

The Curious Case of the Migrating Seat:
Understanding the Role of Senate Norms in Confirming
Judges on the U.S. Courts of Appeals*

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Abstract

The confirmation of lower federal court judges heavily depends on the application of two Senate norms: Senatorial Courtesy and the Blue Slip. But prior work largely ignores State Representation—a norm whereby each U.S. Courts of Appeals judgeship is assigned to a particular state in the Circuit. Given this norm, senators expect that the President will nominate someone from the same state as the departing circuit judge. However, presidents fail to follow this norm nearly 25 percent of the time. This research analyzes how state representation—specifically the president’s decision to defy the norm—influences the confirmation process. We argue that ignoring state representation norms increases the level of conflict over a nominee. As a result, both previous and new home-state senators will have some sway over their colleagues. Our results reveal several implications of violating the norm of state representation. The (1) probability of the Senate confirming a nominee and (2) time to final action on a nomination are decreasing in the ideological distance between the previous home state senators and the president. Additionally, if the new home state senators reveal public opposition to a nomination, both (a) the likelihood of rejection and (b) time to final action increase.

Introduction

Scholars have long sought to understand the politics of the nomination and confirmation of federal judges (e.g. Binder & Maltzman 2009; Epstein & Segal 2005; Goldman 1967). The process seems straightforward: the President nominates individuals, and those nominees are confirmed “by and with the advice and consent of the Senate.” In reality, a variety of Senate norms, historical developments in the federal judiciary, and changes in the broader political arena make it more complicated than this Constitutional language implies.

We know, for example, that Presidents, when making nominations, bargain with pivotal senators (Primo, Binder, & Maltzman 2008) and appeal to the public for popular support (T. R. Johnson & Roberts 2004). Senators, in turn, consider nominee qualifications (Martinek, Kemper, & Van Winkle 2002), partisan and ideological forces, and the preferences of certain home-state Senators when deciding whether to confirm (Binder & Maltzman 2002). It is also well established that certain Senate norms, such as Senatorial Courtesy, play an essential role, especially in district court appointments. What is less well understood, however, is how these norms relate to filling vacancies on the U.S. Courts of Appeals—the functional court of last resort for tens of thousands of federal litigants. The goal of this paper is to offer a better comprehension of how Senate norms affect the confirmation of Courts of Appeals judges.

Several Senate norms structure the nomination and confirmation process for lower federal courts. First, Senatorial Courtesy is a collegial custom, dating back to 1789, that encourages senators to defer to the preferences of a home-state colleague who supports or opposes a particular federal nominee. Courtesy also gives effect to presidential consultation, whereby presidents confer with senators from their party regarding vacancies in their home states. The bargaining process between the White House and home-state senators is well-documented in scholarship studying U.S. District Court appointments, with presidents typically deferring to the recommendations of home state senators from their party (e.g. Massie, Hansford, & Songer 2004; Giles, Hettinger, & Peppers 2001; S. W. Johnson

& Songer 2002) Indeed, Goldman(Goldman 1997, 79) write that senators see it as “...their birthright to name federal district court judges in their states”.

Second, the Blue Slip originated around 1917 and entails the Senate Judiciary Committee Chair asking home state senators whether they support a nominee to fill a vacancy in her/his state. While courtesy applies only to senators of the president’s party, the Blue Slip created a consultative role for senators not of the president’s party. “Senators who are not of the President’s party, by contrast, ordinarily would not be expected to invoke senatorial courtesy to oppose a circuit court nominee from their state. They, however, can take advantage of the Senate Judiciary Committee’s blue slip procedure to bolster their opposition” (Rutkus 2013, 26). As a result, senators of the president’s party have the “primary” role in suggesting nominees for district court judgeships in their state, and opposite party senators also now play a role, though it is a “much lesser” one (Rutkus 2013, 12). The Blue Slip therefore granted home state senators, of either party, a “veto over any home state judicial nomination to which they were opposed” (Rutkus 2013, 10).

The prior two norms require the Senate and president to know who the “home state” senators are for a given judicial vacancy. Since district courts lie geographically within a single state, it is clear who those senators are. Courts of Appeals, though, span multiple states, with the smallest, the Second Circuit, including three states and the largest, the Ninth Circuit, covering 11 states and territories. How then do political elites know who the home state Senators are for a given judicial vacancy?

A third norm—state representation—determines who the home-state senators are for each judgeship on the Courts of Appeals.¹ The Executive Branch assigns each Courts of Appeals judgeship to a given state within the geographic region of a Circuit. When a seat

¹According to an anonymized report from the Congressional Research Service: “ “State representation”—what one scholar describes as particular judicial seats on the circuit courts being affiliated with particular states—is customary for many seats, but it is not a formal requirement. [footnote omitted] A 1997 law [footnote omitted] requires that every state within a circuit be represented among appeals court judges by a resident of that state. In addition, except for the D.C. and Federal Circuits, appeals nominees must “reside” within the circuit at the time of appointment and “thereafter while in active service.” [footnote omitted] Otherwise, the President is not required by statute to nominate appeals judges from particular states.” (Redacted 2011, 1). See: <https://crsreports.congress.gov/RS22510>.

becomes vacant on a Court of Appeals, the tradition is for the president to nominate someone residing in the same state as the departing judge (Rutkus 2010, 23-24). As Goldman notes, Senators have “...a sense of entitlement to representation on the circuit courts” (Goldman 1997, 16), which “...places a constraint upon the President’s men in their efforts to find a suitable candidate for nomination” (Goldman 1967, 202).

However, when a vacancy arises on the Courts of Appeals, the president still has discretion. As such, he sometimes changes which state is represented by a given judgeship. In other words, the president will sometimes nominate someone from a different state than the home state of the judge who vacated the seat. According to the Congressional Research Service, from 1891 through 2009 there were 455 vacancies on the Courts of Appeals, and the President altered the state being represented in 23% of them (Garrett & Scott 2007; Redacted 2011, 4). The effect of such a change is to transfer the prerogatives associated with Senatorial Courtesy and the Blue Slip to a different set of senators (Rutkus 2010, 24). Specifically, “... the Administration will no longer have to engage in consultation with the same Senators [i.e., the previous home state Senators] regarding the vacant judgeship, because they would no longer be the nomination’s home state Senators. The home state Senators, with whom the Administration would be expected to consult, would now be the Senators of the state of the new circuit court candidate” (Rutkus 2010, 25).

Given the importance of Senatorial Courtesy and the Blue Slip in the confirmation process, it is surprising that no existing research attempts to identify either the causes or consequences of changes to state representation and thus a shift in a seat’s home state. While prior research mentions this norm, it remains relatively unknown and understudied.² Even book-length treatments by the most prominent scholars of the confirmation process at most describe the norm with little explication (Goldman 1997, 136-137). Other notable studies do not mention it at all (Binder & Maltzman 2009) or imply it may not exist (Chase 1972,

²Steigerwalt (2010) makes significant progress in documenting how senators invoke some claim over circuit state representation. Her work extends to understanding how senators utilize their right to place holds on federal judicial nominations—a discretionary act that can occur in response to the president violating the norm of state representation.

44)³. Even President Trump’s White House Counsel from 2017-2018, Donald F. McGahn, who supervised judicial nominations for the administration, was unaware of this practice when he took office: “But for Circuit Court judges, this was something that was in a way news to me when I became White House Counsel—even though a circuit judge sits for many states, certain seats are perceived as being tied to certain states. . . which means you have to get those home state senators involved in the selection of circuit judges” (McGahn 2019, 128).

This paper examines the role of these Senate norms, with special focus on state representation. We specifically examine what effect a change in state representation has on the Senate’s confirmation process for nominees of the U.S. Courts of Appeals. Our theory, in brief, contemplates how changes in circuit court state representation generates conflict between the president and Senate over a nomination. We expect that, after controlling for the typical variables associated with Senate confirmation, the President’s decision to alter which state is represented by a circuit court judgeship will (1) decrease the likelihood of the nominee being confirmed and (2) increase the length of time from nomination to possible confirmation.

Our empirical results—based on 820 circuit court nominations from 1891 to 2016—indicate the president’s decision to not follow the state representation norm has consequences. When the president opts to change the home-state of a particular circuit seat, the previous home-state senator still wields some power over the nominee’s fate; as the previous home-state senator is increasingly ideologically distant from the president, our results indicate the nomination in the new home-state is more likely to fail. The new home state senators also play a role, and when they go on the record opposing a judicial nominee, that opposition significantly decreases the likelihood of confirmation.

We make several contributions to the literature on Senate confirmation of Courts of Appeals judges. First, and most importantly, we add to the scholarly understanding of how

³“...the president’s men may pick and choose among candidates urged upon them by the senators of the president’s party from all the states in the circuit...”

the Senate’s advice and consent process applies to circuit court nominations—something that few other scholars have endeavored to do. We, for example, are the first study to systematically examine the consequences of the president choosing to not follow the state representation norm. Given the Courts of Appeals central role in the judiciary—being the court of last resort for 99 percent of all federal court cases—it is imperative we better understand how individuals ultimately obtain these life-tenured appointments. Second, we assemble new data and measures that allow us to improve our account of how Senate norms affect the confirmation of Courts of Appeals’ nominees, including: (1) a list of all (confirmed and un-confirmed) federal judicial nominees—including district court nominees not utilized here—dating back to 1789; (2) an account of which circuit seat belongs to which home-state, including the identification of movement of seats among states within a circuit; (3) a novel identification of home-state senator opposition to judicial nominees based on the actual positions they took during the confirmation process, rather than a proxy, such as ideological distance.

Building an Understanding of Confirmation Dynamics

Senatorial courtesy applies to nominations for many federal offices, with particular focus on local, state and regional positions (Jacobi 2005). Senators have the constitutionally prescribed role to provide “advice and consent” for all officers of the United States, including ambassadors, ministers, consuls, and judges. Scholars have given significant focus to the last of these offices, given judges’ relative independence as a function of their life-tenure (Cameron et al. 1990; Giles et al. 2001; Caldeira & Wright 1998). Scholars long ago reached consensus on the weighty influence of ideology on decision making on the U.S. Supreme Court (e.g. Pritchett 1948; Schubert 1960; Ulmer 1960; Segal & Cover 1989; Segal & Spaeth 2002). There is also clear evidence of lower court judges behaving ideologically (e.g. Hübert & Copus in press; Sunstein et al. 2007; Epstein et al. 2013), making plain the earnestness underlying

confirmation battles. Across 100 U.S. senators and the president, judicial nominees serve a salient, instrumental purpose: both Democrats and Republicans treat federal judicial actors as a means to an end to achieve policy goals.

Therefore, any rule or norm that substantially impacts judicial confirmations—either (a) successful confirmation or (b) the delay in the confirmation process—broadly impacts politics across the federal government. Senatorial courtesy, the blue slip, and state representation do precisely that. Yet, scholars continue to lack an authoritative account for how these norms impact confirmation battles for vacancies on the U.S. Courts of Appeals. That is not to say that scholars have not made significant headway in understanding confirmation politics. Rather, the circuit courts coverage of multiple states, and the lack of research on state representation hamper efforts to fully understand the nomination and confirmation bargaining process for appellate judgeships.⁴

Contextualizing Judicial Confirmations

In order for us to develop a comprehensive understanding of how Senate norms impact circuit court confirmations, we turn to several motivating examples of judicial nominees. These accounts speak to the microfoundations of our theory—that changing the home-state for a circuit court seat alters the bargaining dynamics between the President and the Senate. A typical circuit judicial vacancy would be filled through an interaction between the President and a senior senator of the same party as the President, with the latter recommending one or more potential nominees to the President. The circuit court nominee would be from the same state as the senator, and once confirmed, the judge would have their chambers in their home state. The process is one of many across the federal system that ensures state representation in the federal judiciary.

When the President opts to change the home state within a circuit, it substantially

⁴The Ninth Circuit U.S. Courts of Appeals includes nine states and two territories. See <https://www.fjc.gov/history/exhibits/graphs-and-maps/federal-judicial-circuits>. The Ninth Circuit also has the most authorized judgeships, at 29 judges.

changes the nature of the bargain. The previous home state senator, who would rightly have the norm-driven leverage to select one or several potential nominees, loses direct influence on who will fill the seat. Even more, the senator’s home state likewise loses representation on the circuit court. Setting aside the potential reasons a president would opt to make such a decision, the previous home state senator is left in a position where she or he might attempt to derail the specific nominee with a new home state. And colleagues across the Senate will be inclined to support the previous home state senator, for fear of losing home-state influence over their own circuit court seats.

This is the process we observed playing out across two convoluted vacancies on the Ninth Circuit Court of Appeals in the mid-2000s. The first of the two vacancies began in November 2003, when Judge Thomas G. Nelson of Idaho—a nominee of President George H. W. Bush in 1990—took senior status⁵, allowing Pres. Bush to appoint a replacement given consultation with Larry Craig, the state’s senior U.S. Senator. Later in 2004, just after Pres. Bush won re-election over Sen. John Kerry, a second Ninth Circuit vacancy arose; Judge Stephen S. Trott—a California judge appointed to the Ninth circuit in 1988 by Pres. Reagan—announced his intention to take senior status. Both U.S. Senators from California were Democrats, as they had been since 1993 when both Sens. Barbara Boxer and Diane Feinstein took office.

Pres. Bush, in turn, opted to nominate N. Randy Smith, who hailed from Idaho, for Judge Trott’s California seat. Smith had been among those potential nominees that Sen. Craig had submitted to Pres. Bush. Sen. Feinstein strongly opposed Smith’s nomination, and coordinated her caucus in obstructing a confirmation vote. At one point, Sen. Feinstein even went so far as to storm out of a Senate Judiciary Committee hearing, after which she said “This is the only way ... to give me leverage with the White House. We cannot lose another judge for California. Holding this judge in committee would send that message loudly and clearly and indicate that I have some support. [...] If I have to filibuster this

⁵See: <https://www.courtlistener.com/person/2390/thomas-g-nelson/>.

judge I will do so.”⁶

Smith’s nomination to the California-based Ninth Circuit seat failed in the Senate four times across the 109th and 110th Congresses. The last failure was a withdrawal by Pres. Bush on January 16, 2007, after the Democrats had re-taken control of the chamber.⁷ But Pres. Bush also immediately re-nominated Smith, instead designating that the nomination was for the Ninth Circuit’s Idaho-vacancy left by Judge Nelson in mid-2004. Smith was officially confirmed by a 94-0 vote on February 15, 2007.⁸

During the ongoing battle to move Judge Trott’s vacant California seat to Idaho, Pres. Bush endeavored to fill Judge Nelson’s Idaho-based Ninth Circuit seat. In anticipation of Judge Nelson taking senior status, Pres. Bush had nominated William G. Myers III, a former solicitor at the Department of the Interior.⁹ Despite being confirmed to his Interior post by unanimous consent in 2001, Myers’ nomination to the Ninth Circuit—as supported by Sen. Craig—received substantial opposition. Myers’ nomination was at the center of a Senate confirmation logjam, with Republicans threatening to eliminate the filibuster after gaining four seats in the 2004 general election. Avoiding the “nuclear option,” a gang of 14 senators came together to invoke cloture for three other judicial nominees, but that compromise did not include Myers and another of Pres. Bush’s circuit court nominees.¹⁰ Myers’ nomination failed in the Senate a total of four times across the 108th and 109th Congresses.

While the Idaho seat was eventually filled by Judge N. Randy Smith, Judge Trott’s California seat remained vacant for over a decade. By March of 2014, Pres. Barack Obama’s nominee to the Ninth Circuit—John Byron Owens, of California—was confirmed by a 56-43 vote. Only months earlier, Senate Majority Leader Harry Reid (D-NV) and his colleagues invoked a procedural maneuver to “nuke” the legislative body’s super-majority requirement

⁶See: <https://www.metnews.com/articles/2006/smit092206.htm>.

⁷See: <https://www.fjc.gov/history/judges/unsuccessful-nominations-and-recess-appointments>.

⁸See: <https://www.metnews.com/articles/2007/smit021607.htm>.

⁹See: <https://www.govinfo.gov/content/pkg/CHRG-109shrg21544/html/CHRG-109shrg21544.htm> and <http://www.metnews.com/articles/2007/judg011007.htm>.

¹⁰See: <https://www.cnn.com/2005/POLITICS/05/24/filibuster.fight/>.

for lower court judicial confirmations. The Republican-controlled Senate would respond in kind in 2017, when they reciprocated by eliminating the filibuster for Supreme Court nominees.

The Effect of a Change in State Representation on the Confirmation Process

The ability of a senator to invoke Courtesy or the Blue Slip depends on their status as the home state senator. By custom, this requires a judicial vacancy to have a geographic connection to the state they represent. For district court vacancies, this is straightforward, since each district court falls within a single state. Appeals courts' geographic jurisdiction covers multiple states, and the home state for a vacancy is determined by the informal policy of State Representation. Based on this Senate "folkway", each judgeship on a Circuit is associated with a state within it. When a vacancy occurs "...the senators of the president's party are quick to reclaim that position" (Goldman 1997, 136). The President must then decide whether to honor state representation and nominate someone from the same state as the departing judge. If he does not then we expect the confirmation of the nominated judge to be more contentious.

First, we expect a change in state representation (hereafter also referred to as *Change in Home State*) to decrease the likelihood a nominee is confirmed and lengthen the number of days from nomination to confirmation. As Goldman (1967, 137) points out, when the President bucks the state representation norm, a "...political firestorm [is] likely to arise in the bypassed state..." As a result, the previous home state Senators are likely to call on their Senate colleagues to resist the President's attempt to alter which state is represented by the judgeship.

Second, we anticipate the ideological distance between the previous home state Senators and the President (*Previous Home State Ideological Distance*) to affect the confirmation

of Courts of Appeals’ nominees. The likelihood of the Senate rejecting a nominee and the length of the confirmation process will increase in the ideological distance between the former home state Senators and the President. We further expect *Change in Home State* to condition the influence of *Previous Home State Ideological Distance*, such that the ideological distance between the previous home state Senators and the president will have an enhanced effect when the president changes the home state of a seat.

Third, based on the courtesy norm, if a home state Senator (meaning the new home state senator when a seat is assigned to a different state) takes a position against the nominee then the likelihood of the nominee being confirmed will decrease and the length of time between nomination and confirmation will increase.

Data on Article III Judicial Nomination

This research presents a novel dataset of all Article III judicial nominations dating back to the founding. Gathering historical data of this nature requires merging multiple existing datasets and supplementing with primary sources. This ensures coverage of all judicial nominees—both those who are ultimately confirmed by the Senate and those who are not. First, Binder & Maltzman (2002; 2009) offer an excellent starting point, making available their data on confirmed and unconfirmed judicial nominees from 1947 to 2008. Second, we utilize the publicly available data on judicial nominations from the Federal Judicial Center.¹¹ Importantly, the FJC data offer comprehensive coverage of any individual who has ever earned Senate confirmation to a life-tenured federal judgeship. But it does not include data for judges who are not confirmed¹²

In order to fully capture all potential nominees who were not confirmed—especially those prior to 1947—we supplement the existing data with several other sources. First, we

¹¹See: <https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export>.

¹²The Federal Judicial Center does offer a minimalistic list of failed judicial nominations—a resource we only discovered after gathering the bulk of our data. The list is available here: <https://www.fjc.gov/node/7511>.

integrate data from Box-Steffensmeier et al. (2016), whose Blue Slip dataset provides nomination coverage dating back to 1933. Second, we hand coded data from the Senate Executive Journal, which were available through an institutional membership in the HathiTrust Digital Library. Importantly, this primary source allowed us to reliably document the home state for each nominee, as was declared in the Senate record.

For this paper, our theory and empirical tests center on the U.S. Courts of Appeals. We therefore examine circuit court nominations from 1891 to 2016, 1.¹³ This results in a dataset of 820 circuit court nominations 1. ¹⁴

Given our expectations relate to both the likelihood of nomination success and the duration of the entire nomination-confirmation process, we employ two dependent variables 1. First, we measure the success of the nomination dichotomously, and we code *Confirmation*, as one if the nominee was confirmed and zero otherwise (i.e., if the nomination is formally rejected by a Senate vote or if the nomination dies without vote). Panel A of Figure 1 plots the frequency of successes and failures over time 1. Second, we measure *Days to Final Action* as the number of days from the day the President announced the nomination to the day the Senate took final action on a nominee, whether (a) the nomination received a vote or (b) it was the last day of the congressional session or term, causing a nomination to die. In Panel B of Figure 1, we plot this variable over time 1.

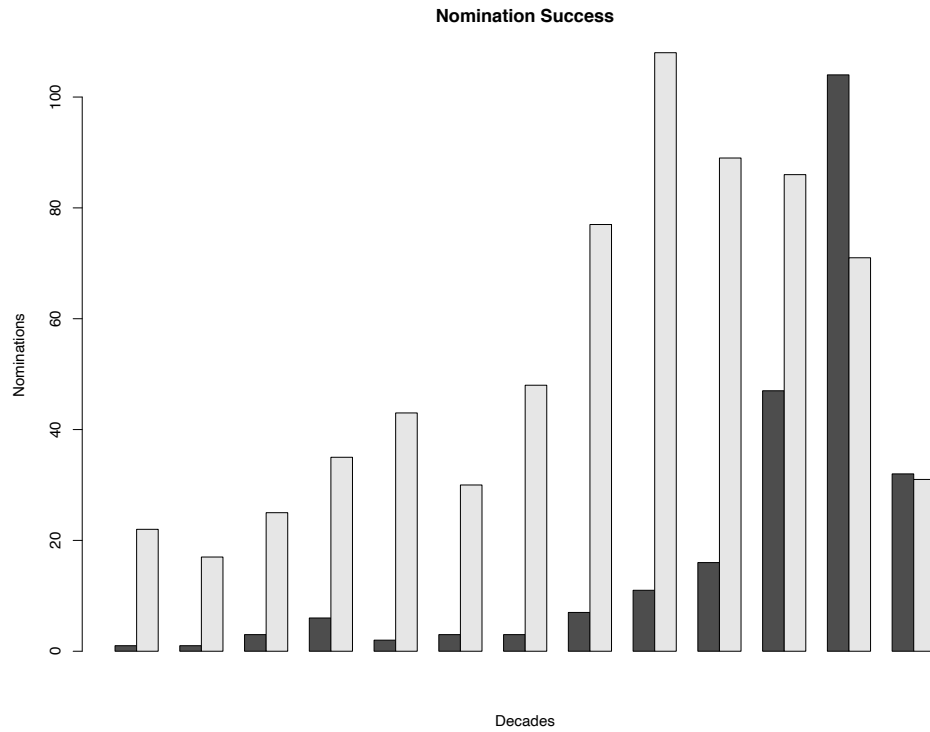
We measure our three key independent variables of interest in the following ways. First, using the sources discussed above, we code *Change in Home State* as one if the president’s circuit court nominee for a given vacancy had a different home state than the previous incumbent judge, else we code it as zero. was the case in the example of Ninth Circuit Judge Stephen S. Trott of California, who Pres. George W. Bush attempted to replace with a

¹³Our data also include all those federal judges nominated during the administration of Pres. Donald J. Trump from 2017 to 2020. But, as of the drafting of this paper, Pres. Trump does not have a DW-NOMINATE ideal point estimate. Therefore, many of the ideological distance measures we utilize in our statistical analyses below are not possible to calculate.

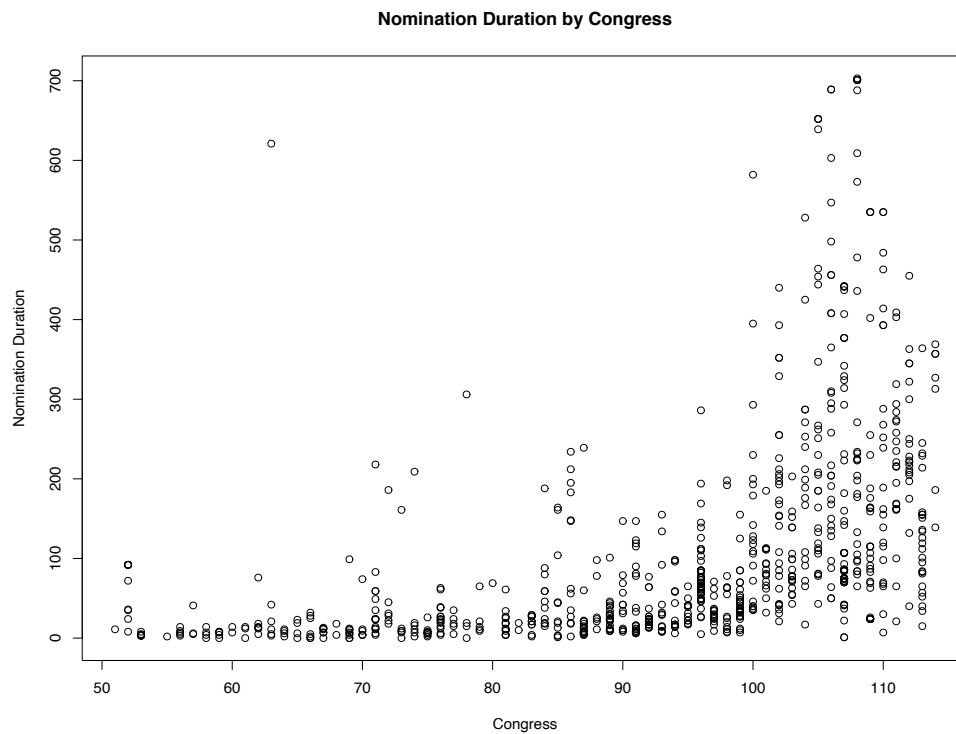
¹⁴Some individuals appear in our data multiple times, as evidenced by the examples of N. Randy Smith and William G. Myers III above; each time a nomination failed or lapsed at the end of a congressional term, we treat a potential re-nomination anew. This is especially important given the new and different political circumstances that the re-nomination would be subject to, including new home state senators.

Figure 1: Variations in Circuit Court Nominee Success and Duration Over Time

(a) Nomination Success by Decade 1890s to 2010s: Dark bars indicate failed nominations, light bars indicate success.



(b) Length in days between Senate's receiving a nomination and final action.



nominee from Idaho.

Second, we measure *Previous Home State Ideological Distance* as the divergence in the preferences of the previous home state senators and the nominating president. Using DW-NOMINATE scores for the president¹⁵ and the most proximate previous home state senator, this variable is the absolute value of the difference in their DW-NOMINATE scores. Given our expectation that *Previous Home State Ideological Distance* will moderate the effect of *Change in Home State* on *Confirmation*, we also include an interaction of these two independent variables: *Change in Home State* \times *Previous Home State Ideological Distance*. A previous home state senator is more likely to express opposition when the president selects a nominee from a different state, and our we expect our interaction variable to have a negative effect on confirmation and delay.

Third, we created a novel measure of a home state senator's expressed opposition to a nominee. We coded *Home State Opposition* based on media/press accounts in either a national or major state newspaper of a senator publicly opposing a circuit court nominee from her or his home state. This allows for a more comprehensive understanding of senatorial courtesy, as it stretches outside the temporal bounds of the blue slip process, which did not begin until 1917 and was not always recorded. To be sure, our novel *Home State Opposition* variable likely misses some instances of opposition, which we believe makes our variable and the corresponding empirical tests conservative in nature.

We also include a series of control variables drawn from Binder and Maltzman's excellent studies(e.g. Binder & Maltzman 2002, 2009). These variables serve the usual purpose of controlling for variables potentially correlated with our variables of interest and our dependent variables. First, we control for *Senate Polarization*, measured as the difference in the mean DW-NOMINATE scores of the two parties. Second, *Divided Government* is coded as one if the majority of the Senate is a different party from the president and zero otherwise. Third, we include *Balanced Bench* to control for the partisan balance of the circuit

¹⁵See footnote 13 above.

in question. Given the vacancy on a given circuit, we code the variable as one if between 40 and 60 percent of the active judges were appointed by Democratic presidents, and zero otherwise. Fourth, we include *Election Year* to consider if a nominee arises during a presidential campaign cycle and potential transition of power. Fifth, *Well-Qualified Nominee* is a dichotomous measure of whether the American Bar Association rated a given nominee as “well qualified” or not. Several model specifications omit the ABA well-qualified control, as its inclusion requires us to omit 147 of our 820 observations.¹⁶

Empirical Models of Circuit Court Confirmation Politics

We begin our discussion of our empirical analyses with a focus on *Confirmation*—whether or not a nomination ultimately results in a vacancy being filled. To reiterate, we expect that a *Change in Home State* and *Previous Home State Ideological Distance* will jointly decrease the likelihood of confirmation. Likewise, we anticipate *Home State Opposition* will similarly decrease the likelihood of confirmation. We present these results in Table 1

Table 1 reveals empirical results largely consistent with our theoretical story. First, consider our interaction variable: *Change in Home State* \times *Previous Home State Ideological Distance*. When (a) there is a change in home state for the president’s nomination and (b) the ideological distance between the previous home state senator and the president is increasing, we observe decreasing likelihood of confirmation. The result for our interaction variable is statistically and substantively significant. Even accounting for the high baseline likelihood

¹⁶Our supplementary analyses, which we present in this paper’s appendices, include additional independent variables—most of which do not impact the statistical significance or substantive interpretation of our main empirical results. First, we include several different ideological distance measures—between (1) the Senate median and the president and (2) the judiciary committee chair and the president. Second, we include *Fixed Effects for Judiciary Chair*, which allows us to control for variations in Blue Slip practices and other committee-based norms over time. Third, we control for the number of pending nominees before the Senate, which would place greater demands on the Senate’s resources. Fourth, we include a time control—a count of day’s left in the Senate’s session.

Table 1: Logistic Regression Model on the Success on Nominations to the US Courts of Appeals Nominations from 1891-2016

	<i>Dependent Variable:</i>	<i>Odds Ratio</i>
	Confirmation	
Change in Home State \times Previous Home State Ideological Distance	−3.136* (0.823)	0.043
Change in Home State	1.721* (0.581)	5.587
Previous Home State Ideological Distance	0.564* (0.342)	1.758
Home State Opposition	−2.863* (0.389)	0.057
Senate Polarization	−7.909* (1.219)	0.001
Divided Government	−1.055* (0.192)	0.348
Balanced Bench	−0.216 (0.197)	0.806
Election Year	−0.715* (0.233)	0.489
Constant	6.801* (0.851)	
Observations	820	
Log Likelihood	−377.160	
Akaike Inf. Crit.	772.320	
<i>Note:</i> *p<0.05; all one-tailed <i>t</i> tests		

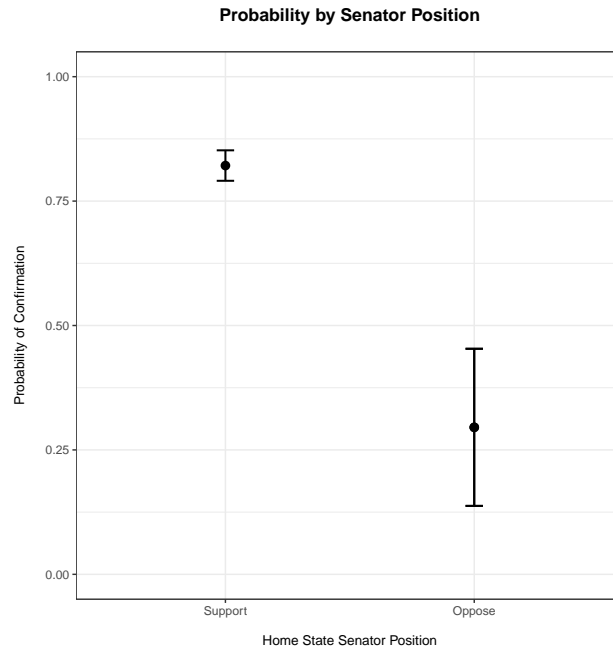
that a nomination ends in confirmation—as evidenced in the positive coefficients for our interaction’s constitutive terms—we observe a negative conditional effect of our variables jointly.

Second, we turn to our results for *Home State Opposition*, which is a binary indicator for whether any home state senator expressed opposition to the president’s nomination for a circuit vacancy. As we expected, this variable has a negative and statistically significant impact on the likelihood of confirmation. Finally, it is worth noting that our results are robust to controlling for the typical variables in an empirical model of confirmation, as well as alternative model specifications (see the Appendix).

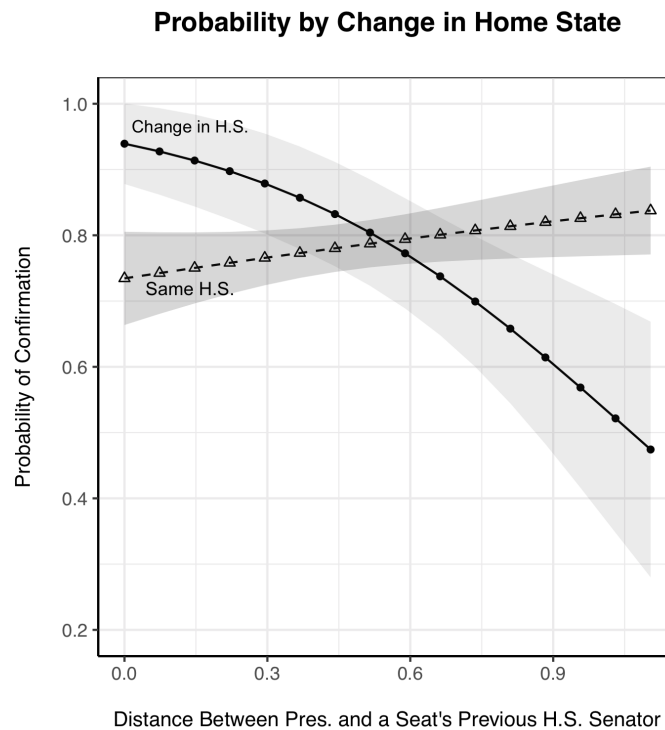
To better understand the magnitude of these relationships, consider Figure 2. The upper panel depicts the affect of a home state senator’s opposition to a circuit nomination. When neither home state senator opposes a nomination (i.e. *Support*, on the left hand side of

Figure 2: Predicted Probability of Circuit Court Confirmation

(a) Probability of Confirmation by Home State Opposition. Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.



(b) Probability of Confirmation by Ideological Distance. 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.



the graph), we observe a high probability of confirmation—a probability of about 0.8, with small confidence intervals resulting from the modal outcome across our data. On the other hand, if either opposes the nomination, we observe a significant decrease in the likelihood of confirmation—a probability of about 0.3, though admittedly with large confidence intervals. As we detail in Table 3 in the appendix, when either home state senator opposes the nomination, and we hold all other variables at their mean, we observe a 0.208 probability of confirmation. This is juxtaposed to an identical scenario, except that neither senator opposes, resulting in a 0.821 probability of confirmation. Thus, we find strong support for the maintenance of collegial norms across senators.

The lower panel of Figure 2 details the dynamics of our interaction variable from Table 1. We plot the predicted probabilities for confirmation given a change in home state on the solid line with circles for symbols. The slope indicates a negative relationship between ideological distance and confirmation. In other words, we find evidence of decreasing likelihood of confirmation as the ideological distance between the president and previous home state senator increases. Over the full distribution of ideological distance along the x -axis, the likelihood of confirmation changes significantly; when ideological distance is zero, we observe high probability of confirmation—approximately 0.95; when ideological distance is large (0.9 or larger), the probability of confirmation is nearing 0.5 and decreasing. To be sure, our confidence intervals are large at the high end of ideological distance.

When there is no change in home state—indicated by a dashed line with triangles for symbols—we observe an anomalous empirical result. When there is no change in home state and ideological distance is low, the probability of confirmation is lower than when there is a change in home state. This falls outside the theoretical story we attempt to tell here, but it is worthy of further exploration. While the slope appears to positive, the confidence intervals suggest it is indistinguishable from zero.

As with prior work in the judicial nomination and confirmation literature, our empirical analysis extends to include Senate delay. We examine *Days to Final Action* on a circuit

Table 2: Delay in Senate Action on Nominations to the US Courts of Appeals, 1947–2016

	<i>Dependent Variable:</i> Days to Final Action	<i>Hazard Ratio</i>
Change in Home State \times Previous Home State Ideological Distance	−1.279* (0.455)	0.278
Change in Home State	0.791* (0.285)	2.205
Previous Home State Ideological Distance	0.439* (0.174)	1.551
Home State Opposition	−2.130* (0.344)	0.119
Senate Polarization	−0.908* (0.069)	0.375
Divided Government	−0.552* (0.096)	0.576
Balanced Bench	0.112 (0.101)	1.117
Election Year	−0.457* (0.147)	0.633
Well-Qualified Nominee	0.263* (0.100)	1.301
Observations	673	
R ²	0.401	
Log Likelihood	−2,573.881	
Wald Test	338.360*** (df = 9)	
LR Test	344.806*** (df = 9)	
Score (Logrank) Test	342.215*** (df = 9)	
<i>Note:</i> *p<0.05; all one-tailed <i>t</i> tests		

court nomination in Table 2, where we find that our independent variables tell a similar story as they did above with *Confirmation*. First, *Home State Opposition* is negative and statistically significant, suggesting that when either home state senator reveals their opposition to a nomination in the media, that significantly increases the length of time time to final action. Furthermore, the hazard ration below 1 indicates that *Home State Opposition* makes the confirmation process take more time. Second, we find similar results for our interaction variable: *Change in Home State \times Previous Home State Ideological Distance*. When there is a change in a home state and the ideological distance between a senator and the president is increasing, we find evidence of greater delay on the nomination. Likewise, the small hazard ratio suggests that confirmation is less likely even as time passes.

Discussion & Conclusion

It is only on a narrow set of occasions that all three branches of the United States federal government coalesce on a single task. Judicial vacancies—with presidential nominations and the Senate’s advice and consent—present such a task. Across the sequence of events, a judicial nominee can fail at any number of junctures. Indeed, a single senator can play a pivotal role in determining an outcome, and if that senator withholds their support, it can upset the entire process.

Across our analyses, we see the significant power that an individual senator can play in shepherding or derailing a circuit court nomination given the norm of state representation in the circuit courts. Furthermore, when the president opts to ignore long-standing Senate norms—either Senatorial Courtesy or State Representation—he is much less likely to achieve his preferred outcome. A senator who opposes a president’s circuit court nomination decreases the probability of confirmation by 75 percent, *ceteris paribus*. Similarly, a president who opts to change the home state of a circuit court judgeship, *ceteris paribus*, lowers the probability of confirmation as much as 38 percent. Nominations also take much longer to achieve final action given potential home state change or opposition. This has significant downstream consequences for the workload of the federal circuit courts, which have been frequently understaffed and overworked in recent decades (e.g. Steigerwalt 2010; Tobias 2018).

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Appendix

Table 3: Predicted Probabilities Across Varying Levels of Variables of Interest

H.S. Senator Position	Change in H.S.	Previous H.S. Senators Ideological Distance	Controls	Probability of Confirmation
Mean Value (0.071)	Mean Value (0.164)	Mean Value (0.474)	Mean Value	0.790
Oppose (0)	Mean Value (0.164)	Mean Value (0.474)	Mean Value	0.208
Support (1)	Mean Value (0.164)	Mean Value (0.474)	Mean Value	0.821
Mean Value (0.071)	No (0)	None (0)	Mean Value	0.734
Mean Value(0.071)	No (0)	Low (0.295)	Mean Value	0.766
Mean Value (0.071)	No (0)	Medium (0.663)	Mean Value	0.801
Mean Value (0.071)	No (0)	High (1.031)	Mean Value	0.832
Mean Value (0.071)	Yes (1)	None (0)	Mean Value	0.940
Mean Value (0.071)	Yes (1)	Low (0.295)	Mean Value	0.879
Mean Value (0.071)	Yes (1)	Medium (0.663)	Mean Value	0.738
Mean Value (0.071)	Yes (1)	High (1.031)	Mean Value	0.522

Table 4: Alternative Specifications for Logistic Regression Models on the Success of US Courts of Appeals Nominations Using Controls from Binder and Maltzman (2009)

	<i>Dependent variable:</i>		
	Confirmation		
	(1)	(2)	(3)
Change in Home State x Previous Home State Ideological Distance	−3.180* (1.024)	−2.816* (0.867)	−2.754* (1.048)
Change in Home State	1.602* (0.761)	1.287* (0.614)	1.377* (0.772)
Previous Home State Ideological Distance	0.675* (0.374)	0.828* (0.367)	0.466 (0.381)
Home State Opposition	−2.632* (0.415)	−2.543* (0.422)	−2.298* (0.418)
Senate Polarization	−13.395* (1.643)	−0.366 (3.902)	0.207 (4.034)
Divided Government	−0.792* (0.211)	−0.483* (0.275)	−0.415 (0.289)
Balanced Bench	0.066 (0.221)	−0.035 (0.222)	−0.107 (0.232)
Election Year	−1.069* (0.274)	−1.117* (0.269)	−1.239* (0.293)
Well-Qualified Nominee	0.765* (0.211)		0.712* (0.222)
Fixed Effects for Judiciary Chair		✓	✓
Constant	9.469* (1.089)	18.198 (774.778)	2.433 (2.278)
Observations	673	820	673
Log Likelihood	−305.797	−332.104	−290.682
Akaike Inf. Crit.	631.593	726.208	623.364

Note:

*p<0.05; all one-tailed *t* tests

Table 5: Alternative Specifications for Logistic Regression Models on the Success of US Courts of Appeals Nominations Using Controls from Binder and Maltzman (2002)

	<i>Dependent variable:</i>			
	Confirmation			
	(1)	(2)	(3)	(4)
Change in Home State x Previous Home State Ideological Distance	−2.990* (0.832)	−2.895* (1.032)	−2.836* (0.883)	−2.763* (1.070)
Change in Home State	1.518* (0.575)	1.360* (0.758)	1.237* (0.621)	1.362* (0.786)
Previous Home State Ideological Distance	0.894* (0.364)	0.829* (0.397)	0.928* (0.388)	0.537 (0.408)
Home State Opposition	−2.739* (0.404)	−2.681* (0.437)	−2.728* (0.437)	−2.523* (0.439)
Ideological Distance President-Senate	0.035 (0.616)	0.344 (0.680)	0.410 (0.644)	0.614 (0.694)
Ideological Distance President-Judiciary Chair	0.477 (0.446)	1.196* (0.499)	1.145* (0.554)	1.755* (0.617)
Senate Polarization	−6.122* (1.310)	−12.638* (1.876)	−1.346 (4.204)	−0.249 (4.353)
Divided Government	−1.161* (0.292)	−1.340* (0.333)	−0.943* (0.398)	−1.241* (0.456)
Balanced Bench	−0.179 (0.204)	0.107 (0.232)	0.011 (0.230)	−0.053 (0.242)
Election Year	−0.707* (0.243)	−1.039* (0.283)	−1.112* (0.280)	−1.241* (0.306)
Number of Unconfirmed Nominations	−0.037* (0.006)	−0.030* (0.007)	−0.015* (0.008)	−0.015* (0.008)
Well-Qualified Nominee		0.803* (0.221)		0.782* (0.230)
Time Left in Session	0.003* (0.001)	0.005* (0.001)	0.005* (0.001)	0.005*** (0.001)
Fixed Effects for Judiciary Chair			✓	✓
Constant	5.365* (0.949)	8.047* (1.218)	17.980 (777.444)	1.160 (2.499)
Observations	820	673	820	673
Log Likelihood	−353.591	−287.158	−318.949	−275.994
Akaike Inf. Crit.	733.183	602.316	707.898	601.989

Note:

*p<0.05; all one-tailed *t* tests

Table 6: Alternative Specifications for Cox Proportional Hazard Models on the Timing of US Courts of Appeals Nominations Using Controls from Binder and Maltzman (2009)

	<i>Dependent variable:</i>		
	Days to Final Action		
	(1)	(2)	(3)
Change in Home State x Previous Home State Ideological Distance	−1.112* (0.353)	0.080 (0.181)	−0.885* (0.506)
Change in Home State	0.772* (0.201)	−0.239 (0.100)	0.515 (0.311)
Previous Home State Ideological Distance	0.091 (0.154)	0.333* (0.141)	0.230 (0.185)
Home State Opposition	−2.256* (0.309)	−1.308* (0.191)	−1.866* (0.348)
Senate Polarization	−0.538* (0.052)	0.408* (0.043)	4.209 (2.164)
Divided Government	−0.715* (0.087)	−0.118 (0.090)	−0.318* (0.129)
Balanced Bench	−0.082 (0.090)	0.079 (0.091)	−0.009 (0.107)
Election Year	−0.192 (0.120)	−0.293* (0.123)	−0.389* (0.150)
Well-Qualified Nominee			0.290** (0.105)
Fixed Effects for Judiciary Chair		✓	✓
Observations	820	820	673
R ²	0.318	0.534	0.557
Log Likelihood	−3,462.858	−3,307.102	−2,472.336

Note:

*p<0.05; all one-tailed *t* tests

Table 7: Alternative Specifications for Cox Proportional Hazard Models on the Timing of US Courts of Appeals Nominations Using Controls from Binder and Maltzman (2002)

	<i>Dependent variable:</i>			
	Days to Final Action			
	(1)	(2)	(3)	(4)
Change in Home State x Previous Home State Ideological Distance	−0.875* (0.369)	−1.468* (0.467)	0.015 (0.401)	−1.085* (0.501)
Change in Home State	0.568* (0.209)	0.918* (0.290)	−0.259 (0.245)	0.672* (0.310)
Previous Home State Ideological Distance	0.295* (0.162)	0.570* (0.182)	0.389* (0.176)	0.312* (0.192)
Home State Opposition	−2.092* (0.311)	−2.085* (0.346)	−2.326* (0.327)	−1.909* (0.350)
Senate Polarization	−0.381* (0.055)	−0.820* (0.075)	3.241 (1.949)	3.538 (2.314)
Divided Government	−0.805* (0.140)	−1.192* (0.168)	−0.274 (0.155)	−0.692* (0.166)
Balanced Bench	−0.097 (0.092)	0.025 (0.103)	0.100 (0.101)	−0.083 (0.109)
Election Year	−0.108 (0.121)	−0.428* (0.149)	−0.275* (0.125)	−0.335* (0.152)
Well-Qualified Nominee		0.286* (0.102)		0.306* (0.106)
Ideological Distance President-Senate	−0.165 (0.258)	0.066 (0.305)	−0.225 (0.272)	0.093 (0.309)
Number of Unconfirmed Nominations	−0.030* (0.004)	−0.027* (0.004)	−0.005 (0.005)	−0.010* (0.005)
Ideological Distance President-Judiciary Chair	0.223 (0.210)	1.059* (0.248)	−0.058 (0.258)	0.826* (0.276)
Time Left in Session	−0.003* (0.0004)	−0.002* (0.0005)	−0.002* (0.0005)	−0.002* (0.001)
Fixed Effects for Judiciary Chair			✓	✓
Observations	820	673	820	673
R ²	0.421	0.469	0.578	0.571
Log Likelihood	−3,396.096	−2,533.310	−3,266.171	−2,461.363

Note:

*p<0.05; all one-tailed *t* tests