

# SHORTENING AGENCY AND JUDICIAL VACANCIES THROUGH FILIBUSTER REFORM? AN EXAMINATION OF CONFIRMATION RATES AND DELAYS FROM 1981 TO 2014

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## ABSTRACT

*This Article explores the failure of nominations and the delay in confirmation of successful nominations across recent administrations, with a focus on the November 2013 change to the Senate voting rules. Using a new database of all nonroutine civilian nominations from January 1981 to December 2014, there are several key findings. First, approximately one-quarter of submitted nominations between 1981 and 2014 were not confirmed, with a higher failure rate for the last two Presidents. Nominations to courts of appeals and independent regulatory commissions had much higher failure rates than other entities. Second, for confirmed nominations, the time to confirmation has been increasing. President Obama's nominees faced confirmation delays that were more than twice as long as President Reagan's choices. Failure rates of nominations did not always go hand-in-hand with confirmation delays for successful nominations. Although more nominations failed in divided government, confirmation delays were roughly equal when different parties controlled the Senate and the White House. Third, comparing the year after the change to the filibuster rules to the preceding year, confirmation times for the courts decreased but increased for all types of agencies. For many agencies*

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*and agency positions, however, significantly fewer nominations failed after the voting change. Even so, these improvements in 2014—to the confirmation rates for both agency and judicial nominees and to the confirmation pace for judicial picks—are relative: for the average nomination, the failure rate was higher and the confirmation process was slower than under preceding administrations. Fourth, nearly 30 percent of nominees hailed from the District of Columbia, Maryland, and Virginia, raising concerns that the confirmation process may be narrowing the pool of top officials. This Article suggests some possible explanations for the findings and further avenues of investigation, and also proposes some reforms.*

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## INTRODUCTION

All of the plum positions in the federal courts and agencies are never fully staffed. The process to fill these attractive and important jobs involves two branches of government. Under the Constitution, all judges on Article III courts and the top leaders of federal agencies have to be nominated by the President and confirmed by the Senate.<sup>1</sup> If Congress has not chosen otherwise, “inferior” officers—who still exercise significant authority but are typically directed and supervised

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1. See U.S. CONST. art II, § 2, cl. 2.

by someone other than the President<sup>2</sup>—have to go through the same process.<sup>3</sup> We call these “PAS”<sup>4</sup> positions. There are currently over 2000 of them: 874 Article III, territorial court, and Court of International Trade judgeships,<sup>5</sup> and 1217 agency positions.<sup>6</sup>

The vacancies in these leadership positions can be staggering. In one of my studies, top jobs in executive agencies and cabinet departments had been vacant (or filled by an acting official) between 15 and 25 percent of the time, on average, in recent administrations.<sup>7</sup> And the problem may be worse for the current administration.<sup>8</sup> There are cycles of agency vacancies: at the start of an administration when Presidents transition from campaigning to governing, in the middle when the first (or second) set of officials departs to another administration position or to a non-governmental perch (including at the start of a second term), and in the final year or two when officials leave the administration, often to take advantage of their governmental connections.<sup>9</sup> Until very recently, the Chief Justice regularly called attention to judicial vacancies—often termed

2. *Edmond v. United States*, 520 U.S. 651, 662–63 (1997).

3. U.S. CONST. art II, § 2, cl. 2.

4. PAS positions are those positions that require presidential appointment with Senate confirmation.

5. U.S. COURTS, *Judges and Judgeships: Federal Judgeships*, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Apr. 8, 2015).

6. H. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., POLICY AND SUPPORTING POSITIONS app. 1, at 200 (Comm. Print 2012) (quadrennial report commonly referred to as the “Plum Book”).

7. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 965 (2009).

8. See PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER 315 (2014) (reporting that “over 40 percent of . . . senior leadership positions [in the Department of Homeland Security] were either vacant or had an ‘acting’ placeholder when the president finally nominated a new secretary in October 2013”); Michael D. Shear, *Trading Blame as U.S. Posts Stay Unfilled*, N.Y. TIMES, May 3, 2013, at A1, A14 (noting that nearly 25 percent of senior State Department and about 30 percent of senior Commerce Department jobs were not filled with Senate-confirmed appointees); Eileen Sullivan & Alicia A. Caldwell, *Napolitano Departure Bares Gaps in DHS Leadership*, U-T SAN DIEGO (July 13, 2013, 7:11 AM), <http://www.utsandiego.com/news/2013/jul/13/napolitano-departure-bares-gaps-in-dhs-leadership> (noting that one-third of top Department of Homeland Security jobs were vacant or filled with acting officials); Gordon Lubold, *Help Wanted at the Pentagon*, FP'S SITUATION REP. (Apr. 25, 2013), <http://foreignpolicy.com/2013/04/25/help-wanted-at-the-pentagon-wilkerson-being-investigated-for-an-extramarital-affair-mikulski-wants-some-r-e-s-p-e-c-t-hagel-pressed-on-syrian-cw-hand-sanitizer-as-sexual-assault-prevention-tool-a> (finding that more than 20 percent of top Department of Defense positions were vacant or filled with acting officials).

9. O'Connell, *supra* note 7, at 917–20.

“judicial emergencies” by the Judicial Conference, depending on the relevant court’s workload—in his annual reports to Congress.<sup>10</sup>

In the face of these vacancies, complaints targeting the confirmation component of the appointments process are commonplace. For instance, in a September 30, 2010 letter to Senate officials, President Obama criticized the Senate’s slow pace on judicial nominations: “Proceeding this way will put our judiciary on a dangerous course, as the Department of Justice projects that fully half of the Federal judiciary will be vacant by 2020 if we continue on the current pace of judicial confirmations.”<sup>11</sup> President Obama is not alone. Every recent modern President has complained that the Senate is not acting quickly enough on nominations.<sup>12</sup> It is not just Presidents who protest. Commentators with no connection to the White House also lament the length of the confirmation process.<sup>13</sup>

In response to these delays, some called for the end of filibustering nominees—specifically, for the elimination of the three-fifths hurdle to close debate and hold a vote.<sup>14</sup> These supermajority mandates empower the minority when the same party controls the Senate and the White House, whether that minority is Republican or Democrat. When George W. Bush was President, Republican

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10. See WILLIAM H. REHNQUIST, YEAR-END REPORT ON THE FEDERAL JUDICIARY (2003); JOHN ROBERTS, JR., YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011); Tony Mauro, *Chief Justice Roberts Readies Tenth Annual Year-End Report*, NAT’L L. J., Dec. 29, 2014. Scholars have noted that in some recent years “more than 10 percent of the seats on the federal bench have been vacant.” Sarah A. Binder & Forrest Maltzman, *The Politics of Advice and Consent: Putting Federal Judges on the Federal Bench*, in CONGRESS RECONSIDERED 241, 242 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009).

11. Michael D. Shear, *Obama Blasts G.O.P. for Stalling Judicial Nomination*, N.Y. TIMES: THE CAUCUS (Oct. 1, 2010, 6:48 AM), <http://thecaucus.blogs.nytimes.com/2010/10/01/obama-blasts-gop-for-stalling-judicial-nominations> (reprinting President Obama’s letter).

12. See Associated Press, *Clinton Worries About Attacks on Nominees*, S.F. CHRON., Jan. 21, 1994, at A3; *150 Bush Nominees Still Await Confirmation*, CLEVELAND PLAIN DEALER, Dec. 29, 1991, at 10A; Ian R. Allen, *White House Asks End to Appointee Backlog*, WASH. POST, Oct. 9, 1985, at A17; Press Release, The White House, Office of the Press Secretary, Fact Sheet: Senate Must Act on Nominations to Federal Courts and Agencies (Feb. 7, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080207-9.html>.

13. See, e.g., JAMES P. PFIFFNER, DWIGHT INK, DAVID LEWIS & ANNE O’CONNELL, NAT’L ACAD. OF PUB. ADMIN., STRENGTHENING ADMINISTRATIVE LEADERSHIP: FIXING THE APPOINTMENTS PROCESS (2012); Paul C. Light, Op-Ed, *Nominate and Wait*, N.Y. TIMES, Mar. 24, 2009, at A27; Norman Ornstein, *Confirmation Process Leaves Government in Serious Gridlock*, ROLL CALL (Mar. 25, 2009), [http://www.rollcall.com/issues/54\\_108/ornstein/33458-1.html](http://www.rollcall.com/issues/54_108/ornstein/33458-1.html).

14. See, e.g., Editorial, *Filibustering Nominees Must End*, N.Y. TIMES, Jan. 28, 2012, at A10; Norman Ornstein, *A Filibuster Fix*, N.Y. TIMES, Aug. 27, 2010, at A19.

Senators contemplated eliminating the filibuster rule.<sup>15</sup> More recently, Democratic Senators had reached the brink of major changes to the filibuster rules and stepped back once agreement (with the Republicans) was reached to confirm certain nominees.<sup>16</sup> Filibusters, in the form of preventing a vote on the nomination, however, continued. In February 2013, Senate Republicans blocked a vote on one of their own—Chuck Hagel, a former Republican Senator—to become Secretary of Defense, “the first-ever filibuster against a Pentagon chief.”<sup>17</sup> Republicans (and Democrats in earlier times) have used other delay tactics as well, including giving a nominee hundreds of written questions that the nominee had to answer in writing before a confirmation vote.<sup>18</sup> In late October 2013, Senate Republicans refused to advance under the supermajority cloture rules the nomination of Representative Melvin Watt to head the Federal Housing Finance Agency and Patricia Ann Millett to the U.S. Court of Appeals for the D.C. Circuit, creating outrage among Democrats.<sup>19</sup> The *New York Times* repeated its call for the demise of the filibuster.<sup>20</sup>

A few weeks later, on November 21, all but three of the Senate Democrats voted to change the Senate’s rules, so that all confirmations (other than those to the Supreme Court) could proceed by majority vote.<sup>21</sup> The change resulted from allowing a simple majority (instead of three-fifths) to set time limits on the

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15. See Binder & Maltzman, *supra* note 10, at 255.

16. Jonathan Weisman, *Filibuster Deal Heralds Stirring of Compromise*, N.Y. TIMES, July 17, 2013, at A13; Jonathan Weisman, *Senate Strikes Filibuster Deal, Ending Logjam on Nominees*, N.Y. TIMES, July 17, 2013, at A1; see generally Ezra Klein, *Let’s Talk: The Move to Reform the Filibuster*, THE NEW YORKER, Jan. 28, 2013, at 24. These reform-minded Senators did make minor progress. Jeremy W. Peters, *New Senate Rules to Curtail the Excesses of a Filibuster*, N.Y. TIMES, Jan. 24, 2013, at A18; see generally Richard S. Beth & Anthony J. Madonna, *The Senate’s “Nuclear” Precedent: Implications for Efforts to Control the Filibuster* (American Political Science Association 2014 Annual Meeting Paper, Aug. 22, 2014) (examining attempts at reform and successful changes to Senate procedure from 1953 to present).

17. Jeremy W. Peters, *G.O.P. Blocks Vote in Senate on Hagel for Defense Post*, N.Y. TIMES, Feb. 14, 2013, at A1. Hagel was subsequently confirmed. Jeremy W. Peters, *Hagel Approved for Defense in Sharply Split Senate Vote*, N.Y. TIMES, Feb. 27, 2013, at A1.

18. Jeremy W. Peters, *G.O.P. Delays on Nominees Raise Tension*, N.Y. TIMES, May 11, 2013, at A1.

19. See Jeremy W. Peters, *Republicans’ Blocking of Obama Nominees Could Renew Debate*, N.Y. TIMES, Nov. 1, 2013, at A20.

20. Editorial Board, *The Politics of Petulance*, N.Y. TIMES, Oct. 31, 2013, at A30.

21. Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1.

consideration of almost all nominations.<sup>22</sup> Technically, the change was not a formal amendment of the Senate's rules but rather supplanted a decision of the chair, who had previously concluded that the rules required three-fifths of the Senate to set the time limits.<sup>23</sup> This controversial maneuver allowed the majority of the Senate to make the change.<sup>24</sup> The reinterpretation of the Senate's rules—the so-called “nuclear option”—was a major event.<sup>25</sup>

As predicted,<sup>26</sup> with the Democrats in control of the Senate, judicial confirmations appeared to pick up in subsequent months, at least with respect to the number of judges placed on the bench.<sup>27</sup> Specifically, three judges who had previously failed to get the then-necessary sixty votes to end debate were confirmed to the D.C. Circuit, tipping the party balance of active judges in favor of Democratic nominees.<sup>28</sup> But some agency nominations lingered under Democratic control. When several cases of Ebola popped up in the United States in October 2014, there was no confirmed Surgeon General, despite President Obama's nomination of Dr. Vivek Murthy seven months earlier.<sup>29</sup> For over four years, there has been an acting Assistant Administrator for Water at the Environmental Protection Agency, despite a string of nominations submitted to each Congress dating back to June 2011.<sup>30</sup> Other top environmental and energy

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22. Beth & Madonna, *supra* note 16, at 2–3.

23. *Id.*

24. *Id.*

25. See Peters, *supra* note 21. See generally Ian Ostrander, Winning the Waiting Game: Senatorial Delay in Executive Nominations 196 (Aug. 2013) (unpublished Ph.D. dissertation, Washington University in St. Louis) (on file with the *Duke Law Journal*) (“Any filibuster reform will have immediate and profound implications for the executive nomination process.”).

26. See, e.g., Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, BROOKINGS FIXGOV (Dec. 30, 2013, 10:33 AM), <http://www.brookings.edu/blogs/fixgov/posts/2013/12/30-staffing-federal-judiciary-2013-no-breakthrough-year>.

27. See Al Kamen, *Obama Judges Confirm Numbers Way Up in “Post-Nuclear” World*, WASH. POST: THE LOOP (June 28, 2014), <http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/06/28/obama-judges-confirm-numbers-way-up-in-post-nuclear-world>.

28. Daniel Wilson, *Senate Advances 3rd Contentious DC Circ. Nominee*, LAW360 (Jan. 9, 2014, 8:06 PM), <http://www.law360.com/articles/500129/senate-advances-3rd-contentious-dc-circ-nominee>. The three new D.C. Circuit judges are Patricia A. Millett, Cornelia T.L. Pillard, and Robert L. Wilkins. *Id.*

29. Kristina Peterson & Louise Radnofsky, *Ebola Furor Renews Sparring Over Surgeon General Nomination*, WALL. ST. J. BLOGS (Oct. 17, 2014), <http://blogs.wsj.com/washwire/2014/10/17/ebola-furor-renews-sparring-over-surgeon-general-nomination>.

30. See Robin Bravender, *Top Jobs Vacant as Nominees Linger in Confirmation Limbo*, GREENWIRE (July 1, 2014), <http://www.eenews.net/greenwire/stories/1060002220>; ENVTL. PROT. AGENCY, *Nancy Stoner, Acting Assistant Administrator for Water*,

positions as well as ambassadorships have garnered attention.<sup>31</sup> It took a rare Saturday session in December—which occurred because of Republican Senators Ted Cruz’s and Mike Lee’s complaints to a spending bill—to confirm the President’s nominee for Surgeon General, ten other agency officials, and twelve judges.<sup>32</sup>

The Senate shifted to Republican control in January 2015. There is some chance the Republicans could restore the filibuster.<sup>33</sup> At the least, the new Republican majority will presumably slow down confirmations in the final two years of President Obama’s administration.<sup>34</sup> For instance, although cabinet secretaries are generally confirmed quite quickly, it took over five months to confirm Loretta Lynch as Attorney General.<sup>35</sup> Days after she had been placed on the Senate calendar, new Senate majority leader Mitch McConnell announced that he would not schedule the confirmation vote until

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<http://www2.epa.gov/aboutepa/nancy-stoner-acting-assistant-administrator-water> (last updated May 8, 2014).

31. See Bravender, *supra* note 30; Editorial Board, *Confirmation Dysfunction: Senate Should Act on Embarrassing Backlog of Confirmation Nominees*, WASH. POST, Oct. 1, 2014, at A18 (“According to the American Foreign Service Association, 47 nominees are awaiting confirmation to represent the United States . . .”).

32. Ed O’Keefe & Brady Dennis, *Surgeon General Nominee Vivek Murthy, Opposed by Gun Lobby, Confirmed*, WASH. POST (Dec. 17, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/12/15/surgeon-general-nominee-vivek-murthy-opposed-by-gun-lobby-confirmed>.

33. See Jennifer Bendery, *Republicans Are All Over The Place On Senate Filibuster Reform*, HUFFINGTON POST (Nov. 21, 2014), [http://www.huffingtonpost.com/2014/11/21/republicans-senate-filibuster-reform\\_n\\_6194198.html](http://www.huffingtonpost.com/2014/11/21/republicans-senate-filibuster-reform_n_6194198.html).

34. See Gavin Broady, *Obama Judicial Noms Face Uphill Battle in Republican Senate*, LAW360 (Jan. 7, 2015, 6:25 PM), <http://www.law360.com/articles/609043/obama-judicial-noms-face-uphill-battle-in-republican-senate>; Greg Jaffe & Rajiv Chandrasekaran, *White House Seeks a Stronger Hand at Pentagon to Manage Crises*, WASH. POST (Nov. 25, 2014), [http://www.washingtonpost.com/national/white-house-seeks-a-stronger-hand-at-pentagon-to-manage-crises/2014/11/24/438307fa-7414-11e4-9c9f-a37e29e80cd5\\_story.html](http://www.washingtonpost.com/national/white-house-seeks-a-stronger-hand-at-pentagon-to-manage-crises/2014/11/24/438307fa-7414-11e4-9c9f-a37e29e80cd5_story.html). Presidential selections presumably will shift as well, with President Obama more likely to pick nominees more palatable to Senate Republicans, such as former Senate staffers. See, e.g., Ben James, *Obama’s NLRB Nominee Swap Seen as Shrewd Strategic Play*, LAW360 (Nov. 17, 2014, 8:16 PM), <http://www.law360.com/articles/595968/obama-s-nlr-b-nominee-swap-seen-as-shrewd-strategic-play>; Max Stendahl, *Obama May Play It Safe with AG Pick After GOP Win*, LAW360 (Nov. 5, 2014, 12:47 PM), <http://www.law360.com/articles/591102/obama-may-play-it-safe-with-ag-pick-after-gop-win>.

35. Ruth Marcus, *Senators, Do Your Job and Confirm Loretta Lynch*, WASH. POST (Mar. 24, 2015), [http://www.washingtonpost.com/opinions/the-delay-over-lynchs-confirmation-isnt-about-race-or-gender/2015/03/24/1bdefa2e-d233-11e4-8fce-3941fc548f1c\\_story.html](http://www.washingtonpost.com/opinions/the-delay-over-lynchs-confirmation-isnt-about-race-or-gender/2015/03/24/1bdefa2e-d233-11e4-8fce-3941fc548f1c_story.html); Daniel Wilson, *Senate Confirms Lynch as Attorney General*, LAW360 (Apr. 23, 2015, 1:59 PM), <http://www.law360.com/articles/646969/breaking-senate-confirms-lynch-as-attorney-general>. Lynch’s 2014 nomination was returned to President Obama in December; he renominated her at the start of 2015.

stalled human trafficking legislation passed.<sup>36</sup> Then, there was debate on the budget before the Senate left for a two-week recess.<sup>37</sup> In the middle of the recess, she had waited longer than other nominees to the cabinet in the past three administrations to be confirmed.<sup>38</sup>

Although we have some snapshots, we do not have a systematic handle on how the agency and judicial confirmation process changed when the Senate shifted its rules in November 2013.<sup>39</sup> Using a comprehensive new database covering almost all civilian nominations between January 1981 and December 2014, this Article offers an empirical assessment of that change, along with other aspects of the Senate's role in staffing important positions.

There are several key findings. First, almost a quarter of submitted nominations between 1981 and 2014 were not confirmed, with higher failure rates for Presidents George W. Bush and Obama. Nominations to courts of appeals and independent regulatory commissions (IRCs) had much higher failure rates than did those to other entities. Second, for confirmed nominations, the time to confirmation has been increasing. Although the average time from nomination to confirmation in the dataset was 88.5 days, it was 127.2 days for President Obama. Failure rates of nominations did not always go hand in hand with longer confirmation delays for successful nominations. Although considerably more nominations failed during periods of divided government (26 percent compared to 21 percent when the same party controlled the Senate and the White House),

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36. Emmarie Huetteman, *Human Trafficking Bill Stands in Way of Pick for Attorney General*, N.Y. TIMES, Mar. 15, 2015, at A14.

37. See Mike DeBonis, *With a Seemingly Innocuous Bill, Senate Manages to Tie Itself In Knots*, WASH. POST (Mar. 16, 2015), [http://www.washingtonpost.com/politics/with-a-seemingly-innocuous-bill-senate-manages-to-tie-itself-in-knots/2015/03/16/8bd62ca2-cc08-11e4-8a46-b1dc9be5a8ff\\_story.html](http://www.washingtonpost.com/politics/with-a-seemingly-innocuous-bill-senate-manages-to-tie-itself-in-knots/2015/03/16/8bd62ca2-cc08-11e4-8a46-b1dc9be5a8ff_story.html).

38. See Al Kamen & Colby Itkowitz, *Loretta Lynch to Lead Pack—Going Three White Houses Back—of Waiters*, WASH. POST (Mar. 26, 2015), [http://www.washingtonpost.com/politics/loretta-lynch-to-lead-pack--going-three-white-houses-back--of-waiters/2015/03/26/956019d8-d3f9-11e4-8fce-3941fc548f1c\\_story.html](http://www.washingtonpost.com/politics/loretta-lynch-to-lead-pack--going-three-white-houses-back--of-waiters/2015/03/26/956019d8-d3f9-11e4-8fce-3941fc548f1c_story.html).

39. There has been some media coverage of judicial nominations. See, e.g., Al Kamen & Paul Kane, *Did 'Nuclear Option' Boost Obama's Judicial Appointments?*, WASH. POST (Dec. 17, 2004), <http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/12/17/did-nuclear-option-boost-obamas-judicial-appointments>. In addition, I have recently learned of some academic research conducted independently of this study. See Christina L. Boyd, Michael S. Lynch, and Anthony J. Madonna, *Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations* (Feb. 2015) (unpublished manuscript) (on file with the *Duke Law Journal*) (finding that “while post-nuclear nominees are not significantly more liberal, they are being confirmed more often and more quickly”).



successful nominations took only four days longer, on average, to confirm when different parties controlled the Senate and the White House. Third, comparing the year after the change to the filibuster rules to the year before, confirmation times for nominations to the courts decreased but jumped for all types of agencies. For many agency positions, however, significantly fewer nominations failed after the voting change. Even so, these improvements—to the confirmation rates for both agency and judicial nominees and to the confirmation pace for judicial picks—are relative: across all nominations as a group, the failure rate was higher and the confirmation process was slower, on average, than under preceding administrations. Fourth, nearly 30 percent of nominees hailed from the District of Columbia, Maryland, and Virginia, raising concern that the confirmation process may be narrowing the pool of top officials.

This Article proceeds as follows. Part I provides a description of the new database and the major questions for investigation. Part II supplies some key findings, including but not limited to those previously highlighted, on failed nominations in the past thirty-four years, the length of the confirmation process during that time, and the effects of the filibuster change on President Obama's nominations. Part III turns to some possible explanations for this Article's findings and suggests further avenues of investigation. Finally, Part IV briefly proposes some reforms and then concludes. Because of data limitations, the Article focuses on the Senate's role once a nomination is submitted. Judicial and agency vacancies depend critically as well on the President's role in submitting nominations for Senate consideration.<sup>40</sup> Nevertheless, there is still much to be learned by looking at the role of the Senate in isolation.

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40. See, e.g., Edward-Isaac Dove & Jennifer Epstein, *Empty Jobs Plague Obama Administration*, POLITICO (Aug. 14, 2013, 6:34 PM), <http://www.politico.com/story/2013/08/barack-obama-administration-staffing-95512.html> (noting that “the president’s taking his time too”); Josh Rogin, *Kerry Blames White House for State Department Vacancies*, FOREIGN POL’Y (Apr. 17, 2013, 12:19 PM), <http://foreignpolicy.com/2013/04/17/kerry-blames-white-house-for-state-department-vacancies> (noting how, during a congressional hearing, Secretary of State John Kerry blamed the “White House vetting process” for vacancies in the State Department). In other work, I address the White House’s delays in making nominations for key positions. See ANNE JOSEPH O’CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA’S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 1–19 (Apr. 2010); O’Connell, *supra* note 7, at 952–74; PFIFFNER ET AL., *supra* note 13; Dwight Ink, Anne Joseph O’Connell, David Lewis, and James P. Pfiffner, *Strong Executive Leadership Crucial for Policy Implementation*, PUB. MANAGER, Winter 2012, at 37; Anne Joseph O’Connell, *Five Myths about Presidential Appointments*, WASH. POST, July 21, 2013, at B2.

## I. DATA AND QUESTIONS

This Article uses a new dataset that I have constructed of nonroutine civilian nominations<sup>41</sup> submitted to the Senate from January 1, 1981, to December 31, 2014. Some past work relies on the Library of Congress's online nominations database (THOMAS), which covers civilian nominations but goes back only to 1987.<sup>42</sup> Other past work extends back further in time (and covers a wider time period than this Article) but does not cover the same breadth of civilian nominations.<sup>43</sup> Still other work focuses only on judicial nominations.<sup>44</sup> The Congressional Research Service (CRS) produces comprehensive reports on civilian nominations but typically does so

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41. The dataset thus excludes military nominations. According to the Congressional Research Service, "[m]ilitary appointments and promotions make up the majority of nominations, approximately 65,000 per two-year Congress, and most are confirmed routinely." ELIZABETH RYBICKI, CONG. RESEARCH SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE 1 (2015). The dataset also excludes civilian nominations that are routine promotions. *See infra* note 52 and accompanying text.

42. *See, e.g.*, Matthew M. Dull, Patrick Roberts, Sang Ok Choi & Michael Keeney, *Appointee Confirmation and Tenure: Politics, Policy, and Professionalism in Federal Agency Leadership, 1989–2009* (American Political Science Association Toronto Meeting Paper, Sept. 2, 2009) (relying on THOMAS for confirmation data); Ian Ostrander, *The Logic of Collective Inaction: Senatorial Delay in Executive Nominations* (Mar. 31, 2011) (unpublished manuscript) (on file with the *Duke Law Journal*) (analyzing 7000 nominations from THOMAS to executive agencies from 1987 to 2010).

43. *See, e.g.*, Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations, 1885–1996*, 43 AM. J. POL. SCI. 1122, 1132 (1999) (covering "more than 3500 nominations to positions in domestic executive branch agencies from the 49th to the 104th Senates (1885–1996)" and excluding the Departments of Defense, the State Department, and IRCs and independent regulatory boards).

44. *See, e.g.*, Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190, 192–94 (2002) (analyzing confirmation process for nominations to federal appellate courts between 1947 and 1998); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 267 (2002) (examining over 1600 judicial nominations between 1969 and 1998); Lisa M. Holmes, Salmon A. Shomade & Roger E. Hartley, *The Confirmation Obstacle Course: Signaling Opposition Through Delay*, 33 AM. REV. POLITICS 23, 33 (2012) (examining 1800 nominations for district and circuit court judgeships between 1977 and 2010); David C. Nixon & David L. Goss, *Confirmation Delay for Vacancies on the Circuit Courts of Appeals*, 29 AM. POL. RES. 246, 251 (2001) (examining vacancy delays (from opening to confirmation, rather than by nomination) for 548 openings on the federal appellate courts from 1892 to 1994); Nancy Scherer, Brandon L. Bartels & Amy Steigerwalt, *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026, 1030 (2008) (assessing confirmation delays in nominations to federal courts of appeals from 1985 to 2004). Remapping Debate has an online tool that allows users to track and compare recent judicial vacancies. *See Judicial Vacancies: Show Us the Numbers*, REMAPPING DEBATE (Mar. 28, 2013), <http://www.remappingdebate.org/map-data-tool/judicial-vacancies-show-us-numbers?>

only for a particular Congress.<sup>45</sup> Some interest groups and think tanks track nominations.<sup>46</sup> The work most similar to this Article in scope

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45. See MAEVE P. CAREY, MICHAEL W. GREENE & MAUREEN BEARDEN, CONG. RESEARCH SERV., R42932, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES DURING THE 111TH CONGRESS* (2013); MAEVE P. CAREY & HENRY B. HOGUE, CONG. RESEARCH SERV., R41776, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES DURING THE 110TH CONGRESS* (2011); ROGELIO GARCIA & HENRY B. HOGUE, CONG. RESEARCH SERV., RL30564, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES DURING THE 106TH CONGRESS, 1999–2000* (2001); ROGELIO GARCIA, CONG. RESEARCH SERV., RL30124, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES, 105TH CONGRESS, 1997–1998* (1999); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 96-985 GOV, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES, 104TH CONGRESS* (1996); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 94-473, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES, 103RD CONGRESS* (1994); ROGELIO GARCIA, CONG. RESEARCH SERV., RL30476, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 106TH CONGRESS* (2001); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 96-271, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 104TH CONGRESS* (1996); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 94-628, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 103RD CONGRESS* (1994); HENRY B. HOGUE, CONG. RESEARCH SERV., RL31677, *FILLING PRESIDENTIALLY APPOINTED, SENATE-CONFIRMED POSITIONS IN THE DEPARTMENT OF HOMELAND SECURITY* (2004); HENRY B. HOGUE, CONG. RESEARCH SERV., RL31346, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN EXECUTIVE DEPARTMENTS DURING THE 107TH CONGRESS, 2001–2002* (2003); HENRY B. HOGUE, CONG. RESEARCH SERV., RL30910, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 107TH CONGRESS* (2003); HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., R41463, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 110TH CONGRESS* (2010); HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., R41497, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN EXECUTIVE DEPARTMENTS DURING THE 110TH CONGRESS, 2007–2008* (2010); BARRY J. McMILLION, CONG. RESEARCH. SERV., R42556, *NOMINATIONS TO U.S. CIRCUIT AND DISTRICT COURTS BY PRESIDENT OBAMA DURING THE 111TH AND 112TH CONGRESSES* (2012); Memorandum from Maeve Carey & Henry B. Hogue, Cong. Research Serv., to Senator Tom Coburn, *Presidential Appointments and Nominations Data from the 111th and 112th Congresses* (May 20, 2011). These reports generally detail by agency the number of nominations submitted, the outcome of those nominations (whether confirmed, withdrawn, or returned), and the days required to confirm each successful nomination. There are some CRS reports that cover a longer time period. See ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 93-464 GOV, *SENATE ACTION ON NOMINATIONS TO POLICY POSITIONS IN THE EXECUTIVE BRANCH, 1981–1992* (1993) [hereinafter *SENATE ACTION*] (providing the percentage of confirmed nominations, returned nominations, and withdrawn nominations for three big categories: departments, agencies, and commissions); HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., R40119, *FILLING ADVICE AND CONSENT POSITIONS AT THE OUTSET OF A NEW ADMINISTRATION* (2010) (examining appointments to executive-branch agencies at the start of an administration, from President Reagan to President Obama) [hereinafter *FILLING ADVICE AND CONSENT POSITIONS*]; BARRY J. McMILLION, CONG. RESEARCH SERV., R43058,

looks at nominations to federal courts, executive agencies, and IRCs from 1965 to 2008.<sup>47</sup>

The comprehensive dataset allows examination of a range of topics, including nominations that fail to get confirmed, the confirmation process for nominations that succeed, and the 2013 change in Senate voting practices. Section A describes the dataset in more detail. Section B outlines the major areas of inquiry.

#### A. Data Description

Using information from congress.gov, the new dataset covers most civilian nominations submitted to the Senate from January 1, 1981, through December 31, 2014.<sup>48</sup> There are separate fields for the nominee's name, the description of the nomination (including the nominee's residence, the position and the agency or court), the date the nomination was received, the relevant Senate committee (if any), the final action taken on the nomination, and the date of that last action. Thus, the observations are *individual nominations*.<sup>49</sup> For example, if an individual is nominated for a particular position and the nomination is still pending when the Senate adjourns or recesses for more than thirty days, the nomination under Senate rules will be returned to the President.<sup>50</sup> In the dataset, that nomination will show a return to the President as its final action. If the President then nominates the individual for the position again and the Senate

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PRESIDENT OBAMA'S FIRST-TERM U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN ANALYSIS AND COMPARISON WITH PRESIDENTS SINCE REAGAN (2013) (comparing judicial nominations in Presidents' first terms from Reagan to Obama) [hereinafter FIRST-TERM]; DENIS STEVEN RUTKUS, CONG. RES. SERV., REPORT NO. 98-510, JUDICIAL NOMINATIONS BY PRESIDENT CLINTON DURING THE 103RD-106TH CONGRESSES (2006) (looking at judicial nominations over four sessions of Congress).

46. See, e.g., ALLIANCE FOR JUSTICE, THE STATE OF THE JUDICIARY: JUDICIAL SELECTION DURING THE REMAINDER OF PRESIDENT OBAMA'S FIRST TERM (2012), available at <http://www.afj.org/wp-content/uploads/2013/09/state-of-the-judiciary-may-2012.pdf>; BROOKINGS INST., PRESIDENTIAL APPOINTMENTS, <http://www.brookings.edu/research/topics/presidential-appointments#/?> (last visited Apr. 8, 2015) (collecting news articles and research on presidential appointments).

47. Jon R. Bond, Richard Fleisher & Glen S. Krutz, *Malign Neglect: Evidence that Delay Has Become the Primary Method of Defeating Presidential Appointments*, 36 CONG. & PRESIDENCY 226, 232 (2009) (examining 2610 nominations). This Article considers more recent nominations, including those occurring after the 2013 change in Senate voting practices.

48. For more detailed information, see *infra* Data Appendix.

49. Others follow this approach. See, e.g., Boyd et al., *supra* note 39, at 9 n.12.

50. S. Comm. on Rules & Admin., Standing Rules of the Senate, Rule XXXI, par. 6, available at <http://www.rules.senate.gov> (follow "Standing Rules of the Senate" hyperlink; then follow "Executive Session Proceedings on Nominations" hyperlink).

confirms her (for instance, by a recorded vote), that nomination will be the second in the dataset for this individual and position, and the second nomination will show a confirmation outcome by a recorded vote (and the vote) as its final action.

The dataset includes all judicial nominations to district courts, courts of appeals, the Supreme Court, and non–Article III courts (for example, the Tax Court and the Court of Federal Claims); all nominations to cabinet departments and agencies within them; all nominations to freestanding executive agencies (for example, the Environmental Protection Agency); all nominations to full-time IRCs and independent regulatory boards (for example, the National Labor Relations Board); and all nominations to quasi-agencies and other entities (for example, Member of the Board of Directors for Amtrak, U.S. Governor for the International Monetary Fund, and the President of the Solar Energy and Energy Conservation Bank). For some of the analysis, where noted, I exclude nominations for ambassador and special representative positions for the State Department and nominations for U.S. Marshals and U.S. Attorneys in the Justice Department.<sup>51</sup> The dataset does not include (by choice) routine nominations needed for promotions within the Foreign Service, Public Health Service, and the National Oceanic and Atmospheric Administration, though it does include individual nominations for career ambassadors and for Surgeon General.<sup>52</sup>

After these and other deletions described in the Data Appendix, there are 15,972 observations, each representing a submitted nomination for a particular person that led to either confirmation or failure (including being returned to or withdrawn by the President).<sup>53</sup> For each observation, there is a start date to the process (the date on which the nomination was submitted to the Senate) and an end date to the process (the date on which the nomination was confirmed or failed). The type of confirmation (for example, voice vote or recorded

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51. If these nominations are included, they overwhelm the other nominations because they are so numerous, and therefore, skew the dataset.

52. These positions form the majority of civilian nominations submitted to the Senate, *see* Christopher J. Deering, *Damned If You Do and Damned If You Don't: The Senate's Role in the Appointments Process*, in *THE IN-AND-OUTERS* 100, 103 (G. Calvin MacKenzie ed., 1987), but are considered routine (rather than critical) policy jobs. *Id.* Modern studies therefore typically do not include them.

53. Some official nominations included multiple individuals, typically to a board of directors or representatives to an international entity. I broke these “group” records into individual observations.

vote) or failure and the duration of the process are also included. From the start date, each nomination is assigned to a President, an institutional conflict (between the White House and Senate) status,<sup>54</sup> and a filibuster rule status.<sup>55</sup>

If it is a judicial nomination, there is information on the level of federal court and, if for a court of appeal, the particular court (for example, the D.C. Circuit). If it is a nonjudicial nomination there is information on the position (for example, Assistant Secretary, General Counsel), the agency (for example, the EPA), and the type of agency (for example, Cabinet Department, Executive Agency, IRC or Board). The Cabinet Department category excludes nominations for U.S. Marshal, U.S. Attorney, Ambassador, and U.S. Representative positions.<sup>56</sup>

### *B. Questions for Investigation*

This Article investigates three major areas: nominations that fail to get confirmed, the confirmation process for nominations that succeed, and the 2013 change in Senate voting practices on nominations. The first two areas provide important information separate from filibuster reform and are also helpful in analyzing the reform.

First, not all nominations to the Senate are confirmed. Some are returned to the President, some are withdrawn by the President, and a few are voted down. What percentage of nominations from 1981 through 2014 failed? How did failure vary by President; the presence of institutional conflict; the type of court or agency, position, and Senate committee; and by timing within an administration?

Second, successful nominations take time to be confirmed. What was the average time of confirmation for nominations from 1981 through 2014? How did that average vary by President, the presence of institutional conflict; the type of court or agency, position, and Senate committee; and by timing within an administration? How did failure and confirmation delay interact? Were some nominations

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54. If the Senate and White House are controlled by different parties, the nomination is assigned to divided government.

55. For much of the analysis, the nomination is classified as “prereform” if it was submitted to the Senate in the year prior to the change, “postreform” if submitted in the year after and “other” otherwise. For some analysis, the “prereform” category included any nomination made by President Obama (in other words, since January 2009) before the change in voting rules.

56. See *infra* Data Appendix for more information on how I created all these variables.

more likely both to fail and to take longer to succeed? Or did failure and confirmation delay work as substitutes for some nominations?

Third, the November 21, 2013 action in the Senate shifted the rules for Senate voting on nominations. Did the change speed up confirmations? Did it make nominations more likely to succeed? How do the effects vary by the type of court or agency, position, and Senate committee?

The next two Parts attempt to provide some answers to these questions.

## II. PATTERNS AND ANALYSIS

The analysis in this Part is rather straightforward. With the new dataset I have constructed, my primary objective is to describe various features of the confirmation process. This Part turns first to failed nominations, then to confirmed nominations, and finally to reform of the filibuster rule. Because much political science research aims to tell some sort of causal story, such work often lacks descriptive detail. In the next Part, I consider more aggregate and predictive approaches to nomination failure and confirmation length.

### A. Failed Nominations

Outside of studies of the Supreme Court, scholars (including myself) and commentators often focus on who is selected or on confirmation delays, explicitly or implicitly assuming that all nominations will succeed.<sup>57</sup> But nominations fail—in other words,

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57. See, e.g., Deering, *supra* note 52, at 112 (showing mean and median confirmation lags from President Johnson to President Reagan); Dull et al., *supra* note 42, at 436 (focusing on confirmation times and appointee tenure of successful nominations); Thomas H. Hammond & Jeffrey S. Hill, *Deference or Preference? Explaining Senate Confirmation of Presidential Nominees to Administrative Agencies*, 5 J. THEORETICAL POL. 23, 23 (1993) (“Presidential nominees for executive office are almost always confirmed by the Senate.”); O’Connell, *supra* note 7, at 967 n.241 (noting that analysis excluded failed nominations and raising concerns); Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J.L. ECON. & ORG. 269, 299 (2000) (testing a model of political influence over the National Labor Relations Board that predicts that “no nominees are rejected”). *But see* G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 175–77 (1981) (discussing failed nominations); SENATE ACTION, *supra* note 45, at 2–4 (reporting near 13 percent failure rate of approximately 2000 executive branch nominations between 1981 and 1992 and noting that the Senate voted down only one of those nominations); BARRY J. McMILLION, CONG. RESEARCH SERV., R40470, U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: SENATE REJECTIONS AND COMMITTEE VOTES OTHER THAN TO REPORT FAVORABLY, 1939–2013, at 6–8 (2014) (examining the 11 nominees from 1973 to 2013 who “received votes from the Senate Judiciary Committee other than to report favorably” and

they fail to get confirmed. Specifically, they may be voted down, they may be withdrawn, or they may be returned to the President. Of all nominations received by the Senate from 1981 to 2014, 22.9 percent failed. Most of these (19.7 percent of the nominations) were returned to the President, with all but a handful of the remaining nominations being withdrawn by the President (3.2 percent of the nominations).<sup>58</sup>

The failure rate is generally rising by administration: of the nominations submitted by President Reagan, 17.5 percent failed; by President George H.W. Bush, 17 percent failed; by President Clinton,

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noting that only one was voted down by the full Senate); Binder & Maltzman, *supra* note 10, at 244–45 (noting that “confirmation rates [for judicial nominations] dip[ped] below 50 percent in some recent Congresses”); Bond et al., *supra* note 47, at 232 (examining failure rates and confirmation delays of judicial and agency nominations in the 1965–2008 period); Hartley & Holmes, *supra* note 44, at 269–70 (examining failure rates of judicial nominations from 1969 to 1998 and finding them low, though increasing over time); Holmes et al., *supra* note 44, at 33 (examining failure rates and confirmation delays of judicial nominees at committee and full-Senate stages); James D. King & James W. Riddlesperger, Jr., *Senate Confirmation of Appointments to the Cabinet and Executive Office of the President*, 28 SOC. SCI. J. 189, 192–95 (1991) (looking at rejected and withdrawn nominations to cabinet level posts from President Truman to President George H.W. Bush); Glen S. Krutz, Richard Fleisher & Jon R. Bond, *From Abe Fortas to Zöe Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871, 874 (1998) (examining the less than 5 percent of “important nominations” that failed between 1965 and 1994); McCarty & Razaghian, *supra* note 43, at 1125–26 (examining low failure rates of executive-agency nominations during the 1885–1996 period but noting “the rate of failures has risen substantially over the past 30 years”); Elliot E. Slotnick & Sheldon Goldman, *Congress and the Courts: A Case of Casting*, in GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S, at 197, 214–15 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998) (noting failed judicial nominations by President Clinton); Gilbert David Nuñez, *Polarization and Presidential Nominations: The Case of Contested Presidential Nominations in Increasingly Polarized Times* (American Political Science Association Annual Meeting Paper, Aug. 28, 2014) (examining failure rates from 1965 to 2008); Anthony Madonna & Ian Ostrander, *Decommissioned Commissions: Holdover Capacity, Confirmation Dynamics and Independent Regulatory Commissions* 5 (Nov. 25, 2014) (unpublished manuscript) (on file with the *Duke Law Journal*) (noting “confirmation rate of just under 70%” for nominations to regulatory boards and commissions between 1987 and 2010); Ostrander, *supra* note 42, at 22 (examining failed and censored nominations). Some work implicitly considers failed nominations as it studies the entire vacancy period. *See, e.g.*, Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 PRES. STUDIES Q. 432, 435–36 (2009); Nixon & Goss, *supra* note 44, at 246 (examining vacancy durations but noting that “lower court nominees are very rarely rejected”); O’Connell, *supra* note 7, at 954–55; Kevin M. Scott & Philip Habel, *The Nomination and Confirmation of Federal Judges: An Integrated Approach* (American Political Science Association Annual Meeting Paper, Aug. 31, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300558](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300558).

58. For withdrawals, the nominee typically asks the President to withdraw the nomination, though the White House can pull a nomination on its own. *See, e.g.*, Charlie Savage, *Long After Nomination an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16 (noting “[i]t was not clear whether Ms. Johnsen or the White House had made the decision to pull her nomination”).



22.9 percent failed; by President George W. Bush, 26.4 percent failed; and by President Obama (through 2014), 28.0 percent failed. More nominations failed when different parties controlled a majority of the Senate and the White House (25.8 percent) than when the same party had control of both (20.6 percent). These rates are much higher than those for older administrations.<sup>59</sup>

Table 1 breaks down failed nominations by type of court and agency.

*Table 1. Failure Rates by Type of Entity, 1981–2014*

Type of Organization	Failure Rates (%)
District Court	23.7
Court of Appeals	40.8
Supreme Court	20.0
Non–Article III Court	22.2
Cabinet Department	18.8
White House Agency	21.4
Executive Agency	20.5
Independent Regulatory Commission or Board	30.5

Nominations to courts of appeals and IRCs were more likely to fail. On the judicial side, this finding accords with courts of appeals having more authority than district courts—specifically, the appellate courts set precedent for the district courts and for other appellate panels in their circuit.<sup>60</sup> This explanation would predict that Supreme Court nominations would fail more often than courts of appeals nominations, but my data show the opposite to be true. To be fair, the number of Supreme Court nominations in the period studied is quite small.<sup>61</sup> The President could also select more moderate nominees for

59. See Bond et al., *supra* note 47, at 229 (seeing less than a 10 percent failure rate in the 1965–2008 period); Krutz et al., *supra* note 57, at 871 (finding a failure rate of under 5 percent in “important nominations” between 1965 and 1994); McCarty & Razaghian, *supra* note 43, at 1126 (finding a failure rate of 4.4 percent for executive agencies in the 1885–1996 period).

60. See Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQUETTE L. REV. 755, 755–56 (1993).

61. The failure rate does seem representative, however, of a longer time period. See RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789–2011, at 1 (2011) (noting that 36 of 160 Supreme Court nominations between 1789 and 2010 were not confirmed).

the Supreme Court.<sup>62</sup> In addition, there may have been more pressure in recent decades for Senators to defer (at least in the final vote) to presidential picks for the Supreme Court (than to defer to appellate court selections), and this pressure may have swamped their concern over the Supreme Court's power.<sup>63</sup> The courts of appeals with more than 40 percent failed nominations were the D.C. Circuit (53.2 percent); the Fourth Circuit (56.6 percent); the Fifth Circuit (47.9 percent); the Sixth Circuit (49.1 percent); the Ninth Circuit (46.2 percent); and the Eleventh Circuit (40.7 percent).<sup>64</sup>

On the agency side, this result matches with the view that Congress wields more power over IRCs than over agencies more under the control of the President.<sup>65</sup> The IRCs with more than 30 percent failed nominations were the Federal Election Commission (38 percent); the Federal Housing Financial Board (55.9 percent); the Federal Trade Commission (30.2 percent); the Interstate Commerce Commission (39.1 percent); the International Trade Commission (39.6 percent); the National Labor Relations Board (59.1 percent); the Occupational Safety and Health Review Commission (52.6 percent); and the Surface Transportation Board (35.3 percent).

Table 2 breaks down failed nominations by position.

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62. See Binder & Maltzman, *supra* note 44, at 190–91.

63. Cf. Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 559 (“Although lower court judgeships represent prime patronage opportunities for senators of the President’s party, Supreme Court nominations have long been widely accepted as a presidential prerogative.”).

64. See Binder & Maltzman, *supra* note 10, at 246 (finding higher failure rates for the same courts of appeals).

65. Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1180 (2009).

*Table 2. Failure Rates by Type of Position, 1981–2014*

Type of Position	Failure Rates (%)
Ambassador	10.8
U.S. Marshal	10.0
U.S. Attorney	11.7
General Counsel	24.3
Inspector General	23.9
Chief Financial Officer	18.8
Administrator	21.4
Director	23.2
Assistant Secretary	18.1
Under Secretary	17.8
Deputy Secretary	16.3
Secretary	6.3
Commissioner (non-advisory)	28.5
Board Member (non-advisory)	34.6
Council Member	30.1

There is considerable overlap between the non-advisory Commissioner and Board Member categories (which include chairpersons) with the IRC or Board category in Table 1, as such agencies typically do not have multiple layers of Senate-confirmed appointees. Table 2 splits, for example, nominations for General Counsel and Board Member at the National Labor Relations Board into two categories. Nominations for Ambassador, U.S. Marshal, U.S. Attorney, and Cabinet Secretary were noticeably less likely to fail overall.

Table 3 breaks down failed nominations by Senate committee.

Table 3. Failure Rates by Senate Committee, 1981–2014

Committee	Failure Rates (%)
Agriculture	18.2
Armed Services	17.4
Banking	20.4
Budget	0
Commerce	24.4
Energy	20.1
Environment	24.5
Finance	25.5
Foreign Relations	16.2
Governmental Affairs	31.9
Indian Affairs	26.9
Intelligence	15.6
Judiciary	23.4
Labor	29.8
None	41.7
Rules	38.8
Small Business	29.4
Veterans' Affairs	16.5

Compared to nominations outside of a particular committee, the following committees had failure percentages that were more than five points lower: Armed Services; Budget (though Budget had very few nominations, all of which were to the Office of Management and Budget); Foreign Relations; Intelligence; and Veterans' Affairs. Again, comparing to nominations outside of a particular committee, the following committees had failure percentages that were more than five points higher: Government Affairs/Homeland Security and Governmental Affairs; Labor and Human Resources/Health, Education, Labor, and Pensions; "None" where no committee is listed; Rules and Administration; and Small Business/Small Business and Entrepreneurship.<sup>66</sup>

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66. For more information on the None category, which became much more prevalent after the Senate agreed in 2011 that certain nominations would be considered without being referred to a Committee, *see infra* Data Appendix, Section D. The Budget Committee received joint jurisdiction over nominations for the Director and Deputy Director of the Office of

Table 4 separates failure rates by time within the administration.

*Table 4. Failure Rates by Time in Administration, 1981–2014*

Time in Administration	Failure Rates (%)
First Year	9.7
Second Year	23.9
Third Year	16.3
Fourth Year	38.5
Fifth Year	22.8
Sixth Year	26.4
Seventh Year	18.5
Eighth Year	39.6

The lowest failure rate was in the President's first year. Failure rates were higher in the second year of a particular Congress, compared to the first year, and were highest in the final year of a President's term. The pattern on even-numbered years did not hold for President Obama in 2013 and 2014, as discussed in Part C, *infra*.

To see both the timing within the administration and which administration is making the nomination, you can examine the failure rate by nomination year. Figure 1 displays the failure rate of district court and appellate court nominations, while Figure 2 shows the failure rate of ambassador and assistant secretary nominations, all by nomination year.

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Management and Budget, starting with the 109th Congress. See CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 13 n.46 (2012). The Senate Resolution granting the joint jurisdiction requires that "if one committee votes to order reported such a nomination, the other must report within 30 calendar days session, or be automatically discharged." *Id.*

*Figure 1. Failure Rates for District and Appellate Court Nominations, 1981–2014*

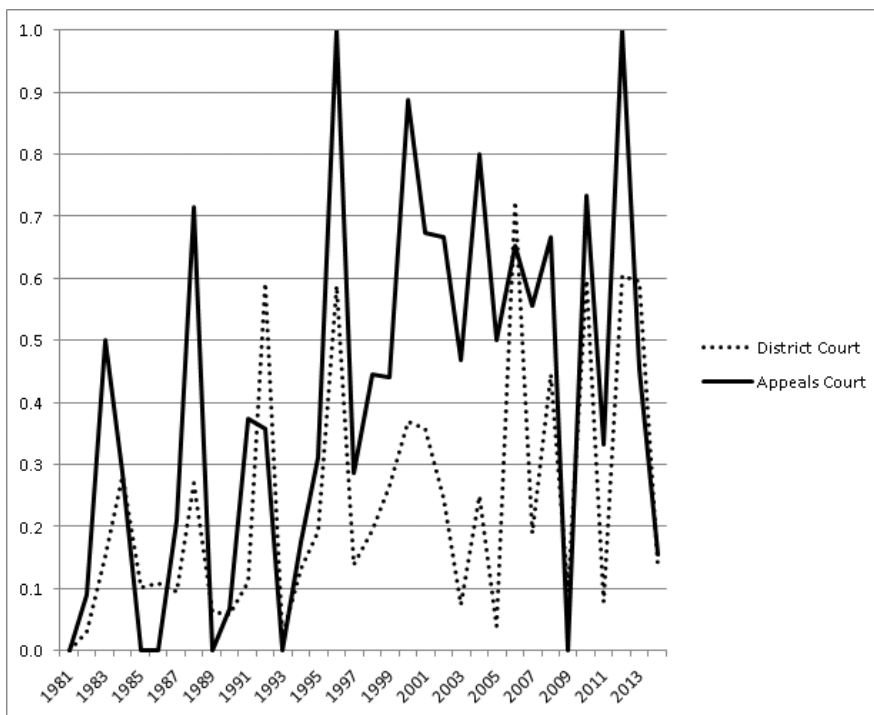
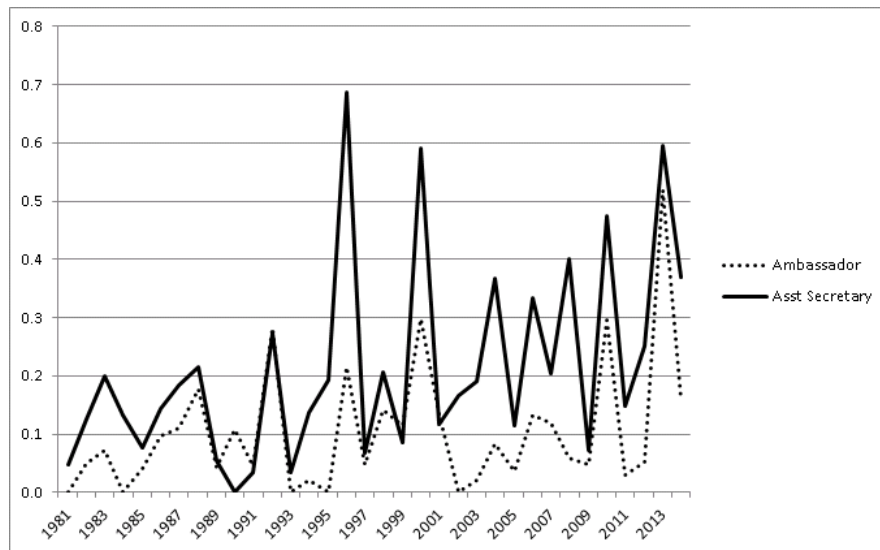


Figure 2. Failure Rates for Ambassador and Assistant Secretary Nominations, 1981–2014



In sum, many nominations are not confirmed. To be fair, the dataset treats every nomination sent to the Senate as an individual nomination. So if a President nominates  $x$  and the nomination is returned to the President and then the President renominates  $x$ , and  $x$  is later confirmed, that information appears as two records in the dataset: one nomination that failed and one nomination that was confirmed. In such cases, the initial failures still have consequences. Most notably, they take time. The average duration of a failed nomination (from the receipt of the nomination to the return to or withdrawal by) the President was 179.7 days. The typical failed nomination was therefore not one that lacked any chance to succeed; six months provides sufficient time for the Senate to hold a hearing and decide whether to confirm the nomination.<sup>67</sup>

67. “Last-minute” nominations are not driving the results here. To be sure, the failure rate of nominations submitted in the final two months of a particular Congress was much higher (75.5 percent) than nominations submitted at other times (21.6 percent). But only 392 nominations between 1981 and 2014 were submitted during that period. See *infra* Data Appendix, Section E.

In addition, cases of multiple nominations of the same person are not typical, at least to agency positions.<sup>68</sup> When a nomination fails, the President is more likely not to submit the nomination again, either because the White House or the nominee decides not to face the Senate again. Even if the nomination is resubmitted, the process in the Senate again starts at the beginning.<sup>69</sup> Nevertheless, for a comprehensive analysis of failure rates it would be important to pair these results with studies on the overall vacancy period.

We can no longer keep the “presumption of success”<sup>70</sup> when it comes to nominations, particularly those to agency positions. If a meaningful number of important nominations fail in modern administrations, it is not enough to consider only those nominations that are confirmed. Political scientists often treat nominations that are returned to the President as “censored” in their empirical analyses.<sup>71</sup> But those censored nominations become failed nominations if the President does not resubmit the nominations in the next Senate. And even if the President does resubmit and the nominations are eventually confirmed, they nonetheless failed initially.<sup>72</sup> In addition, the Senate likes to include thousands of routine nominations, such as promotions within the Foreign Service and Public Health Service, to inflate its confirmation figures.<sup>73</sup> But these routine nominations are

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68. See SENATE ACTION, *supra* note 45, at 4. Presidents do seem to renominate more individuals for judgeships. See RUTKUS, *supra* note 45, at i (noting that most returned judicial nominations under President Clinton were “later renominated and ultimately confirmed”); Binder & Maltzman, *supra* note 44, at 194 (noting that “93 percent of judicial nominees are eventually confirmed”); Daniel Wilson, *Obama Renominates 54 Judges After GOP Lets Picks Lapse*, LAW360 (Jan. 7, 2014, 6:37 PM), <http://www.law360.com/articles/499382/obama-renominates-54-judges-after-gop-lets-picks-lapse> (noting renominations). Research that examines the period between the departure of one official and the start of the next person gets around this problem. See Nixon & Goss, *supra* note 44, at 246; O’Connell, *supra* note 7, at 954–55. The dataset here does not contain departure dates. Nevertheless, because it does identify the persons being nominated, future research could determine failure rates that account for renominations.

69. See Jeremy W. Peters, *White House Steps Up Effort to Confirm Federal Judges*, N.Y. TIMES, Apr. 29, 2014, at A13 (“By refusing to consent to votes last year, they forced Mr. Obama to resubmit a slate of nominees, restarting a cumbersome process that required them all to be nominated and processed again.”).

70. See Krutz et al., *supra* note 57, at 871.

71. See, e.g., Binder & Maltzman, *supra* note 44, at 192 n.3; Ostrander, *supra* note 42, at 22, 32.

72. See Ostrander, *supra* note 25, at 6 (treating returned nominations as failures).

73. See U.S. SENATE, REPORT OF THE TASK FORCE ON THE CONFIRMATION PROCESS, 138 CONG. REC. 1348, 1349 (Feb. 4, 1992, report Dec. 18, 1991) (noting that in the last ten years the Senate has confirmed 97 percent of the 600,000 nominations it received).



generally not the same as policy-relevant nominations such as Assistant Secretary for Legislation or Deputy Secretary. Failure is as important to understand as delay.

### *B. Confirmation Process*

Those nominations that do not fail take time to succeed. On average, from 1981 through 2014, successful nominations took 88.5 days to be confirmed. This figure has been increasing over the past five administrations: for successful nominations submitted by President Reagan, confirmation took on average 59.4 days; by President George H.W. Bush, 67.3 days; by President Clinton, 91.8 days; by President George W. Bush, 97.4 days; and by President Obama (through 2014), 127.2 days. Interestingly, whether the nomination was submitted when the same party controlled the Senate and the White House does not matter much: confirmed nominations took 86.9 days in unified government (looking only at the Senate) and 90.7 days in divided government.<sup>74</sup> Figure 3 shows the histogram and kernel density plot of confirmation delays for all successful nominations in the dataset. Because nominations are almost always returned at the end of a particular term of Congress, there are no extreme outliers, which makes looking at means sensible.

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74. Others have found similar results with less data. *See, e.g.,* HOGUE ET AL., FILLING ADVICE AND CONSENT POSITIONS, *supra* note 45, at i, 17 (examining appointments to executive branch agencies at the start of an administration, from President Reagan to President Obama and finding that “the period of Senate consideration has . . . grown longer”); PAUL C. LIGHT & VIRGINIA L. THOMAS, THE MERIT AND REPUTATION OF AN ADMINISTRATION: PRESIDENTIAL APPOINTEES ON THE APPOINTMENTS PROCESS, at 4, 12 (Apr. 2000) (finding through surveys increased confirmation delays); O’CONNELL, *supra* note 40, at 9–10 (seeing increasingly longer confirmation times for executive agency nominations); Hartley & Holmes, *supra* note 44, at 270–71 (finding increasing delays for judicial nominations).

*Figure 3. Histogram and Kernel Density Plot of Confirmation Lengths of Successful Nominations*

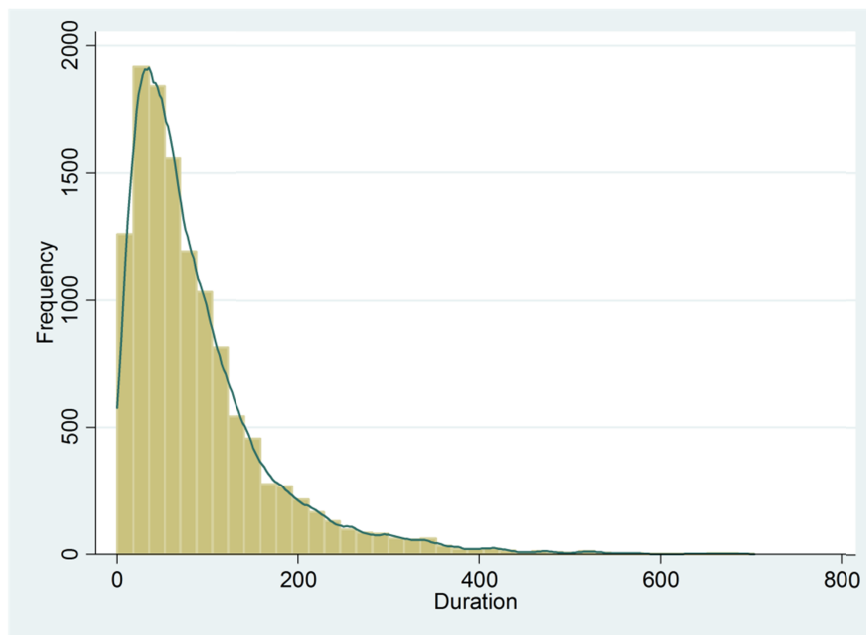


Table 5 breaks down the confirmation duration by type of court and agency.

*Table 5. Confirmation Lengths by Type of Entity, 1981–2014*

Type of Organization	Mean Days
District Court	115.3
Court of Appeals	128.4
Supreme Court	65.0
Non–Article III Court	125.3
Cabinet Department	75.5
White House Agency	78.2
Executive Agency	72.8
Independent Regulatory Commission or Board	97.1

Nominations to all courts but the Supreme Court took much longer than the average time required to confirm all nominations, conditioned on the nominations being confirmed. And nominations to IRCs took slightly longer than average to confirm and much longer than did nominations to other agencies, again conditioned on the nominations being confirmed.

On the judicial side, these longer confirmation times may reflect the greater permanency of these selections. Judicial appointments to Article III courts, of course, have lifetime tenure, and appointments to non-Article III courts still have terms much longer than a presidential administration.<sup>75</sup> The courts of appeals for which successful nominations took more than 130 days were the Fourth Circuit (141 days); the Sixth Circuit (137.9 days); the Ninth Circuit (170.6 days); and the Eleventh Circuit (135.8 days). Nominations to some appellate courts, such as the Ninth Circuit, had both a much higher failure rate and a much longer confirmation process, on average; nominations to other courts of appeals, such as the D.C. Circuit, had a much higher failure rate but not a meaningfully longer (though still longer than the average for all nominations) confirmation process.

On the agency side, as with failed nominations, this finding comports with the view that Congress wields more power over IRCs than agencies that are more under the control of the President.<sup>76</sup> Nominations to the following IRCs took more than 120 days on average, to confirm: the Equal Employment Opportunity Commission (134.1 days); the International Trade Commission (145.1 days); the National Labor Relations Board (129.6 days); and the Nuclear Facilities Safety Board (127.1 days). As with courts, some of these agencies (such as the NLRB) had both a higher chance of failure and a longer confirmation process. What is more striking are the agencies, such as the Federal Housing Finance Board, that had an above-average failure rate and below-average confirmation length (or vice versa).

Table 6 breaks down the confirmation length for successful nominations by position.

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75. For example, judges on the Tax Court have 15-year terms. 26 U.S.C. § 7443(e) (2012).

76. See *supra* note 65 and accompanying text.

*Table 6. Confirmation Lengths by Type of Position, 1981–2014*

Type of Position	Mean Days
Ambassador	64.9
U.S. Marshal	71.6
U.S. Attorney	61.7
General Counsel	80.6
Inspector General	96.2
Chief Financial Officer	111.3
Administrator	69.8
Director	85.7
Assistant Secretary	78.0
Under Secretary	72.6
Deputy Secretary	63.0
Secretary	21.1
Commissioner (non-advisory)	91.0
Board Member (non-advisory)	100.8
Council Member	112.8

As noted above, there is considerable overlap between the nonadvisory Commissioner and Board Member categories (which include chairpersons) and the IRC category in Table 5. Nominations for Cabinet Secretaries (including the Attorney General and service secretaries within the Defense Department) were confirmed very quickly. Although their failure rates did not differ from the average, successful Inspector General and Chief Financial Officer nominations did take longer than the average for all positions to be confirmed.

Table 7 breaks down confirmation lengths by Senate committee.

*Table 7. Confirmation Lengths by Senate Committee, 1981–2014*

Committee	Mean Days
Agriculture	76.7
Armed Services	71.4
Banking	88.6
Budget	85.5
Commerce	85.2
Energy	80.2
Environment	95.5
Finance	96.3
Foreign Relations	69.5
Governmental Affairs	111.2
Indian Affairs	93.1
Intelligence	63.5
Judiciary	98.1
Labor	103.4
None	131.7
Rules	108.7
Small Business	73.0
Veterans' Affairs	99.8

Comparing to nominations outside of a particular committee, nominations to the following committees took ten fewer days, on average, to confirm: Agriculture, Nutrition, and Forestry; Armed Services; Foreign Relations; Intelligence; and Small Business/Small Business and Entrepreneurship. Again, comparing to nominations outside of a particular committee, nominations to the following committees took ten days longer, on average, to confirm: Government Affairs/Homeland Security and Governmental Affairs; Judiciary; Labor and Human Resources/Health, Education, Labor, and Pensions; “None” where no committee is listed; Rules and Administration; and Veterans’ Affairs. Many of the committees identified in the preceding Section had both high failure rates and longer confirmation times, or both low failure rates and shorter confirmation times, compared to averages. For those committees, in other words, failure rates and confirmation delays worked as complements.

Table 8 examines confirmation delays by time within the administration and notes the number of confirmed nominations per President in each year.

*Table 8. Confirmation Lengths (and Confirmed Nominations) by Time in Administration, 1981–2014*

Time in Administration	Mean Nominations (per President)	Mean Days
First Year	577.8	63.1
Second Year	362.6	74.8
Third Year	412.0	110.9
Fourth Year	186.6	87.6
Fifth Year	318.6	97.8
Sixth Year	257.6	91.2
Seventh Year	295.8	112.0
Eighth Year	158.5	86.3

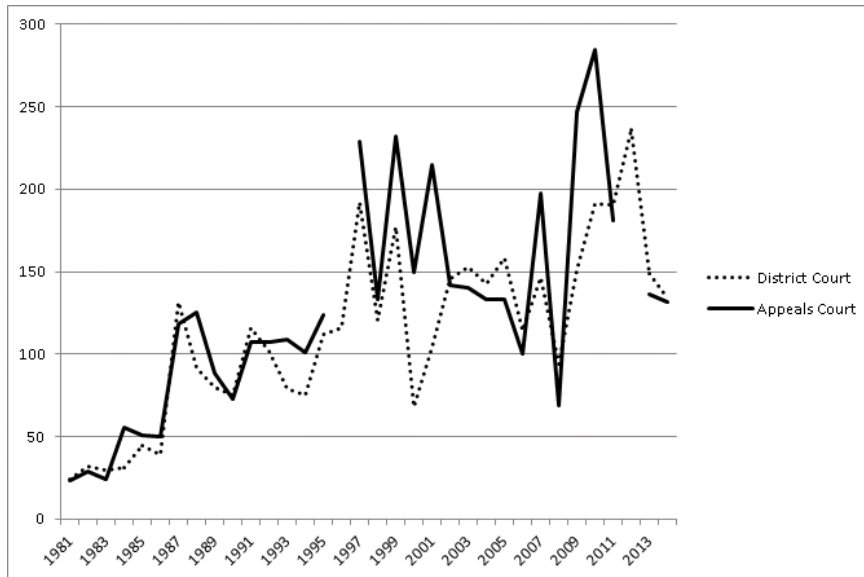
Most striking, the number of nominations and confirmation delays are negatively correlated (-0.34). In addition, confirmation delays were longest in the third year of a President's term. Comparing Table 8 to Table 4 illustrates that failure rates and confirmation delays can move in opposite directions, functioning as substitutes instead of complements.

To see both the timing within the administration and which administration made the nominations, you can analyze the confirmation delays by nomination year. Figure 4 displays the confirmation lengths of successful district court and appellate court nominations,<sup>77</sup> while Figure 5 shows the confirmation lengths of successful ambassador and assistant secretary nominations, all by nomination year.

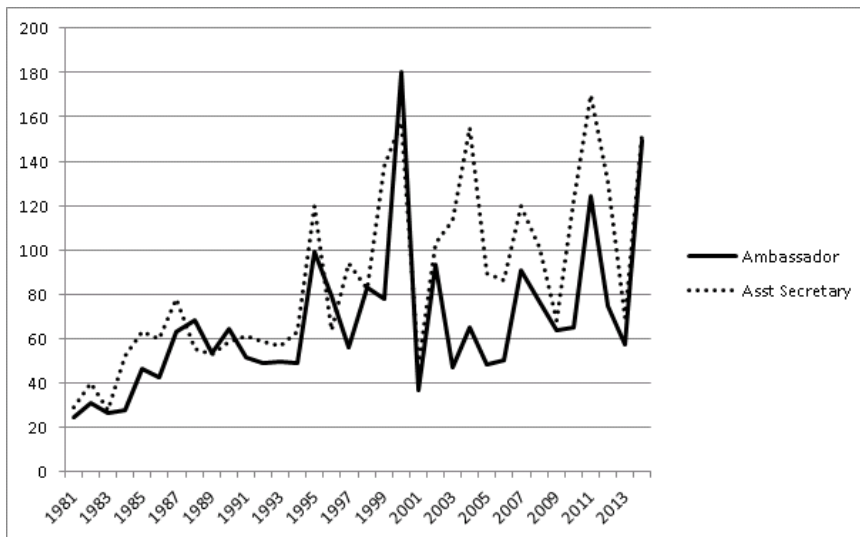
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77. The breaks in the appellate court line mark the years where there were no confirmed nominations.

*Figure 4. Confirmation Lengths for District and Appellate Court Nominations, 1981–2014*



*Figure 5. Confirmation Lengths for Ambassador and Assistant Secretary Nominations, 1981–2014*



In short, for successful nominations, the length of the confirmation process has increased over time for almost every organization, position, and committee. Again, this Article considers renominations separately. If nominations of the same individual to a particular position were combined, the failure rate would decline but the confirmation delay would increase.

The mechanism by which a nomination is confirmed can also vary—the Senate can agree by unanimous consent, by voice vote, or by recorded vote. Not only is the length of the process growing over time, but so is the likelihood that a nomination will be confirmed by voice or recorded vote. Starting with the Clinton administration, few policy-relevant or judicial nominations have been confirmed by unanimous consent. And since the George W. Bush administration, many more nominations have gone to recorded vote.<sup>78</sup>

### C. *Filibuster Reform*

In November 2013, there was a big change in how the Senate treated nominations, making it possible for a majority (rather than three-fifths) of Senators to advance a nomination to a vote. From all the attention surrounding this change by academics, reporters, and politicians, the firm expectation was that nominees would be confirmed more quickly,<sup>79</sup> or, at the least, would be more likely to be confirmed.<sup>80</sup>

Comparing the year before the filibuster reform with the year after (including December 2014, when then-Majority Leader Harry Reid did some fancy footwork to get several dozen nominees

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78. See, e.g., Aeberle Coe, *Senate Votes to Confirm 12 Federal Judges*, LAW360 (Dec. 17, 2014, 11:24 AM), <http://www.law360.com/articles/605542/senate-votes-to-confirm-12-federal-judges> (noting that of the twelve judges confirmed in December, one was by recorded vote and eleven were by voice vote); Kamen & Kane, *supra* note 39; Daniel Wilson, *Munger Tolles' Michelle Friedland Confirmed to 9th Cir.*, LAW360 (Apr. 28, 2014, 7:01 PM), <http://www.law360.com/articles/532289/munger-tolles-michelle-friedland-confirmed-to-9th-circ> (noting that Republicans have “required individual confirmation for judicial and other executive nominees, instead of the quicker unanimous consent process”).

79. See, e.g., Editorial, *Democracy Returns to the Senate*, N.Y. TIMES, Nov. 21, 2013, at A28 (citing “a record-setting amount of delay in approving the president’s choices for cabinet positions and federal agency posts” as a reason why “the Democrats had little choice but to change the filibuster rule”); cf. Ostrander, *supra* note 25, at 196 (predicting “immediate and profound implications”). But see Al Kamen, *Filibuster Reform May Not Open Confirmation Floodgates*, WASH. POST (Nov. 22, 2013), <http://www.washingtonpost.com/blogs/in-the-loop/wp/2013/11/22/filibuster-reform-may-not-open-confirmation-floodgates>.

80. See, e.g., Kamen & Kane, *supra* note 39.



confirmed at the end of the term of Congress),<sup>81</sup> nominations submitted the year before the change took 105.8 days on average to be confirmed; whereas, nominations submitted after the rule change required 147.9 days on average. This outcome is the opposite of what one might expect, but those averages are conditioned on successful nominations. Of nominations submitted the year before the change in voting practices, 52.2 percent failed (were returned or withdrawn) and of nominations submitted the year after, 34.1 percent failed.<sup>82</sup>

There is variation, of course, by organization type, position, and committee. For all the tables in this Section, I compare the year before the change to the year after.<sup>83</sup> Table 9 compares failure rates and confirmation delays by type of court and agency. The total number of nominations, for each category, is in parentheses in the first two columns.

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81. See O’Keefe & Dennis, *supra* note 32.

82. If instead of comparing to the year before, one compares to all nominations under President Obama before the change (these had a failure rate of 26.5 percent, and the duration of successful nominations was 122.6 days), both measures were worse after the reform. Because many more nominations are confirmed in the first year of an administration and confirmed more quickly, I focus on the year before the Senate change in voting rules. *Cf.* Boyd et al., *supra* note 39, at 9–12 (comparing judicial nominations the year after the change to all of President Obama’s nominations before the change).

83. See *infra* Data Appendix, Section F.

*Table 9. Failure Rates and Confirmation Length by Type of Organization, Pre- and Post-Filibuster Reform*

Type of Organization	Failure Rates (percent)		Confirmation Length (days)	
	Prereform	Postreform	Prereform	Postreform
District Court	56.8 (n=74)	20.6 (n=97)	148.6	133.9
Court of Appeals	40.0 (n=20)	26.7 (n=15)	136.7	131.7
Cabinet	54.6 (n=119)	30.3 (n=132)	84.2	141.5
Department				
White House	25.0 (n=8)	37.5 (n=8)	53.3	133.6
Agency				
Executive Agency	50 (n=12)	62.5 (n=16)	94.7	191.3
Independent	36.6 (n=41)	14.3 (n=35)	99.6	124.7
Regulatory				
Commission or				
Board				

The change in Senate process had differing effects on courts and agencies. It seems to have sped up confirmation times for the courts and slowed down the process for all types of agencies. Similar but not identical results hold for the failure of nominations. Many fewer judicial nominations failed after the change.<sup>84</sup> Although successful nominations took longer for cabinet departments and IRCs, more of those nominations were confirmed after the change. For executive and White House agencies, both measures worsened, though the total number of nominations was small.

Table 10 compares failure rates and confirmation delays by position.<sup>85</sup>

84. Research conducted concurrently (and independently) found similar results for judicial nominations, comparing all of President Obama's nominations before the rule change to those nominations made after the change. *See* Boyd et al., *supra* note 39, at 12–14.

85. If there are no successful nominations, there can be no average confirmation length.

*Table 10. Failure Rates and Confirmation Length by Position, Pre- and Post-Filibuster Reform*

Type of Position	Failure Rates (percent)		Confirmation Length (days)	
	Prereform	Postreform	Prereform	Postreform
Ambassador	50.7 (n=73)	17.5 (n=103)	57.3	149.3
U.S. Marshal	100.0 (n=4)	33.3 (n=6)	—	37.0
U.S. Attorney	60.0 (n=5)	0 (n=7)	114.0	101.0
General Counsel	58.3 (n=12)	18.2 (n=11)	95.6	131.3
Inspector General	40.0 (n=5)	50.0 (n=4)	85.7	88.5
Chief Financial Officer	75.0 (n=8)	33.3 (n=9)	56.0	248.0
Administrator	28.6 (n=7)	16.7(n=6)	84.2	91.6
Director	57.9 (n=19)	45.0 (n=20)	114.8	163.8
Assistant Secretary	58.7 (n=46)	38.2 (n=55)	69.9	152.5
Under Secretary	82.4 (n=17)	26.9 (n=26)	97.3	108.5
Deputy Secretary	57.1 (n=7)	0 (n=11)	101.3	80.4
Secretary	0 (n=10)	25.0 (n=4)	61.2	38.0
Commissioner (non-advisory)	38.5 (n=39)	27.8 (n=36)	115.0	141.0
Board Member (non-advisory)	31.6 (n=38)	48.3 (n=29)	107.6	173.5

For most of these positions, the failure rate and length of confirmation process moved in opposite directions—with fewer nominations failing but successful nominations taking longer—after the change. Only for Deputy Secretary and U.S. Attorney nominations did both measures improve.

Table 11 compares failure rates and confirmation delays by committee.

*Table 11. Failure Rates and Confirmation Length by Committee, Pre- and Post-Filibuster Reform*

Committee	Failure Rates		Confirmation Length	
	Prereform	Postreform	Prereform	Postreform
Agriculture	60.0 (n=5)	25.0 (n=8)	35.0	135.3
Armed Services	35.0 (n=20)	20.8 (n=24)	104.3	140.8
Banking	28.6 (n=14)	25.0 (n=16)	108.0	132.1
Budget	0 (n=2)	0 (n=1)	64.0	38.0
Commerce	39.3 (n=28)	33.3 (n=30)	88.0	123.9
Energy	87.5 (n=16)	31.6 (n=19)	66.0	173.5
Environment	54.6 (n=11)	42.9 (n=14)	120.0	138.9
Finance	47.1 (n=17)	31.6 (n=19)	94.3	174.1
Foreign Relations	55.0 (n=120)	24.3 (n=148)	72.6	149.8
Governmental Affairs	48.0 (n=25)	59.1 (n=22)	104.6	137.4
Indian Affairs	100 (n=2)	66.7 (n=3)	—	171.0
Intelligence	66.7 (n=3)	0 (n=5)	44.0	55.2
Judiciary	50.4 (n=121)	26.6 (n=143)	140.1	131.3
Labor	50.0 (n=34)	42.3 (n=26)	95.9	121.1
None	58.6 (n=58)	61.9 (n=84)	133.8	240.6
Rules	50.0 (n=6)	40.0 (n=5)	88.7	216.0
Small Business	no nominations	50.0 (n=2)	—	70.0
Veterans' Affairs	100 (n=3)	33.3 (n=6)	—	86.3

Drawing on work by Professor Jon R. Bond and his coauthors for an earlier period, it would be interesting to examine whether the rules change affected the point at which nominations are stalling—specifically, at the committee stage or at the full-Senate stage.<sup>86</sup> On one hand, the change affected the full-Senate stage, so delays at the committee stage could be increasing. On the other hand, there are still other devices to delay confirmation votes at the full Senate stage.

In sum, filibuster reform has had more complicated effects on the confirmation process than may have been predicted. The change does seem to have uniformly aided judicial nominations: fewer were

86. See Bond et al., *supra* note 47, at 234.

returned to (or withdrawn by) the President, and successful nominations came more quickly. Indeed, in 2014, President Obama had more judges confirmed than any other recent President had confirmed at the same time in his tenure.<sup>87</sup> President Obama's success in judicial nominations is in marked contrast to the prereform failure rate of his district- and appellate-court nominations, ranking second highest, and the prereform judicial confirmation delays, ranking as the longest among recent administrations.<sup>88</sup> In addition, when President Obama came into the White House only one federal court of appeals had a majority of judges nominated by a Democrat; by the fall of 2014, nine did.<sup>89</sup> But the change had conflicting effects for many agencies and agency positions: fewer nominations failed but successful nominations took longer to be confirmed. The next Part suggests some potential explanations and avenues for research for both the judicial and agency findings.

### III. EXPLANATIONS AND FURTHER INVESTIGATION

This Part turns from the descriptive to the explanatory and suggests avenues for additional research. Section A examines nomination failure and confirmation delays more generally and analyzes the likelihood of failure within the dataset constructed here. Section B considers possible reasons for the outcomes observed in the year after filibuster reform. Section C pivots the focus to the nomination stage (from the confirmation perspective generally taken in the Article).

#### A. *Explanations for Nomination Failure and Confirmation Delays*

Previous work in political science has examined the relative influence of various factors on nomination failure and confirmation delay.<sup>90</sup> Research is more extensive on the latter than the former. On

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87. See Kamen & Kane, *supra* note 39.

88. See FIRST-TERM, *supra* note 45, at 10, 20.

89. See Jeremy W. Peters, *Eye on Legacy, Obama Shapes Appeals Courts*, N.Y. TIMES, Sept. 14, 2014, at A1, A22.

90. This Article focuses on empirical work. There is also purely theoretical research. See, e.g., Timothy P. Nokken & Brian R. Sala, *Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies*, 12 J. THEORETICAL POL. 91, 91 (2000) (using a model to examine "conditions under which senators will constrain presidential appointments to independent agency boards"); Michael A. Bailey & Matthew L. Spitzer, *Appointing Extremists* (Feb. 2015) (unpublished manuscript), available at <http://ssrn.com/abstract=2568129> (developing

confirmation delay, empirical studies have demonstrated that election years,<sup>91</sup> divided government,<sup>92</sup> polarization of the Senate,<sup>93</sup> a less friendly relationship between the President and home-state Senators (for judicial picks),<sup>94</sup> more conflictual Senate oversight committees,<sup>95</sup> committee (or Senate) extremity (compared to the President),<sup>96</sup> Department of Justice positions,<sup>97</sup> positions in agencies with ideological preferences opposing the President's,<sup>98</sup> positions on collegial boards and IRCs,<sup>99</sup> "[h]ighly contentious positions,"<sup>100</sup> opposite party replacements on courts,<sup>101</sup> and opposition by interest groups<sup>102</sup> are linked to slower confirmation times. In addition, higher-level agency positions,<sup>103</sup> lower-level court positions,<sup>104</sup> Department of Agriculture positions,<sup>105</sup> nominations earlier in an administration,<sup>106</sup>

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a game theory model of both nomination and confirmation for the Supreme Court that takes into account uncertainty of the nominee's preferences).

91. See Ostrander, *supra* note 25, at 122.

92. See Hartley & Holmes, *supra* note 44, at 278 (noting divided government's role); McCarty & Razaghian, *supra* note 43, at 1138. *But see* Ostrander, *supra* note 42, at 24 (failing to find connection).

93. See Bond et al., *supra* note 47, at 226; McCarty & Razaghian, *supra* note 43, at 1138; Ostrander, *supra* note 42, at 23.

94. See Holmes et al., *supra* note 44, at 29.

95. See Dull et al., *supra* note 42, at 12, 14 (using coding from survey of committee members and others to identify low, medium and high conflict of issues handled by relevant committee).

96. See Nolan McCarty & Rose Razaghian, *Hitting the Ground Running: The Politics of Presidential Appointments in Transition*, in *PRESIDENTIAL POWER: FORGING THE PRESIDENCY FOR THE TWENTY-FIRST CENTURY* 339, 350 (analyzing committee extremity compared to the President); Jinhee Jo, *Now or Later? A Dynamic Analysis of Presidential Appointments*, at 30–31 (Nov. 2011) (using filibuster pivot of Senate to examine confirmation delays of nominations to appellate courts).

97. See McCarty & Razaghian, *supra* note 43, at 1138.

98. See Ostrander, *supra* note 42, at 23.

99. See *SENATE ACTION*, *supra* note 45, at 5; Ostrander, *supra* note 42, at 23.

100. See Dull et al., *supra* note 42, at 1, 14 (defining such positions as those in redistributive and regulatory agencies).

101. See P.S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793, 797 (1993) (finding higher failure rate for opposite party replacements).

102. See Holmes et al., *supra* note 44, at 38; Scherer et al., *supra* note 44, at 1037.

103. See McCarty & Razaghian, *supra* note 43, at 1138; Dull et al., *supra* note 42, at 14.

104. See Hartley & Holmes, *supra* note 44, at 275.

105. See McCarty & Razaghian, *supra* note 43, at 1138.

106. See Garland A. Allison, *Delays in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8, 10–11 (1996) ("A president would find it in his interest to fill all vacancies as quickly and as early in the term as possible."); Dull et al., *supra* note 42, at 15; Holmes et al., *supra* note 44, at 38 (finding faster process for district-court and circuit-court nominees at the

higher presidential approval,<sup>107</sup> judicial picks with higher American Bar Association ratings,<sup>108</sup> and nominations to independent agencies with “holdover capacity”<sup>109</sup> are connected to faster confirmation times. On nomination failure, studies have shown that election years,<sup>110</sup> positions in agencies with ideological preferences opposing the President’s,<sup>111</sup> attempts to “portray a nominee in a negative light,”<sup>112</sup> media coverage,<sup>113</sup> the ability to shift the ideological balance of a court,<sup>114</sup> divided government,<sup>115</sup> and polarization of the Senate<sup>116</sup> are paired with nominations not getting confirmed, while early selections,<sup>117</sup> presidential popularity,<sup>118</sup> and cabinet positions<sup>119</sup> are linked to nominations succeeding.

The dataset constructed here could be used to test both nomination failure and confirmation length more holistically and systematically. For a flavor of such analysis, this Section focuses on nomination failure, specifically the likelihood of a nomination not being confirmed within the year it was made. I run a probit model, a regression model frequently used to estimate a binary response by a maximum-likelihood procedure, to analyze most of the nominations submitted to the Senate from January 20, 1981 through December 31, 2014. The binary outcome—failure (by being returned to the

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committee stage); McCarty & Razaghian, *supra* note 43, at 1139; Ostrander, *supra* note 42, at 25.

107. See McCarty & Razaghian, *supra* note 96, at 349–50; Ostrander, *supra* note 42, at 25. But see Binder & Maltzman, *supra* note 44, at 196–97 (finding no significant effect); Jo, *supra* note 96, at 32 (finding opposite result for appellate court nominations).

108. See Allison, *supra* note 106, at 10–11; Holmes et al., *supra* note 44, at 38.

109. See Edward Burmila, Anthony Madonna, Ian Ostrander & Mark E. Owens, *Decommissioned Commissions: Holdover Capacity, Confirmation Dynamics and Independent Regulatory Commissions* 17 (Apr. 6, 2013) (unpublished manuscript) (on file with the *Duke Law Journal*). Holdover capacity (that is, commissioners’ ability to serve past their term for a period of time) may reflect either the importance of the agency or the importance of having the agency staffed.

110. See Binder & Maltzman, *supra* note 10, at 252; Ostrander, *supra* note 25, at 144.

111. Ostrander, *supra* note 25, at 149.

112. See Krutz et al., *supra* note 57, at 876–77 (including “alleged wrongdoing, lack of qualifications, and ideological extremism”).

113. See *id.* at 878.

114. See Binder & Maltzman, *supra* note 10, at 252.

115. See *id.*; Ostrander, *supra* note 25, at 144. But see Krutz et al., *supra* note 57, at 878 (not finding connection with divided government).

116. See Binder & Maltzman, *supra* note 10, at 252; Nuñez, *supra* note 57, at 16.

117. See Ostrander, *supra* note 25, at 144.

118. See Krutz et al., *supra* note 57, at 878.

119. *Id.*

President, withdrawn by the President, or voted down by the Senate) or confirmation—is the dependent variable in the model.

Drawing on previous work, the model includes several categories of explanatory variables. First, it considers major types of nominations: district court, appellate court, cabinet secretary, cabinet assistant secretary, executive agency, and IRC. Second, it examines the timing of the nomination: the year of the administration and whether the nomination was made in the last two months of a Congress. Third, it distinguishes among Presidents, including dummy variables for each presidential administration (dropping the Reagan administration, so all administrations are to be interpreted compared to it). Fourth, it considers the relationship between the White House and the Senate as well as dynamics within the Senate: whether the same party controlled the Senate and White House and whether the nomination was post-filibuster reform.

Table 12 presents the results from this model. The coefficients are reported as marginal effects. Standard errors are clustered, generally at the individual agency or circuit level, but with some other categories, in case observations for a particular agency, circuit, or other type of entity are not independent. Cluster sizes are unequal; similar results are obtained without clustered standard errors and more independent variables.

*Table 12. Marginal Effects from Probit Model of Nomination Failure*

*Dependent Variable is Final Outcome (1 for Failure (Return, Withdrawal, Rejection), 0 for Confirmation)*

Independent Variable	Marginal Effect (standard error)
District Court	0.032 (0.040)
Court of Appeals	0.203** (0.053)
Cabinet Secretary	-0.132** (0.040)
Cabinet Assistant Secretary	-0.015 (0.038)
Executive Agency	0.012 (0.055)



White House Agency	0.003 (0.052)
IRC or Board	0.097* (0.058)
Administration Year	0.027** (0.003)
Last Minute	0.578** (0.031)
Bush 41	0.061** (0.021)
Clinton	0.056** (0.015)
Bush 43	0.117** (0.023)
Obama	0.209** (0.027)
Divided Government	0.067** (0.012)
Post-Filibuster	-0.054 (0.030)
65 clusters	
** $p < 0.01$ , * $p < 0.10$ (2 tailed)	
Number of Observations	12779
Pseudo Likelihood Ratio	-6053.890
Wald $X^2(15)$ :	1759.55
Predicted Failures	19.49%
(variables held at means)	
Actual Failures in Data	21.15%

Many of the included factors are linked to a higher chance of failure. With respect to type of position, nominations to courts of appeals and IRCs were 20.3 and 9.7 percent, respectively, more likely to not be confirmed. With regard to timing within the administration, nominations in later years were 2.7 percent more likely to have failed, a statistically significant but substantively small effect. However, nominations in the final two months of a Congress were much more likely to fail, at nearly 60 percent more. Compared to nominations

under President Reagan, all later Presidents faced higher failure rates, with nominations under President Obama being 20.9 percent more likely not to be confirmed. Finally, nominations made when the White House and the Senate were controlled by different parties were 6.7 percent more likely to fail.

A few factors are connected to a higher chance of confirmation. Nominations to the top position in cabinet departments (including service secretaries at the Defense Department) were 13.2 percent more likely to be confirmed. Although not statistically significant, nominations after the change to the Senate voting rules were less likely to fail. There seems to be no relationship between nominations to district courts, assistant secretary positions, executive agencies, or White House agencies and failure.

These results largely support the descriptive findings in the previous Part, at least with respect to higher failure rates, and they allow comparisons across various dimensions. More research should be done, including considering potential interaction of these variables as well as including other factors.

#### *B. Possible Explanations for Post-Filibuster Reform Outcomes*

So far as I know, this Article is the first systematic study of nomination failure and confirmation delays for both judicial and agency nominations post-filibuster reform.<sup>120</sup> Its main contribution is to show that although confirmation times for nominations to the courts decreased, they increased for all types of agencies, though for many agency positions significantly fewer nominations failed after the voting change. This Section explores several potential explanations for these outcomes. Future work would need to examine them more closely to determine their validity.

First, Republican Senators (or Democratic Senators who did not want to follow the Democratic leadership) likely substituted other delaying mechanisms for the filibuster after the November 2013 change. That change affected only the number of Senators needed to put a nomination up for a final vote. Senators, for example, can still refuse to submit blue slips on judicial nominations to federal courts in their states; both slips need to be returned under current Senate norms for a vote to take place.<sup>121</sup> In addition, Senators on a committee

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120. Cf. Boyd et al., *supra* note 39 (examining judicial nominations pre and postreform).

121. See Charlie Savage, *Despite Filibuster Limits, A Door Remains Open To Block Judge Nominees*, N.Y. TIMES, Nov. 28, 2013, at A18.

to which a nomination has been referred can submit extensive (and time-consuming) written questions to the nominee that have to be answered before the committee votes on a nomination. For instance, the Senate Armed Services Committee submitted 328 “advance policy questions” to Ashton B. Carter, whom President Obama recently nominated to be Secretary of Defense.<sup>122</sup> Republican Senators also required a vote on nearly all nominations after the change, refusing to acquiesce to time-saving unanimous consent procedures.<sup>123</sup>

Comparing these alternative delaying mechanisms across time, however, is difficult. One could compare the D.C. Circuit, for which there are no Senators to file blue slips, with other courts of appeals. The number of nominations to the D.C. Circuit, however, is very small. But outside of this, it is hard to make headway, as there is no reliable and easily accessible source of information on the use of those other devices over a long period of time.<sup>124</sup>

Second, Democratic Senators may have shifted how they scheduled nominees in light of the change in voting rules. Specifically, they may have postponed more routine nominees to get through more contentious nominees earlier, leading to those routine nominees having longer confirmation times than they would have had before the voting change. Relatedly, the type of nominees may have shifted. President Obama may have appointed individuals who catered to the Senate majority, rather than the filibuster-proof majority, and was willing to have nominations fail, leading to outcomes in 2014 that may not look that different than 2013. Noting that only 15 of 96 votes on judicial nominations had fewer than 60 affirmative votes, Russell Wheeler of the Brookings Institution concludes that “the great majority of the 2014 confirmations would have occurred even under the old rule.”<sup>125</sup> For some judicial nominations, President Obama did

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122. Helene Cooper, *Defense Nominee Says He Would Consider More U.S. Military Aid to Ukraine*, N.Y. TIMES, Feb. 4, 2015, <http://www.nytimes.com/2015/02/05/us/politics/defense-secretary-nominee-looks-to-send-senate-panel-strong-message.html>.

123. See Coe, *supra* note 78; Kamen & Kane, *supra* note 39; Wilson, *supra* note 78.

124. Cf. Ryan J. Owens, Daniel E. Walters, Ryan C. Black & Anthony Madonna, *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 376 (2014) (using released data on blue slips from 107th to 110th Congress).

125. Russell Wheeler, Record Lame Duck Confirmations Pad Obama’s Improving Judicial Record, BROOKINGS INST. (Dec. 22, 2014, 9:00AM), <http://www.brookings.edu/blogs/fixgov/posts/2014/12/19-obama-lame-duck-judicial-confirmation-success-wheeler>. To be sure, if you count the twelve votes at the very end of 2014, permitted only because of Republican Senators criticizing a spending bill, see *supra* note 32, as nominations that would not have succeeded

seem to compromise with Senate Republicans, at least in states with a Republican Senator (presumably because of the blue slip tradition). For instance, the rejection by Senate Democrats (through return to the President, with no renomination) of Michael P. Boggs for a district court position shows that President Obama went too far in trying to placate Georgia Republicans in that selection.<sup>126</sup> To test these explanations, there would need to be some measure of the “extremity” of the nominees. The Article turns to the wider issue of nominees in Section C.

Third, the number of nominations may have been a factor, at least in combination with other factors. In the year before the change, President Obama submitted 485 nominations; the year after he submitted 575 nominations. The largest increases were in district court and cabinet nominations. But those entities had different outcomes in the year after the change: confirmation delays decreased for the former and increased for the latter. Nevertheless, the combination of workload and type of nominee may have interacted in ways to explain that difference.

Finally, the midterm election occurred in the year after the voting change, which must have shaped the confirmation process. One could compare nominations in the first few months of 2013 and 2014.<sup>127</sup> In addition, it would be important to examine the process the next time the same party controls the White House and the Senate.<sup>128</sup> For instance, with a longer time period under the new regime, it would be possible to filter out election years (which fall in the second year of a two-year Congress) from other years. From Tables 4 and 8, the second year of each Congress appears to have higher failure rates and, except for the first year of an administration, a shorter confirmation process, on average.

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under the old rule, close to one-third of judges confirmed in 2014 would not be on the bench if the Senate voting rules had not changed.

126. See Carl Hulse, *Obama Judicial Choice is Urged to Withdraw*, N.Y. TIMES, Sept. 22, 2014, at A19.

127. I performed some preliminary analysis. Comparing nominations made in the first three months of 2013 and in the first three months of 2014, the confirmation process lengthened for successful nominations (from 137.3 days to 163.0 days). But the failure rate also increased (14.7 percent to 22.6 percent).

128. It may also take more time than one year for the President and the Senate to figure out how they will deal with PAS positions under the new rule as a long-term matter.

### C. *The Nomination Question*

What much previous work using large numbers of nominations does not consider are particular characteristics of the nominees—their educational background, experience, and connection to the President, for example.<sup>129</sup> If the nomination and confirmation processes interact, as they presumably do, these characteristics would matter.<sup>130</sup> As suggested in the previous Section, changes to either part of the staffing process could also cause changes to the other. For example, after the change to the Senate rules, how did Obama shift his judicial and agency picks? Many assume that the filibuster rules encouraged moderation in presidential picks.<sup>131</sup> But testing that assumption is difficult, particularly in the agency context.<sup>132</sup>

Because of the large number of nominations here (close to 16,000 nominations in the dataset), it would be very hard to get much information on nominees at the time of nomination. The rare work that exists considers campaign contributions. Those measures include contributions post nomination, which make them somewhat cloudy measures of pre-nomination characteristics. Nevertheless, the measures should be considered in an analysis of the 2013 change. It appears that President Obama did not select more liberal judicial nominees after the voting rule change, but no work, to my knowledge, has examined agency nominees.<sup>133</sup>

There is another possibility to consider: the official descriptions of the nominations from congress.gov almost always include the state of residence for the nominee. Of the 1412 nominees from California,

129. *But see* Adam Bonica, Jowei Chen & Tim Johnson, *Automated Methods for Estimating the Political Ideology of Individual Public Bureaucrats Across Time and in a Common Ideological Space* (2012) (unpublished manuscript) (on file with the *Duke Law Journal*) (using text-matching algorithm to generate ideological measures of PAS officials from the Federal Election Commission's contribution records); Adam Bonica, *Mapping the Ideological Marketplace*, 28 AM. J. POL. SCI. 367, 369–70 (2014) (same); Boyd et al., *supra* note 39.

130. *See, e.g.*, Nokken & Sala, *supra* note 90; Bailey & Spitzer, *supra* note 90.

131. *See* Edward H. Stiglitz, *Appointment Politics and the Ideological Composition of the Judiciary*, 39 LEG. STUD. Q. 27, 27–28, 30 (2014) (collecting citations for judicial nominations).

132. There is some work on judicial nominations, prior to the 2013 change. *See* Timothy R. Johnson & Jason M. Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONG. & PRESIDENCY 31 (2005); David M. Primo, Sarah A. Binder & Forrest Maltzman, *Who Consents? Competing Pivots in Federal Judicial Selection*, 52 AM. J. POL. SCI. 471 (2008); Stiglitz, *supra* note 131.

133. *See* Boyd et al., *supra* note 39, at 9, 12 (using common-space campaign finance measures to examine President Obama's judicial nominations before and after the 2013 change).

President Reagan nominated 401 of them (comprising 11.6 percent of his 3455 nominations with residence information). Of the 778 nominees from Texas, President George H.W. Bush picked 109 (making up 5.9 percent of his 1847 nominations) and President George W. Bush selected 291 (making up 7.2 percent of his 4022 nominations). Of the 161 nominees from Arkansas, President Clinton nominated 72 of them (comprising 2.0 percent of his 3594 nominations). And of the 511 nominees from Illinois, President Obama selected 117 (making up 4.0 percent of his 2913 nominations). Of 15,838 nominations with state information, 4652 list the District of Columbia, Maryland or Virginia for the nominee's residence.

Are nominees from the President's home state—who are presumably more likely to be political connections of the President—named earlier in the administration? Do nominees from the President's home state fail more often or take longer to confirm? What about nominees from the D.C. area? Table 13 displays how home-state nominations fall by administration year. Figure 6 shows the percentage of D.C. area nominees over time, with a trend line over the period.

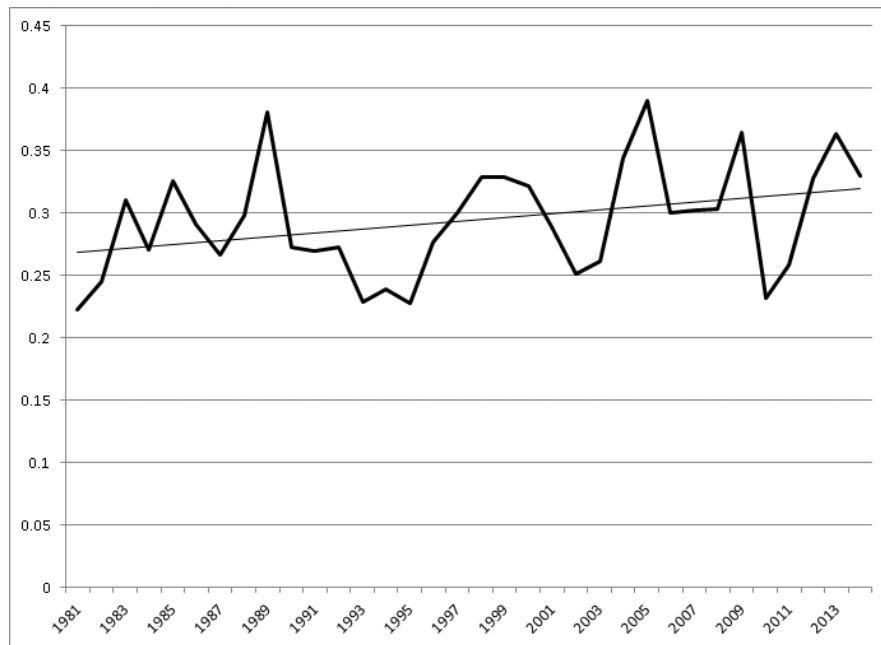
*Table 13. Percentage of Home-State Nominations by Year of Administration*

Time in Administration	Home-State Nominations (as percentage of all Home-State nominations)
First Year	18.6
Second Year	16.7
Third Year	16.9
Fourth Year	11.0
Fifth Year	13.5
Sixth Year	8.0
Seventh Year	8.3
Eighth Year	7.4

Of the home-state nominations, most occurred in the first year of an administration; they generally declined over the course of a term and rebounded in the first year of a second term. Home-state nominations did not fail at a higher rate overall (23 percent failure rate) and took about the same amount of time to confirm if successful

(85.3 days on average), but because fewer nominations failed and confirmation times were faster early in an administration, home-state nominations did seem to fare worse on both measures.

*Figure 6. Percentage of D.C. Area Nominations (of Total Nominations), 1981–2014*



The percentage of nominations from the D.C. area rose over the past three decades, and generally increased over the course of an administration except under President George H.W. Bush. What is perhaps most striking is that almost 30 percent of all nominations came from the D.C. area.

These are just a few snapshots on the residence of nominees in the dataset; more study is needed. That study should likely focus on agency nominations, as judicial nominations have less geographic flexibility because choices are often constrained to match court location.

#### IV. POLICY IMPLICATIONS

The empirical work here does not lead directly to policy proposals. To start, this Article focuses on only one part of staffing important judicial and agency positions—the Senate’s role. Another

important component is the President's role. My previous work has shown that the lag in nominations often exceeds the lag in confirmation, sometimes quite significantly.<sup>134</sup> In addition, as noted above, the two interact: who the President selects affects the reaction of the Senate and the expected reaction of the Senate shapes who the President nominates. Finally, the dataset has no measure of the consequences of failed nominations or long confirmations.

Nevertheless, it seems safe to assume that most of the time, delays in staffing agencies have deleterious effects.<sup>135</sup> Most critically, without confirmed political appointees, agencies may shy away from needed action, including rulemaking and enforcement.<sup>136</sup> More specifically, there are effects on both the demand and supply side of the nominations process. On the demand side, Presidents may turn to substitutes such as acting officials, White House czars,<sup>137</sup> and recess appointments,<sup>138</sup> which even if constitutional, may have less

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134. See O'CONNELL, *supra* note 40, at 10.

135. To be clear, I am not claiming that staffing delays always produce negative consequences. For instance, it may take more time to get a particularly qualified person to take an important job. O'Connell, *supra* note 7, at 946–47. Alternatively, turnover might produce innovative solutions to intractable policy problems. *Id.* at 947–48. Sometimes, it might promote social welfare to have agency inaction. *Id.* at 948–49. Finally, acting officials, particularly long-serving senior career employees at the agency, may be more competent at certain tasks than political picks. *Id.* at 949–50. More recently, Nina Mendelson's Article in this Symposium suggests that confirmed agency officials were not necessary for certain complex rulemakings to occur. See Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1587–97 (2015).

136. See O'Connell, *supra* note 7, at 938–39. But see Mendelson, *supra* note 135, at 1585 (“Thus, even with a vacancy and no designated official, rules in the Federal Register, for example, can be properly signed.”). The lack of action may be voluntary, in the sense that acting officials have the authority to act but may choose not to exercise that authority because of White House or congressional pressure. In other cases, the agency will have no choice and will not be able to make decisions. See *New Process Steel, L.P. v. Nat'l Labor Relations Bd.*, 560 U.S. 674, 688 (2010) (“If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.”).

137. See, e.g., Brady Dennis, *Warren Expected to be Advisor*, WASH. POST, Sept. 16, 2010, at A18.

138. See, e.g., Cindy Skrzycki, *A Miner Matter*, WASH. POST, Oct. 31, 2006, at D1; see also Ryan C. Black, Anthony Madonna, Ryan Owens & Michael Lynch, *Adding Recess Appointments to the President's "Tool Chest" of Unilateral Powers*, 60 POL. RES. Q. 645, 646–48 (2007) (examining the use of recess appointments by Presidents, but neglecting to realize that independent agencies cannot be staffed with acting officials); Nicole Schwartzberg, *What is a "Recess"? Recess Appointments and the Framers' Understanding of Advice and Consent*, 28 J. L. & POL. 231, 234 (2013) (viewing recess appointments as “a core unilateral executive power”).



accountability.<sup>139</sup> Alternatively, when acting officials, czars, and recess appointees are not possible (either legally or politically), there may be fewer officials to make important decisions.<sup>140</sup> Courts with fewer judges, for example, may spend less time on cases or rely on visiting judges to hear cases.<sup>141</sup>

On the supply side, talented individuals may turn down White House entreaties for these important agency and judicial positions.

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139. See E.J. DIONNE & WILLIAM A. GALSTON, BROOKINGS INST., A HALF-EMPTY GOVERNMENT CAN'T GOVERN: WHY EVERYONE WANTS TO FIX THE APPOINTMENTS PROCESS, WHY IT NEVER HAPPENS, AND HOW WE CAN GET IT DONE, Dec. 14, 2009, at 3; O'CONNELL, *supra* note 40, at 12; O'Connell, *supra* note 7, at 943–45; see also BARBARA L. SCHWEMLE, TODD GARVEY, VIVIAN CHU & HENRY HOUGE, CONG. RESEARCH SERV., R40856, THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT 54, 56 (2011) (noting that White House advisors generally face less congressional oversight than recess appointees at the back end). *But cf.* Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CAL. L. REV. 235, 241 (2008) (arguing that broad recess appointment power “provides for a more effective functioning of government than a narrow recess appointment power would offer”); Aaron Saiger, *Obama's “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2592 (2011) (arguing that czars may be an “ingenious compromise” to get neutral competence without interest-group capture). To be sure, on some level, Presidents may prefer recess appointees and White House advisors to confirmed officials, as the former picks are not “compromise” selections who must obtain Senate approval.

140. See Binyamin Appelbaum, *Vacancies Pose Threat to Fed*, N.Y. TIMES, May 12, 2014, at B1 (noting that in two recent meetings of the Federal Open Market Committee, which sets monetary policy, “a majority of the votes were cast by the regional presidents, who are allocated five votes [of the twelve] on the committee on a rotating basis”).

141. See Binder & Maltzman, *supra* note 10, at 258; Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1113 (2011) (analyzing the impact of judicial burdens on outcomes); Carolina Bolado, *11th Circ. Nears Full Strength as Nomination Backlog Eases*, LAW360 (Aug. 8, 2014 7:52 PM), <http://www.law360.com/articles/565697/11th-circ-nears-full-strength-as-nomination-backlog-eases> (discussing difficulty of operating the court without a full staff); see generally Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2388–89 (2014) (summarizing “exponential” growth in caseloads at the appellate level and calling it a “crisis”). Part of the controversy before the Senate rules change concerned Obama's three nominations to the D.C. Circuit. Republicans claimed there was no “pressing need.” See Tom Clark & Sanford Gordon, *Was the Nuclear Option About Filling the Courts or Filling the Courts with Democrats?*, WASH. POST MONKEY CAGE BLOG (Nov. 23, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/23/was-the-nuclear-option-about-filling-the-courts-or-filling-the-courts-with-democrats> (finding that “efficiency was unlikely the driving force behind the obstruction that precipitated the nuclear option”); see also *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 362 (D.C. Cir. 2005) (noting that the plaintiff who sued over the filibuster rule failed to show a link between “delayed vacancy filling and delayed adjudication”). *But see* Russell Wheeler, *Federal Judicial Nomination: Skunky D.C. Stats, Justified Ideological Nominations, Vacancies Without Nominees*, BROOKINGS FIXGOV (Nov. 4, 2014, 12:15 PM), <http://www.brookings.edu/blogs/fixgov/posts/2013/11/4-federal-judicial-nominations-dc-stats-vacancies-wheeler> (noting that “developing valid comparative workload measures is a challenge”).

Surveys of elites in the private sector indicate that potential nominees are leery of the confirmation process.<sup>142</sup> This leads to little “new blood” in the government.<sup>143</sup> As shown in the previous Section, nearly thirty percent of all nominees from 1981 to 2014 hailed from the D.C. area and the trend is positive over the past three decades. Such individuals are more likely to have government work experience. Instead of top officials being drawn from a wide range of career paths and states (and returning to those jobs), Presidents may be increasingly relying on a D.C. elite that cycles in and out of appointed positions and private and think tank jobs inside the Beltway.

Individuals who agree to be nominated may also be affected. Some withdraw, such as Anthony Lake when nominated to head the CIA by President Clinton.<sup>144</sup> Many who are not confirmed understandably harbor resentment. And some who are confirmed to agency posts may be less willing to engage cooperatively with Congress in their positions or to go through the process again.<sup>145</sup> As Department of Health and Human Services Secretary Tommy Thompson explained in a 2001 interview: “It’s not a partisan thing . . . it’s just a terrible ordeal, and good people, especially in the future, are just going to say—I’d never go through it again.”<sup>146</sup>

If the goals then are to decrease both the number of failed nominations and the confirmation time for successful nominations, several changes may help.<sup>147</sup> The focus here is on plausible reforms. In

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142. See PAUL C. LIGHT & VIRGINIA L. THOMAS, BROOKINGS INST., POSTS OF HONOR: HOW AMERICA’S CORPORATE AND CIVIC LEADERS VIEW PRESIDENTIAL APPOINTMENTS 10 (2001).

143. See G. Calvin Mackenzie, *Hung Out to Dry: Let’s Stop Our Shabby Treatment of Those We Ask to Serve*, WASH. POST, Apr. 1, 2001, at B5 (claiming that “our government is now largely run by a governing class”). Russell Wheeler has suggested that delays “help explain why the proportion of district judges who came from private practice of law has decreased from about two thirds during the Eisenhower administration to one third now, and the proportion of former state and term-limited federal judges has increased.” Wheeler, *supra* note 26.

144. See Mackenzie, *supra* note 143 (quoting Lake’s “scathing withdrawal letter” where Lake describes the process as “nasty and brutish without being short”).

145. See LIGHT & THOMAS, *supra* note 74, at 4, 10–11 (finding through a survey that “confusion and embarrassment are . . . increasing”).

146. *Government in Molasses*, WASH. POST, June 12, 2001, at A25.

147. Presumably, the main objective is to decrease the time a position is vacant—from the time of departure of the preceding official to the time a new “permanent” (that is, neither acting nor recess) official begins. This can be done in a variety of ways: by increasing how long officials stay, by decreasing how long Presidents take to choose replacements, or by decreasing the length of the Senate process. This Article focuses on the third approach. In other work, I have made three proposals on the first approach (requiring executive-agency officials to commit to serve for a full presidential term, or at least for two years; ensuring that agency officials receive

large part, the reforms draw from public administration, rather than politics. That is not to deny the political nature of the process but rather to emphasize “bureaucratic” changes that might have meaningful consequences.

First, as national commissions, the Government Accountability Office and commentators (including Paul Light and William Galston) advocate, fewer agency positions should be subject to Senate confirmation.<sup>148</sup> By taking the Senate out of the process, this reform targets both nomination failure and confirmation delay. In previous work I was skeptical of such a change, targeting it as politically infeasible.<sup>149</sup> But the bipartisan Presidential Appointment Efficiency and Streamlining Act of 2011 cut confirmation mandates for 163 positions, such as Assistant Secretary positions for Administration and Management as well as for Public Affairs.<sup>150</sup> There are many

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comprehensive and institutionalized training to improve performance and relationships with Congress and the White House; and increasing the salary and benefits of agency officials) and four proposals on the second approach (making more agency leadership choices earlier, even before a President takes office, and devoting more resources to the appointments process; having Presidents pay more attention to lower-level agency positions; planning for future appointments before resignations are announced; and asking appointees to provide four weeks of notice before leaving). O’Connell, *supra* note 7, at 988–97. I have also made three proposals on the third approach (cracking down on holds by individual Senators; fast-tracking some nominations; and encouraging more Senate deference). O’CONNELL, *supra* note 40, at 17–18. All of my previous reform suggestions have targeted agency, rather than judicial, vacancies.

148. See, e.g., DIONNE & GALSTON, *supra* note 139, at 17; MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 164, 266 (2000); HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* 260 (1977); PAUL C. LIGHT, *A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT* 91 (2008); H. COMM. ON POST OFFICE & CIVIL SERV., 101ST CONG., REP. AND RECOMMENDATIONS OF THE NATIONAL COMMISSION ON THE PUBLIC SERV. 17–19 (Comm. Print 1989); NAT’L COMM’N ON PUB. SERV., *URGENT BUSINESS FOR AMERICA: REVITALIZING THE FED. GOVERNMENT FOR THE 21ST CENTURY* 19–20 (2003); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-235R, *SUGGESTED AREAS FOR OVERSIGHT FOR THE 110TH CONGRESS* 40 (2006); James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 63 (1987).

149. See, e.g., O’Connell, *supra* note 7, at 988. Political appointees generally favor the creation of more political positions. See Carolyn Ban & Patricia W. Ingraham, *Short-Timers: Political Appointee Mobility and Its Impact on Political-Career Relations in the Reagan Administration*, 22 ADMIN. & SOC’Y 106, 118–19 (1990). In addition, Congress often prefers to have a role in the appointments process. Evan Weinberger, *Legislation To Increase NY Fed Oversight Reintroduced*, LAW360 (Feb. 23, 2015, 5:35 PM), <http://www.law360.com/articles/624304/legislation-to-increase-ny-fed-oversight-reintroduced>.

150. Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283; see also Carl Hulse, *Senate Votes to Streamline the Confirmation Process*, N.Y. TIMES, June 30, 2011, at A18 (noting that it was a “rare step of relinquishing power” but that the law passed “easily,” on a 79–20 vote). All negative votes came from Republicans. Ian

more positions that qualify as inferior offices and thus under the Constitution do not require confirmation, if Congress chooses an acceptable alternative.<sup>151</sup>

To be sure, there is some balance to be struck. The confirmation process adds accountability. The Senate clings to its role, noting in a study on the appointments process: “The confirmation hearing is the only point in the appointment process of Federal officials that offers the public an opportunity to evaluate the qualifications of a nominee.”<sup>152</sup> It is not clear in our modern world whether the hearing itself is critical, but the availability of information to the public and the need for Senate agreement can foster accountability. But if the Senate is spending less time confirming members to part-time Boards of Trustees, the institution could spend more time on Assistant Secretaries of important policy areas.

In addition, the confirmation process may add “stature” to positions, giving officials necessary authority within an agency. For instance, the Senate removed Chief Financial Officers from the 2011 Act, citing concerns that CFOs needed the “full respect of other agency employees” to promote “successful financial operations within agencies.”<sup>153</sup> It is not clear that these respect benefits outweigh the costs of having acting officials in the gaps, however. It may also be possible to provide these more informal forms of authority outside of the confirmation process. In sum, it might be more important to staff certain oversight positions quickly than to have Senate confirmation.<sup>154</sup>

Second, in line with other reform proposals, Senate requirements for confirmation should be streamlined.<sup>155</sup> This reform focuses more

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Ostrander, *Conceding Confirmation? Recent Reforms in the Executive Nominations Process* 7 (Aug. 2014) (unpublished manuscript) (on file with author).

151. Arguably, any official directed and supervised by someone other than the President qualifies as an inferior officer. See *Edmond v. United States*, 520 U.S. 651, 662–63 (1997) (holding that “[w]hether one is an ‘inferior’ officer depends on whether he has a superior”).

152. U.S. SENATE, *supra* note 73, at 1349.

153. MAEVE P. CAREY, CONG. RESEARCH SERV., R41872, *PRESIDENTIAL APPOINTMENTS, THE SENATE’S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS* 13 n.45 (2012).

154. See Patrick S. Roberts & Matthew Dull, *Guarding the Guardians: Oversight Appointees and the Search for Accountability in U.S. Federal Agencies*, 25 J. POL’Y HIST. 207 (2010) (examining long delays in staffing Inspector General, Chief Financial Officer, and General Counsel positions and noting ironically that this may lead to less accountability).

155. See, e.g., *The State of the Presidential Appointment Process: Hearing before S. Comm. on Governmental Affairs*, 107th Cong. (2001); DIONNE & GALSTON, *supra* note 139, at 14–15; Terry Sullivan, *Fabulous Formless Darkness: Presidential Nominees and the Morass of Inquiry*,

on shortening the length of the process than on reducing nomination failures. To start, the Senate should not be asking for information that the nominee has already provided in the process. The Senate, to be fair, is not the only culprit. Currently, a nominee fills out different forms for the White House, Office of Government Ethics, Federal Bureau of Investigation, and Senate.<sup>156</sup> The first three entities are vetting the nominee for the White House, which understandably wants to avoid embarrassment.<sup>157</sup> According to the Congressional Research Service, “[t]he background checks for nominees are essentially restarted once the nomination is sent to the Senate, since it appears that the President tends not to share the background information with the Senate.”<sup>158</sup> In a 2001 hearing, agency official Sean O’Keefe testified that there was extensive overlap: “The Form 86, the Committee questionnaire, and the President’s general counsel request for information probably covers 75 percent of the same material.”<sup>159</sup> Overlapping information such as education should be entered in one place and shared with all.<sup>160</sup> Improvements in information technology should make this easy to do; President Reagan’s nominees were filling out Form 86 on a typewriter but current nominees should not be.

In addition, the Senate should agree, where practicable, on standard forms so that the same person does not have to submit different background forms and information depending on which committee has jurisdiction.<sup>161</sup> For instance, commentators E.J. Dionne and William Galston have pointed to a married couple who filed taxes jointly, both of whom were nominated by President Obama to positions falling under different committees. The confirmation demands on their household finances, though joint finances, varied considerably.<sup>162</sup> At the least, certain positions common to many agencies, such as Inspectors General or General Counsels, could have

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BROOKINGS INST. (Spring 2001), <http://www.brookings.edu/research/articles/2001/03/spring-governance-sullivan> (last visited April 24, 2015).

156. See CAREY, *supra* note 153, at 8; Sullivan, *supra* note 155.

157. See CAREY, *supra* note 153, at 8.

158. *Id.* The Ethics in Government Act does require that certain financial information and potential conflicts of interest be disclosed to the relevant Senate committees. *Id.*

159. S. Comm. on Governmental Affairs, *supra* note 155, at 7.

160. See *id.*

161. See DIONNE & GALSTON, *supra* note 139, at 15 (noting that standardizing Senate forms is more difficult to achieve than cutting back on duplication).

162. *Id.*

identical forms, with any necessary agency-specific questions added on.<sup>163</sup> Finally, the Senate in creating these forms should try to decrease the number of unique questions to the nominee.<sup>164</sup> Streamlining disclosures may not be unrealistic. It is costly, but primarily only in the short term in figuring out the implementation. It comes with few political costs in the long-term, and it would be greatly appreciated by nominees.<sup>165</sup>

Third, as I and others have called for previously, the Senate should impose time limits on itself, for at least some categories of nominations.<sup>166</sup> Like the previous proposal, this reform targets the length of the process. For example, there are nominations that eventually get confirmed with little recorded opposition, such as when Martha Johnson, who was nominated to head the General Services Administration on May 4, 2009, was confirmed almost a year later on February 4 on a 94–2 vote.<sup>167</sup> More generally, nominations to cabinet departments and executive agencies generally receive more deference (in terms of whether they are confirmed, not how long they take, which varies by position level) as those agencies are closer to the President.<sup>168</sup> Ideally, the Senate would impose a binding deadline on itself to vote, such as three months from when the nomination is received. The Senate operates under deadlines in other contexts—fast-track repeal of major regulations under the Congressional Review Act, for instance. To the extent that delay is signaling opposition (to some statute, for example) there may be other ways besides delaying confirmation to advance that concern, such as amending the statute or engaging in other oversight mechanisms.<sup>169</sup>

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163. Alternatively and less plausibly, there could be fewer committees that consider such positions. *See generally* DAVIS & MANSFIELD, *supra* note 66 (listing which positions fall under which committee).

164. *See* Sullivan, *supra* note 155.

165. *See, e.g.,* LIGHT & THOMAS, *supra* note 74, at 21; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-93-28FS, POLITICAL APPOINTEES: SELECTED APPOINTEES' VIEWS OF THEIR FEDERAL WORK ENVIRONMENT 5 (1992).

166. *See* O'CONNELL, *supra* note 40, at 17–18.

167. *Id.* at 18.

168. Notably, the President has more ability to remove the leaders of these agencies than leaders of IRCs. *See* O'Connell, *supra* note 7, at 918–19 n.20. In addition, executive agencies and cabinet departments have to seek White House approval before issuing major regulations. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–06 (2012).

169. O'CONNELL, *supra* note 40, at 18 (explaining that refusing to confirm presidential nominations is not “a fair way to rein in government”).

At the least, the Senate could announce aspirational targets, which it could be criticized for missing. For example, after the 9/11 Commission warned about delays in confirming national-security officials, the Senate agreed to a thirty-day target for such positions.<sup>170</sup> The courts present particular complexities, as the positions are lifetime appointments. Here, fast-tracking may not be as feasible or defensible.<sup>171</sup> Instead, Senators of both parties could be more explicit about opposition based on partisan preferences.<sup>172</sup>

Finally, more career (that is, long-term) government workers should be named to important agency jobs.<sup>173</sup> The recent conflict over ambassadors may be due, in part, to President Obama naming fewer career Foreign Service officers to head U.S. embassies abroad.<sup>174</sup> Assuming transitions back to nonpolitical slots can be arranged, careerists may be both more willing and more qualified to serve in key agency positions.<sup>175</sup> This change would both decrease the chance of nomination failure and the length of the confirmation process.

These are concrete changes that would benefit both Republicans and Democrats. They do not depend on a return of old Senatorial courtesy or a change in norms.<sup>176</sup> But they do depend on both parties

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170. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601(b), 118 Stat 3638. More research is needed on whether these targets made a difference.

171. Cf. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1493–94 (1992) (calling for less deference to judicial nominations and arguing that less deference will—counterintuitively—make the process less partisan). But see Sarah Binder & Forrest Maltzman, *How to Fix the Senate?*, WASH. POST, Feb. 21, 2010, at A3 (calling for fast-tracking of judicial nominations). It is not clear where IRCs should fall. On one hand, like courts, they are not covered by the Federal Vacancies Reform Act of 1998, so openings cannot be filled by acting officials. In addition, unlike courts, IRCs generally sit at least partially in the Executive Branch. On the other hand, the appointments are for particular terms and, like courts, the positions have restrictions on removal.

172. See David Greenberg, *Admit the Obvious—It's a Political Process*, WASH. POST, July 18, 2004, at B3.

173. See O'Connell, *supra* note 7, at 994; see also Elliot L. Richardson & James P. Pfiffner, *Politics and Performance: Strengthening the Executive Leadership System*, in THE MANAGERIAL PRESIDENCY 175, 182–83, 192 (James P. Pfiffner ed., 1999) (describing the difficulties in retaining qualified individuals in high-ranking agency positions).

174. See Juliet Eilperin, *Obama Ambassador Nominees Prompt an Uproar with Bungled Answers, Lack of Ties*, WASH. POST (Feb. 14, 2014), [http://www.washingtonpost.com/politics/obama-ambassador-nominees-prompt-an-uproar-with-bungled-answers-lack-of-ties/2014/02/14/20fb0fe4-94b2-11e3-83b9-1f024193bb84\\_story.html](http://www.washingtonpost.com/politics/obama-ambassador-nominees-prompt-an-uproar-with-bungled-answers-lack-of-ties/2014/02/14/20fb0fe4-94b2-11e3-83b9-1f024193bb84_story.html) (noting that Presidents have generally nominated careerists for 70 percent of ambassadorships but that President Obama has picked careerists for between 47 and 63 percent of such jobs).

175. See O'CONNELL, *supra* note 40, at 15.

176. See Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1689–90 (2001) (calling for shifts in appointments-related norms);

believing that the benefits, over time, of more efficient staffing of courts and agencies—no matter which party controls the White House—outweigh the costs (particularly when the President is from the opposite party), and then acting in line with those long-term interests. In sum, they are politically feasible reforms of a deeply political process. Nevertheless, although plausible, change is still difficult. Staffing delays are not a new problem, and these proposed reforms are not new solutions.<sup>177</sup>

### CONCLUSION

Many important positions in the judiciary and administrative agencies sat empty for long periods of time, even after the exercise of the nuclear option by Senate Democrats in late 2013. Hopefully, we can draw some lessons from the failures of nominations and the confirmation process for nominations that did succeed in the 1981–2014 period. The political stakes and consequences for governance are substantial. At the least, we have a more systematic understanding of failures and delays, particularly surrounding the change in Senate voting rules.

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George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, at 38 (contrasting the rise of partisanship in the Senate with older practices). The CRS has flagged some interesting possible norms: “As a gesture of bipartisanship, should a newly elected President who is of the opposite political party as his predecessor renominate some of his predecessor’s judicial nominees who failed to receive Senate floor votes in the previous Congress?” “Where one or both of a state’s Senators are of the opposition party, would the Senators’ establishment of bipartisan selection commissions be a way, possibly acceptable to the President, for the Senators to influence which judicial candidates a President considers before selecting a nominee?” DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., IS40340 ISSUE STATEMENT ON JUDICIAL APPOINTMENTS 5 (2010).

177. See Light, *supra* note 13, at A27; Paul C. Light, *Back to the Future on Presidential Appointments*, 64 DUKE L.J. 1499, 1499–1502 (2015).



## DATA APPENDIX

The dataset includes almost all civilian nominations submitted to the Senate from January 1, 1981, to December 31, 2014. It does not include (by choice) routine nominations needed for promotions within the Foreign Service, Public Health Service, and the National Oceanic and Atmospheric Administration, though it does include individual nominations to career ambassadorships and to be Surgeon General.<sup>178</sup> Nominations in these excluded categories are often submitted in bulk, and the bulk nomination (for example, “40 individuals”) becomes the official submitted record. Because military promotions are not civilian nominations, the dataset omitted them. For several dozen nominations (out of approximately 16,000) where there was no date for the last action or the final action was something other than confirmation or failure (through withdrawal, return, or vote rejecting), such as a referral to a committee, those nominations were not included. Many of these deleted nominations appeared again as full records on congress.gov (with a confirmation or failure as the final action date), and those full records were included. I made a handful of corrections involving duplicate nominations in the same year. Finally, I broke several dozen nomination records that covered multiple individuals (usually to an advisory board) into individual observations. There are 15,972 observations in the dataset.

The “scraped” data from congress.gov provided the following fields: Name, Description of the Nomination (including the position and agency or court), Position, Date the Nomination was Received, the relevant Senate Committee (if any), the Final Action Taken on the Nomination, and the Date of that Last Action. The information, however, was not usable without significant cleaning and coding. Most notably, the Position field in the official data was filled with spelling errors, often did not identify the exact position (for example, “Secretary” rather than “Secretary of the Treasury”), and sometimes was empty. The Description of the Nomination, a long text field, was more complete and provided more information on the position, including the formal title.<sup>179</sup> The problem I faced was that the position and the agency needed to be extracted from the Description field. Likewise, the Final Action field was a long text field, from which particular outcomes had to be extracted.

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178. *See supra* note 52.

179. In several dozen observations, where the description field was empty, I used information from the position field.

This Appendix describes the cleaning and coding of the data I performed. It covers judicial and court-related nominations (positions and courts), agency nominations (positions and organizations), outcomes and durations, Senate committees, timing within the administration, political environment, and residence of nominee.

#### *A. Judicial and Court-Related Nominations*

For judicial and court-related nominations, I created the following judicial positions: District Court Judge; Court of Appeals Judge; Associate Justice; Chief Justice; and Judge on Non–Article III Court (U.S. Court of Federal Claims, U.S. Court of International Trade, U.S. Tax Court, Court of Federal Claims, U.S. Court of Military Appeals, U.S. Court of Veterans Appeals, and Superior Court of Washington, D.C.). I also created the following court-related positions: U.S. Marshal and U.S. Attorney. To be able to compare particular courts with particular agencies, I made binary variables for each of the federal courts of appeals: D.C. Circuit; Federal Circuit; First Circuit; Second Circuit; Third Circuit; Fourth Circuit; Fifth Circuit; Sixth Circuit; Seventh Circuit; Eighth Circuit; Ninth Circuit; Tenth Circuit; and Eleventh Circuit. Table A1 displays the frequencies of these positions and circuits.

*Table A1. Judicial and Court-Related Nominations*

Judicial Variables	Frequency
District Court Judge	1635
Court of Appeals Judge	510
Associate Justice	13
Chief Justice	2
Non–Article III Judge	266
U.S. Marshal	541
U.S. Attorney	648
D.C. Circuit	47
Federal Circuit	34
First Circuit	17
Second Circuit	35
Third Circuit	39
Fourth Circuit	53
Fifth Circuit	48

Sixth Circuit	55
Seventh Circuit	19
Eighth Circuit	23
Ninth Circuit	78
Tenth Circuit	35
Eleventh Circuit	27

### *B. Agency Nominations*

For nonjudicial nominations, I created the following positions: Ambassador (which includes any position given the “rank of ambassador” in the position part of the description); General Counsel (including the Solicitor at the Labor and Interior Departments and the Legal Adviser at the State Department); Inspector General (which includes a handful of deputy Inspector Generals and special Inspector Generals); Chief Financial Officer; Assistant Administrator; Associate Administrator; Deputy Administrator; Administrator; Assistant Director; Associate Director; Deputy Director; Director (but not including members of a Board of Directors or Executive Directors); Assistant Secretary (or Assistant Attorney General); Under Secretary (or Associate Attorney General); Deputy Secretary (or Deputy Attorney General); Cabinet Secretary (or Attorney General and including service secretaries at the Department of Defense); Commissioner (or Chairman, Chairperson, or CEO) of nonadvisory Commission; Board Member (or Chairman, Chairperson, CEO, or Governor) of nonadvisory board; Executive Director; member of Board of Directors; member of Board of Regents; member of Board of Trustees; and member of advisory body (for example, National Council or Advisory Commission). Table A2 displays the frequencies of these positions.

*Table A2. Agency Positions*

Agency Position Variables	Frequency
Ambassador	2187
General Counsel	243
Inspector General	163
Chief Financial Officer	85
Assistant Administrator	198
Associate Administrator	3

Deputy Administrator	81
Administrator	248
Assistant Director	30
Associate Director	83
Deputy Director	114
Director	564
Assistant Secretary (and Assistant Attorney General)	1508
Under Secretary (and Associate Attorney General)	400
Deputy Secretary (and Deputy Attorney General)	190
Secretary (and Attorney General)	176
Commissioner or Head (non-advisory Commission)	1206
Member or Head (non-advisory Board)	1206
Executive Director	68
Member (Board of Directors)	1262
Member (Board of Regents)	38
Member (Board of Trustees)	285
Member (Advisory Body)	930

Many descriptions of agency nominations (except for some cabinet nominations) made establishing agency variables straightforward. I created the following variables for IRCs and boards: CFTC (Commodity Futures Trading Commission); CPSC (Consumer Product Safety Commission); CSHIB (Chemical Safety and Hazard Investigation Board); EEOC (Equal Employment Opportunity Commission); FCC (Federal Communications Commission); FEC (Federal Election Commission); FED RESERVE (Federal Reserve); FERC (Federal Energy Regulatory Commission); FHFB (Federal Housing Financing Board); FTC (Federal Trade Commission); ICC (Interstate Commerce Commission); ITC (International Trade Commission); NFSB (Nuclear Facilities Safety Board); NLRB (National Labor Relations Board); NRC (Nuclear Regulatory Commission); NTSB (National Transportation Safety Board); OSHRC (Occupational Safety and Health Review Commission); SEC (Securities and Exchange Commission); and STB (Surface Transportation Board). I combined all of these positions into an IRC agency variable. Table A3 displays the frequencies of nominations to these independent regulatory commission and boards.

*Table A3. Nominations to Independent Regulatory Commissions and Boards*

IRC and Board Variables	Frequency
CFTC	63
CPSC	40
CSHIB	34
EEOC	70
FCC	54
FEC	47
FED RESERVE	66
FERC	59
FHFB	34
FTC	43
ICC	23
ITC	48
NFSB	33
NLRB	110
NRC	54
NTSB	75
OSHRC	38
SEC	50
STB	17
IRC AGENCY	958

I created the following variables for White House agencies: CEA (Council of Economic Advisers); CEQ (Council on Environmental Quality); DRUG POLICY (Office of National Drug Control Policy); OMB (Office of Management and Budget); OSTP (Office of Science and Technology Policy); USTR (Office of the U.S. Trade Representative). I also combined all of these positions into a WHITE HOUSE agency variable. I established the following variables for stand-alone executive agencies (that is, those not in cabinet departments): CIA (Central Intelligence Agency, often in description as Central Intelligence); EPA (Environmental Protection Agency); GSA (General Services Administration, often in description as General Services); NASA (National Aeronautics and Space Administration); OPM (Office of Personnel Management); SBA

(Small Business Administration); and USAID (Agency for International Development). And I put together all of these variables for an EXECUTIVE agency variable. Table A4 displays the frequencies of nominations to these White House and stand-alone executive agencies.

*Table A4. Nominations to White House and Stand-Alone Executive Agencies*

White House and Executive Agency Variables	Frequency
CEA	43
CEQ	10
DRUG POLICY	40
OMB	59
OSTP	42
USTR	54
WHITE HOUSE AGENCY	248
CIA	35
EPA	149
GSA	15
NASA	24
OPM	25
SBA	41
USAID	111
EXECUTIVE AGENCY	400

For cabinet nominations, many did not include the full (or even partial) name of the cabinet department. I therefore used text matching to establish the agency binary variables (the terms used are in parentheses): USDA (Department of Agriculture; Agriculture; Farmers Home Administration; Federal Grain Inspection Service; Rural Electrification Administration; excluded United Nations and representative positions); DOC (Department of Commerce; National Oceanic and Atmospheric Administration; Commerce; Patents and Trademarks; Foreign Commercial Services; Commissioner of Customs (when the position was at Commerce); Director of Census; excluded United Nations and ICC positions); DOD (Department of

Defense; Air Force; Army; Navy; Defense; excluded BRAC, NFSB, NNSA, DOE and negotiator positions); EDUC (Department of Education; Education; Rehabilitation Services Administration; excluded advisory entity, national boards related to Education, Board of Trustees, United Nations, education funds, USDA, and DOS positions); DOE (Department of Energy; Energy; National Nuclear Safety Administration; Alcohol Fuels; Economic Regulatory Administration; Office of Minority Economic Impact; excluded FERC, international energy, and bank positions); HHS (Health and Human Services; Social Security (but not SSA advisory board); Health; Centers for Medicare and Medicaid; excluded non-HHS health review, member, representative, Board of Regents, DHS, DOE, DOL, and VA positions); DHS (Homeland Security); HUD (Housing and Urban Development; excluded FHFB, FHFA, board of director, and national corporation positions); DOI (Interior; Bureau of Land Management; Fish and Wildlife Service; National Park Service; Office of Surface Mining Reclamation); DOJ (Justice; Attorney General; Solicitor General; U.S. Attorney; U.S. Marshal; Drug Enforcement; Federal Bureau of Investigation; Bureau of Alcohol; Commissioner of Immigration and Naturalization at DOJ; Victims of Crime; excluded court and State Justice Institute positions); DOL (Labor; excluded FLRA, NLRB, and State positions); DOS (of State; Ambassador; Representative of the United States; Permanent Representative; Coordinator for Counter Terrorism; Director General of the Foreign Service; excluded DHS and USTR positions); DOT (Transportation; Federal Aviation Administration; Federal Highway Administration; Federal Motor Carrier Safety Administration; Federal Railroad Administration; Federal Transit Administrator; Maritime Administration; Urban Mass Transportation; excluded Alaska Natural Gas, NTSB, STB, and DHS positions); TREAS (Treasury; Internal Revenue; Comptroller of the Currency; Mint); and VA (Veterans Affairs; excluded court and DOL positions).

The Departments of Justice and State had large numbers of nominations, so I created second variables for each: DOJ2 (DOJ, with U.S. Attorney and U.S. Marshal positions removed); DOS2 (DOS, with Ambassador and Representative positions removed). I combined these variables (DOJ2 and DOS2) with the other thirteen cabinet variables into a CABINET agency variable. Table A5 displays the frequencies of nominations to these cabinet departments.

*Table A5. Nominations to Cabinet Departments*

Cabinet Department Variables	Frequency
USDA	142
DOC	299
DOD	475
EDUC	185
DOE	219
HHS	198
DHS	96
HUD	139
DOI	140
DOJ	1462
DOJ2	273
DOL	193
DOS	2835
DOS2	376
DOT	186
TREAS	295
VA	104
CABINET DEPARTMENT	3320

*C. Outcomes and Durations*

The field for final action taken on the nomination included approximately one thousand unique entries. Outcomes were broken into two large categories: Confirmed and Failed nominations. Each of those categories had subcategories as well. For confirmed nominations, there were Confirmations by Unanimous Consent, Confirmations by Voice Vote, Confirmations by Recorded Vote, and Other Confirmations (the last category was used then the last action was listed as simply “confirmed”). For recorded votes, the number of “yea” and number of “nay” votes were extracted and placed in separate columns: Yes Votes and No Votes. For failed nominations, there were Nominations Returned to the President, Nominations Withdrawn by the President, and Nominations that Were Voted



Down by the Senate.<sup>180</sup> There were several dozen observations for which the final action was neither confirmation nor failure, for example, being referred to committee. As described above, I deleted those observations. Table A6 presents the frequency of the options for the failed and confirmed outcomes.

*Table A6. Outcomes of Nominations*

Outcome Variables	Frequency
Unanimous Consent	3069
Voice Vote	8442
Recorded Vote	794
Other Confirmation	9
Confirmed	12,314
Returned	3141
Withdrawn	514
Voted Down	3
Failed	3658
Total	15,972

All nominations had a date for the Senate's receipt of the nomination and a date for the final action. I created three variables to describe these durations: Duration (no matter the outcome); Confirmed Duration (if the nomination was confirmed), and Failed Duration (if the nomination failed). Fourteen nominations had negative durations recorded in the congress.gov data (mostly, the nominations were confirmed at the start of a session and the official nomination was recorded as being received a few days later); I recoded those to zero. Table A7 presents the averages of these variables.

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180. The Senate rejects very few nominations by full Senate vote. See SENATE ACTION, *supra* note 45, at 3 (agency nominations); MCMILLION, *supra* note 57, at 7 (judicial nominations). The three rejected nominations in the dataset are Robert Bork (nominated by President Reagan to be an Associate Justice of the Supreme Court), John Tower (nominated by President George H.W. Bush to be Secretary of Defense), and Ronnie White (nominated by President Clinton to be a district court judge). Most failed nominations come from "committee inaction," which causes nominations to be returned to the President. SENATE ACTION, *supra* note 45, at 3.

*Table A7. Duration of Process (Nomination Date to Last Action)*

Duration Variables	Average (days)
All Outcomes	109.39
Confirmed	88.51
Failed	179.70

*D. Senate Committees*

Most nominations had an assigned Senate Committee. I combined committees listed in congress.gov where it was clear the committees were essentially the same entity, despite a name change or minor change in jurisdiction: specifically, Governmental Affairs (to early 2004) and Homeland Security and Governmental Affairs (since 2004) in Governmental Affairs; Labor and Human Resources (to early 1999) and Health, Education, Labor, and Pensions (since 1999) in Labor; and Small Business (to 1997) and Small Business and Entrepreneurship (since 1998) in Small Business. Before 2011, only forty-eight nominations had no committee assigned. These nominations were almost always to the highest cabinet positions, such as Secretary of State, in the first year of an administration.<sup>181</sup> In 2011, the Senate agreed that certain nominations would be considered “privileged” and placed on the Executive Calendar, without being referred to a committee. Under this agreement, any Senator can request that any privileged nomination be referred to the appropriate committee.<sup>182</sup>

The Budget and Small Business Committees handle the fewest nominations. The Budget Committee recently received joint jurisdiction over nominations for the Director and Deputy Director of the Office of Management and Budget, starting with the 109th Congress.<sup>183</sup> The Small Business and Entrepreneurship Committee examines only four positions at the Small Business Administration,

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181. I did not recode these nominations to the committees that would normally handle them. It was not clear if the committee did not participate because of the timing or if the official nomination record on congress.gov is inaccurate. Given the small number, the results should not be affected.

182. S. RES. 116, 112th Cong. (2011) (enacted).

183. See DAVIS & MANSFIELD, *supra* note 66, at 13 n.46. Under new Senate practices, “if one committee votes to order reported such a nomination, the other must report within 30 calendar days session, or be automatically discharged.” *Id.*

and one of those positions, Inspector General, is also handled by the Committee on Homeland Security and Governmental Affairs.<sup>184</sup>

Table A8 presents the frequency of committees.

*Table A8. Committees Assigned to Nominations*

Committee Variables	Committee Name	Frequency
Agriculture	Agriculture, Nutrition, and Forestry	319
Armed Services	Armed Services	720
Banking	Banking, Housing, and Urban Affairs	770
Budget	Budget	8
Commerce	Commerce, Science, and Transportation	960
Energy	Energy and Natural Resources	413
Environment	Environment and Public Works	428
Finance	Finance	635
Foreign Relations	Foreign Relations	3849
Governmental Affairs	Government Affairs; Homeland Security and Governmental Affairs	700
Indian Affairs	Indian Affairs	93
Intelligence	Intelligence	64
Judiciary	Judiciary	4035
Labor	Labor and Human Resources; Health, Education, Labor, and Pensions	2467
None	No committee listed	259
Rules	Rules and Administration	85
Small Business	Small Business; Small Business and Entrepreneurship	34
Veterans' Affairs	Veterans' Affairs	133
Total		15,972

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184. *Id.* at 42.

### *E. Timing within Administration*

Nominations and confirmations may differ over the course of a particular administration and of a particular Congress. For differences within an administration, I created binary variables for each year based on the date the nomination was received: First Year, Second Year, Third Year, Fourth Year, Fifth Year, Sixth Year, Seventh Year, and Eighth Year. President George H.W. Bush served only one term, so his nominations fell under only the first four variables. The dataset ends in December 2014, so President Obama's nominations fell under only the first six variables. Nominations made by the outgoing President in January were not included in any variable. For differences within a Congress, I created the binary variable End of Congress to flag nominations made in the final two months (in other words, in November or December of an even-numbered year).

Table A9 presents the frequency of these timing variables.

*Table A9. Timing within Particular Administration and Congress*

Timing Variables	Frequency
First Year	3200
Second Year	2381
Third Year	2460
Fourth Year	1517
Fifth Year	2063
Sixth Year	1751
Seventh Year	1451
Eighth Year	1050
End of Congress	392

### *F. Political Environment*

The dataset includes nominations from January 1981 through December 2014, covering five presidential administrations. First, I created two variables for the nomination year. For the first, Nomination Year, I included any nomination received in the calendar year. For the second, Nomination Year 2, I removed nominations received in January by an outgoing President (for example, President

Carter's nominations in January 1981). I created a binary variable to mark those 165 nominations: Outgoing President. (President Carter made nine; President Reagan made seventy-two; President George H.W. Bush made twenty-one; President Clinton made sixty-two; and President George W. Bush made one). The analysis in the Article used Nomination Year 2 when analyzing nominations by year.

To distinguish the presidential administrations, I created the following variables, measured as of the date the nomination was received: Reagan; Bush 41; Clinton; Bush 43; and Obama. I was careful to assign nominations submitted between January 3 and January 19 of an outgoing administration to the outgoing President. (This meant that some nominations were not assigned to a President, as they were President Carter's nominations in his final weeks in office in 1981.) The Senate majority sometimes was of the same party of the President and sometimes was not. Again using the date the nomination was received and being careful with nominations in the final weeks of an administration, I created a Divided Government variable that was marked 1 when the Senate majority and the President were from different parties (1987–1992, early weeks of 1993 before Clinton took office, 1995–June 4, 2001 (before Senator Jeffords became an Independent and caucused with the Democrats), June 5, 2001 (after Jeffords switched)–2002, 2007–2008, and early months of 2009 before Obama took office.

The Senate changed its rules on November 21, 2013, to no longer require sixty votes to close debate on any non–Supreme Court nomination. To compare nominations immediately before and after that change, I constructed three variables: Pre–Filibuster Reform, 1 Year (November 20, 2012, to November 21, 2013), Pre–Filibuster Reform, Obama (January 20, 2009, to November 21, 2013), and Post–Filibuster Reform (November 22, 2013–December 31, 2014).

Table A10 presents the frequency of all these political variables.

*Table A10. Political Environment*

Political Variables	Frequency
Reagan Administration	3508
Bush 41 Administration	1861
Clinton Administration	3617
Bush 43 Administration	4055
Obama Administration	2922
Divided Government	7046
Pre-Filibuster Reform (1 year)	485
Pre-Filibuster Reform (Obama)	2347
Post-Filibuster Reform	575

*G. Residence of Nominees*

The description of each nominee typically gives the state in which the nominee resides. For military officers, the description identifies the military branch instead of the state. And for nominees who are currently in an appointed position, the description identifies the current position when the nomination is for a position to run concurrently (as opposed to moving from one position to another). In sum, there were 134 observations with no state provided in the description (either because it was a military officer or a concurrent nomination from an agency position). For the rest, I created binary variables for the home states of the Presidents—California (for President Reagan), Texas (for Presidents George H.W. Bush and George W. Bush), Arkansas (for President Clinton), and Illinois (for President Obama)—and for the D.C. area: D.C., Virginia, and Maryland. If no state was provided in the description, the state variables have a missing value. I also created a binary Home-State to convey if the nominee came from the home-state of the nominating President.

Table A11 presents the frequency of these residence variables.

*Table A11. Residence of Nominees*

Residence Variables	Frequency
California	1412
Texas	778
Arkansas	161
Illinois	511
Home-State	990
D.C. Area	4652