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Female and Minority Judicial Nominees: President's Delight and Senators' Dismay?

Female and minority judicial nominations take longer and are less likely to be confirmed, yet presidents eagerly seek such nominations. I account for this puzzle by building a model in which senators face costs for opposing female and minority nominees. I predict that such nominations are more likely when the gridlock interval is large. Using appellate nominations from 1977 to 2004, I find that Republican presidents are more likely to pursue these nominations during periods of high gridlock. Furthermore, accounting for the gridlock interval erases the differences in confirmation duration and success between female/minority nominees and white male nominees.

The judicial nominating process presents a puzzle: While presidents appear eager to nominate women and minorities to the federal bench, the Senate seems reluctant to confirm them. Why should the factors that make presidents so eager to nominate female and minority judges not induce senators to be equally amenable to confirming them?

Certainly, over the last half-century, presidents have increasingly nominated women and minorities to the federal courts, each president opting for such nominations at a greater pace than his predecessor of the same party. Prior to Carter, only a handful of women and minorities served on the federal courts, but due to a concerted effort by the last five presidents, over 40% of active federal judges today are women or minorities (or both). Furthermore, anecdotal press accounts of the nomination process portray presidents as heavily valuing such nominations; Clinton is praised for living up to his pledge to make the judiciary look "more like America" (Biskupic 2000, 1A), and members of the Bush administration are shown to be "scour[ing] the directories of federal and state judges, and even the rosters of major law firms, in the quest for qualified minorities they might have overlooked" (Allen and Dewar 2003, A01).

Juxtaposing this view of the president is the media's characterization of the Senate as engaging in foot-dragging, partisan squabbling, and even outright discrimination. In reference to confirmation delays during

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Clinton's presidency, one reporter writes that despite the volume of female/minority nominations, these numbers "mask an appointment system that is so dominated by politics and paybacks that minority nominees are twice as likely to be rejected[1] as whites" (Biskupic 2000, 1A). The issue received new attention in Bush's first term during the high-profile filibusters of appellate court nominees Miguel Estrada, Janice Rogers Brown, and Priscilla Owens. Although the filibusters were purportedly "unprecedented," various tactics have been used in previous congresses to thwart nominations,[2] and the numbers attest to their disproportionate damage to female and minority nominees: their nominations take an average of 30 days (or 27%) longer, and they are more likely to fail; in the case of appellate nominations, 38.5% of female/minority nominees are unsuccessful compared to 29.3% of white males.[3]

These numbers suggest a disturbing picture—that female and minority nominees are getting "pulled over," so to speak, by the Senate and selected for special scrutiny for no other reason than their race or gender. However, this naïve "discrimination hypothesis" is unsatisfactory for several reasons: first, no rationale is provided for why presidents are so persistent in making female and minority nominations given that they run a higher risk of their nominations stalling or failing. Second, if racial or gender discrimination is to blame, we would expect to see an attenuation over time, but we observe just the opposite. Finally, neither Republican nor Democratic presidents have been immune to stalled nominations, and in some cases, vocal critics of racial and gender discrimination were active in thwarting their nominations. Nevertheless, the race and gender of judicial nominees appear to be salient factors that are consequential in confirmation battles, at least more consequential than stark spatial models of the nomination process allow.

I offer an alternative explanation that accounts for both the president's eagerness to nominate women and minorities and the Senate's alleged reluctance to confirm them. I propose that senators are rather disinclined to oppose female and minority nominations because they face political costs for doing so. However, knowing this, the president exploits the situation by nominating women and minorities closer to his ideal judicial philosophy but more extreme than senators would normally be willing to accept if the nominee were a white male. In modeling this strategic interaction, I demonstrate that there are circumstances where the president can benefit from choosing a female or minority nominee. When testing this model with appellate court data, I find that there is, indeed, evidence that Republican presidents pursue such a strategy and that this accounts for the delays and lack of success of female and minority nominations.

Existing Literature

The literature concerning nominations of female and minority judges can be divided into two research tracks, each of which comes to a different conclusion regarding the benefits to the president of pursuing such nominations. The first vein of research concerns the circumstances surrounding individual nomination opportunities, is mostly qualitative, and tends to focus on Supreme Court or high-profile appellate court nominations. A second vein consists of large-N quantitative studies concerned with explaining variation in confirmation duration and likelihood of success, mostly focused on the federal district and appellate courts.

In the first line of research, it is well accepted that Democratic presidents have made deliberate efforts to nominate women and minorities to the federal bench. Johnson, the first president to appoint an African American to the Supreme Court, proudly publicized his record of appointing minorities, at one point instructing an assistant to "[f]ind out how many Negro judges I have named. Have a planted question [at press conferences]—each time one is announced" (quoted in Goldman 1997, 185). Carter, though at first exhibiting a hands-off, merit-based approach to nominee selection by using a nominating commission to generate lists of qualified candidates, opted for women and minorities when presented the option by the nominating panels, even when more qualified white male nominees were available (Slotnick 1983), and in the face of a lackluster supply of female candidates, revised the executive order creating the commission to explicitly encourage panels to "make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees" (quoted in Goldman 1997, 239). Continuing this pattern, Clinton "expressly promised to outdo Carter's record number of minority and female appointments" (Scherer 2005, 83) and even exploited tough confirmation battles of controversial black nominees "to score points with black leaders by signaling them, that he like they believed Republicans to be racist" (Scherer 2005, 89). Whatever the potential pitfalls of female or minority nominations, Democratic presidents have been determined in their efforts to diversify the courts.

A less obvious—but still apparent—pattern in the qualitative literature is that Republican presidents have also pursued diversity, albeit as a subordinate goal to placing conservatives on the courts. Nixon, for example, relished the thought of nominating a "good, tough, conservative woman" to the Supreme Court because no senator would dare oppose a woman as long as she could "read and write" (quoted in Yalof 1999, 118).[4] Likewise, Reagan made good on his campaign promise to appoint the first female Supreme Court Justice, but in other nomination

opportunities, Reagan did not let diversity come at the expense of ideology. The response of his Assistant Attorney General for Legal Policy to criticisms of the administration's lack of diverse nominees reflects the conflicting nature of these goals:

> Nothing would please us more to find more qualified black and minority candidates in this process. . . . [T]here is just not even a respectably small pool of black lawyers of suitable age, in suitable career positions, with any kind of Republican background, with some affinity for the President's philosophy. (quoted in Goldman 1997, 335)

More recent Republican presidents, however, have had more success in exploiting the advantages of female and minority nominations, perhaps due to a deeper pool of potential nominees. Many studies of George H. W. Bush's nomination of Clarence Thomas credit the racial issue as decisive in securing Thomas's confirmation (e.g., Johnson and Roberts 2005; Rohde and Shepsle 2007). In fact, Overby et al. (1992) demonstrates that senators seeking reelection were increasingly more likely to vote for confirmation the greater the black population of their districts. The example of Senator Wyche Fowler is illustrative. A Democratic senator from Georgia, Fowler "faced a damned-if-you-do, damned-if-you-don't choice on the Thomas nomination," opted to vote with his black constituents in favor of the African American nominee, thus alienating previously supportive liberal interest groups, and subsequently lost reelection (Baxter 1991, 2). Indeed, Thomas's nomination provides a clear example of a situation in which making a minority nomination—rather than conflicting with president's primary ideological objective—actually enhances it. Pointing to the nominations of Clarence Thomas, Miguel Estrada, and Janice Rogers Brown, one scholar credits these picks as being successful even if they fail: "By nominating candidates from the demographic core of the opposing party, presidents stand to gain regardless of the outcome: opposing senators are forced either to incur political damage, or to support nominees they might otherwise reject on ideological grounds" (Law 2004, 512). Taken together, these observations suggest that presidents—regardless of party—do no worse by nominating female or minority judges, all else (e.g., ideology and qualifications) equal.

This is in contrast to the quantitative literature where the implicit assumption is that female and minority nominations are disadvantageous to the president. When race and gender are included as explanatory variables in studies of duration and confirmation success, the

hypothesized effect is always that minority and female nominations take longer and are more likely to fail. The empirical results, however, are mixed. While Scherer, Bartels, and Steigerwalt (2008) and Stratmann and Garner (2004) find no effect of gender and race on confirmation duration or success, Nixon and Goss (2001) show that both minority and female nominations take longer, and Bell (2002) discovers a race and gender effect only under divided government. However, Schraufnagel (2005) shows that minority—but not female—nominations take longer, and in Martinek, Kemper, and Van Winkle (2002) this holds for minority district court nominees only. On the other hand, Hartley (2001) finds an effect of gender, but not race, on confirmation duration. The only study to show a positive incentive for the president to make a female or minority nomination is Lott (2005), who finds that African American nominees are confirmed faster, but only for the appellate courts.

It is uncertain what we should conclude except that the results are highly contingent on the model's specification as well as the time span and types of courts included in the data set. Martinek, Kemper, and Van Winkle account for their lack of findings by positing a selection effect: "[I]t is quite likely that in selecting minority and female nominees, a president may settle on those individuals who are least likely to raise additional red flags in the Senate . . . [so our results] may underestimate the effect of these characteristics" (2002, 358). This conclusion seems plausible when considering the quantitative studies in isolation; however, it is at odds with the qualitative studies which paint presidents as seizing female and minority nominations as opportunities to push their fellow ideologues through the Senate. What is missing from the large-N studies is the role of the president as an active and strategic participant in the nomination process, anticipating the reaction of the particular Senate he faces. In developing and testing a model that explicitly incorporates the president's choice to nominate a female or minority nominee, I am able to offer a theoretical reason for the seemingly contradictory findings of past studies, helping to resolve an important debate in the literature about whether female and minority nominees are treated differently.

The Model

The model that I propose for the judicial nomination process is not unlike other spatial models of judge selection (e.g., Bailey and Chang 2003; Cameron, Cover, and Segal 1990; Segal, Cameron, and Cover 1992) that are built on the foundation of the Romer and Rosenthal (1978) setter model and the Krehbiel (1998) pivotal politics model. The main

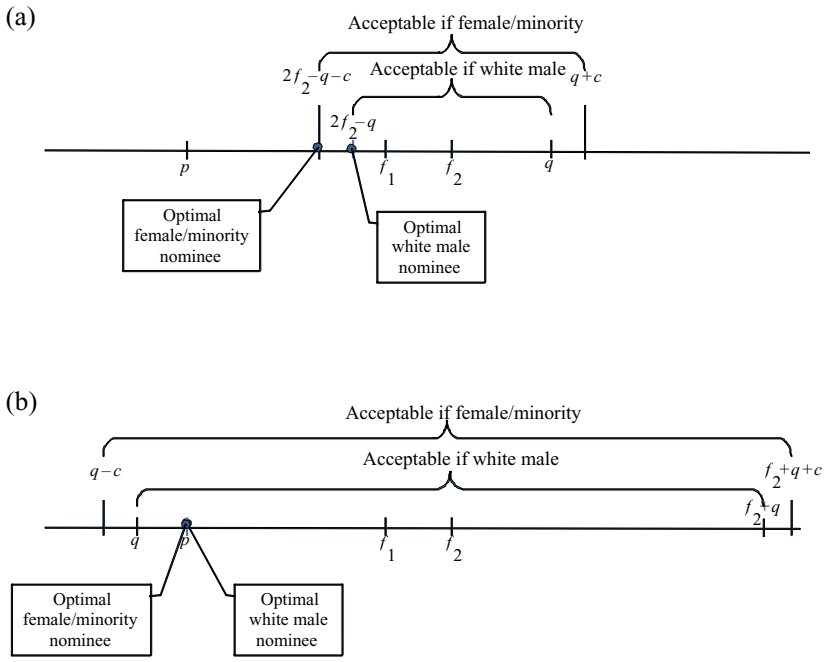
difference is that I incorporate costs for senators who oppose confirmation of female or minority nominees.[5]

In this model, let judicial ideology be represented by a unidimensional policy space. I assume that there are three players: the president and two pivotal senators. For ease of explanation, assume that these two senators are the filibuster pivots, that is, the 41st and 60th senators when arranged in order of judicial ideology.[6] Let the players have symmetric, single-peaked preferences and assume that the ideal points of the president, the left filibuster pivot and the right filibuster pivot are p, f_1, and f_2, respectively. Let the status quo ideology of the court be q.[7] The game begins with the president making a nomination—either a white male nominee or a female/minority nominee—which, if confirmed, would change the ideology of the court to y. Next, each filibuster pivot decides whether to approve or block the nomination. If neither filibuster pivot blocks the nomination, the nominee is confirmed and the president, the left filibuster pivot, and the right filibuster pivot receive utility $-|p-y|$, $-|f_1-y|$, and $-|f_2-y|$, respectively. If either of the filibuster pivots blocks the nominee, the nomination fails and the players receive payoffs $-|p-q|$, $-|f_1-q|-c$, and $-|f_2-q|-c$, respectively, where c is equal to zero if the nominee is a white male or if the pivots do not choose to block, and $c>0$ if the nominee is female/minority and a pivot chooses to block. Additionally, I assume that a filibuster pivot does not block if she is indifferent.

The game is solved by backwards induction. It is easy to see that a filibuster pivot blocks the nomination of a white male if q is closer to her ideal point than y, and she blocks the nomination of a woman or minority if the distance between q and her ideal point is greater than the distance between y and her ideal point plus c. Therefore, the optimal strategy for the president is to choose the y closest to his ideal point that makes the most distant filibuster pivot at least indifferent between approving and blocking. Depending on the location of the status quo, the president's optimal choice may be a female/minority nominee, or he may do equally well with a white male nominee or a female/minority nominee. Panel (a) of Figure 1 demonstrates the first situation—the president can clearly do better by making a female/minority nomination. However, panel (b) illustrates the second situation—the president can achieve his ideal court composition by making either a white male or female/minority nomination.

Figure 2 summarizes the outcomes the president can achieve if he chooses the optimal white male or female/minority nominee as the status quo court ideology (q) varies. The three panels correspond to the three possible configurations of ideal points of the president and the filibuster pivots: in panel (a), the president is to the left of both pivots; in panel (b),

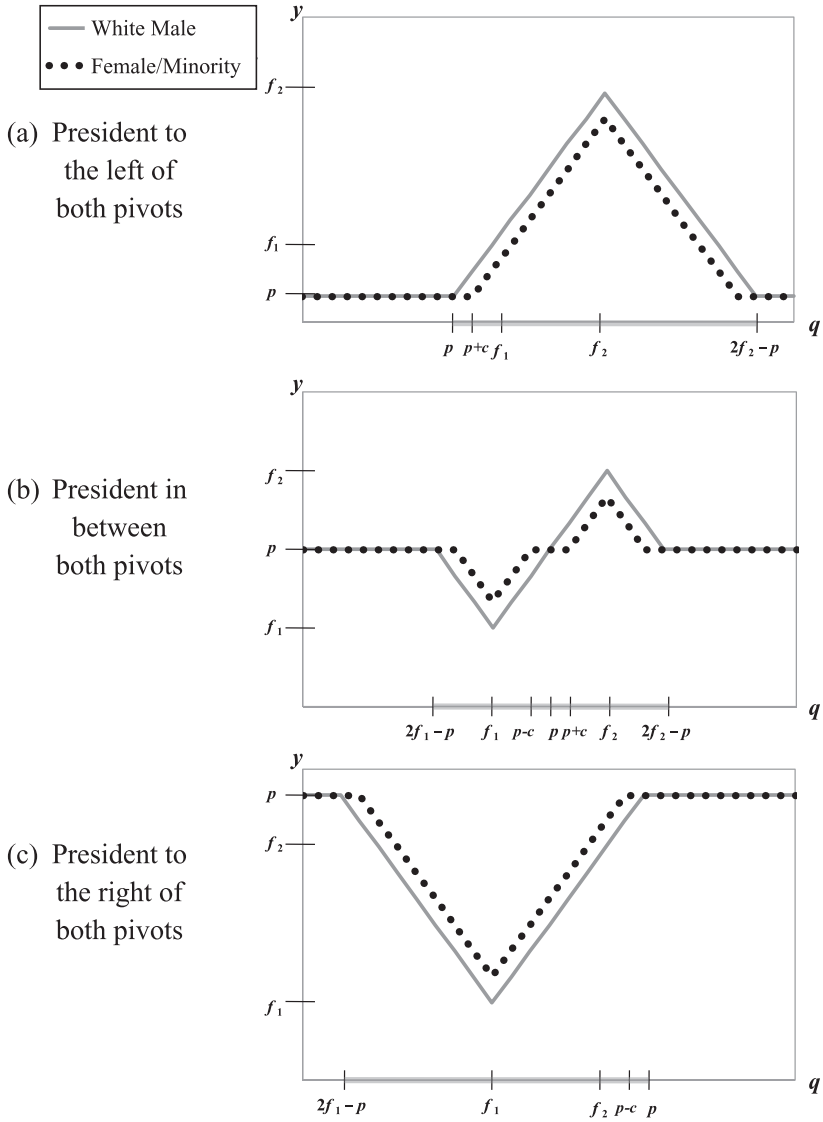
FIGURE 1
Examples of President's Optimal Choices



the president is in between the pivots; and in panel (c), he is to the right of both pivots. As for whether the president will choose a white male or a female/minority nominee, the choice depends on the location of the status quo court ideology. Making a female/minority nomination is strictly optimal for left presidents when q is in the interval $(p, 2f_2 - p)$, for moderate presidents when q is in $(2f_1 - p, 2f_2 - p)$, and for right presidents when q is in $(2f_1 - p, p)$. Otherwise, the president is indifferent between making a white male or female/minority nomination. These regions are highlighted with a gray bar on the horizontal axis of each graph.

Note that the range of q for which the president strictly prefers making a female/minority nomination is equal to two times the distance that is commonly referred to as the "gridlock interval"—that is, the interval between the leftmost and rightmost of the three pivotal players. Assuming that q is drawn from a uniform distribution,[8] I derive the following hypothesis: *The greater the gridlock interval, the more likely it is that the president makes a female/minority nomination*.

FIGURE 2
Outcomes of the Judicial Nomination Game



This hypothesis depends on two nontrivial assumptions. The first is that the president's utility only depends on the distance between his ideal point and the court's ideology, which means that he receives no additional utility from nominating a woman or minority unless it results in moving the court's ideology closer to his ideal point. Suppose instead that the president receives a separate, direct benefit from choosing a female/minority nominee. Then he would always be better off by making such a nomination, and I would expect no relationship between the size of the gridlock interval and the likelihood of a female or minority nomination. This is the null hypothesis of the prediction above.

A second important assumption is that the costs of opposing female and minority nominees are equal for both filibuster pivots. As it turns out, the prediction remains the same as long as the costs are positive for both pivots. If, however, one pivot's cost of opposing is zero, the likelihood of making a female or minority nomination depends on the size of the gridlock interval *and* the location of the president. This is because the president need only concern himself with pleasing the most distant pivot. Suppose we have the case in which the left filibuster pivot has $c > 0$ cost of opposing and the right filibuster pivot has $c = 0$. Then, a president with an ideal point to the left of both pivots is always indifferent between nominating a female/minority or white male, and a president whose ideal point is in between or to the right of both pivots strictly prefers to make a female/minority nomination when q is in the interval $(2f_1 - p, p)$.

A plausible interpretation of the literature suggests that it may actually be the case that only Democratic senators face these costs. The qualitative literature has hinted that Republican presidents may be particularly able to exploit senators' political costs due to the greater reliance of the Democratic Party on the support of women and minorities (e.g., Law 2004). On the other hand, Solowiej, Martinek, and Brunell (2005) argue that senators of both parties have incentives to acquiesce to female and minority nominations—Republicans want to cultivate their rapport with women and minorities, and Democrats want to maintain it. Therefore, I also test a modification of the above hypothesis: *The greater the gridlock interval, the more likely it is that the president makes a female/minority nomination only when the president is Republican*.

Data and Method

I test the above hypothesis using data on appellate court nominations from 1977 to 2004 from the Lower Federal Court Confirmation Database (Martinek 2004). The dependent variable *Female/minority nominee* takes a value of 1 if the nominee is a woman and/or minority

(African American, Hispanic, or Asian), and 0 otherwise.[9] To measure the main variable of interest, the *Gridlock interval*, I collected the first-dimension DW-NOMINATE scores for the president and the 41st and 60th senators (Poole 2007), using the difference between the highest and lowest of these three scores as a measure of gridlock.[10] To allow for the possibility that the gridlock interval has different effects for presidents of different parties, I include a dummy variable for *Democratic president* and an interaction term *Gridlock* × *Democratic president*.

When estimating this model, it is also necessary to control for the availability of female/minority nominees, since the theoretical model presumes that a potential female/minority nominee exists at every point along the judicial ideology space. This assumption may be especially problematic for nomination opportunities occurring early in the period under observation (before women and minorities started obtaining law degrees in significant numbers) and for appellate seats belonging to states with very small minority populations. To capture the availability of female/minority nominees, I use two control variables. Since the most common source of appellate nominees is the federal district bench, I include *Female/minority district court judges*, which is the number of female/minority judges nominated by a president of the same party serving full-time on the federal district bench of the state for which the appellate court vacancy occurs at the time of the nomination.[11] Second, to account for a wider pool of potential nominees, I include *Percent female/minority lawyers*, which is the percent of lawyers who are female and/or minority in the state for which the vacancy occurs in the year of the nomination.[12] Additionally, I control for other variables which may be related to the likelihood of making a female/minority nomination. First, if the outgoing judge is a woman or minority (*Replacing female/minority)*, presidents may be more inclined to fill the seat with another female or minority judge. However, if the number of women and minorities already serving on the court (*# females/minorities on court*) is high, it may be less costly for senators to oppose female and minority nominees. When the nomination opportunity is due to a new judgeship being created (*New seat*), presidents are not confined to the potential nominees from a single state but instead can choose from those of any state in the circuit, which may increase the likelihood of a female/minority nomination. Finally, I include other variables that have been posited to affect the duration and outcome of the confirmation process: *Presidential approval*, *Senatorial courtesy*,[13] *Presidential election year*, and *Ideologically balanced court*.[14] The first two, which are associated with shorter durations and a higher likelihood of confirmation success, give the president an upper hand in bargaining with the Senate, through his personal

popularity or the advocacy of a home-state senator, which may make the recourse of nominating women/minorities less of a necessity. The latter two, which are associated with more protracted nominations battles, may give additional motivation to make a female/minority nomination. Given the dichotomous nature of the dependent variable, I estimate a logit model.

Results

Results are presented in Table 1.[15] The first column shows the parameter estimates for the model which includes only *Gridlock interval* and, as control variables, *Female/minority district court judges* and *Percent female/minority lawyers*. Although the control variables have the predicted sign and one is significant, the main explanatory variable has the opposite sign of what was predicted.

However, when I allow the effect of the gridlock interval to vary for Democratic and Republican presidents, the results are quite different. Model 2 includes a dummy variable for *Democratic president*, as well as its interaction with the gridlock interval, *Gridlock* × *Democratic president*. Here we see that the larger the gridlock interval, the more likely it is that a Republican president opts for a female or minority nominee, but there is no effect for Democratic presidents.[16] In the third model, I add additional control variables which may be related to the likelihood of making a female or minority nomination. Although insignificant, their inclusion further strengthens the effect of the explanatory variables.[17]

Figure 3 displays the predicted probability that a president makes a female/minority nomination as the gridlock interval varies over its observed range (all other variables held constant at their medians). The likelihood that a Democratic president makes a female/minority nomination is just above 40%, regardless of the size of the gridlock interval. However, the effect of gridlock is dramatic for Republican presidents, who hardly ever opt for a female or minority nomination when the gridlock interval is small, but quickly catch up to the pace of their Democratic counterparts as this distance widens.

Two questions are worth addressing. First, does it matter if female and minority nominations are considered separately? I reestimated Model 3 using a multinomial logit model, and the results are substantively similar. Republican presidents are significantly more likely to nominate a white female or minority male than a white male as gridlock increases ($p = 0.028$ and $p = 0.088$, two-tailed test, respectively). Although positive, the effect for female minorities is not statistically

TABLE 1
Logit Estimation: Likelihood of a Female/Minority Nomination
(standard errors in parentheses)

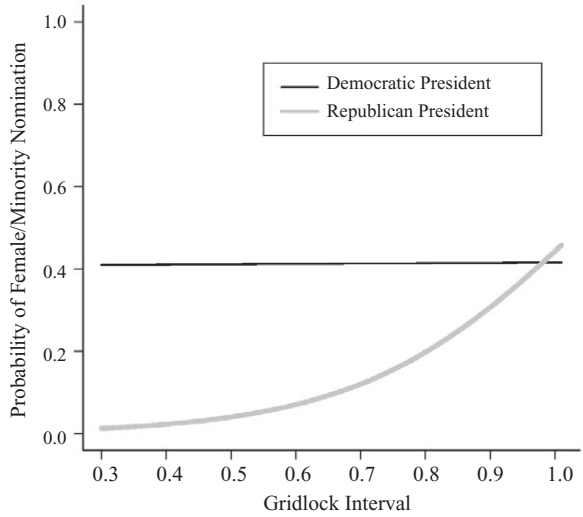
Variable	Model 1	Model 2	Model 3
Gridlock Interval	–2.25*	3.63*	5.86*
	(0.74)	(1.71)	(2.07)
Democratic President		4.54*	5.72*
		(1.52)	(1.71)
Gridlock × Democratic President		–4.37*	–5.83*
		(2.00)	(2.23)
Female/Minority District Court Judges	0.07	0.04	0.06
	(0.04)	(0.04)	(0.04)
Percent Female/Minority Lawyers	0.06*	0.05*	0.06*
	(0.02)	(0.02)	(0.02)
Replacing Female/Minority			0.25
			(0.39)
Number of Females/Minorities on Court			–0.11
			(0.06)
New Seat			0.51
			(0.36)
Presidential Approval			<0.01
			(0.01)
Senatorial Courtesy			0.04
			(0.29)
Presidential Election Year			0.46
			(0.37)
Ideologically Balanced Court			0.21
			(0.27)
Constant	–0.97	–5.56*	–7.50*
	(0.54)	(1.40)	(1.90)
N	361	361	361
Log Likelihood	–217.8	–205.4	–202.1
LR χ^2	28.91	53.66	60.27
Prob > χ^2	<0.001	<0.001	<0.001
Pseudo-R^2	0.062	0.116	0.130

Note: Includes all appellate court nominations 1977–2004, excluding 55 nominations to the Federal Circuit and the DC Circuit.
*$p < .05$ (two-tailed test).

significant. Democratic presidents' nomination decisions, as in the logit model, are not affected by the gridlock interval.

Second, is the gridlock interval simply serving as a proxy for divided government? To determine whether this is the case, I reestimated Models 1–3 in Table 1, replacing the *Gridlock interval* with a dummy variable for *Divided government*. The effects of *Divided government* and

FIGURE 3
Probability of a Female or Minority Nomination (Model 3)



Divided government × *Democratic president* are statistically and substantively insignificant in every estimation. Furthermore, when adding *Divided government* to Model 3, the effect of the *Gridlock interval* is slightly strengthened while *Divided government* remains insignificant. Thus, the empirical results support the hypothesis that Republican presidents are more likely to nominate women and minorities when the gridlock interval is large.

Revisiting the Puzzle

The original puzzle was twofold: Why do presidents eagerly pursue female and minority nominations? And why do senators take longer to confirm them and are less likely to confirm them? The theoretical model and empirical analysis have shed light on the president's behavior. However, the model cannot directly answer the second question because it has nothing to say about duration, and moreover, it predicts that the president always chooses a nominee who makes the senators better off or indifferent, so no nominations fail. Therefore, any explanation I provide for confirmation delays and failures must come from outside of the model. I do this by reference to the gridlock interval.

When the gridlock interval is wide, the status quo composition of the court is more likely to fall in the gridlock interval, that is, the ideological space between the president and the furthest pivotal player. When the status quo is between the players, the only nominee acceptable to both players is a nominee who preserves the status quo ideological composition of the court. Any movement to the left makes the rightmost pivotal player worse off and vice versa. Several reasons are given in the literature for why confirmations should take longer when the status quo is in the gridlock interval. First, when the status quo is outside this interval, both players can gain from the confirmation of a new nominee, and so have a positive incentive to act quickly, as opposed to when they are indifferent between the new and old court composition (Shipan and Shannon 2003). Second, since the ideology of judicial nominees, unlike policies, cannot be chosen with precision, finding a judge who perfectly preserves the existing court ideology is extremely difficult, and senators may take more time to evaluate the nominee's ideology (Primo, Binder, and Maltzman 2008). Finally, if senators suspect that the nominee would result in a movement away from their preferred court ideology[18] (either due to the president's inability to choose a nominee's ideology with precision, or due to the senators' uncertainty about the nominee's ideology), they may delay confirmation to give opposition time to materialize (Krutz, Fleisher, and Bond 1998) or in hopes that a scandal might surface and derail the nomination (Cameron and Segal 1998).[19] Given these reasons for confirmation delay, I should also expect that confirmation success will be less likely when the gridlock interval is wide, since nominations are more likely to be rejected, withdrawn by the president, or unacted upon by the close of the congressional session.

Confirmation Duration

The existing literature on judicial nominations has sometimes found that race and gender are important determinants of confirmation duration. Based on the intuition stated in the previous section, however, I hypothesize that female and minority nominations do not take longer to confirm when controlling for the size of the gridlock interval. I test this hypothesis using the same appellate court data and a Cox proportional hazards model. The dependent variable *Duration* is the number of days between the nomination by the president and final action by the Senate, excluding recesses. I treat as censored data those nominations that are withdrawn by the president or those that are unacted upon by the end of the congressional session.[20]

The independent variables of interest have been described above: *Female/minority nominee*, *Gridlock interval*, *Democratic president*, and *Gridlock × Democratic president*. In a Cox regression, a coefficient with a positive sign signifies that the variable is associated with shorter durations, while negative signs indicate longer duration. I expect that *Female/minority nominee* will have a negative sign when I do not control for gridlock, but it will be insignificant when I do. I also expect that *Gridlock interval* will be negatively signed, but that *Gridlock × Democratic president* will be positive, since in the previous empirical result, I found that Republican presidents' propensity to make female and minority nominations is more strongly affected by the size of the gridlock interval than Democratic presidents'.

Following the previous literature, I also include control variables that may be associated with duration. The American Bar Association rating (*ABA rating*) of the nominee (which takes integer values between 1 and 6, with 1 signifying "not qualified" and 6 signifying "well qualified") should have a positive sign, since more qualified candidates should take less time to confirm. Also, nominees who previously served on the federal district courts (*Previously district judge*) should take less time because they have already been confirmed by the Senate. It has also been hypothesized that nominations are quicker when the president's approval ratings are high (*Presidential approval*), and when at least one of the nominee's home-state senators is of the same party as the president (*Senatorial courtesy*). On the other hand, the number of district and circuit court nominations being considered by the Senate at the time of the nomination (*# pending nominations*) should be associated with longer durations and therefore should have a negative sign, and nominations occurring during the last year of a presidential term (*Presidential election year*) may also take longer. Concern about upsetting the partisan balance on the court may also cause delay, so I expect a nomination to an *Ideologically balanced court* to take longer. Additionally, the entry of interest groups into confirmation politics beginning in 1985 may have also played a part in creating longer queues for nominees, so I expect variables indicating the *Post-1984* period and *Interest group opposition* to be negatively signed.[21]

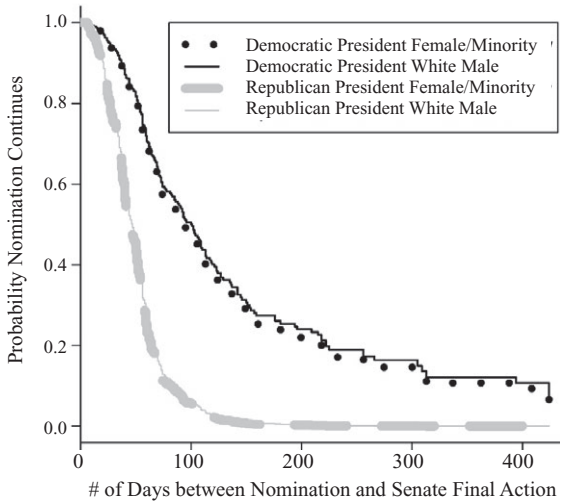
Results are presented in the first two columns of Table 2.[22] The results of the first regression (Model 4) are not surprising, given the previous findings in the literature. Without controlling for the *Gridlock interval*, female and minority nominations do in fact take significantly longer. However, the next regression (Model 5) strongly supports the hypothesis that—all else equal—female and minority nominations do not take longer. Once I include *Gridlock interval*, *Democratic president*, and *Gridlock × Democratic president*, the coefficient for *Female/*

TABLE 2
Cox Proportional Hazards Estimation of Confirmation Duration and Logit Estimation of Confirmation Success
(standard errors in parentheses)

	Model 4	Model 5	Model 6	Model 7
Variable	Confirmation Duration	Confirmation Duration	Prob. of Confirmation	Prob. of Confirmation
Minority/Female Nominee	–0.37*	0.06	–0.52*	–0.16
	(0.13)	(0.14)	(0.26)	(0.29)
Gridlock Interval		–6.70*		–9.68*
		(1.28)		(2.22)
Democratic President		–3.64*		–2.40
		(0.98)		(2.41)
Gridlock × Democratic President		3.21*		1.55
		(1.34)		(3.11)
ABA Rating	0.09*	0.15*	0.16	0.22*
	(0.04)	(0.04)	(0.09)	(0.09)
Previously District Judge	0.17	–0.16	0.51	0.28
	(0.13)	(0.14)	(0.29)	(0.32)
Presidential Approval	–0.01	–0.01	–0.03	–0.01
	(0.01)	(0.01)	(0.02)	(0.02)
Number of Pending Nominations	–0.03*	–0.02*	–0.02*	<0.01
	(0.01)	(0.01)	(0.01)	(0.01)
Senatorial Courtesy	0.09	0.11	0.53*	0.57*
	(0.13)	(0.14)	(0.26)	(0.28)
Presidential Election Year	–0.23	–0.63*	–1.14*	–1.86*
	(0.20)	(0.21)	(0.37)	(0.45)
Ideologically Balanced Court	–0.16	–0.18	–0.39	–0.40
	(0.14)	(0.14)	(0.28)	(0.30)
Post-1984	–0.96*	–0.52*	–1.77*	–0.23
	(0.18)	(0.24)	(0.66)	(0.81)
Interest Group Opposition	–1.53*	–1.46*	–1.77*	–1.42*
	(0.22)	(0.23)	(0.30)	(0.35)
Constant			4.24*	8.84*
			(1.06)	(1.90)
N	408	408	408	408
Log Likelihood	–1386	–1350	–192.4	–175.1
LR χ^2			121.21	155.81
Prob > χ^2			<0.001	<0.001
Pseudo-R^2	0.435	0.522	0.240	0.308

Note: Includes all appellate court nominations 1977–2004, excluding eight for whom ABA ratings are not available.
*$p < .05$ (two-tailed test).

FIGURE 4
Confirmation Duration: Probability of Nomination Continuing (Model 5)

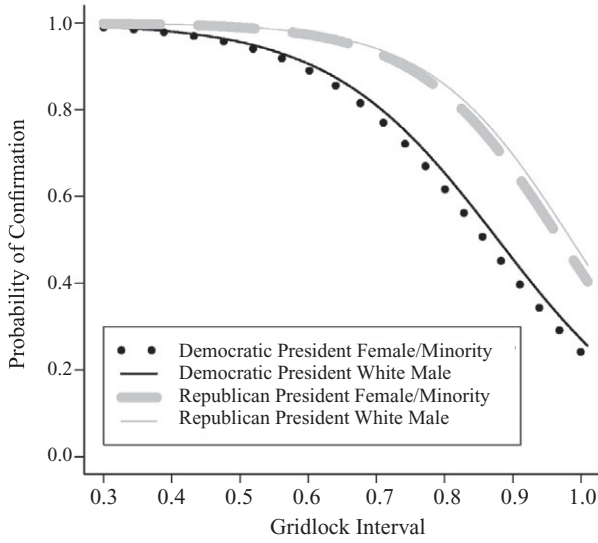


minority nominee shrinks to less than one-sixth its size, changes sign, and loses significance. Meanwhile, the effect of gridlock is strong, although, as expected, its effect is less dramatic for Democratic presidents. The predicted probabilities displayed in Figure 4 show no effect whatsoever for gender and race on duration; holding the gridlock interval constant, female/minority Republican nominees have identical durations to white male Republican nominees, and female/minority Democratic nominees have identical durations to white male Democratic nominees.

Confirmation Success

In addition to longer durations, differing rates of confirmation success between female/minority nominees and white male nominees are a concern. As before, I hypothesize that controlling for gridlock, female and minority nominees are just as likely to be confirmed as white male nominees. I test this hypothesis using the same data as in the previous estimations. The dependent variable, *Confirmed*, takes a value of 1 if the nomination is confirmed during the congressional session in which the nomination is made, and zero otherwise. The independent variables and their predicted signs are all the same as in the analysis of confirmation duration.

FIGURE 5
Probability of Confirmation Success (Model 7)



Results are presented in the last two columns of Table 2. In Model 6, which does not control for gridlock, I find that female and minority nominees are significantly less likely to be confirmed than white male nominees. Predicted probabilities of success are 77.3% for female/minority nominees and 85.1% for white male nominees.

When I add the additional variables *Gridlock interval*, *Democratic president*, and *Gridlock* × *Democratic president* in Model 7, the coefficient of *Female/minority nominee* shrinks to less than a third of its original size and loses statistical significance. The effect of *Gridlock interval* is large and negative, but, as before, its effect is slightly dampened for Democratic presidents. Figure 5 presents predicted probabilities that a nominee is confirmed as the gridlock interval varies. Again I observe almost no differences between female/minority nominees and white male nominees chosen by presidents of the same party.

The results of these two analyses suggest that presidents do not face any disincentives to choosing minority and female nominees. In fact, such nominees have nearly identical lengths of confirmation and rates of success as white male nominees chosen under the same circumstances. The reason that a simple comparison of the raw numbers reveals

differences is that the circumstances are in fact different—female and minority nominations are more likely when the gridlock interval is large.

Discussion

Before concluding, it is worthwhile to consider possible reasons for the divergence in behavior of Republican and Democratic presidents, as well as some normative implications this study has brought to light. The behavior of Republican presidents conforms very closely to the prediction of the model: when gridlock is low, Republican presidents see no need to make female or minority nominations, but they increasingly embrace such nominations as gridlock becomes more severe. Democratic presidents, on the other hand, regularly make female and minority nominations even when gridlock is low. There are several explanations consistent with the theoretical model for why Democratic presidents appear to be less affected by the size of the gridlock interval than Republicans. First, Democratic presidents may frequently choose female and minority nominations even when they can achieve the same court ideology by nominating a white male. The theoretical model only illuminates how the president acts when the status quo court ideology is in the interval for which a female or minority nomination is strictly preferred, not how he will act when he can do equally well by nominating a white male. Second, Democratic presidents may receive some benefit from making female or minority nominations beyond the benefit of getting their preferred ideological makeup of the court, in which case female or minority nominations would be beneficial regardless of the size of the gridlock interval. Finally, it may be that the cost of blocking the confirmation of female and minority nominees differs across senators, with it being more politically costly for left-of-center senators than right-of-center senators to block female and minority nominees—in other words, Republican presidents would be advantaged by putting Democratic senators on the spot, but not vice versa. More than likely, a combination of these factors results in Democratic presidents being unaffected by the size of the gridlock interval.

If we believe that presidents do make female and minority nominations strategically as in this model, then at least some of the vast increase in the representation of women and minorities in the courts can be attributed to the president's ability to exploit senators' costs to opposing female and minority nominees. We thus have a somewhat counterintuitive result that more gridlock helps to bring about what many people would consider a normatively good thing: a diversified federal bench. Also encouraging normatively is that the results tend to support the claim

that female and minority nominees are not being unfairly singled out for greater scrutiny because of their gender or race. Rather, delays and higher failure rates are due to more severe gridlock. Instead of Martinek, Kemper, and Van Winkle's (2002) fear that presidents would have to choose more moderate female/minority nominees due to the hostility of the Senate, the reverse implication—that delays in the Senate are related to the president's use of female and minority nominations to form a court closer to his ideal point—receives some support here.

Yet we should be skeptical of how beneficial such a nomination game is. For the nominees involved, the length of the confirmation process and the uncertainty of its outcome require them to put their lives and careers on hold. Illustratively, Thomas Sowell, a conservative African American economist whose election-year nomination by Ford to the Federal Trade Commission was stalled by Senate Democrats, describes his experience bitterly: "[P]olitically, my nomination was a heads-I-win-tails-you-lose situation for the administration. Either they would get someone with the kind of philosophy they wanted on the Federal Trade Commission or they would have a political issue, with a qualified black man being rejected by the Democrats. I was the only one who could lose" (2000, 258). The delay and additional scrutiny that senators invoke has already had the effect of deterring potential nominees from accepting presidential nominations to the Supreme Court.[23] The result is a reduction in the quality of the nominee pool, as well as a backlogged court system, as filling vacancies becomes more difficult. Finally, given our empirical results which indicate that Republican presidents are more likely to make female and minority nominations strategically, we can question whether the increase in the *descriptive* representation of women and minorities on the federal bench has resulted in greater *substantive* representation—that is, are female and minority citizens really served by having more female and minority judges on the courts, even if they are nominated by Republicans?[24] Ironically, in pushing for greater descriptive representation in the courts, minority and female activists may be unwittingly tying the hands of their ideological allies in the Senate, to the detriment of their own substantive interests.

Conclusion

The goal of this article was to reconcile seemingly contrary observations: that presidents seem eager to nominate minorities and women, but that senators appear reluctant to confirm them. Furthermore, my analysis has also made sense of a related puzzle concerning the divide between the qualitative and quantitative literature on judicial

nominations—while qualitative studies give the impression that female and minority nominations are advantageous to the president, the quantitative literature focuses on the additional hurdles female and minority nominees face. My results suggest that both discrepancies can be understood by a model incorporating the president's advantage in being able to choose a nominee of a particular race or gender. In doing so, it becomes clear that although senators may be favorably disposed to approving female and minority nominees, they may yet be disgruntled by those the president selects. By incorporating political costs for opposing female and minority nominees, I derived the hypothesis that female and minority nominations are more likely as the size of the gridlock interval increases. Empirical results were supportive for Republican presidents, and subsequent analyses showed that the greater likelihood of female/minority nominees to be chosen at times of more intense gridlock accounted for the longer durations and lack of success of minority and female nominees. By repositioning the spotlight on the president rather than the Senate, I show that race and gender shape outcomes in a different way than the existing literature recognizes.

The model and statistical tests presented here can also weigh in on another important research question in the interbranch bargaining literature, that is, whether the president or the legislature has a superior bargaining position (Chang 2001; Deering 1987; Hammond and Hill 1993; McCarty and Razaghian 1999; Moraski and Shipan 1999; Nixon 2004). The result of my model shows that the president's ability to choose a nominee of a particular race or gender—an advantage inextricably tied to his role as first mover in the judicial nomination process—gives him an additional bargaining advantage which is over and above the advantages he gains from being able to choose the timing of the nomination (Massie, Hansford, and Songer 2004) or to "go public" on behalf of a nominee (Holmes 2007).

There are several promising directions for future research suggested by this analysis. First is to check the generalizability of the results by examining other nomination opportunities, the most obvious of which is nominations to the federal district courts. Although I think the same strategic considerations are at play, both Giles, Hettinger, and Peppers (2001) and Primo, Binder, and Maltzman (2008) agree that home-state senators play a larger role in selecting district court nominees, a factor which could obfuscate any effects. A second step is to improve the model by explicitly incorporating the public as a player in the game, as in Groseclose and McCarty's (2001) model of the "politics of blame." Their model considers the case of divided government in which Congress tries to make the president appear extreme to the public by sending him a bill

which they know he will veto. In the confirmation game, the order of the roles is reversed—it is the president who moves first, proposing a female or minority nomination to the Senate in hopes that the Senate will either confirm the nominee or appear prejudiced to the public by blocking the nomination. A model such as this could account for nomination failures, which occur quite frequently but which cannot occur in equilibrium in my model, just as Groseclose and McCarty's model allows for vetoes to occur in equilibrium.

This analysis has demonstrated the fruitfulness of incorporating salient personal characteristics of judges into a strategic spatial model of interbranch bargaining over judicial nominees. While a focus on simple spatial models has in general benefitted the study of presidential appointments, this article has shown that valence characteristics, such as race and gender, merit further exploration.

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APPENDIX
Geographical Distribution of Female and/or Minority Nominations by Presidential Term

	Carter	Reagan–1	Reagan–2	Bush HW	Clinton–1	Clinton–2	Bush W–1	All Presidents
1st Circuit (ME, MA, NH, PR, RI)	0%	100%	—	0%	100%	0%	0%	25%
	(2)	(1)	(0)	(4)	(2)	(1)	(2)	(12)
2d Circuit (CT, NY, VT)	33%	25%	0%	0%	25%	40%	60%	29%
	(3)	(4)	(4)	(3)	(4)	(5)	(5)	(28)
3d Circuit (DE, NJ, PA)	100%	0%	14%	40%	50%	43%	0%	32%
	(2)	(1)	(7)	(5)	(2)	(7)	(4)	(28)
4th Circuit (MD, NC, SC, VA, WV)	0%	0%	0%	33%	50%	67%	44%	35%
	(4)	(4)	(1)	(6)	(4)	(6)	(9)	(34)
5th Circuit (LA, MS, TX)	38%	17%	20%	20%	40%	67%	60%	38%
	(16)	(6)	(5)	(5)	(5)	(3)	(10)	(50)
6th Circuit (KY, MI, OH, TN)	50%	0%	0%	20%	100%	67%	38%	40%
	(6)	(4)	(6)	(5)	(5)	(6)	(16)	(48)
7th Circuit (IL, IN, WI)	0%	0%	0%	100%	50%	100%	100%	25%
	(2)	(5)	(4)	(1)	(2)	(1)	(1)	(16)
8th Circuit (AR, IA, MN, MO, NE, ND, SD)	33%	0%	0%	0%	100%	33%	25%	21%
	(3)	(3)	(3)	(3)	(1)	(3)	(8)	(24)
9th Circuit (AK, AZ, CA, HI, ID, MT, NV, OR, WA)	47%	25%	18%	50%	50%	50%	50%	43%
	(15)	(4)	(11)	(4)	(6)	(18)	(10)	(68)
10th Circuit (CO, KS, NM, OK, UT, WY)	33%	—	17%	0%	50%	50%	0%	19%
	(3)	(0)	(6)	(2)	(4)	(2)	(9)	(26)
11th Circuit (AL, FL, GA)	—	—	0%	29%	50%	33%	0%	24%
	(0)	(0)	(2)	(7)	(2)	(3)	(3)	(17)
DC Circuit	75%	0%	0%	50%	33%	33%	38%	30%
	(4)	(5)	(6)	(4)	(3)	(3)	(8)	(33)
Federal Circuit	—	20%	25%	0%	50%	25%	100%	27%
	(0)	(5)	(4)	(5)	(2)	(4)	(2)	(22)
All Circuits	40%	12%	10%	24%	55%	48%	37%	33%
	(60)	(42)	(59)	(54)	(42)	(62)	(87)	(406)

Note: Percent of nominees who are female and/or minority. Total number of nominations in parentheses. Until the 11th Circuit was created in 1981, the 5th Circuit also included Alabama, Florida, and Georgia.

NOTES

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1. Here, "rejection" refers to an unsuccessful confirmation attempt—usually due to the session ending without the Senate taking action—not necessarily defeat by a vote of the Senate.

2. Judicial nominees have been filibustered as far back as 1968, and moreover, have long been victims of other stall tactics, such as blue-slipping, anonymous holds, and denial of hearings (Ornstein 2005).

3. Calculations cover the period 1977–2004 and were made by the author using the Lower Federal Court Confirmation Database (Martinek 2004).

4. Nixon intended to nominate California Appeals Court Judge Mildred Lillie to the Supreme Court, but nixed the plan after the ABA deemed her "unqualified" (Yalof 1999, 123).

5. Bailey and Chang's (2003) model of Supreme Court nominations similarly includes costs for opposing a nominee who would be the only African American, female, or Jewish justice. These costs could take many forms, such as the loss of reputation due to allegations of racism, sexism, or hypocrisy, the loss of political support from interest groups, donors, or key voting constituencies concerned with diversity, or the loss of resources due to the need to compensate for a lack of enthusiasm for female/minority judges by investing in other credit-claiming vehicles.

6. For the consideration of other numbers or types of pivotal senators, see note 10.

7. On appellate courts, where judges sit on three-judge panels drawn from the full circuit, the status quo ideology can be thought of as the average of the median judges' ideology across all possible three-judge panels of currently serving judges.

8. The assumption that status quo points are uniformly distributed is necessary for making the hypothesis empirically testable, and is therefore common when testing theories of gridlock. Furthermore, this assumption is less problematic for studies of judicial nominations than legislative policies, since status quos can only be changed upon the retirement of a judge or the addition of a seat (unlike in legislatures where any policy could plausibly be addressed at any time). For a similar assumption and justification, see Primo, Binder, and Maltzman (2008).

9. The appendix provides a table of the geographical distribution of female and minority nominations by presidential term.

10. To consider other potential pivotal players, I also collected DW-NOMINATE scores for home-state senators, floor medians, Judiciary Committee medians and majority party medians. Following Primo, Binder, and Maltzman (2008), I estimated the model 16 times using different sets of pivotal players (those mentioned above as well as all possible permutations). A comparison of BIC scores shows that the top three models in terms of fit are the model incorporating the Judiciary Committee and floor medians, the model incorporating the Judiciary Committee median and the filibuster pivots, and the

model incorporating the filibuster pivots (in that order). Since the differences in BIC scores among these three are negligible, I choose to report the results of the filibuster pivot model, given the emphasis on filibuster pivots in the literature on court appointments (e.g., Johnson and Roberts 2005; Rohde and Shepsle 2007). These results are available upon request, as are the results of all other models mentioned but not shown in this article.

11. The plurality of appellate court nominees have come from this pool (35.5% of women/minorities and 35.0% of white males). For a similar approach, see Gryski, Zuk, and Barrow (1994), who proxy the eligibility pool for minority district court judges with whether any minorities are serving on the highest state court.

12. These data were collected from the 1970–2000 decennial censuses.

13. *Senatorial courtesy*, which refers to the informal practice of giving senators the ability to "blue-slip" (veto) nominees from their home-states, takes the value of 1 if at least one of the nominee's home-state senators is of the president's party.

14. *Ideologically balanced court* is equal to 1 if between 40–60% of judges in the circuit were appointed by Democratic presidents, as in Scherer, Bartels, and Steigerwalt (2008).

15. These results exclude nominations to the Federal and D.C. Circuit Courts because there is no relevant state pool of potential nominees. I also estimate the model using national counts of female/minority district court judges and lawyers for these two circuits, achieving similar results.

16. When *Democratic president* is equal to 1, determining the size of the effect and standard error for the *Gridlock interval* requires additional calculation due to the interaction variable. The effects (standard errors) of the gridlock interval under Democratic presidents for Models 2 and 3 are −0.75 (1.21) and 0.03 (1.45), respectively; in both cases, it is insignificant.

17. It should be noted that there is a time trend in the data, such that including a linear time trend or presidential fixed effects causes the effect of the *Gridlock interval* to become insignificant. The time trend is also insignificant, suggesting that multicollinearity may be an issue—the correlation between time and *Gridlock* is 0.845—while presidential fixed effects are jointly significant. I have tried to control for factors that also have a positive time trend, in particular, the female/minority nominee pool, but I leave it to the reader to judge whether the omission of time from the reported analyses is a problem.

18. In the case of female/minority nominations, the pivotal senator is concerned with movement away from her ideal judicial ideology $+c$ if she is anchoring the left side of the gridlock interval or her ideal judicial ideology $-c$ if she is anchoring the right side of the gridlock interval.

19. It may seem strange—even in this off-equilibrium path—that a senator would try to cause the confirmation of a white male nominee to fail, given that the president could then nominate a female/minority judge who would make the senator worse off. However, the fact that the president nominated a white male suggests that there were no female/minority nominees in the pool, and in any case, it may be possible to delay the nomination until a new president takes office.

20. Censoring is assumed to be independent of duration, which is problematic if nominations are withdrawn *because* confirmation is expected to be lengthy. However, of

the 408 nominations, only 14 were withdrawn—of these only four were due to political opposition.

21. I use Scherer, Bartels, and Steigerwalt's (2008) measure of *Interest group opposition*, which is equal to 1 if at least two national interest groups publicly oppose a nomination. Their data collection begins in 1985, the time when interest groups began to take an active role in confirmation battles, so I code all pre-1985 nominations as being unopposed by interest groups. Estimating the model on post-1984 observations only produces similar results.

22. Estimating Cox proportional hazards models in the presence of nonproportionality can result in biased estimates and incorrect standard errors. Following Box-Steffensmeier and Zorn's (2001), I test for nonproportionality using Grambsch and Therneau residual-based tests, and estimate Models 4 and 5 again using log-time interactions for variables that failed the nonproportionality test. The same conclusions hold.

23. For example, Sandra Day O'Connor's vacancy was offered to Miguel Estrada (a Hispanic appellate attorney) and Maura Corrigan (a female state supreme court judge); both turned it down because they "didn't want to go through the [confirmation] process" (Greenburg 2007, 198).

24. See Boyd, Epstein, and Martin (2010) and Chew and Kelley (2009) for summaries of the literatures exploring the relationship between judicial decisions and a judge's race or gender.

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