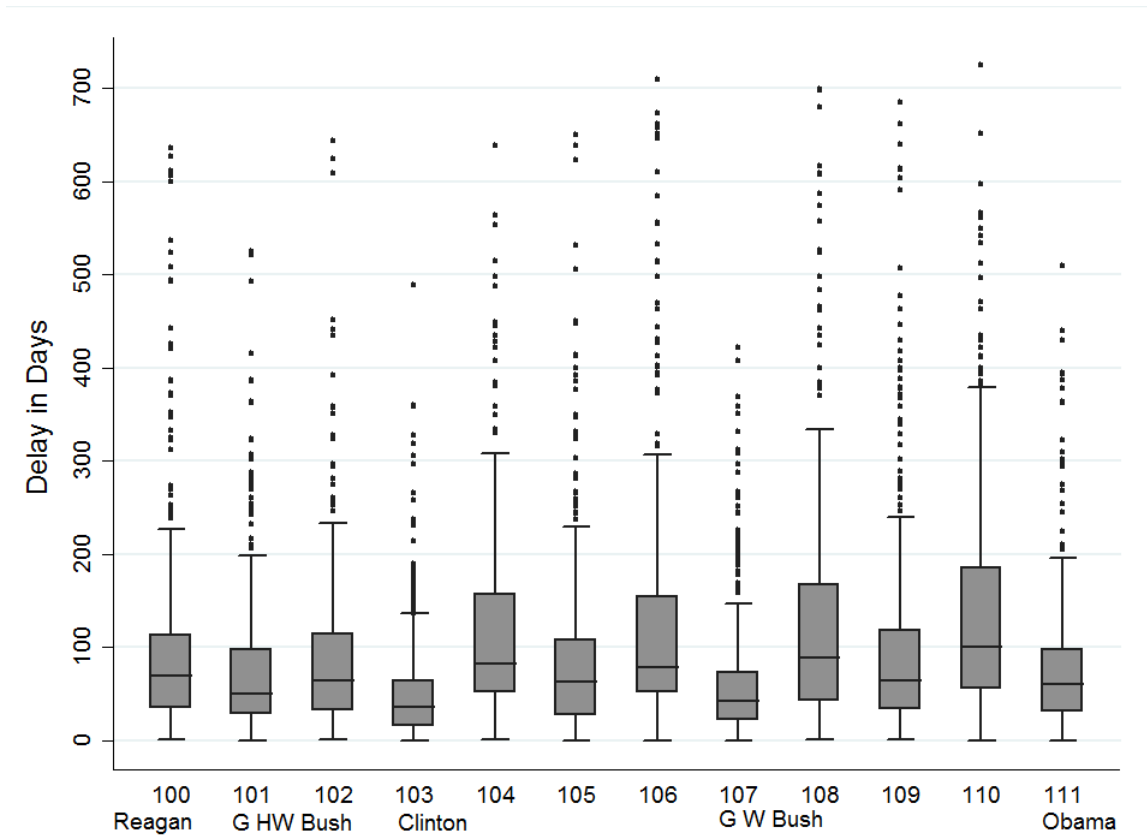
Figure 4.3 shows the average number of days nominations spent within committee by Congress. This figure demonstrates that there is significant variation in the time it takes committees to discharge nominations between Congresses. One implication is that at least some level of delay takes place at the committee level and that it is not the case that committees are simply efficient processors of nominations after which delay occurs on the floor of the chamber. These data, however, do not demonstrate a consistent, monotonic, increase or decrease in the time it takes committees to discharge their nominations over time. In short, the pattern of delay within committees tends to mirror the pattern of delay overall and the same periodicity found in Figure 4.2 can be found here as well.

Figure 4.4 shows a Kaplan-Meier survivor function for both presidential election years and all other years. Given that presidential election years always occur at the end of a Congress, these data end within about 360 days rather than the 720 days possible for nominations taking place at the beginning of a Congress. As such, these trends are not directly comparable after the 360 days mark. However, censorship is taken into account within these figures, which means that given this caveat one can compare between the trends with respect to what proportion of positions await decision. It is clear that nominations are far more likely to face delay within presidential election years.

Figure 4.4: Kaplan-Meier Survivor Function for Executive Nominations by Election Year, 1987 to 2010
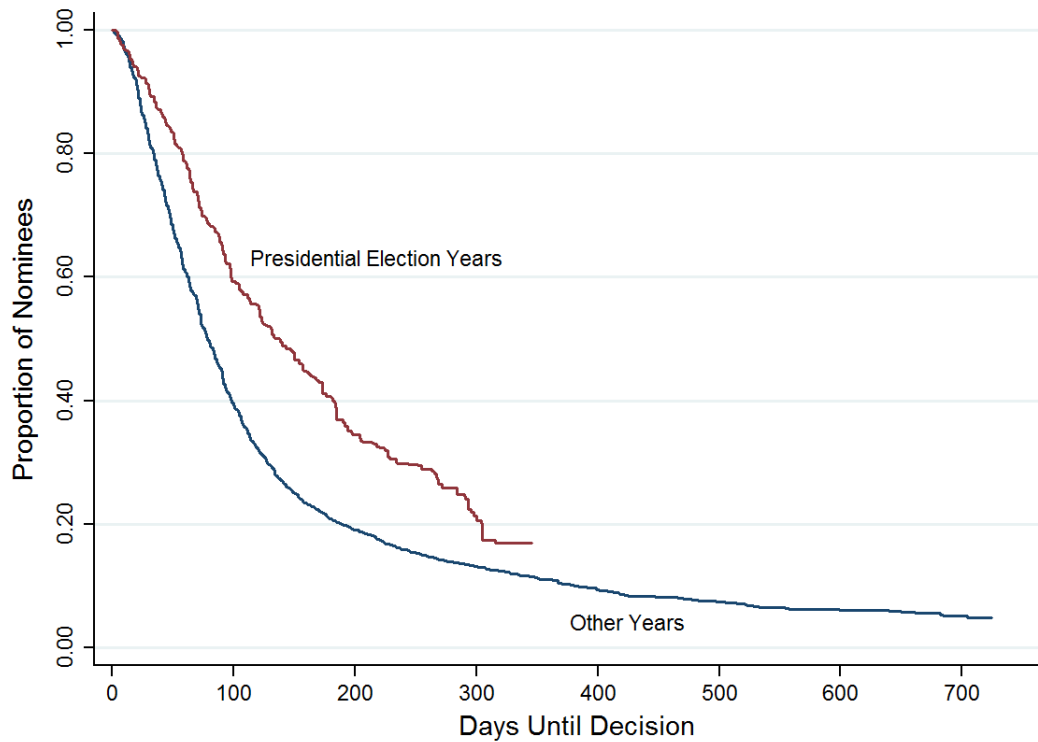
The model in Table 4.5 demonstrates the results of the Weibull duration model on the nominations data described above. The estimates of the duration model are given in terms of hazard ratios rather than estimated coefficients in order to aid interpretation. The hazard ratio can be read as increasing or decreasing the hazard of ending the nominations process with the baseline for comparison being 1.00. So a hazard ratio of 3 indicates that a unit increase in the independent variable will make the nominations process three times faster while a ratio of .50 suggests that a nomination will take twice as long. Alternatively, we can view these hazard ratios in Figure 4.5 where the dots represent the predicted hazard ratio and the horizontal lines with vertical ticks respectively representing the 95 and 90 percent confidence intervals. The "ln(p)" term is a shape parameter for the Weibull with $H_0 = 0$. The significant value of .069 suggests that the hazard is monotonically decreasing.

The model results suggest support for the key hypotheses listed above. Looking at the first hypothesis on agency ideology, being nominated to an agency or board with a disposition opposite of the ideology of the President does significantly lengthen the nomination process. As suggested by the theory of conditional strategic delay, this effect is not present in those agencies or boards with allied ideologies. This finding is interesting because both "allied" and "opposed" categories contain exactly the same mix of agencies and what is changing is their relationship to each president's ideology. Ultimately, these findings support $\mathbf{H_1}$ and the theoretical notion that agency reversion points are a key consideration for strategic delay.

With respect to $\mathbf{H_2}$, these findings also show that nominations to major IRC are significantly more likely to be delayed. While major IRCs do not fill vacancies in the same way that agencies do, it is important to note that a theory centered on reversion points will also pick out major IRCs as likely targets. This is due to the leverage gained

Table 4.5: Duration of Nomination Decisions 100th to the 111th Congress

Variable	Hazard Ratio	Z Score	[95% CI]
Political Contexts			
Senate Divided	0.841	-4.47	[0.779 − 0.907]
Polarization	0.059	-11.90	[0.037 − 0.095]
Presidential Approval	1.004	3.09	[1.001 − 1.008]
First 90 Days	2.410	14.97	[2.148 − 2.705]
Presidential Election	0.741	-6.31	[0.676 − 0.814]
Lame Duck	0.818	-5.46	[0.761 − 0.879]
Agency Traits			
Allied Ideology	0.945	-1.53	[0.878 − 1.016]
Opposed Ideology	0.894	-3.21	[0.834 − 0.957]
Defense	1.113	2.15	[1.010 − 1.227]
Appointment Level			
Cabinet Level	3.264	11.06	[2.647 − 4.025]
High Level	1.062	1.36	[0.974 − 1.157]
Major Commission	0.679	-5.59	[0.592 − 0.778]
Low Level	0.723	-7.83	[0.666 − 0.784]
ln(p)	0.069	6.45	[0.048 − 0.090]
N	6026		
Log likelihood	-8272.13		

from placing even a single individual within a small voting body. Furthermore, when a nomination to an IRC can potentially shift the median, this appointment is likely much more valuable than regular agency appointments. Combined with the findings on agency ideology, these results support the notion that reversion points are critical to understanding delay across agencies.

Building off of the purely descriptive treatments of delay above, the model provides more evidence for **H₃** and the notion that there are difference in the degree of delay between the tiers of appointments. Position level clearly matters. The results of

the model indicate that cabinet level nominations are much faster than the lowest level nominations while major commission and low-level nominations are significantly slower. High-level nominations seem to have delay about on par with the lowest-level nominations. These findings comport well with both prior descriptive analysis as well as intuitions about where delay is likely to occur.

In testing $\mathbf{H}_4$, the results suggest that the presidential election cycle does influence the speed at which nominations are decided. First, presidential election years appear to significantly slow the nominations process. This comports well with the descriptive data above and may explain the periodicity of delay trends across Congresses. Similarly, if a president is a lame duck it appears that nominations will take longer. This could have a variety of explanations from strategic delay in the hopes of a new president to problems of recruitment and retention at the end of a long administration. In either case, the presidential electoral cycle is a significant influence upon senatorial delay of executive nominations.

Presidential approval also influences delay in the expected direction. In support of $\mathbf{H}_5$, nominations made by popular presidents tend to conclude faster than less popular presidents. High public approval rates may make a president more likely to press a nominee given that approval makes it easier to bargain with Congress. This result is interesting, however, as it is not necessarily the case that a popular president at the time of the nomination will be as popular when the nomination is concluded. It may still be the case that early gains in the process (ie quicker committee turnaround) are carried through to lower average delay times in general.

Figure 4.5: Duration of Nomination Decisions as Hazard Ratios
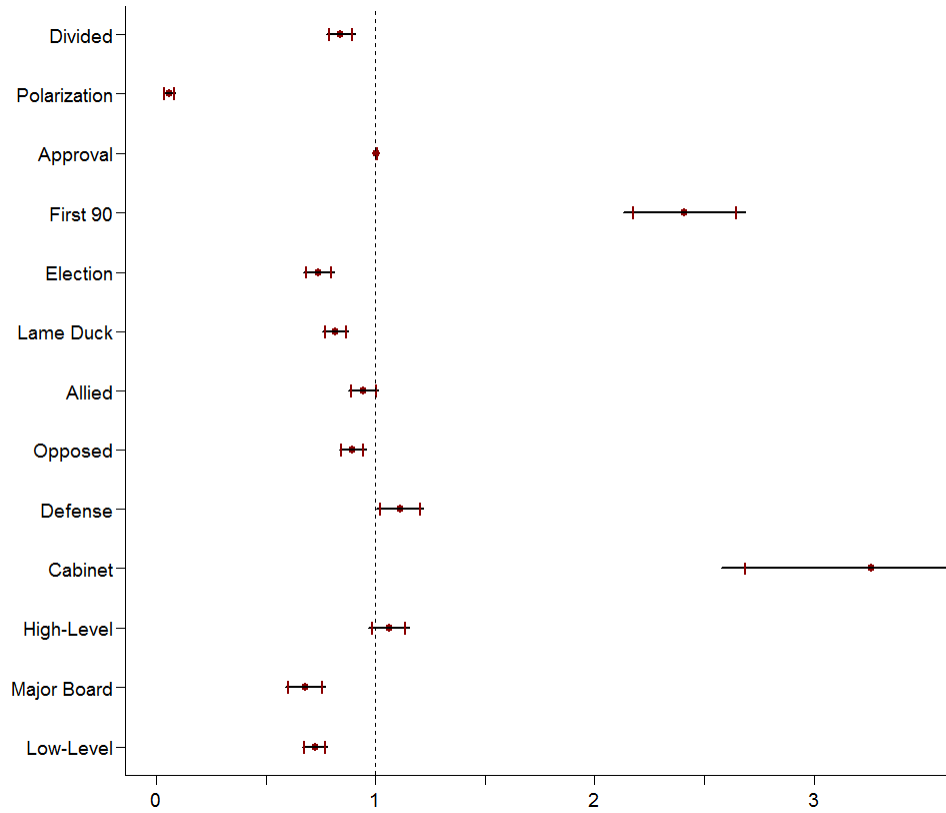
$\mathbf{H}_6$ is also supported as the results suggest that the kind of work agencies engage in can influence the level of delay their nominees face. According to the results of the model, defense related nominations seem to enjoy a faster confirmation processes. This could be due to deference towards presidents in defense matters, and/or that some positions deemed important may be more visible and thus less susceptible to strategic delay. These results, however, suggest that agency-specific characteristics, including the subject under their purview, do matter in considering the time to complete nominations.

Broad political contexts appear to influence senatorial delay in expected ways. First, when the Senate and a president are divided, nominations take significantly

longer to decide. Such a finding is intuitive as the majority party in the Senate would have little reason to speed up confirmations for an opposition party president. Second, the level of polarization between the parties in the Senate is also found to significantly slow nominations. Third, making a nomination within the first 90 days of a presidency decreases the time it takes to make a nomination decision. The first 90 days of a presidency fall within the traditional period of nomination deference in which the Senate may be more likely to give presidents a free hand to set up a government. As such, the findings with respect to traditional measures of political capital correspond well with established intuitions.

Discussion

As lengthy delay continues to be a salient issue for both the running of executive agencies and partisan politics, understanding the sources of delay becomes more important. This investigation joins several other studies demonstrating that strategic considerations play a role in determining how fast presidential nominations proceed. It is simply not the case that presidents are treated with wide deference with respect to nominations. Even after a historical increase in the length and depth of vetting along with all of the negotiations taking place in the pre-nomination process, there remain significant prospects for lengthy delay in executive nominations. To understand this delay we must look to the motivations of the Senate and the factions therein.

Based on prior literature and a focus on the motivations of the Senate, this paper outlines and tests a theory of conditional delay. The tests support the basic expectations that motivations for delaying specific nominations is in part due to the reversion point. Specifically, these results indicate that under circumstances where some senators may be advantaged by the continued prevalence of a reversion point,

delay is likely to occur. Furthermore, these findings comport well with prior analyses of delay in that classic political factors such as the timing of the nomination, the proximity of an election, the proportion of seats held by the President's party as well as polarization are demonstrated to influence delay times.

These findings contribute to the understanding of the nominations process in several ways. The analysis builds on prior work by extending the analysis to cases that usually are not counted. These cases include censored observations as well as a variety of lower-level positions and offices. The analysis also bridges the gap between studies of just IRCs such as Nixon (2001) and studies that do not include IRCs such as McCarty and Razaghian (1999). Importantly, the results suggest that even if major IRC nominations are important only in median-shifting circumstances, that these occur often enough to make IRC nominations take significantly longer in general as compared with other nominations.

Together, the findings suggest that beyond divided government, polarization, and electoral politics, there are also factors that influence which nominations *within* a Congress may be targeted for delay. This implies that some nominations are more profitably delayed, which is the difference between strategic delay, where individuals are targeted, and universal delay, where everyone's nomination is slowed without any pattern. Furthermore, some factors may influence the motivations of senators to delay while others reflect the ability of senators to delay once the motivation exists. It is important to divide these because the interplay between opportunity and desire will have a significant effect on observed delay. Many of the Congress-level variables, such as polarization and divided government, speak to the ability of a faction to sustain delay. Factors such as impending elections or ideological reversion points may speak more to motivation. More attention must be paid to understanding and untangling these different factors in nomination delay.

Both results from a purely descriptive analysis as well as the empirical model suggest that nominations differ greatly by the tier of appointment with respect to how much delay they are likely to experience. One of the most important considerations of this discovery is that findings from studies investigating a subset of nominations, such as only cabinet level offices or just major IRCs, will not be generalizable to the broader range of nominations. The results from this chapter suggest that strategic delay may be more effective or at least more common on mid-level nominations. Future studies should take into account the differences in exposure to delay between relative ranks of offices.

While this chapter viewed delay as an outcome of a strategic interaction between the Senate and a president, it may also be a contributing factor in the failure of a nomination. In this sense, delay may be more than an end as it can also be conceived of as a means towards failure. Given that pending nominations are all returned to the president at the end of a congressional session, a long enough delay will provide the opportunity to kill a nomination without the difficulty of bringing a nominee up for a direct vote. The following chapter will examine the role of delay as a path toward failure.

Chapter 5

Failure in Executive Nominations

The mere fact that the President submits a name for consideration does not obligate the Senate to act promptly. Particularly toward the end of a President's term, Congress may prefer to let his successor do the nominating.

– Louis Fisher, "Constitutional Conflicts Between Congress and the President", 26.

Why do some nominations fail while other, seemingly similar, nominations succeed? Given that presidents enjoy a first mover advantage and the ability to consult with key members of the Senate before issuing a formal nomination that cannot be amended, these failures are theoretically interesting. Prior scholarly work on this issue has generally fallen within one of two potential possibilities. First, scholars have noted that the qualifications of the individual nominee along with ethical considerations are the driving force behind the success or failure of most nominees (King and Riddlesperger, 1996; Krutz, Fleisher, and Bond, 1998). In this sense, the quality of the candidate, either professionally or ethically, is to blame for the failure. Second, other scholars have noted the degree to which strategic partisan activity can influence the duration of executive nominations (McCarty and Razaghian, 1999; Nixon, 2001,

2004; O'Connell, 2009) and through delay influence failure rates (Bond, Fleisher, and Krutz, 2009). Under this interpretation, the vast majority of nominees are assumed to be qualified candidates and instances of failure are largely due to ideological values and partisan advantage. Carter (1994) suggests that the recent trend of focusing on candidate *dis*-qualifications, such as unpaid back taxes or a "nanny" problem, is largely a cover for more partisan motivations. While there are a multitude of anecdotes, large-scale analyses of failure in executive nominations are rare and many important questions remain unexamined.

Failure in the executive nominations process is both a theoretically and substantively interesting phenomenon. First, given the advantages that presidents have when making nominations, the frequency of failure observed in the process may pose theoretical concerns for the models with which we use to understand the process. Second, these officials are considered vital to a president's ability to influence policy outcomes (Lewis, 2008; Gill and Waterman, 2004) and appointing like-minded individuals is known to be a key mechanism by which control is maintained over the bureaucracy (Wood and Waterman, 1991). As such, if we believe that nominees influence outcomes then the denial of these key presidential assets must equally be an important consideration for how policy unfolds and for predicting presidential success. Third, executive nominations constitute a window into presidential-congressional relations as the president is given proposal authority over nominations that can not be amended in the Senate. Because of these implications, understanding how and why some nominations fail in the Senate can illuminate many other aspects of presidential-legislative politics.

In his study of the executive nominations process, Mackenzie (1981, xi) noted that "our accumulation of knowledge on how Presidents are chosen vastly exceeds our knowledge of how administrations are chosen." Unfortunately, this observation is

still largely true today. In the course of this chapter, I will attempt to uncover more information about how administrations are chosen by looking at when nominations fail. First, I will introduce and discuss conflict within the executive nominations process. Next, I will evaluate the theoretical and substantive reasons why nominations might fail and I will list expectations. The following section will outline definitions and empirical operationalization of these theoretical concepts. Once the data have been described, I will analyze executive nominations between 1987 and 2010 in order to observe patterns in failure. I find that failure in executive nominations is often more likely the result of strategic partisan delay rather than a reflection of nominee quality. Last, I will discuss the results of the analysis with respect to future research.

Defining Failure

By the broadest measure, most failed nominations likely die in the pre-nomination process. At this stage, hundreds of potential appointees are tracked down and their history is vetted for any potentially embarrassing incidents and names may even be floated by key members of Congress. Many likely candidates never pass this stage and several qualified individuals may be examined before one is formally nominated. Unless the nominee is particularly visible, for example an ex-governor slated to become a cabinet secretary, these failures are rarely noted. Because there is no data on which nominees fail at the pre-nomination phase, systematic studies of individual failure in presidential nominations often rely on the pool of formal nominations as the population of interest. The alternative is to use the office as the unit of analysis and track the time that each position lies vacant.[1]

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[1]See O'Connell (2009) and Nixon (2001) as examples of studies that look at vacancy periods.

While formal nominations do not take into account the many failures that occur during the pre-nomination phase, using the formal nomination as the unit of analysis does provide several benefits to the researcher. First, all formal nominations are documented and their progress and ultimate fate is reported in the Executive Proceedings of the Senate. Because of this information, we are able to provide individual-level analysis that could include nominee characteristics. Second, because all nominations that do not receive a vote by the end of a congressional session are returned to the President, formal nominations occur within well-defined institutional settings. In contrast, a single vacancy period for an office may encompass several failed nominees with quite different individual characteristics as well as lasting beyond the scope of a single Congress or presidential term. Because institutional settings are key to understanding the strategic delay or defeat of nominees, I will use the population of formal nominations as the unit of analysis in this investigation.

It can often be difficult to define failure within the nominations process. First, most nominations that fail never come to a direct vote, so it is impossible to predict which of these nominees lacked sufficient support as opposed to failing through neglect. Second, nominations may end for a variety of purposes and sometimes when the President withdraws a formal nomination it really is due to the changing health of the nominee. Other times it may be due to the fact that the nominee was successfully appointed to a different position. Third, some nominees fail due to a legitimate lack of time to consider the nomination before the end of a session. Many of these individuals may be re-nominated at the start of the next Congress and they may ultimately win confirmation. The problem with these detailed definitions is that they explode the concept of failure into many categories that are difficult to implement in a study. Furthermore, the boundaries between some categories are often privileged information. For example, even when a nominee fails one nomination while succeed-

ing in another, it is unclear whether the prediction of failure in the face of opposition led to the additional nomination.

In prior studies by Krutz, Fleisher, and Bond (1998); Bond, Fleisher, and Krutz (2009), the definition of presidential failure in the nominations process was simply the lack of a confirmation in a formal nomination. In this sense, those nominations returned to the President at the end of a Congress are equally failures alongside those withdrawn in committee. This definition, basically described as non-success, has the advantage of being systematic, clear, and easy to implement across different cases. It is, however, somewhat imprecise. Despite this drawback, uncomfirmed nominations will be the broad definition of failure used throughout this study unless otherwise noted.

When and Where Nominations Fail

Prior literature on executive nominations suggests many general expectations about when, where, and how failure occurs. First, most nominations that fail will likely do so in the relevant Senate committee, as these institutions serve gatekeepers for the floor. Any nominations that are unlikely to win on the floor are usually not forwarded by the committee. Prior research on failure by Krutz, Fleisher, and Bond (1998) has also suggested that this is the case. Second, most nominations that explicitly fail will be withdrawn by the president rather than fail more formally by being voted down by a committee or on the floor of the Senate. Rather than risk a failed vote, presidents will often simply withdraw a nominee from consideration. Third, as noted by Bond, Fleisher, and Krutz (2009) most failures in general should be the result of being delayed to death rather than failing explicitly through either

presidential withdrawal or a vote in the Senate. As such, most failures in nominations are quiet.

Looking at both direct and de facto instances of failure, Figure 5.1 provides a description of the proportion of nominations that fail explicitly to receive confirmation, are censored, or successfully confirmed over time. For explicit failures, most of the cases are presidential withdrawals rather than a rejection through a vote in either the committee or on the floor of the Senate. Most importantly, the data show remarkably lower rates of success than prior literature would have suggested. Within these data, the actual rate of success hovers close to or below 80 percent, which is a full 10 to 15 points below their commonly assumed values found in Bond, Fleisher, and Krutz (2009) and Krutz, Fleisher, and Bond (1998) respectively. This finding may be due to the difference in the unit of analysis used between these studies. By investigating only "high-level" nominees including judges, prior studies (Bond, Fleisher, and Krutz, 2009; Krutz, Fleisher, and Bond, 1998) have limited their focus to an unrepresentative, but arguably important, sample as high-level nominees are expected to have shorter confirmation periods and face less delay than their lower-level counterparts.

Although there does exist variation across time in the rate of nomination success, censorship, and failure rates, there is no clear pattern in presidential success with respect to time. For example, the data in Figure 5.1 do not demonstrate a consistent and compelling trend towards more or less success. It may be the case, however, that a longer time series would demonstrate these trends. For example, in a study of delay and failure in judicial nominations by Hendershot (2010) demonstrates a clear pattern of increasing delay while using a much longer time span. Using evidence from Congresses in the era before the Bork nomination would likely yield similar results for bureaucratic nominations more generally.

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Figure 5.1: Failed, Censored, & Confirmed Nominations
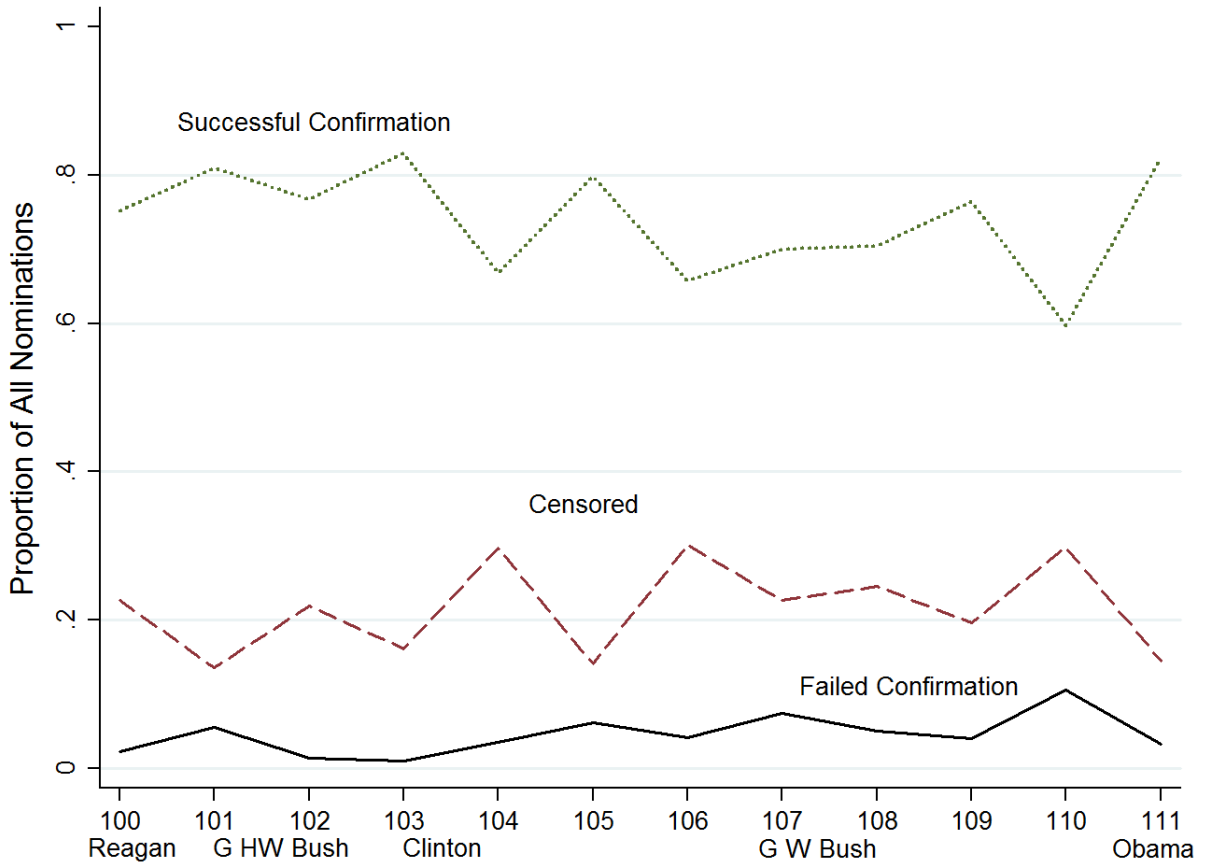
While the rate of explicit rejections may slightly increase over time, Figure 5.1 demonstrates that the significant variation in the rate of successful confirmations over time is driven mostly by nominations that have been delayed to death. These findings comport well with prior studies of failure in the nominations process (Bond, Fleisher, and Krutz, 2009) in that failure is most often the result of censorship rather than withdrawal or rejection. In this sense, while explicit Senate rejection of nominees may be rather consistent over time, the presence of strategic and partisan delay may change over time in response to institutional and other incentives. As such, rejection may be rare and idiosyncratic while delay is strategic and common.

Table 5.1 portrays some of the same information as Figure 5.1 above, but the data are aggregated to presidential terms rather than congresses. Because these timeframes in these two portraits are not exactly coterminous, the results for the presidential success scores appear lower. The differences are due the late nominations made during the presidential transition period. While there is only limited data for Presidents Reagan and Obama, these data give a picture of success by the most recent administrations. Again, one can see from these scores a remarkably different picture of presidential success as compared with prevailing intuition. One can also see that rates of success seem to be higher during a president's initial term with the highest rates of failure tending to occur in second terms.

Table 5.1: Percent Confirmed, Censored, and Failed by President: 1987 – 2010

President	Confirmed	Censored	Failed	Total
Reagan ('87-89)	66.8%	26.8%	6.5%	626
H.W. Bush	83.1%	15.4%	1.5%	1,186
Clinton I	78.1%	20.3%	1.6%	1,279
Clinton II	69.3%	20.9%	9.8%	1,043
W. Bush I	72.6%	24.1%	3.2%	1,488
W. Bush II	69.0%	24.2%	6.7%	1,217
Obama ('09-10)	82.3%	14.5%	3.1%	766

Looking at the distribution of where executive nominations were stopped or stalled during the nominations process reveals that most nominees that die do so in a committee rather than on the floor. Table 5.2 shows the exact breakdown of these trends by the key points in the process. As expected, the vast majority of cases that fail to receive confirmation – 70 percent – die in committee without ever having had a hearing or action taken on their nomination. Importantly, these cases are not withdrawn by the president but rather are the victims of what Bond, Fleisher, and Krutz (2009) refer to as "malign neglect." Still within the committee, the next largest category of

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failure – 14.2 percent of failed cases – occurs when presidents do withdraw a nominee from consideration before a committee acts on a nomination. This category includes individuals who met serious opposition immediately upon their formal nomination as well as cases in which a president chose to remove a nominee after facing lengthy delay. Even after the relevant committee takes action in the form of a hearing, many cases – 5.5 percent – are stalled without reaching the floor while others – 1.4 percent – are then withdrawn by a president. It may be the case that public hearings brought forth condemning information about these nominees that made progression towards confirmation more difficult.

Table 5.2: Where Nominations Stop or Stall, 1987–2010

Final Point in Process	Percent	Frequency
Stalled before Committee Hearing	70.0%	1,348
Withdrawn before Committee Hearing	14.2%	273
Stalled After Hearing	5.5%	105
Withdrawn After Hearing	1.4%	27
Committee Rejection	0.03%	6
Stalled on Floor	7.2%	139
Withdrawn on Floor	1.4%	27
Floor Rejection	0.01%	2
Total	100%	1,927

Table 5.2 demonstrates the rarity in which nominees fail given that they have made it out of a committee and to the consideration of the full Senate. Upon reaching the floor however, we again observe that the largest grouping of failures – at 7.2 percent – occurs via stalling on the floor rather than being withdrawn by a president or failing through a direct vote. In this sense, even those nominees that make it out of committee are more likely to die through neglect than direct action from either a president or the Senate. Few nominees are either withdrawn by the President while

on the floor or fail through a direct floor vote and together these two possibilities represent less than 2 percent of observed failures. Overall, the data suggest that within each stage of the nomination process failure through never receiving a vote – a "stalled nomination" – is much more likely than failing by being withdrawn by the President or voted down directly.

Table 5.3: Presidential Success in Nominations by Level of Position, 1987–2010

Nomination Position by Tier	Percent Successful
Cabinet Secretary & Attorney General	93.5%
High-level Nomination	83.8%
Major IRC Board/Commission Member	68.8%
Low-Level Nomination	69.7%
Lowest-Level/Other Nominations	78.7%

Table 5.3 shows the variation in presidential success by the relative importance of the nomination. In the top tier, Cabinet secretaries and Attorneys General are shown to be very likely to receive confirmation with the highest success rate of 93.5 percent.[2] The next tier down, which includes high-level nominations such as undersecretaries, has approximately a 10 percent lower success rate than this high. The lowest rates of success in nominations are to major IRCs or low-level nominations with success rates of 68.8 and 69.7 percent respectively. Lastly, the lowest level of nominations – which includes nominations with long amalgamated titles like "deputy assistant director" as well members of scholarship boards – enjoys a success rate of 78.7 percent. While these divisions are somewhat arbitrary and crude, it can be seen that there is a slight parabolic shape in which the highest and lowest-level nominations are relatively

[2]See Chapter 4 for a complete breakdown of the positions in each tier.

successful while those in the middle are not. One explanation for this trend is that the high-level nominees are protected by the salience of their positions while the low-level positions are ignored due to their lack of strategic value. Those positions in between, however, are ideal targets due to their combination of low public salience with true policy relevance.

Determinants of Failure

One determinant of failure is a nominee's impropriety or lack of experience. This characteristic is, however, an individual-level attribute that should not necessarily have any pattern at the agency, congressional, or presidential level. For example, there are few reasons to believe that divided government or polarization may influence presidential choices such that executive nominees are less qualified. In fact, one might very well assume the opposite given that presidents wish to successfully win confirmation even in the face of opposition. It may be more likely that high-level nominees such as cabinet secretaries are more vigorously vetted and may thus have a lower chance of being accused of impropriety. In general, however, one would not expect failures due to impropriety to be patterned.

Presidents enjoy a first-mover advantage in the executive nominations process that allows them to choose individuals who are likely to receive a majority (or super-majority) of votes in the Senate. While this is theoretically enough support to win either a direct vote or to successfully envoke cloture, as noted above the opposition party may use dilatory tactics that require far less than a 40 Senators to implement. If the opposition party is in the minority, it is simply the case that they may use dilatory tactics as a group to strategically hinder a president's agenda. When the opposition party is in the majority, however, even a nominee appealing to a majority

of the majority party may still be delayed by a small group of discontented opposition senators. Given that senators are often able to count on co-partisan support for procedural motions (Lee, 2009), it is likely the case that even a small group of opposition senators would receive support from their fellow co-partisans and leaders beyond what preferences alone would suggest. Blocking is thus likely to occur regardless of whether the opposition party is in the majority or the minority.

Given that opposition is likely to come from a numerical minority of senators, dilatory tactics will likely be the culprit in most failures. Given that a majority or a super-majority of senators are likely to support most cases, the fact that presidents rarely withdraw nominees makes sense. If failure were due to qualifications, then presidents would withdraw nominees upon discovery of their faults. If, however, most failures are due to dilatory tactics being used against an otherwise acceptable nominee, a president may be just as well off by waiting as by replacing the nominee. Given these expectations as to the origins of most failures, a variety of possible influences on success in the executive nominations process are described in detail below.

Political Context. The politics of the executive nominations process is very likely tied to politics more broadly. Divided government is a common feature of the recent political landscape and it has been found to influence a variety of political outcomes. For the nominations process, divided government means that the Senate is controlled by a party different from the president's. Such situations imply that a president will have to compromise more and/or negotiate harder with the Senate in order to win confirmation for nominees. Because of these extra costs in bargaining with a rival party, we expect that:

H_1: Divided government increases the risk of failure.

An additional aspect of the political context to consider is the level of polarization between the two parties in the Senate. Partisan polarization is measured by the degree of separation between the two parties with respect to their recorded votes (Poole, 1998).[3] When polarization is higher, it implies that the distance between the two parties is higher. This should influence the ability of bargaining across party lines in the Senate which can in turn influence the likelihood of nomination failure. In fact, Bond, Fleisher, and Krutz (2009) suggest that polarization may be the primary culprit behind failure through delay. Thus, we can expect that:

H$_2$: High partisan polarization within the Senate increases the risk of failure.

In his analysis of presidential power, Neustadt (1990) suggested that a high public approval rating made all things easier for a president. Similarly, prior research on executive nominations has suggested that presidents are more successful when they are more popular (Nixon, 2001, 2004). Because a high public approval rating gives a president more bargaining power we can expect that:

H$_3$: High presidential approval decreases the risk of failure.

Politics does not occur in a vacuum and one of the most important contextual considerations is the timing of events. Presidents in their first few months are given wider latitude in selecting their staff and key officials. This early term deference is not tied to the notion of a "honeymoon" effect, but rather it is independent and due to a widely held belief among political actors that a new president should be able to select their own team without undue interference from the Senate (Mackenzie, 1981). Prior by McCarty and Razaghian (1999) has also noted the influence that early nominations have on curbing delay. As such, one would expect that:

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[3]Polarization is measured as the distance along the first dimension of DW-NOMINATE scores between the two party means.

H$_4$: Nominations made within the early days of a presidency are less likely to fail.

Many executive appointees, such as members on independent regulatory commissions, serve fixed terms than extend beyond political boundaries such as presidential terms. Due to the nature of fixed terms, delaying a nomination past a presidential election by failing a nominee may effectively change who gets to appoint an officer who will serve for many years to come. Because of this potential gain from denying an appointment to a potentially outgoing president, we expect that:

H$_5$: Nominations made within a presidential election year are more likely to fail.

Agency Traits. If failure is strategic, then one would expect a variety of agency-level characteristics to be influential. For example, agencies develop norms and dispositions over time that can influence how they implement policy (Clinton and Lewis, 2008; Lewis, 2008). While the reversion point for negotiating over a judge is an empty seat, vacancies to executive agencies are often filled by career civil servants. In this way, while the Senate is delaying a bureaucratic nominee, the predisposition of the agency serves as a kind of "reversion point" (Romer and Rosenthal, 1978) in the executive appointments bargaining game. As noted by McCarty and Razaghian (1999, 1127), even if a majority of the Senate support a presidential nominee, "some senators will prefer the policies implemented by the career servants." As such, one may expect that the predisposition of an agency will influence the likelihood that a nominee will be delayed to death. Because presidents are more likely to attempt to gain control over agencies with opposed ideological predispositions using politization (Lewis, 2008), and because these agencies represent the furthest potential shift from the status quo to the president's ideal point, one would expect that:

H$_6$: Nominations to agencies with an ideological disposition opposed to the president are more likely to fail.

Beyond the ideological disposition of an agency, the type of work an official would be engaged in may influence the dynamics of the nomination process. Some elements of politics are naturally more controversial than others. For example, while there has always been disagreement over matters of domestic economic policy, there is usually much more bi-partisan agreement over defense policy. Because politics may end at the water's edge, we can expect that:

H$_7$: Nominations to defense-related positions will be less likely to fail.

Appointment Level. One would also expect that the level of an appointment should influence the likelihood of success or failure. Cabinet officials are generally considered to be a prerogative of the executive and they are usually accustomed to wide latitude in selecting their members. This deference may also extend to agency heads and other key positions, but it does not extend throughout the whole nomination process. Similarly, very low-level nominations are often routine and have little policy influence. Mid-level nominees, however, do have policy influence but may be too unimportant for serious presidential intervention. Thus we would expect that,

H$_8$: Mid-level appointments are more likely than very high or low-level appointments to fail.

Table 5.4 lists all of the above expectations together and grouped into relevant categories.

Table 5.4: Expected Relationships of Key Variables to Success

Factor	Expected Influence
Political Contexts	
Divided Government	−
Start of Term	+
Presidential Election	−
Polarization	−
Presidential Approval	+
Agency Traits	
Allied Agency Ideology	−
Opposed Agency Ideology	−
Defense	+
Appointment Level	
Cabinet Level	+
High Level	+
Major Commissions	−
Low Level	−

Data and Operationalizations

The most important consideration of the study of failure is the population to be considered. When investigating failures, I will use the same scope as chapter 4. While the question has changed, the same policy considerations apply to success and failure as they did to delay. For the same reason, the study of success and failure will use the same time period – 1987 to 2010 – as the investigation of delay. Failure has of course existed before this timeframe, but using the post-Bork era keeps the study within a similar epoch of executive nominations. Furthermore, as delay is a contributing

factor to failure, the same reasoning used in defining the boundaries of a study on delay in nominations cross applies to one on success and failure.

For these reasons, the specific data used in this analysis includes almost exactly the same measures and variables as in Chapter 4. Table 4.3 in Chapter 4 provides the basic operationalization and source for the variables: divided government, polarization, presidential approval, start of term, presidential election, allied/opposed agency disposition, defense related, and appointment level. The one point of departure is the outcome variable, success/failure, in which each nomination is determined to be successful or not. Successful nominations are those that end in a confirmation while unsuccessful nominations are those that do not. This definition has been successfully used in prior literature (Bond, Fleisher, and Krutz, 2009; Krutz, Fleisher, and Bond, 1998).

For the study of failure, agency dispositions are calculated in exactly the same manner as in Chapter 4 based on measurements created by Clinton and Lewis (2008). Much like the prior chapter, a recoding of agency disposition from the raw scores into a measure of either opposition to or agreement with a president will allow one to test the conditional effects of agency predisposition on the likelihood of failure in the executive nominations process. Using these data still results in about a 20 percent rate of missingness in the cases due to only 82 federal agencies being included. Where possible, additional nominations to such positions as scholarship boards and other neutral posts have been categorized as neutral under this measure. To alleviate concerns about this level of missingness, all predictive models have been run both with and without this variable and no change in the pattern or direction of significance was observed.

Findings

The above stated hypotheses are reflective of a strategic model of failure. While previous sections have looked descriptively at when and where failure occurs in the nominations process, this section will attempt to investigate why some nominations succeed while other, similar, nominations fail. To test these assumptions, I use a logistic regression model for the outcome of each nomination between the 100th and the 111th Congress. Table 5.5 shows the results of this logistic regression where the outcome variable is successful confirmation (1) or failure (0). The estimates are given in terms of odds ratios, which can be interpreted as the increase in the odds of success given a one unit increase in the variable at hand. If the odds ratio is above one, this indicates that nominations are more likely to succeed while odds ratios below one indicate that an increase in the given variable will result in decreased odds of success.

Most of the hypotheses are supported by the results found in Table 5.5. With respect to political context, divided government ($\mathbf{H}_1$) and high polarization ($\mathbf{H}_2$) both significantly increases the odds of a nomination ending in failure. This matches our intuition about how more partisan politics may increase failure rates. As expected, high public approval ($\mathbf{H}_3$) ratings are associated with better odds of a successful nomination. Similarly, $\mathbf{H}_4$ is supported as making a nomination during the first 90 days, or three months, of a new presidency implies far lower odds of a failed nomination. Intuition concerning timing, $\mathbf{H}_5$, is also supported as presidential elections are associated with much higher odds of nomination failure.

With respect to agency traits, the hypotheses are again supported. When compared against a baseline of neutral agencies, agencies with an ideological predisposition allied with the president are neither significantly more or less likely to experience failure. Because such positions are likely to be filled by officials agreeing with the

Table 5.5: Successful Nomination Outcomes from the 100th to the 111th Congress

Variable	Odds Ratio	z score	95% C.I.
Political Contexts			
Divided Government	.715	-4.57	[.620 − .826]
Polarization	.025	-7.31	[.009 − .067]
Presidential Approval	1.01	4.44	[1.01 − 1.02]
Start of Term	6.10	5.79	[3.31 − 11.2]
Presidential Election	.344	-12.88	[.293 − .405]
Agency Traits			
Allied Agency	.916	-1.07	[.780 − 1.08]
Opposed Agency	.850	-2.14	[.732 − .986]
Defense Related	1.34	2.38	[1.05 − 1.70]
Appointment Level			
Cabinet Level	2.98	2.81	[1.39 − 6.37]
High Level	1.40	3.21	[1.14 − 1.72]
Major Commission	.617	-3.48	[.470 − .809]
Low Level	.796	-2.50	[.665 − .952]
N	6098		
Log likelihood	-3061.36		
Pseudo R^2	.084		

president's policy positions, there may be little to gain from an opposition keeping a vacancy in these posts. Agencies with an opposed ideology, however, are likely to have their vacant offices filled by members of the civil service with dispositions far away from the president's. Here there may be great value to the minority party engaging in strategic delay and forcing a failure. As suggested in $\mathbf{H}_6$, agencies with opposed ideological predispositions are significantly more likely to experience failed nominations. Furthermore, $\mathbf{H}_7$ is also supported as individuals nominated to defense-related offices

are less likely to face a failed nominations. This implies that the agency mission may influence which nominees are strategically delayed or otherwise failed.

The appointment level of a nomination also influences failure rates in exactly the same ways as Table 5.3 suggested descriptively. The base serving as a comparison point for each level are the lowest of the nominees – such as "assistant deputy secretaries" and members of scholarship commissions – that are more or less routine nominations with the least policy influence. In comparison to this category, cabinet level and other high-level nominations are relatively less likely to end in failure. This comports with intuition about the higher public awareness of these positions as well as an increase in presidential attention and vetting. Those nominated to serve on major commissions, however, are much more likely to fail. This comports well with intuitions concerning the value of the position and the nature of a fixed-term. In support of $\mathbf{H}_8$, mid-level positions are also subject to significantly higher rates of failure. These findings comport well with intuition as such positions are less likely to have a president or public's attention while yet wielding policy influence.

Discussion

Failures are an important consideration within the executive nominations process. Failure happens, and if we believe that presidents are able to influence the bureaucracy by appointing like-minded individuals to key posts then we should equally believe that the denial of such appointments should be equally important. Why do some nominations fail while other, seemingly similar, nominations do not? By looking at where, when, and how nominations fail it can be readily seen that most unsuccessful nominations are in fact delayed to death rather than voted down or withdrawn. Indeed, fully 70 percent of unsuccessful nominations are ones that stalled within a committee

without even a hearing. Furthermore, this delay is likely due to strategic partisan concerns rather than individual nominee qualifications. Rather than being rare and idiosyncratic occurences, the findings of this chapter suggest that failed nominations are much more common and calculated than previously thought.

In agreement with prior literature by Bond, Fleisher, and Krutz (2009), this analysis has shown that the vast majority of nominations that fail do so because of delay. What I have shown is that failure is likely due to strategic delay on a case by case basis rather than simply the product of a more partisan environment in which everything takes longer. Because of prevalent strategic delay, the executive nominations process may be viewed as a kind of waiting game. By using the procedural tools of the Senate the president's opposition can attempt to delay a nomination until the end of a Congress, at which point even a nomination that would have received a majority of support in a straight vote will be "returned" to the president a failure. Presidents can make themselves more likely to win this waiting game if they are able to make nominations within the first three months of their term or use their popularity to force a nomination onto the floor of the Senate. Alternatively, the opposition within the Senate has several paths to obstructin. A Senate majority can simply take advantage of their position to block a nominee from coming to a vote or by voting the nominee down. A Senate minority party can use the procedures of the Senate to keep nominations bottled up in committees or otherwise delayed until the end of a congressional session.

An additional important finding is that the success rate of presidents in the executive nominations process is far lower than previous studies have suggested. This is primarily because such studies have only been concerned with high-level positions, judicial nominees, or rare explicit rejections. When looking more broadly at the pool of formal nominations, presidents are perhaps less than 80 percent successful on aver-

age. Uncovering this 15 percent or more difference between these findings and prior intuition provides an informative look into nomination politics. For example, the differences in these findings are likely due to the fact that failure rates at high-level positions tend to be rare while lower-level positions can be more easily subject to strategic delay. Such a relationship was in fact found within the broader data.

The findings of this study have several implications for future research on the executive nominations process. First, it is very likely that the same factors leading to delay are also primary causes of failed nominations. These two outcomes can profitably be viewed as stemming from the same process. Second, there is danger in cropping a study towards only "high-level" nominees. Some studies rightly focus efforts towards these nominations, but the results found at the higher levels often do not generalize to lower-level positions. Furthermore, many of these lower-level positions are still policy relevant, and vacancies at this level may influence an organization's capacity to operate as well as its character. Third, the nominations process is hardly one of presidential deference and the conflicts that can be observed on this battleground may yet provide insight into other aspects of inter-branch rivalry.

Chapter 6

Reforming the Nominations Process

The contemporary presidential appointments process is a national disgrace. It encourages bullies and emboldens demagogues. It silences the voices of responsibility and nourishes the lowest forms of partisan combat. It uses innocent citizens as pawns in politicians' petty games and stains the reputations of good people. It routinely violates fundamental democratic principles, undermines the quality of and consistency of public management, and breaches simple decency.

– G. Calvin Mackenzie, "Innocent Until Nominated", 76.

Even when a nominee does eventually get confirmed, the process involved is protracted, intrusive, and embarrassing, as would-be officials are forced to disclose many intimate details of their lives and personal histories, which can often end up in the hands of hostile lawmakers or reporters.

– Tevi Troy, "Fixing the Confirmation Process", 83.

A natural topic of any conversation concerning the executive nominations process is the potential for and desirability of reform. As Mackenzie (2001) notes, many who study the executive nominations process believe that it is inadequate to the task of

filling important government offices with highly qualified and motivated individuals. The process is slow, intrusive, inefficient, and overall inconvenient to potential nominees. Most accounts of the nominations process blame the excessive partisan politics present, but there are also calls to reform the more basic elements of the nominations process. Reform proposals abound and there are plenty of examples both of proposed and implemented plans from recent history.

Prior literature and political leaders have brought up many examples and compelling evidence demonstrating a need for reform. First, the nominating process has become so daunting that too few qualified people are willing to staff critical positions within the government (Mackenzie, 2001). Second, the delay in nominations has exacerbated the difficulties associated with high vacancy rates throughout the bureaucracy, raising the potential for bureaucratic inefficiencies up to and including an inability to perform duties (O'Connell, 2009). Third, spending time vetting and debating nominations takes away time from other legislative and executive activities (Senate, 2011). Combining these challenges suggests that the current state of the executive nominations process threatens the good governance of the United States.

There are many different kinds of reforms that have been suggested as fixes for the nominations process, but there are similarities between proposals upon which they may be profitably grouped for investigation. I have grouped reforms into three broad categories: recruitment and retention, procedural, and shifting nomination authority. While not exhaustive, these categories divide reform proposals roughly by the mechanism through which more efficiency is achieved.

Reform in general may be desirable, but it is not the case that every reform proposal will improve the process. For example, many of the problems with the nominations process stem from strategic partisan politics, but it would be undesirable to completely remove politics from the process. While potentially distasteful, con-

trol over bureaucratic appointments by elected officials serves as a vital democratic link between the people and those making policy. Furthermore, the results of some proposals may imbalance the power relationships between the branches and erode the potential for inter-branch checks. As such, even though some plans may make for a faster or more successful nominations process, it is important to consider the externalities of any reform proposal.

In the absence of reform, presidents have been adapting to the elongated and overly complex nominations process by circumventing the Senate. While not reforms per se, these attempts will also be considered as part of the context under which reform may take place. First, presidents have begun utilizing more "policy czars" who wield broad authority without the requirement of confirmation. Second, presidents are now more likely to use recess appointments to fill vital positions while the Senate is unable, or unwilling, to confirm nominees. Third, presidents may be tempted to use interim appointees, who may not necessarily face or win Senate confirmation, in order to fill gaps within the executive bureaucracy. While each of these adaptations provides individuals to fill vacant seats in leadership positions, they are ultimately a source of inter-branch conflict and their existence adds further pressure to reform the nominations process.

The rest of this chapter will outline existing arguments for the necessity of reforming the nominations process as well as providing an overview and typology of the potential reforms along with the advantages and disadvantages associated with each type. Following this list of potential reforms, I will discuss the various means by which presidents are attempting to circumvent the nominations process in the face of delay. Finally, I will discuss the prospects that various kinds of reform will be invoked within the near future followed by a discussion of how nominations reform connects to the other chapters. While chapters 4 and 5 discussed when and where failure and

delay occur within the nominations process, this chapter will briefly discuss the negative influence that such delays and failures have on the federal government and what might be done to eliminate or mitigate those negative consequences. This analysis does not intend to provide a normative critique of the current executive nominations process nor does it endorse any one reform proposal or type; rather it serves as a survey of existent thought concerning the future shape of the nominations process given the widespread desire for reform.

The Necessity of Reform

Perhaps the most commonly stated rationale behind reforming the nominations process is the idea that the current process is not producing the most qualified and able nominees. Under this framework, the targets for reform are the impediments to recruiting such candidates such as cumbersome reporting requirements and redundant questioning. As stated in a recent Senate report (Senate, 2011, 5), "the process for identifying, nominating, and confirming an individual to a Senate-confirmed position has gradually lengthened, become more burdensome, and has discouraged qualified individuals from seeking nominations." Government service is already an increasingly difficult sell for qualified individuals who can often earn more money working in the private sector. As such, the additional burden of a frustratingly slow and embarrassing process can tip the balance towards reducing the overall quality of potential nominees. While the length of the nominations process has a lot to do with pre-nomination vetting, it is also the case that a longer, more intrusive, road to confirmation in the Senate adds to this deterrent effect.

While being slow to confirm nominations may seem trivial, or a concern limited to the individual nominees' inconvenience, it is actually a matter that threatens good

governance. The increasingly lengthy nominations process exacerbates the problem of vacancies in the upper echelons of executive agencies. According to O'Connell (2009, 937-8), high vacancy rates in the federal bureaucracy can lead to "agency inaction, confusion among nonpolitical workers, and decreased agency accountability." There are, in fact, many examples where high vacancy rates have threatened the security and prosperity of the United States. For example, at the time of the 9/11 attacks, President George W. Bush's national security team lacked many of its key subcabinet officials, a fact noted by the 9/11 Commission (Senate, 2011, 4). Similarly, at the height of the financial crisis, President Obama had a difficult time filling important subcabinet posts in the Treasury Department. According to Galston and Dionne (2010, 1), 25 percent of the "key policymaking positions" were still vacant even 18 months into President Obama's term. As previously demonstrated, vacancies were also able to effectively shut down the NLRB due to quorum requirements. Given the importance of these posts, one must conclude that delays influence the quantity and quality of agency output.

An additional motivation for reform is the volume of appointments made to the federal bureaucracy that require Senate confirmation. Paul Light (1995) has noted the "thickening" and growth of the federal bureaucracy in general and it is also the case that the number and type of presidential appointments with Senate confirmation (PAS) have dramatically increased since the 1960s (Mackenzie, 2001, 37). While these positions give the Senate greater oversight and advantages with respect to executive agencies, they also add to the time and energy spent by both branches filling posts. Because of the preference towards making positions Senate confirmed, the United States uses political nominations for a far greater proportion of positions than many other countries (Galston and Dionne, 2010; Mackenzie, 2001). The use of so many

political appointees has a great number of ramifications, not the least of which is a far slower nominations process.

Ultimately, the state of the current executive nominations system threatens the good administration of the government. Fewer qualified candidates are interested in government service, and of those that do agree to become nominated, many face lengthy delay or even outright failure due to partisan considerations. The explosion of PAS positions over the past five decades coupled with the inefficiencies introduced by vacancies caused by delay is likely taking a toll on agency productivity and efficiency. Because policy is increasingly set and enforced by bureaucratic agencies, these inefficiencies have the potential to echo throughout the policy making process. In 2003, the Volcker Commission characterized the need to implement reforms in stark terms. The report of the commission (Volcker, 2003, 2) noted that with respect to executive agencies:

> the gap between expectations and responsive capacity is growing. If we do not make the necessary changes now, when our needs are clear, we will be forced to cope with the consequences later in crisis after crisis.

In response to these difficulties, government commissions, senators, presidents, bureaucratic officials as well as other interested parties have produced a multitude of reform proposals.

A Brief Typology of Reform

There exists a great variety of reform proposals that have been conceived and implemented since the creation of the modern executive nominations process. For the sake of simplicity, three broad types of reforms will be considered: recruitment

and retention, procedural, and nominating authority reforms. First, recruitment and retention reforms seek to streamline the process by speeding up paperwork and other nominee hurdles while also attempting to increase the average time that individuals serve at their posts. Examples of such reforms include paperwork reductions and increasing the salary and benefits of serving in an appointed post. The idea behind these reforms is that the easier and faster it is for a potential appointee to come under Senate consideration and the better the job is at the end of the confirmation process then bureaucrats will spend more time in office. By increasing the lifespan of officials, one would necessarily reduce the burden on the Senate to confirm nominees. The true goal of such reforms, however, may often be to improve the nominee experience.

Procedural reforms are designed to streamline the rules under which nominees are considered by the Senate. Examples of such reforms include limiting the use of the filibuster, restricting the use of holds, and fast-tracking or otherwise speeding nominations. The idea behind these reforms is that procedures are either being abused to slow down the process or that in the presence of inaction nominations should default to confirmation. By making it easier for nominations to clear the Senate, these reforms would speed up the process and ensure that more nominees gain confirmation. Because the Constitution allows for each chamber to decide its own operating rules, and because only the Senate is involved in the confirmation process, many of these procedural reforms could be accomplished through changes to only the Senate rules without the necessity of passing a law.

Nominating authority reforms are aimed at shifting appointments that require Senate confirmation to either purely presidential appointments or using some other mechanism. For example, all appointments that are made under a given threshold of importance may be exempted from the requirement of Senate confirmation. As noted in Chapter two, there are few positions that are constitutionally required to

undergo Senate confirmation and most positions that require it were done so under the authority of Congress. As such, Congress may reverse its decision. The idea behind these reforms is that if the Senate has fewer nominations to examine, then they will do so faster for the remaining nominations. These positions would then either be left up to presidents to nominate or they would become civil service positions. By removing some nominations from this requirement, one would at least guarantee that senatorial delay did not influence some appointments. Similarly, by allowing executives the power to reorganize executive agencies for greater efficiency and to combat redundancy, presidents would be able to reduce the number and kind of individuals required to undergo Senate confirmation.

In the sections below, each type of reform discussed here will be examined in greater depth. These reform types, however, are merely broad categories and it is important to point out that most actual reform proposals will call for multiple actions that can potentially include actions from each of these categories. The goal of this typology is not to provide an exact list of possible reforms, but rather a broad overview. This list is also particular to reforms aimed at reducing the length of the *formal* nominations process. As such, there are additional reforms possible that may be aimed at decreasing vacancy rates or streamlining the prenominations process.

Recruitment & Retention Reforms

Recruitment and retention reforms may be among the most common proposals for fixing the nominations process. These reforms aim at making the process of nominating an individual faster, less intrusive, and less complicated. Once in office, these reforms also seek to retain nominees through offering higher pay, better working conditions, and more support. The logic behind these reforms is twofold: first to increase

the efficiency of the nominations process and second to reduce the number of nominations required to keep positions filled. These reforms consider the decision to become a government official as one taking place within a market of competing opportunities. Normally, such opportunities take the shape of high-paying jobs within a related private industry. To recruit and maintain a qualified workforce, the government must be a competitive alternative.

One of the most common recruitment reforms entails decreasing the paperwork and vetting burden placed on nominees. As noted by Troy (2011), the reporting and vetting requirements are intrusive to the degree that they deter likely candidates as well as add time to an already lengthy process. Investigations into the paperwork required by the nominations process have also suggested that a majority of the required forms and questions asked are redundant (Senate, 2011, 8). In addition to providing tax documents, financial statements, and filling out detailed questionnaires, nominees must also undergo FBI background checks. From a potential nominees perspective, the lengthy and intrusive process may make seeking government office undesirable. Furthermore, as the number of positions requiring Senate confirmation has increased over time, so too has the burden placed on those responsible for vetting nominees. By reducing paperwork and reporting requirements, the faster and ultimately less intrusive process may also induce more qualified candidates to consider government office.

To be competitive with the private sector, many reformers also suggest raising the pay and benefits of appointees. While increasing the pay and benefits does little to directly reduce delay and failure in the nominations process, it can have a dramatic influence in the long run. Reports on executive appointments have often shown that pay significantly lags behind what potential nominees would expect from private industry and that retention of high-level officials is lower as a result of the pay differ-

ential (Volcker, 2003). Increasing pay and benefits should attract more highly skilled applicants, which could have the effect of reducing the time it takes the Senate to vet a candidate. Furthermore, it is quite common for individuals to leave government service early in order to offset the financial costs of government service. By increasing retention through better pay, presidents and senators will be required to vet fewer nominees as replacements for officials who exit early. Benefits and pay thus indirectly lessen the burden on the nominations process.

Recruitment and retention reforms are common to the executive nominations process and there are several recent examples of such proposals. In 2003, a report from the Volcker Commission issued a number of policy recommendations to help fix the nominations process. Among their proposals were suggestions to cut down or modify ethics regulations that were of "little demonstrated public benefit" as well as to provide "significant" pay increases for appointees (Volcker, 2003, x). Of the 14 proposals outlined by the Volcker Commission report (Volcker, 2003, ix-x), the majority involved either increasing pay, streamlining the prenominations process and/or recruitment, or reducing the burden on current officials. The 2003 Volcker Commission report echoed many of the same broad recommendations as a similarly organized commission in 1988. The difficulty with recruitment and retention reforms is that they are often only temporary fixes, and as the market or technology shifts, so too does the need for reform.

More recently, a reform law passed in 2012 and entitled the "Presidential Appointment Efficiency and Streamlining Act" contained, among other proposals detailed below, measures aimed at paperwork reduction and speeding up the early stages of the executive nominations process. While the act did not directly institute reforms, it did call for a working group to investigate the nominations process and report back to the Senate and executive branch with recommendations. Within the report on the

proposed bill, the Senate (2011) suggested using a shared electronic system to keep track of nominee questions/answers within all paperwork. Other suggestions included removing or relaxing the requirement of an FBI background check and implementing a vetting process that would work on a sliding scale in proportion with the nominees level of proposed appointment. Whether the recommendation of these reforms leads to their implementation remains to be seen.

Advantages and Disadvantages

Reforms that streamline the executive nominations process and provide adequate compensation would significantly improve the lives of those in and entering public service. Because of this improvement, it is likely that the average tenure of government officers would increase while overall turnover would decrease. Such an achievement would result in fewer vacant offices and ultimately fewer confirmation hearings. While making life easier for nominees, these reforms would not necessarily place any greater burden on or reduce the powers of either the Senate, presidents, or related institutions. In fact, recruitment and retention reforms such as streamlined and electronically stored file keeping would likely reduce the burden for all parties involved while not advantaging one branch over another. As such, these reforms can be easier to support than others.

Because of their nature, recruitment and retention reforms are more likely than other types of reform to receive bipartisan support in Congress. One reason is that at any given moment both Republican and Democratic officials are serving in appointed posts and furthermore it is also the case that both sides of the aisle can look forward to a time where their co-partisans will hold executive power. When these considerations are coupled with the fact that better recruitment and retention has a marginal influence with respect to partisan advantage, such reforms can be non-controversial

and gain bipartisan support. As such, we see examples of such reforms repeatedly throughout the legislative history whereas major executive branch reorganizations have occurred only a few times since the ratification of the Constitution.

The problem with recruitment and retention reforms is that they do not directly stop or mitigate strategic delay based on partisan gain. Perhaps one of the reasons that recruitment and retention reforms are so politically viable is that in circumstances where a group of senators does oppose a nominee, they can still slow or kill the nomination. The problem of strategic partisan delay, as discussed in the prior chapters, is not caused by inefficiencies in the nominations process and no amount of paperwork streamlining will erase the ability of senators to take hostages or otherwise slow down the process. Ultimately, such reforms may only influence the time spent in the prenominations process rather than the time it takes to confirm an individual post formal nomination.

Similarly, any gains made by streamlining the formal vetting process may be confounded by the expected partisan use of any small detail, such as unpaid taxes or an embarrassing speech. Presidents may still be advantaged by keeping high levels of vetting to ensure that there are no such details for a determined opposition to latch onto. In this sense, the paperwork reductions suggested by prior reforms may influence only the time it takes to make it through the formal vetting process while prenomination vetting may still be influenced by the expectations of partisan opposition.

Finally, while recruitment and retention reforms are easier to produce politically, they might not be durable in the long run. For example, pay increases may make government offices competitive for a time, and then in a few years the private sector will again out pace government pay. It may also be the case that paperwork is reduced for a time, until the accumulated burden of additional questions over time makes the

process redundant and again inefficient. As such, recruitment and retention reforms are likely to be needed again and again through time.

Procedural Reforms

Another type of reform proposal involves changing the procedures by which nominations are considered in the Senate. Because opposition senators are able to use procedures to slow nominations, it is rational to look towards procedural reform as a means of immunizing nominations from such delay. As with other proposals, such reforms can take a variety of shapes. For example, one may eliminate offending procedures entirely, limit their use, or increase the cost of their use by either forcing practices into the public eye or requiring that opponents of a nomination meet desired thresholds in order to instigate delay. Because only the Senate is involved in the confirmation process and because the Constitution gave each of the legislative chambers power to decide their own rules and procedures, such reforms may only require Senate action. Even free from the requirements of passing a law, however, such action is not necessarily likely.

The dilatory tactics used to slow down nominations almost all revolve around the use, or implied threat, of a filibuster. For example, without the threat of a filibuster, the use of UCAs in the Senate would not be as necessary to conduct business. Furthermore, the use of holds, which are threats to deny consent to a unanimous consent agreement, are essentially an implied threat to filibuster and would not be possible without the present system. While eliminating the filibuster alone will not cause the Senate to act more quickly, it would remove the largest procedural hurdle that allows for the strategic partisan delay of executive nominations. The filibuster is the linchpin

of Senate obstructionism and as such it is the most likely target for reforming delay out of the executive nominations process.

While many today defend the filibuster as a Senate tradition of cautioned and principled deliberation created by the foundering fathers, the right of unlimited debate has not always been a feature of the Senate nor was it designed as such (Binder and Smith, 1997). Rather, the rules regarding debate in the Senate were, and are, the result of "previous tradition, political expediency, and pure accident" (Beeman, 1968, 420). In the beginning, the Senate rules did contain provisions for "moving the previous question", which was a means of ending debate and voting on the matter at hand (Beeman, 1968; Binder, 1995). However, after an 1806 revision of Senate rules the motion to call the previous question was left out as a result of its infrequent use and negligible necessity in a chamber of so few members (Wawro and Schickler, 2006; Binder and Smith, 1997; Binder, 1995). This gap in the rules created "confusion and controversy" within the Senate until in 1856 the filibuster was finally accepted as part of the political landscape (Beeman, 1968, 420).

Though it became part of the political landscape in the 1850s, the filibuster has never been without its opponents. In fact, the filibuster survived within the Senate despite the opposition of many prominent Senators from the last two centuries (Binder and Smith, 1997). Because only one third of Senate seats are up for reelection in any given election year, however, the Senate constitutes a continuous body and hence it has no recourse to inter-session rules changes via a simple majority as the House does. In this way, a minority of Senators can often block rule changes designed to override their filibuster. Binder and Smith Binder and Smith (1997) contend that the modern filibuster is the result of path-dependent rule-making. As Binder (1995, 1094) states:

Because rules changes in the Senate may be subject to a filibuster, simple partisan majorities are unable to alter the rules to enhance their procedural advantages on the floor. The result is a chamber that fiercely protects the rights of minorities, in contrast to the House where partisan majorities can potentially shape policy outcomes as they please.

Accordingly, the modern Senate must operate under a set of inherited institutions that are difficult for even a partisan majority to change. Under the interpretation of the path-dependence model, the filibuster is likely to remain until and unless a dramatic future shock forces the Senate to make a change.

While reforming the filibuster may be difficult, it is not impossible. Examples of prior success include the creation of cloture (Rule 22) and further reductions in cloture requirements in the 1970's. Furthermore, Wawro and Schickler (2006) point out that the possibility of reform-by-ruling, which only requires a majority of senators to revise a rule governing debate, has always existed as a credible threat against a recalcitrant minority. One colorful episode of this kind of procedural reform occurred due to prolonged delay of judicial nominees under the George W. Bush administration. At this time, the Republicans controlled the Senate and Democratic filibustering and other dilatory activity were blocking a significant percentage of judicial nominees. In order to break the deadlock, Republican leaders including majority leader Bill Frist threatened to use a controversial procedural maneuver to make judicial nominations immune to filibusters by creating a precedent that judicial nominations require only a simple majority vote. While proponents of this measure referred to it as the "Constitutional" option, it was dubbed the "Nuclear" option by its Democratic opponents. Eventually, a group of 14 centrist senators from both sides of the isle offered a less

controversial resolution that allowed for some less controversial judicial confirmations in return for no filibuster reform (Binder, Madonna, and Smith, 2007).

While the "Nuclear Option" episode concerned judicial nominations exclusively, it has relevant implications for procedural reform of other nominations types. First, it suggests that the crux of procedural reform is the filibuster. The majority leader had exhausted options in the face of a determined Democratic opposition and the best chance of gaining confirmations was to propose filibuster reform. Second, the lack of eventual reform even when the demand existed suggests that filibuster reform will likely fail because centrist Senators may often benefit from the rule and many reform efforts would likely be blocked by a filibuster. Third, it demonstrates that while the "reform by ruling" may be a possible source of reform from a theoretical or legal standpoint, it is often much more difficult in practice to turn majority support for a *substantive* bill into majority support for a *procedural* change. Procedural change thus requires more than mustering a majority along a given policy dimension.

There are a variety of other procedural reforms that would not require changing the rules governing filibusters. For example, one may protect nominations from filibusters by providing executive nominations with a kind of "fast track" rule calling for an up-or-down vote after a set number of days. One could also change the rules such that the Senate must vote down a candidate or after a given time period that individual becomes confirmed in his or her office. This plan has the advantage of placing the burden on the opposition but the disadvantage that it may promote dilatory tactics by the supporters of the president. Furthermore, without eliminating filibusters or the hold, one may still reform their use by making it more public. Efforts have already been made to force "secret" holds into the public eye, thereby increasing their cost. There are, in fact, a near infinite variety of procedural reform combinations that call for higher or lower thresholds or faster processing of some kind.

Advantages and Disadvantages

Procedural reforms have the advantage of acting upon the most direct sources of delay. Without recourse to holds or the filibuster, and/or with the requirement of an up-or-down vote within a given number of days, the potential for strategic delay of executive nominations dwindles dramatically. Hostage-taking by individual Senators, for example, would be largely eliminated. This is not to imply, however, that such reforms are likely or desirable. As with all significant reforms, there are numerous unintended consequences to consider.

Much of the literature suggests that the filibuster is an often problematic anachronism, and many have sought its reform over the past century. Changing filibuster rules would, however, dramatically influence other aspects of the legislative process. In particular, the elimination of the filibuster could, in the absence of other reforms changing the nature of Senate procedure, result in a host of new dilatory tactics equally or perhaps more counterproductive than the present system. For example, opposition senators may take advantage of the Senate's lack of a germaneness rule to delay final passage votes. To combat these new tactics, the rules of the Senate would likely end up closer to the more centralized system of rules used the House. As such, each individual Senator would likely lose some measure of power and influence. In short, filibuster reform has the power to dramatically change the Senate as an institution.

While the elimination of dilatory tactics through procedural reform would hasten the nominations process, it is possible to make the process move too fast. Fast-tracking nominations may decrease the ability of the Senate to properly vet candidates for high office. Without the power of a handful of senators to slow down the process, presidents may be emboldened to make nominations that they would

not otherwise have considered. As noted in Chapter 2, the requirement for vetting potential appointees with the Senate was designed in part as an *ex post* check on presidential nominations and ideally as an *ex ante* influence upon presidents' choices. If the Senate's ability to properly vet nominees were reduced too far, then presidents may lose their incentive to provide for highly skilled appointees. As an alternative, lower-quality or patronage appointments may become more common. Reforms must thus aim for balance rather than maximizing the efficiency of the process.

Reforming Nomination Authority

The final category contains reform proposals that would somehow change the existing structure nomination authority. For example, several reform proposals have suggested reducing the number or kind of nominations that require senatorial confirmation. In addition to decreasing the pressure placed on those who recruit and vet nominees, such a reform would combat the steady rise in PAS positions created over the past several decades. While high-level positions such as cabinet secretaries are constitutionally required to be Senate confirmed posts, there is a wider degree of discretion for lower level positions. With more limited policymaking authority, these positions were also likely and acceptable choices as a target for reform. As noted in Chapters 4 and 5, the majority of stalled or failed nominations are often for offices that were mandated to be Senate confirmed by an act of Congress. As such, these positions could become solely executive appointments, could transition into civil service positions, or could be reformed so as to no longer exist.

The most recent reform reducing the number of PAS nominees came in the form of a Senate bill (S. 679) introduced during the first session of the 112th Congress and signed into law in August of 2012. The reform was entitled "Presidential Appointment

Efficiency and Streamlining Act" (PAESA), and its primary goal was to reduce the number of executive appointments that are subject to the requirement of Senate confirmation. Such positions became purely presidential appointments or were staffed through the relevant agency. By dropping the requirement of Senate confirmation, the reform was intended to reduce the burden on the Senate and the executive branch for vetting and considering such a high volume of nominations. High-level positions, however, were not directly influenced by the legislation but it was hoped that other nominations would proceed more quickly if the overall burden on the system were reduced (Senate, 2011, 7).

Other plans include executive reorganization of the bureaucratic agencies. One example of such a reform was the creation of the Department of Homeland Security out of 22 previously separated agencies. Of the many suggestions made within the 2003 Volcker Commission report, several involved increasing the authority of the executive to reorganize offices for greater efficiency. Allowing presidents greater reorganization authority would have the effect of reducing redundancies and potentially decreasing the overall number of appointees required to staff federal agencies. The power to decide which offices are combined and in what ways is a kind of nomination authority, and it would dramatically change the balance of power between the branches with respect to control over executive bureaucracies.

Because transferring authority between the branches retains ample opportunity for political gaming, other proposals call for the transfer of nomination authority to experts, professionals, or otherwise non-partisan bodies. The idea behind these reforms is to remove the partisanship from the equation for the purpose of promoting qualified and technocratic nominees. For example, during the Carter administration, the use of expert panels for deciding nominations of United States Attorneys was considered. Similarly, one could consider panels of experts voting for members of

commissions where such expertise is required. Examples might include nominations to the Federal Reserve Board being directed by respected economists or nominations of federal judges to take place using the American Bar Association. In a sense, transitioning appointed offices into civil service positions also removes the nomination authority from politics.

Advantages and Disadvantages

Reducing the pool of nominees that require Senate confirmation would have the dramatic and immediate effect of reducing the burden of nominations on the Senate as well as removing potentially hundreds of key positions from the possibility of delay, hostage taking, and partisan intrigue. In this sense, such a reform is likely to be one of the more successful potential reforms along a variety of dimensions. First, the reform is difficult to work around as once the positions are out of the Senate's purview they are virtually immune to senatorial delay. Second, once in place, the reform is likely to endure given the cost of producing new legislation to reverse the decision. Like recruitment and retention reforms, however, reducing the number of nominees may be periodically necessary in order to trim away the natural tendency towards a "thickening" of government as described by Light (1995).

Reforming the pool of appointments that require Senate confirmation may help to alleviate some of the pressure on the system, but there will always exist a class of appointments for which removing senatorial confirmation would likely be unconstitutional and undesirable. As noted in Chapter 2, the Constitution requires Senate confirmation of the highest level offices and nothing short of a new amendment would allow these positions to be appointed entirely by a president. Furthermore, one of the primary reasons to have high-level agency officials appointed with confirmation is to create a more direct link between the performance and policy output of an agency

and the electorate. Breaking or reducing this link may be undesirable from the standpoint of democratic control. As such, reform over nomination authority is likely only produce efficiency at the margins and not to solve the problem of strategic partisan delay.

One disadvantage of these reforms is that it can decrease the power of the Senate to check the executive branch. Senators can use even lower-level positions to gain information from relevant agencies by holding nominations until the requested data is made available. It is also the case that as government becomes more involved in the economy and society that ever lower-level positions will wield more policy-making authority. As such, giving up control of these lower-level appointees to the president would create an imbalance in the relationship between the executive and the Senate. In this way, while a bureaucracy having only the most senior-level individuals appointed through Senate confirmation may be more efficient, it may also be less desirable for those seeking a stronger legislature relative to the executive.

Transferring nomination authority to expert bodies or transitioning offices to civil service positions also has several disadvantages. First, such moves weaken the link between elected officials and policymaking in agencies. Such a move raises questions of democratic values and representation. Second, as noted in previous chapters, agencies are likely to develop their own cultures over time. As these cultures can conflict with the goals of a president and/or legislature, the lack of political control over key appointments can create conflict between institutions and can hamper the ability of elected officials to implement policy initiatives.

Recent Reform Efforts

The reforms enacted by PAESA have been the most dramatic of recent changes to the nominations process. As described above, the bill contained provisions aimed at both reducing the number of nominations as well as streamlining the nominations process in general. At the heart of the reform bill, though, is the idea that reductions in the number of posts requiring Senate confirmation will ultimately allow the Senate to "focus on other legislative and oversight activities" (Senate, 2011, 8). While sponsored by Senator Charles Schumer, a Democrat, the bill received support and co-sponsors from both sides of the aisle. Despite its potential for bipartisan appeal, however, the bill took quite a long time to pass and it was initially resisted by some Republican members. In 2011, it passed in the Senate 79-20 with support from both parties, but all 20 votes against the bill were Republican.[1] Nearly a year later, the House passed the bill 261-116 also with bipartisan support and again all opposition came from Republican members. One potential reason for the reform's passage in the House was that, given the uncertainty about the outcome of the coming presidential election, both sides wanted to ensure that executive nominations would not be held up in the Senate should their candidate win.

The positions that were a part of the reform proposal were generally lower-level positions with limited policymaking authority. Of the nearly 1,200 positions that required Senate confirmation at the start of the Obama administration, about 220, or a little over 18 percent, of these positions were directly influenced by the reform (Senate, 2011). While there is no set rule with respect to which positions were chosen to be a part of the reform, there were rough patterns. For example, many of the po-

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[1]The fact that all 20 votes against were Republican is interesting because as the opposition party, these senators would be those facing the loss of a useful partisan tool. Given the discussion of motivations in Chapter 3, this is exactly where one would anticipate resistance to reform.

sitions included variants of "Assistant Secretary for Legislative Affairs" or "Assistant Secretary for Administration". Such positions are of little policymaking value within even key departments. Other positions included technical posts, such as chief scientists and medical officers. Many more of the positions included the members of several national boards, such as the National Science Board or the National Council on Disability. Dropping the requirement of Senate confirmation for even a single national board may decrease the number of PAS positions by as many as 20 nominations.

Table 6.1: Nominations Impacted by PAESA by Level of Position, 1987–2010

Positions by Tier	Percent	Frequency
Cabinet Secretary & Attorney General	0 %	0
High-level Nomination	7.10 %	61
Major IRC Board/Commission Member	0 %	0
Low-Level Nomination	76.72 %	659
Lowest-Level/Other Nominations	16.18 %	139
Total	100 %	859

Using the data set described in Chapters 4 and 5 as a point of reference, about 11 percent of the nominations from 1987 to 2010 were removed from their confirmation requirement by the recent reform. The difference between all PAS appointments and these appointments over time is likely due to lengthy terms of office for some boards as well as the development and expansion of such positions over time. As can be seen in Table 6.1, most of the reform nominations are clustered at the lower end of the position spectrum. Nearly 77 percent of all the nominations that were outlined in the recent reform were low-level nominations while none of the positions reformed were cabinet level or involved a major board or commission. The next highest category influenced by this reform seems to be the lowest-level positions, about 16 percent, followed by

a few high-level nominations at about 7 percent. These findings correspond to the intuition that the reform favored lower-level, non-policymaking positions.

Figure 6.1: Kaplan-Meier Survivor Function for Reformed Nominations, 1987 to 2001
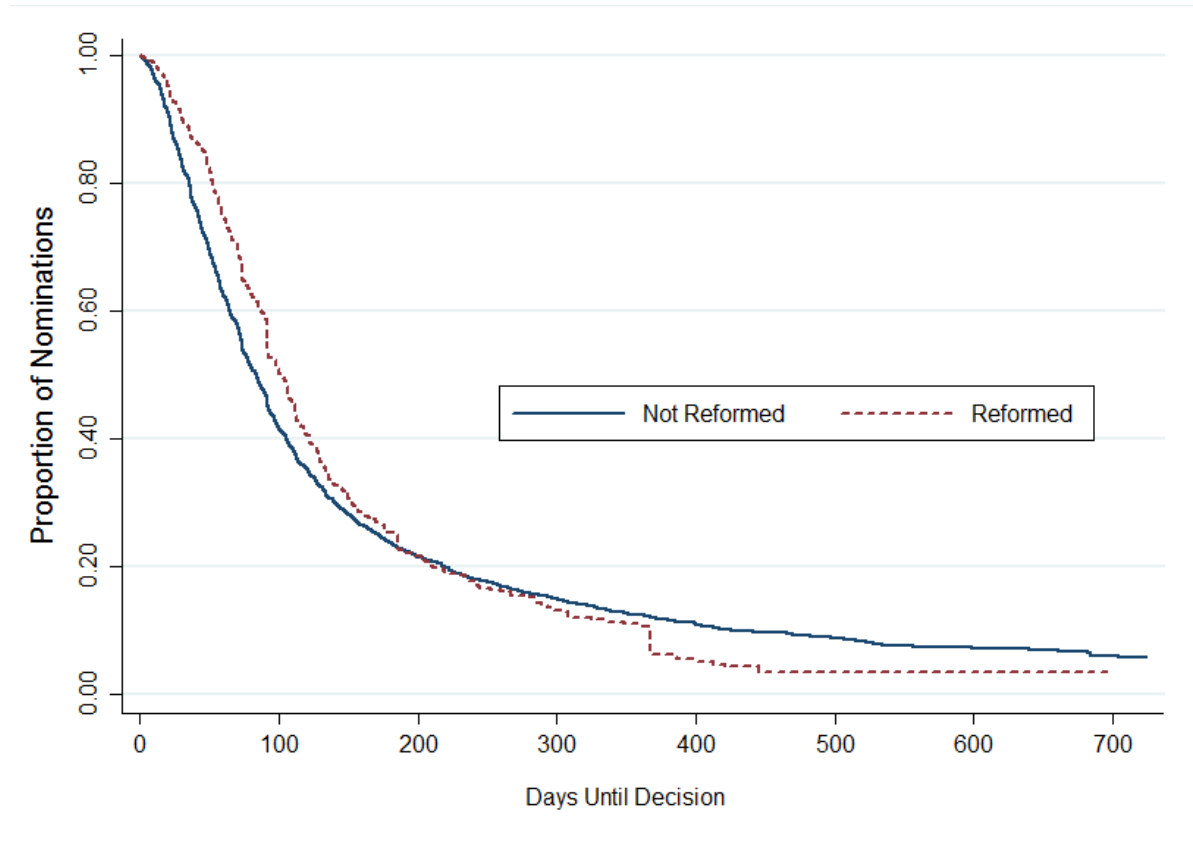
The most important question in relation to the reform positions is whether they have been historical targets of strategic partisan delay. Using the data on executive nominations from 1987 to 2010 as described in previous chapters, it is possible to test whether these reformed nominations were generally subject to greater delay or failure. The data gathered on prior nominations seem to indicate that they are not. Figure 6.1 shows a Kaplan-Meier function for reformed positions as compared with the rest of PAS appointments using the data gathered from 1987 to 2010. The nominations

subject to reform appear to be processed more slowly in the early days of their nomination but ultimately they do not appear to undergo much long term strategic delay. The transition between reform and other nominations appears to occur near the 200 day mark. This indicates that such positions may be of low importance to the Senate and as such are neither acted upon quickly nor subject to strategic delay. In other respects, these reformed nominations have similar, statistically indistinct, rates of failure, censorship, and have comparable mean delay times. As such, the removal of these positions from the requirement of Senate confirmation is unlikely to have a direct influence on delay.

Lasting Influence?

Given the difficulty of nominations reform in an era where nominations are the site of partisan conflict, the PAESA reform represents a significant step forward for the executive nominations process. While the reform targeted primarily lower-level positions, it also targeted roughly 18 percent of the total PAS nominations in existence at its adoption. Ultimately, the reform will have lasting influence over the nominations process if only for eliminating these positions from consideration, which will no longer be potential targets for hostage-taking or political grandstanding. The reform measure is also a positive signal in the battle to keep PAS nominations at a reasonable level and to resist the urge to create more positions requiring Senate confirmation. From this standpoint, the reform could be considered a great success.

While the reform is certain to have a lasting influence, it is unlikely to solve the problem of strategic partisan delay and may not make it so that the remaining nominations proceed more quickly. As noted above, many of the positions most likely to face lengthy strategic delay were not included in the reform. Given that

the average delay time of the reformed nominations is about the same as those that were not reformed, the reform may not actually decrease the time it takes for some nominees to reach confirmation. Many nominations worthy of strategic partisan delay are likely to continue facing it in the future. As such, even though this reform effort represents a significant step forward, presidents and the Senate are still quite likely to engage in lengthy and costly battles over executive nominations.

Circumventing the Nominations Process

Given the confirmation difficulties that many key executive nominations face coupled with the small likelihood of meaningful reform, presidents may opt to circumvent the nominations process altogether. While the Constitution dictates that high officers be confirmed by the Senate, there are a variety of strategies that executives may employ to circumvent the spirit of these requirements. First, presidents may make greater use of their power to issue recess appointments, thereby appointing de-facto officials without the need for confirmation. Second, presidents may attempt to shift power and influence towards appointed bureaucrats who do not require confirmation. Third, presidents may attempt to use more interim appointees and other such measures to fill the leadership gaps in their agencies. Each of these strategies has been used by presidents within the past few decades. The details of each method are discussed below.

Recess Appointments

The most direct route to bypassing the nominations process would be for presidents to make more routine use of their recess appointment authority. While originally intended to fill vacancies during long interludes between congressional sessions (see

Chapter 2), the power to appoint individuals during recesses has expanded over time. Black et al. (2007) have pointed out that recess appointments now deserve to be listed within a president's "tool box" as a unilateral executive power that may allow presidents the ability to circumvent the requirements of legislative confirmation. Furthermore, Corley (2006) has demonstrated that presidents are more likely to use their recess appointment powers in the face of senatorial delay. Combined, these studies suggest that presidents may be using their recess appointment powers in order to better control the bureaucracy in the face of strategic nomination delay.

The power to make recess appointments is, however, not absolute. First, such recess appointments are inherently temporary in nature as the appointee may only serve until the end of a Congress and will have to step down once a nominee is confirmed. Such appointments are also limited to a congressional recess, which has traditionally been defined as an adjournment of at least three days (Hogue, 2008).[2] Because of these limitations, the Democratic majority in the Senate during 2007 was successfully able to thwart President Bush's appointment ambitions by holding *pro forma* sessions during traditional recesses (Black et al., 2011). This adaptation, however, was short-lived. In 2012 after facing intense nominations delay in the Senate, President Obama made several recess appointments despite the existence of such sessions. To justify these actions legally in the face of past precedent, the Office of Legal Counsel (2012) argued that sessions where no business actually took place could not count against a recess. The ultimate legality of these actions has yet to be determined especially after the broad circuit court decision rendered in *Noel Canning v. NLRB* that would effectively end the power to issue recess appointments.[3]

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[2]This tradition is, of course, the site of much controversy as the Constitution is unclear on what constitutes a recess. See Hogue (2008, 2) and Carrier (1994) for more details.

[3]See Chapter 2 for a complete description of the *Noel Canning v. NLRB* decision.

The present state of imbalance between the branches with respect to recess appointment powers is unsustainable. Given that recess appointments can be politically costly (Corley, 2006), it is unlikely that presidents will use this option for lower-level positions. It may become the case, however, that as nominations to higher-level offices such as board members of major IRCs are routinely delayed, that presidents may just as routinely resort to recess appointments. This outcome, however, is likely to be unsatisfactory for all parties. The Senate risks losing its oversight authority for important nominees as presidents would become more tempted to appoint individuals to their own liking without consideration of an ultimately unnecessary Senate vote. While perhaps tempting for presidents, this outcome would also introduce shorter term lengths for nominees as well as potentially hurting recruitment and retention due to the uncertain nature of an interim appointment.

Policy "Czars"

A further trend in recent years has been the increasing reliance upon and creation of so-called policy "czars" within the executive branch. Since the early 1900s, presidents have unilaterally created policy czars that work within the executive branch to confront crisis and to quickly institute policy changes. According to Sollenberger and Rozell (2012, 24), czars:

> usually hold temporary posts, but nonetheless ones that sometimes have exercised even more policymaking power than many cabinet secretaries an agency heads. And some czar positions, through initially slated to be temporary, have carried over from one administration to another over a period of many years... Presidents find the use of czars helpful in that Congress

can be bypassed and policy can be overseen and managed independent of legislative oversight.

As such, the creation and staffing of these offices is constitutionally ambiguous and often a source of inter-branch and partisan controversy.

The creation of the executive Czars may be a response to the burdensome requirements of confirmation as well as the inability of presidents to dramatically re-organize executive offices in order to accommodate new policy goals. One recent example of this phenomenon is the appointment of Elizabeth Warren to head the newly founded Bureau of Consumer Financial Protection in 2010. As the Republican minority in the Senate threatened to filibuster the nomination of Warren to officially run the new bureau, and given that the Democrats lacked the votes to force the issue, any formal nomination would have ended in an unbreakable stalemate. Ultimately, President Obama "skirted" the traditional nominations process by making Elizabeth Warren an assistant to the president and a special adviser to the Secretary of the Treasury (Sollenberger and Rozell, 2012, 153). While the use of czars is not always an attempt to circumvent delay and stalemate in the Senate, it is one possible response.

The tradition of unilaterally appointing officials with broad policy power has a history going back to President Washington, but the creation and use of policy czars within the executive branch has radically increased over time. In fact, Presidents George W. Bush and Obama have been the most frequent users of this tactic to date and since taking office Obama has far outpaced Bush (Sollenberger and Rozell, 2012). If the trends of strategic delay and costly failure continue, it is likely that the use of policy czars, or other such officials that control policymaking without having gone through Senate confirmation, will increase proportionately. Reformers have picked up on this increasing trend and have directly stated that in order to cure this creeping

and corrosive "czar-itis" within the executive branch the appointment and nomination process must first be fixed (Galston and Dionne, 2010, 3).

Interim Appointees

Presidents have often made use of interim appointees to avoid the complications of the long confirmation process. While interim appointees are invaluable and often quite necessary to meet the staffing requirements of agencies that are short staffed, the power to make interim appointments can lead to abuse. Specifically, if a president is able to appoint interim officers who wield the same power as confirmed appointees, then they may simply opt to continue with a preferred interim official rather than compromise and get a nominee confirmed. Interim appointees, like recess appointments, may only be able to serve for limited periods of time, but if a president is able to re-appoint an individual as an interim appointee or similarly chain together a series of like-minded interim appointees, then the functional upshot of the nominations process becomes one of executive controlled appointments with the Senate serving as a rubber stamp if at all.

Because of the necessity to fill vacant offices in the leadership posts of executive agencies, interim appointments are often made by presidents. Congress, in an acknowledgment of how important such authority can be in the running of an agency or the circumvention of Congress, has strictly regulated their use by passing laws such as the Federal Vacancy Reform Act of 1998. The requirements placed on interim appointments, even after such laws were passed, are "difficult to enforce and often violated" Mackenzie (2001, 35). Regardless of what barriers may exist to prevent the abuse of interim appointments, a high vacancy rate makes such appointments

a fact of life and the ability to utilize interim appointees is a potential circumvention of the traditional nominations process.

With the possibility for using interim appointments or by taking advantage of holdover capacity, a president may be advantaged by delay in the executive nominations process. Holdover capacity allows a member of a board or a commission to serve beyond their initial term until a suitable replacement is confirmed in their place. If a president prefers either an interim or a holdover appointee to any nominee likely to win Senate confirmation, then the president may prefer to delay making a nomination. While presidential delay is beyond the purview of this investigation, being slow to issue formal nominations is a charge that is often levied against the executive branch (Galston and Dionne, 2010; Senate, 2011). Using holdover capacity to avoid confirmation in this way weakens the link between the Senate and appointees and thus weakens congressional control over federal agencies and commissions. Ultimately, the strategic use of holdover capacity may be another adaptation to increasingly costly confirmation politics.

Future Prospects

Even after the passage of the PAESA reforms, there exists plenty of reform potential and motivation going forward. Given that the reduction in PAS appointments did not cover the most critical, policy-relevant, nominations, it is likely that presidents will continue to adapt to the slow nominations process by using policy czars, recess appointments, and interim appointees. To respond, Congress will likely continue to adapt with new defensive practices as well as file suit against the executive in order to allow the courts to determine the proper boundaries of each branch with respect to

nominations. In the meantime, the creeping normalcy of delay is likely to continue, adding further fuel to the desire to produce lasting reform.

Recruitment and retention reforms have the highest prospects of passing through Congress at any given time. To remain competitive in attracting and keeping talented executives, the pay of agency leaders will need to be kept at pace with the broader market. Furthermore, advances in information technology and the increasing use of the internet for government activity is likely to lead to a modernization in the paperwork process associated with vetting new nominees. For example, the recently passed reform calls for computerized forms and processing of cases. Such efforts are likely to gather bipartisan support as they are not controversial or advantageous to any one party. The primary benefit to such reforms, however, will be felt at the prenomination phase and perhaps in the quality of recruits. The influence on the long-term strategic delay of key nominees may be only minimally influenced through such reforms as aggregate tenure lengths increase. As such, the pressure to reform will likely continue despite the institution of recruitment and retention reforms.

Despite recent attempts, the filibuster is unlikely to be reformed in the near future. Given the path dependent nature of the filibuster rule, it is unlikely to be reformed and recent attempts to immunize executive nominations from the filibuster ended in controversy and failure. Unfortunately for reformers, as long as the filibuster remains a viable option, the other procedural mechanisms that have grown around it – UCAs, holds – are unlikely to go away. Even if secrecy were removed from the process, true strategic partisan delay can be proudly used by Senators representing partisan districts without the fear of electoral pressure. In fact, such open resistance to a president of the opposite party may be counted as an electoral advantage and a campaign highlight.

Furthermore, the problem with changing Senate procedures is that such reforms fail to strike at the root cause of delay, which is strategic action stemming from partisan disagreement. If Senators are continually willing to deny their opponents access to policymaking tools, then a rules change is not likely going to solve the underlying problem and a new form of delay will spring into existence to replace the old. New procedures are not going to necessarily result in a new spirit of cooperation. As noted by Mackenzie (1981, 260), "if decision-makers lack the freedom or the will to pursue highly qualified appointees, no set of procedures can fully protect them from the consequences of their own irresolution." As such, procedure is unlikely to be the true cause of problems in the nominations process and thus may be equally unlikely to be the solution.

Reforming nominations authority is an alternative possibility. The prospects for reforming nominations authority or the pool of appointees who require Senate confirmation, however, is mixed. On one hand, the Senate has recently passed such a proposal, which proves that the political willpower exists for this kind of reform. On the other hand, given that such a proposal has recently passed it may be the case that there no longer exists a need or the possibility of trimming the lists further. If the proliferation of job titles, new agencies, and new offices continues, then this reform type may be necessary every few decades or so. Other reforms, such as providing presidents with increased powers to reorganize executive offices has also been suggested in the past, but it is unlikely that Congress would be willing to give up such unchecked power.

In general, the prospects for reform of the nominations process are mixed. The likelihood of various kinds of reform are listed in Table 6.2. Recruitment and retention reforms are by far the most likely to be implemented in the near future. This

Table 6.2: Likelihood of Reform

Factor	Reform Potential
Recruitment and Retention	
Reduce Burden of Paperwork	**High**
Reduce Background Checks	**High**
Increase Pay of Appointees	**Moderate**
Earlier Vetting of Nominees	**Moderate**
Procedural Rules	
Reform the Filibuster	**Low**
Reform the use of Holds	**Low**
Immunize Some Nominations	**Moderate**
New Nominations Committee	**Low**
Speed Committee Action	**Low**
Nomination Authority	
Reduce PAS Appointments	**Mixed**
Use Professional Panels	**Low**
Executive Reorganization Power	**Low**

is because they are among the lowest cost to the relevant institutions. Perhaps the most difficult reforms to pass are procedural rules changes. As noted above, Senate procedures are self-protecting and as someone is always advantaged by dilatory tactics, it is unlikely that real reform will take place. Reforming nominating authority is somewhat more likely and has been observed in the recent past. While more costly than recruitment and retention reforms, changing nominating authority is more lasting. Overall, while reform is likely to occur over time, strategic delay in the executive nominations process is just as likely to remain a viable option for opposition senators.

Importantly, even if real nomination reform were to take place, the politics of the nomination process may not change. As noted by Mackenzie (2001, 36):

> far more effort and creativity have been invested by both the Senate and the executive branch in finding more effective ways to fight over appointments than in making peace. Conflict is accepted as a fact of life, and the pursuit of advantage, of leverage, in this conflictual environment greatly exceeds any attempt to make this a more cooperative and less brutal relationship.

In short, where there is a will to delay, there will be a way to delay. The root cause of partisan delay is not inefficiency, redundancies, or the burden of vetting; rather true partisan delay as described in the previous chapters stems from the advantages conferred upon the delaying senators as stalemate exists. This implies that as long as the institutional setup of the nominations process favors some through delay, and as long as some mix of senators are able to induce delay, then partisan obstructionism will continue.

It is also important to note that the future of bureaucratic nominations will depend heavily upon the future of the bureaucracy itself. If the trend continues of giving more and more policymaking authority to executive agencies, then the people who staff such agencies are going to be ever more inviting targets for policy-motivated obstruction. Furthermore, dramatic reorganizations of the executive branch could change the nature of the nominations structure in more direct ways that many of the reforms suggested above. If, for example, more departments were merged into umbrella organizations, as was done with the Department of Homeland Security, then fewer offices may require nominations. Depending on how the reorganization is

conducted, positions that were once filled by political appointees may be re-designed for career civil servants.

Discussion

Reform proposals are an integral part of the history and context in which executive nominations take place. The difficulties that executives have in gaining confirmation of their nominees described in Chapters 4 and 5 have far-reaching ramifications politically. Presidents have begun to stretch the boundaries of their powers to compensate for the dysfunction of the present nominations process. In response to the faults of the nominations process as well as to the machinations of the executive branch, many reform proposals have developed over the years. Some of these proposals have been attempted while others are likely to never reach implementation due to partisan or other disadvantages. The history of and desire for nomination reform provides several insights into the broader story of the nominations process.

Previous chapters have sought to quantify the degree of partisan obstructionism. Building on these insights and empirical observations, this chapter has taken the further step of showing that the influence such delays and failures have on the structure and functioning of the federal bureaucracies is a serious threat to good governance. The nominations process as it currently exists deters qualified candidates, promotes vacancies in key federal offices, and induces the executive to utilize potentially undemocratic means to fill vacant executive posts. The calls for reform that have been discussed within this chapter are a response to the dysfunctional and potentially dangerous state of the executive nominations process.

While the executive nominations process is constantly subject to change, the prospects for successful, Senate-driven, institutional reform are perhaps quite slim.

The reason that reform is unlikely is that reform will likely require an opposition to voluntarily give up an advantage. Eventually, the process may be reformed through legal necessity after Obama's recess appointments threaten Senate participation in the process. Even after reform, however, strategic delay will continue to operate in the Senate as long as it is profitable and possible for Senators to engage in it.

The reforms outlined within this chapter do not constitute an exhaustive survey of possibilities. There exists a near infinite variety of nuanced proposals and combination of reforms that can be proposed. Future reform proposals will likely become necessary as the executive nominations process changes over time to reflect adaptations to new circumstances. As such, the proposals reviewed here should be considered within the context of the present epoch of executive nominations. Furthermore, the discussion of each of these reform proposals does not constitute an endorsement of said reforms. Many of the reforms show positive potential, but each reform comes with caveats and many have significant disadvantages associated with their implementation. What has been offered here is a broad overview of recent reform proposals.

This chapter has also cautioned against the dangers of reforming the nominations process too far. Some level of delay may be valuable to legitimately protect minority interests and to serve as a check against executive administrative powers. Using holds can be a useful tool for prying information out of recalcitrant agencies and it can serve to limit the informational advantage that presidents have over Congress. As such, reducing the power of the Senate to use such tools could alter the balance of power between the institutions. While it may be the case that qualified nominees are sometimes delayed, lengthy vetting may provide for a better quality of appointee in the long run.

Chapter 7

Conclusions

[T]he true test of a good government is its aptitude and tendency to produce a good administration.

– Alexander Hamilton, Federalist No. 68.

One effect of the requirement of senatorial confirmation is that persons of strong convictions, who have taken sides on social and economic questions, are likely to face difficulty in being confirmed; but middle-of-the-road nominees, who have never become a part of such movements and have never expressed any strong convictions on controversial public issues usually face little difficulty. This is unfortunate... [M]any offices call for persons with courage, vigor, and imagination, who feel strongly about the problems of society and have definite ideas, ideals, and convictions.

– Joseph P. Harris, The Advice and Consent of the Senate, 386.

Adding New Understanding

The character of the executive nominations process has changed in recent decades and our studies of the process must similarly change. For example, studies conducted during the early 1980s and before noted that any observed conflict tended to be "well

contained" and was largely "the exception, not the norm" (Mackenzie, 1981, 274). Adding yet more fuel to this sentiment was the fact that so few nominations seemed to end in outright failure, which many studies of high-level nominations have continued to discover (Bond, Fleisher, and Krutz, 2009; Krutz, Fleisher, and Bond, 1998). These facts and observations lend themselves to frameworks of the nominations process that stress either deference towards a single branch or the notion that anticipation of preferences reduces actual open conflict.

Because of this history, delay has often been overlooked and failed nominations were usually seen as anomalous, idiosyncratic, and tending to stem from nominee specific disqualifications or scandal. While it is true that conflict may have been largely absent or at least well contained in the past, an avalanche of anecdotal and empirical evidence from the past few decades suggests that open conflict in the nominations process is now rampant. The empirical findings from Chapter 4 and 5 support the assertion that strategic delay is now a common feature of the new executive nominations landscape, and that this delay is potent enough to be the driving force of failure in the nominations process. These findings lend credibility to the assertion that we now live in a "post-Bork" era of nominations politics that contains far more conflict than prior evidence would have anticipated.

The goal of this project as a whole was to examine the executive nominations process to discover the motivations and patterns of such conflict. In general, the findings of this project support the idea that delay is widespread within the executive nominations process, that it is patterned strategically, that delay can often lead to failure, and furthermore that the weight of these actions on an agency or IRC has the potential to change the character of policy implementation. As such, these findings are important for understanding how the executive nominations process works as well as understanding broader bureaucratic politics.

For making predictions, the most important finding from previous chapters is that strategic partisan delay is patterned relative to the ideological predispositions of bureaucratic agencies. Specifically, when an agency is far away from a president ideologically, such as Ronald Reagan was from the Environmental Protection Agency, opposition senators can gain policy advantages by blocking executive nominations and thus allowing the career civil servants at the given agency to retain the power of the vacant office. Agency predispositions thus serve as the reversion point for bargaining over nominations. This finding demonstrates the value of strategic inaction as well as providing a theoretically driven, and empirically verified, account of why some nominations are delayed while other, seemingly similar, nominations are not. Importantly, this assertion concerning connections between delay and the predispositions of bureaucratic agencies has never before been tested in the literature.

A further major finding is that failure in executive nominations is far more prevalent than prior quantitative studies would suggest, and furthermore, that delay is the primary cause of these failures. Rather than a 95 or 90 percent success rate, president true rate of success in the nominations process is much closer to 70 or 80 percent and depending on the character of the nomination the expectation of success can be far lower. The reason I find much higher rates of failure in executive nominations is the inclusion of mid and lower-level nominations that most investigations ignore. By being inclusive, my findings demonstrate that there are limitations to the generalizability of many prior works and it suggests that all future studies of the nominations process must take into account these cases or adequately defend their absence.

It is also the case that delay and failure were both found to be patterned such that mid-level appointments are more likely to be targeted and fail. As such, these findings redefine the battle over nominations as one taking place over previously unexamined positions. Ultimately, these findings comport well with intuitions developed through

historical analysis and from the old Reagan-era political adage that "personnel is policy." As future studies examine the influence of multiple vacancies on the character and performance of executive agencies, it will be important to keep in mind that the high failure rate of these oft ignored nominees is a likely driver of this trend.

One of the clear findings from the empirical investigations of prior chapters is the uniqueness of Independent Regulatory Commissions (IRCs). Importantly, nominations to IRCs and more traditional agencies are often not compared against one another within the same study. While the findings here suggest that there is ample reason for dividing these cases, it is equally important to note the differences when investigating nominations broadly. IRCs are much more likely to be targets of delay, are much more likely to fail, and are not likely to be targets of reform efforts due to their critical policy importance. IRCs are a unique case because multiple vacancies can lead to an extreme status quo resulting from a board lacking a quorum. Given that most agencies are created through compromise, a crippled IRC may represent the greatest possible distance between a president's ideal point and the status quo. In many cases, anecdotal accounts suggest obstructionist tactics are used to shut down an IRC rather than attempting to bargain for a more favorable nominee. This interesting dynamic is worth future investigation.

The prior chapters also illuminate an important lesson with broad applications to politics more generally. Specifically, these investigations show that time matters in several important ways. First, time is important for understanding how and why the Senate works as it does procedurally. The value of time in the Senate, and the difficulties of scheduling, makes dilatory tactics effective with respect to executive nominations. Second, the value of time with respect to control over a bureaucracy – i.e. the stream of benefits provided by control – provides the motivation for strategic delay even for those nominations that *will* conclude with a confirmation. In short,

time is a valuable political commodity and this value motivates politically meaningful behavior. In particular, political actors care not just about winning, but also how fast they are able to win and in the durability of their victory. One of the key points of this study is recognition of the fact that political entities will fight *over* time in similar ways as policy.

Implications

The politics of executive nominations have broad implications for American politics. Any policy created by Congress and signed into law by a president will ultimately be implemented by bureaucracies. By influencing the key offices responsible for the administration of an agency, one is able to influence the implementation of law by proxy. While numerous studies have demonstrated the existence of intense partisanship during the lawmaking process, the possibility that partisan fighting may continue post enactment through strategically filling or leaving the ranks of bureaucracies vacant has been relatively ignored. The strategic delay of executive nominations brings congressional gridlock to the bureaucracies and has widespread implications for the governance of the United States.

The nature of the executive nominations process directly influences how, and how well, key governmental offices are staffed. The introduction of strategic partisan delay into the nominations process undoubtedly influences the quality and character of the final product: government administration. As noted by Alexander Hamilton, a government is judged to be "good" on the basis of how likely and often its structure produces a good administration. The quality of nominees produced by the nominations process is thus an indication of how well the structures of government are operating. Today, as a large portion of public policy is crafted and/or implemented

within federal agencies, the relationship between the staffing of these agencies and good governance is far stronger and more direct than ever before. Given the state of the nominations process with respect to lengthy delays, common failures, and high vacancy rates, it is natural to conclude that the process is not only an example of bad governance but a contributing factor.

The failures of the nominations process outlined in the previous chapters suggest important considerations for democratic accountability. Specifically, if several nominations to an agency or IRC are significantly delayed throughout a president's administration and as a result the implementation of a popular program suffers, it is unclear who the public can or should blame for the failure during the next voting cycle. Furthermore, the reasons and mechanisms for delay are not always transparent or readily understood. Because delay may be too much "inside baseball" for even above-average voters to pay attention to, opposition to the president may have nothing to stop them from engaging in yet more crippling delay.

Who is to blame for failures in the nominations process? When failures are visible, presidents will likely get the bulk of the blame because they are a unitary actor and the public is much more familiar with them and their policies. However, presidents will almost certainly take their frustrations public by decrying the evils of a partisan and "do nothing" Senate. Even within the Senate it is unclear whether a majority party should be blamed for not more aggressively pushing for a vote on a nominee or the minority party for blocking these efforts. Ultimately, it is likely that, similar to attitudes regarding the filibuster (Smith and Park, 2013), voters will interpret delay through the prism of partisan politics and blame the opposing party for any failures.

One of the less explored implications of research on the politics of the executive nominations process is the effect that intense vetting and the threat of long-term delay has on the quality and kind of nominees that agree to begin the process. First,

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many qualified nominees will be hesitant to even accept a nomination due to the increasingly onerous demands placed upon them. This may ultimately lead to decreasingly desirable – though likely still qualified – nominees filling the key positions within agencies. Second, as noted by Joseph Harris, the focus on candidate nominees who are extremely moderate in their opinions and prior behavior may not often have the characteristics required to effectively staff key positions. Political courage and a willingness to fight for ideas may make the best agency leader but an unlikely candidate for confirmation. The combined impact of multiple vacancies along with less lively leadership within agencies may radically reduce agency effectiveness.

These findings have several implications regarding the nature and implementation of public policy. To the extent that we believe executive appointments have the ability to influence the policymaking activity of an executive agency, then we must also believe that the denial of these appointments is equally important to determining policy implementation. Furthermore, as these nominations are critical to the implementation of presidents preferred policy agenda, the denial of these appointments influences the ability of a president to govern. In this way, strategic delay does not just slow down the process, it changes outcomes.

Implications for Future Research

One of the key implications of this investigation is that future studies must recognize the importance of position level and political insulation when creating studies of the nominations process. Cabinet posts have very different tendencies towards delay, success, and failure than do lower level nominations. Similarly, the differences between nominations to politically insulated IRC positions are predicted to be fundamentally different from those to regular agencies. As such, one must be careful

when selecting a sample of nominations for study and one must acknowledge the limitations in generalizability of any limited sample. Likewise, studies that combine multiple types of nominations must be careful to separate these categories in any analysis.

With respect to the theoretical foundations of studies, new formal models of the nominations process can and should be developed with an eye towards understanding and accounting for the value time. In particular, it is important to look for instances in which stalemate will be a preferred outcome for enough actors so as to create conditions for extreme delay. At present most models of the confirmation process are primarily geared towards discovering what kind of nominee will be nominated and/or confirmed. While this is undoubtedly an important question such models are not able to shed light on many questions concerning the value and timing of strategic delay. By shifting the focus toward time one will be able to better understand strategic stalemate within the nominations process.

Future empirical studies must also properly take failure into account. While some failures are idiosyncratic, many more are not. In this way, asking where, when, and why nominations fail is as important for providing a complete picture of the nominations process as instances of success. Furthermore, looking only at those nominations that succeed ignores a key selection mechanism and may lead one toward biased results in any analysis. Because most nominations that fail do so through delay, many of the same characteristics that predict delay also predict failure. As such, the subjects of failure and delay cannot and should not be separated.

The study of the executive nominations process also points to the need for congressional scholars to more fully develop a theory of minority party power in order to better understand behavior in the Senate. The one-dimensional policy space model with filibuster pivots at 60 vote thresholds simply does not fit the realities of nomi-

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nations politics. For low salience nominations, – and perhaps for legislation as well – the threat of a hold coupled with the high costs of overcoming a filibuster through a cloture vote has made it possible for even lone senators to significantly obstruct and delay. Even for more high-profile nominations, the cost of facing obstruction from fewer than 40 senators can be too great to overcome. As such, we must look for new models and intuition to guide expectations for legislating in the face of minority obstruction.

Future studies of the nominations process that span several decades and multiple centuries are inadvisable. The nature of the nominations process has changed so much during even the modern presidency that nominations made during the administration of Eisenhower may not be comparable to those made during the administration of Obama. Not only has the procedural landscape of the Senate changed dramatically over time but the balance of power between the branches and the very nature of how nominations are treated has also changed. While some broad trends may be demonstrated with long-term data, any study that is too long will be unable to pick up on the nuances inherent to individual epochs and may run the risk of over-generalizing. Future work can develop more fully the boundaries between the epochs and make further comparisons between them.

The Future of the Nominations Process

As noted in Chapter 2, the politics of the nominations process changes through time and all nominations should be considered within the context of their own particular era. The present state of affairs in the nominations process is undoubtedly not the last and one should expect that the process will evolve as the relevant institutions evolve relative to one another. The findings of this study are therefore time

dependent and represent the politics of the current, "post-Bork," era. Perhaps the next epoch will be known as the "post-reform" or "empty office" era depending on the direction that the process takes. In any case, it is worth a moment to speculate on the immediate future of the nominations process.

In the short term, the executive nominations process is likely to remain as contentious and partisan as it is slow. Ultimately, however, there exists strong evidence to suggest that the executive nominations process may be headed towards some change. First, the controversy over Obama's recess appointments during Senate *pro forma* sessions is likely to have a dramatic effect on the nominations process by either rendering the presidential recess appointment power a dead letter or by allowing the President to effectively bypass Senate opposition through direct appointment. As neither of these outcomes is particularly favorable to either institution or political party, a compromise is likely to develop in the face of one or the other extreme position. As noted in Chapter 2, the outcome of this controversy will be decided depending on whether the broad decision in *Noel Canning v. NLRB* is ultimately upheld or rejected by higher courts.

A second path to change may come through the continuation and intensification of obstruction in the Senate. Already, many key offices go unfilled for months before a nominee is confirmed and the combined weight of several vacant seats continually threatens the ability of some boards to operate effectively. Such vacancies limited the effectiveness of defense-related agencies in the weeks leading up to the attacks of September 11 as well as the Treasury Department in the early weeks of the Obama administration as we fought through a financial crisis. As such, momentum towards reform has begun to build on these past examples and may grow stronger in direct proportion to the level of delay. The once unbridled filibuster was ultimately constrained by Rule XXII, which was created in the wake of "12 willful men" who had

held up a popular measure aimed at arming America's merchant marine just before its entry into World War 1. Similarly, one could imagine that an especially egregious and public fight over nominations could spark the ire of voters and issue forth a reformed nominations procedure.

In response to the increasing partisanship and crippling delays in nearly all aspects of the legislative process in the Senate, a variety of reforms have been proposed so as to provide faster decisions and more efficiency going forward. While these reforms have taken a variety of shapes, one common theme is to somehow reform the filibuster. Filibuster reforms in general would influence the nominations process by removing the necessity or decreasing the difficulty of gaining cloture. Additionally, the filibuster could be subject to a more targeted reform such that certain motions or measures – such as executive nominations – would require simple majority cloture rather than the present 60 votes. So far, attempts to reform the filibuster have met with limited success but given the levels of obstruction observed for both legislation and executive nominations the motivation for reform is ever-present. Any filibuster reform will have immediate and profound implications for the executive nominations process.

Congress has already passed a reform eliminating approximately 200 positions from the necessity of Senate approval (Senate, 2011). This has arguably decreased the burden of deciding nominations in the Senate by reducing the number of cases to be decided. However, the nominations targeted by this reform are considered to be non-partisan and generally routine. The reform proposal would, therefore, not necessarily make dilatory tactics any less potent for those positions that have been historically delayed. Strategic delay of key nominees would likely still occur because the logic for delay remains in place. By targeting non-partisan, low policy influence positions, the reform avoids those positions for which policy-motivated targeted delay takes place. In fact, as lower level targets for convenient hostage-taking would be

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fewer, it may actually increase the level of overall delay in high level positions. As such, the likelihood and prospects of reform remain uncertain.

In the foreseeable future, the executive nominations process will continue to be an important site of inter-branch rivalry and partisan battles. While this is true for all nominations, it is especially true for nominations to IRCs. Given that IRCs have been the targets for strategic delay for so long, it is now the case that many boards are facing the loss of a quorum and the potential for using delay to shut down a major regulatory board is now a very real possibility. The NLRB is presently one court case away from impotence, and if it were not for holdover capacity at the Federal Election C allowing members to stay after their term has expired the board wouldn't have any members. Such examples are increasingly common and have profound implications for salient policies such as rules governing fair labor practices and elections. The preference for inaction over any action has led to a predominance of stalemate at many IRCs. Going forward, these are perhaps the most important nominations to observe.

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