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Elevating Justice: The Strategic Elevation of District Court Judges to the Courts of Appeals

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To the Graduate Council:

I am submitting herewith a dissertation written by Mikel Aaron Norris entitled "Elevating Justice: The Strategic Elevation of District Court Judges to the Courts of Appeals." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

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Elevating Justice: The Strategic Elevation of District Court Judges to the Courts of Appeals

A Dissertation
Presented for the
Doctor of Philosophy
Degree
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Mikel Aaron Norris
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DEDICATION

To Mom and Dad

In partial fulfillment of my Fifth Commandment duties

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If there is one thing that I have learned from writing this dissertation is that it is a task that cannot be accomplished alone. So many people have helped me during my time in graduate school to lead me to this moment that to recognize them all would consume as many pages as the actual text of this dissertation. That being said, there are several people I feel should be recognized by name for their assistance and support.

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ABSTRACT

Traditionally, a president elevated district court judges to vacant appellate court positions because to do so would give the president an opportunity not only to place a judge sharing his preferences on an appellate court, but also to give him the opportunity to fill the newly created district court position with another judge sharing his preferences. This is the ultimate example of strategic behavior. However, presidents do not always take this course of action when filling vacant appellate court positions. The purpose of this dissertation is to understand why.

This dissertation examines how presidents have used elevations from 1969 to 2008 to fill vacant appellate court positions. The analyses herein do find that presidents use elevations strategically, but not in the strategic ways discussed in the current literature. The first part of this dissertation discusses how the several presidents since 1969 used elevations to fill vacant appellate court positions. This analysis shows that different presidents use elevations in different contexts. For example, divided government, party affiliation of the president, the location of the appellate court vacancy and the partisan composition of the court where the vacancy occurs, and the number of home-state senators all affect when a president will use elevations to fill vacant appellate court positions.

The next section of this dissertation uses multivariate regression to empirically assess when a president is likely to use elevations. I posit that presidents use elevations to stop potential policy entrepreneurs from thwarting their nominees. I find support for this theory. I specifically find that presidents are likely to elevate district court judges when they are well qualified and when the partisan composition of an appellate court hangs in the balance.

Finally, I test whether using elevations helps the president get his district court nominees to positions created via elevation more quickly than other nominees. Results show that those chosen to fill district court positions created via elevation are nominated and confirmed more quickly than other district court nominees. I do not find evidence that they are more closely aligned ideologically to their nominating president than other district court nominees.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

CHAPTER 1: INTRODUCTION AND EXPLANATION OF RESEARCH DESIGN

Section 1.1: Fundamental Research Questions

The United States Senate confirmed Sonia Sotomayor to be Justice of the United States Supreme Court on August 6, 2009. While most scholars and pundits were interested in the fact that Justice Sotomayor was to be the first Hispanic member of the nation's highest court, few also recognized that Justice Sotomayor was the first Supreme Court justice ever to serve as a judge in all three levels of our federal court system (White House, 2009).[1] In essence, Justice Sotomayor is the first federal judge in United States history to successfully climb the federal judicial career ladder.

However, even though Sotomayor is the first Justice to climb the federal judicial career ladder does not mean that she reached her high position because she is more meritorious than other judges in the federal courts. Justice Sotomayor was only rated by the American Bar Association as "qualified/well-qualified" when she was nominated to her district court position and "well-qualified/qualified" when she was nominated to her circuit court position. She did not receive the American Bar Association's highest rating of "well-qualified" until she was nominated to the Supreme Court.[2] There have been hundreds – maybe thousands – of district court judges that have received higher ABA ratings than Justice Sotomayor who have never left their district court positions, and there have been

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[1] Justice Sotomayor was confirmed to sit as a district judge for the District Court of Southern New York on August 11, 1992, and was also confirmed to sit as appellate judge for the Second Circuit Court of Appeals on October 2, 1998. Some of the details of how Justice Sotomayor climbed the federal judicial career ladder will be discussed in more detail throughout this dissertation.

[2] Ratings for all nominees to all federal court positions are available from the website for the American Bar Association:http://www.americanbar.org/groups/committees/federal_judiciary/resources/ratings_for_judicial_nominees.html.

hundreds of appellate court judges with higher ABA ratings who have never been nominated to the United States Supreme Court.

The reason this is the case is that federal judges ultimately do not have any control over whether they can climb the federal judicial career ladder (Savchak et al. 2006, 488-89). Federal judges are chosen by the president and confirmed by the Senate. The institutional structure of the judicial selection process guarantees that the selection of federal judges will have a political component. While merit does play an important part in who is selected to be a federal judge, politics plays an important part as well.

Politics can be especially important in deciding the career trajectories of federal judges. Presidents can advance the careers of federal judges by elevating them to a court above where they currently are in the judicial hierarchy, or they can nominate someone to a vacant judicial position from outside the federal judiciary. Both types of nominations are political and have their own benefits and drawbacks. The purpose of this dissertation is to assess the institutional and political factors that affect whether a president will elevate a district court judge to the federal Courts of Appeals or nominate someone to a vacant appellate court position from outside the federal judiciary. This dissertation will also examine how the use of elevations affects the president's ability to fill vacant district court positions created via elevation with new federal judges who share the president's preferences. Ideally, presidents should always desire to fill vacant appellate court positions via elevations because to do so will maximize the number of federal court appointments a president can make during his term in office (Barrow et al. 1996, 9). Elevating district court judges to the Courts of Appeals creates a new vacancy in the district court where the elevation has occurred, thus giving the president the chance to fill two federal judgeships with individuals sharing his

preferences as opposed to one. However, presidents do not always do this. Ultimately, the purpose of this dissertation is to understand why. This leads to the fundamental research questions I wish to answer in this dissertation:

Why do presidents elevate district court judges to the federal Courts of Appeals in some cases, but do not elevate district court judges to the federal Courts of Appeals in other cases? I.e. does the president elevate STRATEGICALLY?

Does the use of elevations by the president enable him to shape the federal judiciary in a way that will make the federal judiciary as an institution reflect the president's preferences?

Previous empirical and formal theoretical research has helped us better to understand the decisions different political actors make when nominating and confirming judges to both federal district courts and the federal Courts of Appeals (Asmussen 2011; Binder & Maltzman 2002; Binder & Maltzman, 2009; Martinek et al. 2002; Massie et al. 2004; McCarty & Razaghian, 1999). However, many gaps exist in this literature. First, scholars primarily focus on judicial nominations in isolation, and do not account for any strategy that may be behind the president's decision to nominate one individual to a federal judgeship over another (Massie et al. 2004, 146; Savchak et al. 2006, 479). Second, most of the "advice and consent" literature focuses on the important actors, norms, and rules in the Senate that can stall or kill a presidential nomination or assure that the nominee is confirmed (Binder & Maltzman, 2002; Martinek et al. 2002; Primo et al. 2008; Shipan & Shannon, 2003; Stratmann & Garner, 2004). The role of the president is conspicuously absent from much of this literature. Focusing on strategic elevation eliminates these two problems because it will account for the important role the president plays in the process of staffing the federal judiciary, and it will also show how nominations to both the federal district courts and the federal Courts of Appeals can be used to shape the federal judiciary.

As mentioned earlier, the primary research question of this dissertation is whether or not the president can strategically use judicial elevations to shape the federal judiciary to reflect his policy preferences. However, there are other important questions that can be derived from this broad research question. For example, if the president does strategically elevate district court judges to the federal Courts of Appeals, when does he do so? Specifically, are there necessary conditions for the president to use elevations? If the president does not use judicial elevations strategically to shape the preferences of the federal judiciary, are there other reasons for him to elevate district court judges to the federal Courts of Appeals?

It is impossible to remove the Senate from an analysis of the nomination/confirmation process. However, an analysis of the strategic elevation of federal judges will also yield new and interesting questions about the role of Senate actors. For example, does accounting for two stages in the nomination/confirmation process change how the institutional actors in the Senate behave when confirming federal judges? Does the strategic elevation of federal judges change who are the important institutional actors in the process of "advice and consent"? Must the president make different types of concessions with the institutional actors in the Senate when elevating judges?

Finally, this analysis will attempt to explain how the elevation of federal judges shapes the federal judiciary over time. Previous research has established that elevation influences the composition of the federal judiciary (Barrow et al. 1996, 80), but we do not yet understand the lasting effects of this presidential strategy on the composition of the federal judiciary. Therefore, an important question that will be addressed in this dissertation is *how* strategic elevation changes the composition of the judiciary. Specifically, I wish to answer the

question: does the strategic elevation of district court judges to the federal Courts of Appeals create systematic and observable patterns in the ideological composition of the federal judiciary?

Section 1.2: What is an Elevation?

The first step in understanding how presidents use elevations strategically to fill vacant appellate court positions is to understand exactly what an elevation is. In general, an elevation occurs when a sitting judge is chosen to fill a vacancy on a court that sits above the court where the judge currently sits. Elevations can occur in both federal and state court systems. An example of a judicial elevation in the states would be the selection of a judge sitting on an intermediate state appellate court to that state's Supreme Court. An example of a judicial elevation in the federal courts is the elevation of a federal appellate court judge to the United States Supreme Court. Here I examine when a district court judge is elevated to the federal Courts of Appeals.

Elevations can occur in any organizational setting in which an individual can be promoted to a position that sits above the individual's current position in the organizational hierarchy. In common lingo, it is referred to as "climbing the ladder" within an organization. This language is also used in the judicial appointment literature as "taking it to the next level" or "climbing the *judicial* career ladder" (Hansford et al. 2010; Savchak et al. 2006). There is evidence that judges at all levels of government aspire to climb the judicial career ladder, and that judges often base the decision to leave their judicial posts on the likelihood that they will get the chance to advance their judicial careers (Hansford et al. 2010; but see Lyles 1997, 5).

Judicial elevations are interesting phenomena to study because of the politics behind their use. If a president decides to nominate someone from outside the federal judiciary to a vacant appellate court position, he is afforded one judicial appointment and one chance to change the composition of the Courts of Appeals. However, if the president decides to elevate a district court judge to the Courts of Appeals, he is then given the opportunity to nominate another individual to the new vacancy in the district courts that is created via the elevation. Elevations are unique in that they give the president the ability to control both when and where a vacancy in the federal courts will occur, and allow him to maximize the number of possible judicial vacancies he fills during his term.[3]

Section 1.2.i: The Elevation of Judge William Traxler

The definition of elevation is not complicated. However, understanding how an elevation can be used warrants further discussion. This section and the next provide two different examples of how two different presidents have used elevations in the era of divided government.

Judge William Byrd Traxler was nominated by President George H.W. Bush to fill a vacancy on the district court for South Carolina on November 14, 1991. Judge Traxler, a Republican, was recommended to the president for nomination by Senator Strom Thurmond (R-SC). Judge Traxler was a personal friend of Senator Thurmond, and had previously assisted Senator Thurmond during previous election campaigns.[4] Before being nominated for the district court position, Judge Traxler was serving as a resident judge for

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[3] The other ways in which a judicial vacancy may occur is when a federal judge retires, assumes senior status, resigns, is impeached, or dies.

[4] See Kamen, Al. 1998. "What a Difference 6 Years Make." *The Washington Post.* September 16, 1998. Section A, pg. 15. Final Edition.

the South Carolina's 13th state circuit. Judge Traxler's nomination quickly moved through the Senate Judiciary Committee without any objections, and he was confirmed by the Senate via unanimous consent on February 27, 1992.

As is well documented elsewhere, an intense battle over judicial nominations quickly ensued between President Clinton and the Senate after Republicans gained control of the Senate in the 1994 mid-term elections. Nowhere was the judicial confirmation battle more intense between the president and the Senate than over presidential nominations to fill vacancies on the Fourth Circuit Court of Appeals. For example, at this time the standoff between President Clinton and Senator Jesse Helms (R-NC) over nominees to the Fourth Circuit from the state of North Carolina resulted in that state – the most populous in the circuit – having no nominees confirmed (Betts 2011).[5]

On February 22, 1998, Fourth Circuit Judge Donald Stuart Russell died, creating a vacancy on the Fourth Circuit to be filled with the assistance of the senators from South Carolina. At the time, party control of South Carolina's Senate contingent was divided between Republican Strom Thurmond and Democrat Fritz Hollings. Based on the battles over nominations to the Fourth Circuit, it would appear that filling this vacancy would be difficult for President Clinton; however, this was not the case. Although Judge Traxler was a Republican and was nominated to the district court of South Carolina by a Republican president, his record of decision making on the South Carolina district court was one of

[5] By 2003, the added dynamic of a new Democratic senator in North Carolina (John Edwards) and a Republican president (George W. Bush) resulted in North Carolina having no representation on the Fourth Circuit Court of Appeals at all. See Betts, Jack. 2011. "Senate Has Been a Judicial Graveyard for Tar Heels." *The Herald Sun.* http://www.heraldsun.com/view/full_story/9765569/article-Senate-has-been-a-judicial-graveyard-for-Tar-Heels. (Accessed: Sept. 11, 2011).

moderation, with several decisions that reflected President Clinton's policy goals.[6] Furthermore, Judge Traxler demonstrated several other qualities that convinced both Senators Thurmond and Hollings that he would be an excellent choice to fill the newly vacated position on the Fourth Circuit Court of Appeals. President Clinton agreed with the recommendations of Senator Thurmond and Senator Hollings and nominated Judge Traxler for the vacant position on July 11, 1998. Judge Traxler moved swiftly through the Senate Judiciary Committee and was confirmed by the Senate without a negative vote on September 28, 1998. It only took 81 days for the Senate to confirm Judge Traxler to the Fourth Circuit Court of Appeals – less than half the time of the mean number of days it took for the Senate to confirm all of President Clinton's appellate court nominees.[7]

President Clinton was afforded an opportunity to fulfill one of his goals in staffing the federal bench – federal court diversification – by elevating Judge Traxler. President Clinton made it known soon after Judge Traxler's nomination that he would nominate Margaret Seymour – an African-American female - to the position vacated by Judge Traxler upon his confirmation. In doing so, she would become the first ever African-American female to fill a federal court position in South Carolina.[8] Senator Fritz Hollings recommended Seymour to the president. Seymour also received support from Senator Thurmond, who said of Seymour: "She is … a person of character and integrity. I am very pleased to support her, and I am confident that she will be a very able addition to the

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[6] See, for example: Associated Press. 1999. "Judge Strikes Down Abortion Clinic Rules." *The New York Times,* February 7, 1999. Section 1, pg. 33. Final Edition.

[7] The mean number of days it took for the Senate to confirm President Clinton's appellate court nominees was 164.66.

[8] See Associated Press. 1998. "Traxler gets Senate Approval for Federal Appeals Bench." September 28, 1998, Monday BC Cycle. http://www.lexisnexis.com.proxy.lib.utk.edu:90/hottopics/lnacademic/. (Accessed: September 11, 2011).

District Court (Thurmond 1998, 27645)." It took 43 days for the Senate to confirm Ms. Seymour to the District Court of South Carolina. Again, this is less than half the mean number of days it took for the Senate to confirm all of President Clinton's district court nominees.[9]

Section 1.2.ii: The Elevation of Judge Michael Melloy

The story of the elevation of Michael Melloy to the Eighth Circuit Court of Appeals begins in the waning days of the Clinton administration. On March 2, 2000, President Clinton nominated Bonnie Campbell to fill a vacancy on the Eighth Circuit Court of Appeals created by the retirement of Judge George Gardner Fagg. Ms. Campbell was given a "qualified/non-qualified" rating by the American Bar Association but was strongly supported by both of Iowa's senators – Senator Tom Harkin (D-IA) and Senator Chuck Grassley (R-IA). Ms. Campbell received a full hearing in the Senate Judiciary Committee. However, Ms. Campbell's nomination came under fire by several religious interest groups and senators on the Judiciary Committee because of supposed anti-religious comments Ms. Campbell made during her failed attempt to gain the Iowa governorship in 1994.[10] The Judiciary Committee never voted to move her nomination to the entire Senate for a floor vote and her nomination was returned to President Clinton at the end of the Senate term. Clinton renominated her again on January 3, 2001, but President George W. Bush withdrew the nomination after assuming the presidency.

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[9] The mean number of days it took for the Senate to confirm President Clinton's district court nominees was 115.35.

[10] Although the old placed on Ms. Campbell in the Senate Judiciary Committee is supposed to be a "secret" hold, it was well publicized – particularly by Senator Harkin – that the two Senators who initiated the hold were Orrin Hatch (R-UT) and Jeff Sessions (R-AL).

Michael Melloy, a Republican judge on the Northern Iowa District Court, was nominated to fill the Eighth Circuit position on September 4, 2001, but not without controversy. The controversy was not about Judge Melloy, however. Rather, the controversy surrounded the fact that the Senate Judiciary Committee refused to clear Ms. Campbell's nomination for a floor vote in the Senate. Senator Harkin gave testimonies to the Judiciary Committee and on the Senate floor chiding Republicans for thwarting Ms. Campbell's confirmation. In his words, Senator Harkin stated that the "…only reason Bonnie Campbell is not on the Eighth Circuit is because of pure, hardball politics," and that the excuse given by Republicans that her nomination was made too late in the Senate term was "Nonsense. Gobbledly-gook" (Harkin 2000, 22068). Senator Harkin would continue to use this example to call out Republican senators throughout President Bush's term in office when the Republican president complained that the thwarting of his judicial nominees in the Senate was because of political motives (Harkin 2005, 10412-14).[11]

Senator Harkin's rancor, however, did not preclude him from supporting Judge Melloy once he was nominated to the vacant Eighth Circuit seat. Although he called out his fellow home-state senator for not supporting Ms. Campbell's nomination after President Bush took office, he did give his blessing to the nomination of Judge Melloy even though he did not participate in selecting Judge Melloy for the vacant seat. Judge Melloy was chosen from a list of three potential candidates who were hand-picked by Senator Grassley. Judge Melloy was the only person on the list who was a district court judge.[12] After his nomination Judge Melloy was rated as "well-qualified" by the American Bar Association and was

[11] See also Associated Press. 2001. "Judge Nominated to Federal Bench, Campbell Shut Out." July 11, 2001. Wednesday BC cycle. http://www.lexisnexis.com/hottopics/lnacademic/. (Accessed: September 15, 2011).
[12] See Tapper, Jake. 2001. "Dems to GOP: It's Payback Time!" *Salon.com.* , May 10, 2001.http://www.lexisnexis.com/ hottopics/lnacademic/. (Accessed: September 13, 2011).

unanimously voted out of the Senate Judiciary Committee on February 7, 2012. After the Committee vote, Senator Grassley said of Judge Melloy that "[he shows]…tremendous dedication to public service. And… possess[es] the skill, integrity, commitment, intellect, and temperament we expect of all good judges."[13] Judge Melloy was subsequently confirmed by the Democratic-controlled Senate by a 91-0 vote on February 14, 2002. In all, 228 days elapsed from the beginning of the Bush presidency to the day he nominated Judge Melloy to the Eighth Circuit Court of Appeals. This is less than half of the mean number of days it took for President Bush to make nominations to appellate courts after a vacancy occurred. It took 161 days for the Senate to confirm Judge Melloy after he was nominated – only 6 days more than the mean number of days it took to have President Bush's appellate court nominees confirmed.[14]

Elevating Judge Melloy to the Eighth Circuit Court of Appeals allowed President Bush the opportunity to fill the vacated position created via elevation on the District Court for the Northern District of Iowa. At the request of Senator Grassley, and with the consent of Senator Harkin, President Bush nominated Linda Reade to fill this position. Ms. Reade, a Republican, was an Assistant United States attorney during the Reagan administration and had previous judicial experience. Senator Grassley said of Ms. Reade: "Judge Reade's past experience and strong track record of public service make her highly qualified for this

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[13] See United States Congress. Senate Judiciary Committee. "Senate Committee Considers Iowa Judicial Nominees. Judiciary Committee Holds Hearings for Melloy, Gritzner." 107th Congress, January 24, 2002. 1st Session. http://www.lexisnexis.com/hottopics/lnacademic/. (Accessed: September 15, 2011).

[14] The mean number of days it took for President Bush to make a nomination to a vacant appellate court position during his presidency was 576.88. The mean number of days it took for the Senate to confirm his appellate court nominees was 155.76. However, one should also note that this nomination occurred under divided government, and most of Bush's appellate court nominations occurred under unified government. Furthermore, Judge Melloy was nominated only seven days before September 11, 2001, which most certainly delayed his and all other pending judicial nominations in the Senate.

position."[15] The American Bar Association gave Ms. Reade a "well-qualified" rating, and her name moved swiftly through the Senate Judiciary Committee.

The Democratic-controlled Senate confirmed Ms. Reade by voice vote on November 14, 2002. The confirmation of Ms. Reade to her district court position also ensured that the partisan composition of the District Court for the Northern District of Iowa would be split evenly between Republican and Democratic appointees. In all, 121 days elapsed between the elevation of Judge Melloy and the nomination of Linda Reade – less than half the number of days as the mean number of days it took for President Bush to make nominations to district court positions. 142 days elapsed between her nomination and confirmation by the Senate. This was only three days more than the mean number of days it took for the Senate to confirm President Bush's district court nominees.[16]

Section 1.3: Theoretical Relevance to the Discipline

The contribution of this dissertation will be twofold. First, this dissertation will provide insight to a strategic decision that confronts all presidents (the decision of whether or not to elevate district court judges to the federal Courts of Appeals). This decision is not unique to any one president, but is an institutional decision that all presidents may contemplate when deciding to fulfill their constitutional duty to nominate federal judges. Therefore, this dissertation will contribute to the growing literature on the institutional presidency, and will specifically make a contribution to the relatively new and dynamic

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[15] See Associated Press. 2002. "Senate Confirms Reade as Federal Judge." November 15, 2002. Friday, BC Cycle. http://www.lexisnexis.com/hottopics /lnacademic/. (Accessed September 17 2011).

[16] The mean number of days between the creation of a district court vacancy and the nomination of a person to fill that vacancy in the George W. Bush administration was 376.15 days. The mean number of days between nomination and confirmation in the Senate during the President Bush's administration was 139.05 days. Again, Democrats were the majority party in the Senate. Most of President Bush's nominees to the district courts occurred during unified government.

literature on rational decision making within the institutional context of the modern presidency.

Second, this dissertation will provide a contribution to the voluminous literature on "advice and consent." This area of research has become increasingly important among scholars over the last decade, and scholars have approached the study of advice and consent in a myriad of ways. However, most research on "advice and consent" analyzes the confirmation process without attempting to grasp the political ramifications of the nomination process. With few exceptions, scholars have not examined *how* or *why* particular nominations are made to different federal courts (Asmussen, 2011; Masssie et al. 2004; Savchak et al. 2006). This dissertation will provide insight into the nomination process, and hopefully provide insight into the politics of nominations that goes beyond what we already know about them.

Finally, this dissertation can provide insight into the how the executive and legislative branches interact with one another as they vie for control of the federal judiciary. Who are the winners and losers in this battle? Ultimately, I hope this dissertation will provide at least a partial answer to this broad but very important question. My analyses will provide insight into how policy positions of president and the Senate influence who gets chosen to fill judicial vacancies. Hopefully, these analyses will help us to understand the dynamics behind the battle for institutional control of the judiciary; however, I also hope that these analyses will also inspire meaningful questions that can fuel more research on this important and interesting topic.

Section 1.4: Data Sources, Units of Analysis, and Methods Used in this Dissertation

This dissertation uses a variety of data for vital variables used in the analyses of federal judicial nominations and confirmations. The primary database I used is Biographical Directory of Federal Judges housed on the website for the Federal Judicial Center (2011). The Biographical Directory provided information on the district and appellate court judges nominated and confirmed during the time frame under analysis, including names of judges, their nominating presidents, the district and circuits where nominations and confirmations occurred, nomination and confirmation dates, the names of the judges who were being replaced, and the race and gender of each appointee. The data gathered from the Biographical Directory of Federal Judges were supplemented by three other data sources. The first was the Attributes of U.S. Federal Judges Database constructed by Gary Zuk, Deborah Barrow, and Gerard Gryski and housed by the Judicial Research Initiative at the University of South Carolina. The second source is the Lower Federal Court Confirmation Database, 1977-2004, constructed by Wendy Martinek and housed at SUNY Binghamton. The final source of data comes from the final editions of the Senate Judiciary Committee's *Legislative Executive Calendar*.

Much of this dissertation will focus on the effect that the preferences of important institutional actors in the judicial selection process have on the president's decision whether or not to elevate district court judges to the Courts of Appeals. Three data sources were used to gather this information. First dimension DW-NOMINATE scores were used to measure the preferences of the president and relevant congressional actors. This database was compiled by Keith Poole and Howard Rosenthal and is housed on the website for the VoteView project (Poole, 2009). Judicial Common Space scores were used to estimate the

preferences of appellate court judges. The data were collected by Giles et al. (2001), and refined further by Epstein et al. (2007). Judicial Common Space scores are measured on the same scale as DW-NOMINATE scores and can be used in collaboration with DW-NOMINATE scores to compare the preferences of appellate court judges, the president, and Congress.[17] The final dataset used to measure preferences is Christina Boyd's dataset (2010) of the preferences of district court judges. Boyd's dataset is an extension of the Judicial Common Space scores. It uses the same techniques used to generate the Judicial Common Space scores and applies them to district courts to generate preference points for district court judges.

Section 1.5: Overall Structure of this Dissertation

As discussed earlier, the purpose of this dissertation is to add to our understanding of how presidents use elevations strategically to fill appellate court vacancies. By understanding how presidents use elevations to fill appellate court vacancies we as political scientists will be placed in a better position to understand the politics behind "advice and consent" for federal judges more broadly. Chapter Two of this dissertation places the research performed herein within the broader political science literature on new institutionalism, the presidency, and the politics of "advice and consent" while also providing the theoretical foundation on which this dissertation is built. Chapter Three

[17] DW-NOMINATE scores and Judicial Common Space scores can be used together for comparison because DW-NOMINATE scores are used to create Judicial Common Space scores. Giles et al. developed their preference scores for appellate court judges based on the assumption that the preferences of appellate court judges are similar to the preferences of the institutional actors who nominate and confirm them to their judicial positions. Specific attention is given to the preference of a judge's nominating president and the preferences of the home state senators where a judicial vacancy occurs. If none of the home state senators are in the same party as the president, then the preference value assigned to the judge is the DW-NOMINATE score of his or her nominating president. If one of the home state senators is a member of the president's party then the preference value of the assigned to the judge is the DW-NOMINATE score of the home state senator from the president's party. If both home state senators are in the president's party, then the preference value assigned to the judge is the average of the DW-NOMINATE scores of the two home state senators.

provides a descriptive overview of the historical use of elevations to fill appellate court vacancies and also presents case studies that offer explanations as to why and how different presidents in the divided government era used elevations to staff the Courts of Appeals.

Chapter Four of this dissertation provides quantitative testing of several variables that may affect whether a president decides to elevate a district court judge to the Courts of Appeals. Several of these variables are uncovered in the analysis performed in Chapter Three of this dissertation. Chapter Five of this dissertation examines how the elevation of district court judges to the Courts of Appeals affects the ability of the president quickly to nominate and have confirmed individuals to the district court vacancies created via elevation. Chapter Six of this dissertation provides an overview of the results and key findings of this dissertation, reiterates how this dissertation fits within the broader literature on "advice and consent," and provides recommendations for future research.

Section 1.5.i: "Chapter 2: New Institutionalism, the Presidency, and the Politics of Advice and Consent"

Chapter Two of this dissertation provides a review of the literature on presidential nominations to federal courts and explains how this dissertation fits within that literature. It also outlines the broad theoretical foundations on which this paper is built.

This chapter begins by discussing New Institutionalism and explaining how this dissertation fits within the broader literature on New Institutionalism. I discuss the several tenets and varieties of New Institutionalism. I pay specific attention to the variant of New Institutionalism known as rational choice institutionalism. The analyses performed throughout this dissertation utilize the rational choice institutional approaches to understanding presidential nominations. More specifically, I highlight how the president acts strategically when making nominations so as to maximize his chances of nominating

someone who shares his policy preferences. I also discuss how he is also a constrained actor, since his nominees to the federal courts must also be confirmed by the Senate.

From here, I provide a discussion of how rational choice institutionalism generated a paradigmatic shift in the study of the presidency. Until the mid 1990s presidency research focused on the specific character traits of individual presidents and how these traits determined whether or not a president could be successful. Research since the 1990s, however, has shifted away from this paradigm toward a paradigm that assesses presidents as generic-types who make a common set of decisions regardless of who is in office. This new line of research uses rational choice institutionalism to explain how presidents make choices given a set of institutional constraints. I provide a discussion of some of the important literature produced as a result of this paradigmatic shift, and also show how literature on the nomination and confirmation of federal judges falls within this new and exciting presidential literature.

The final section of this chapter looks at the burgeoning literature on "advice and consent." In particular, I demonstrate how, after using rational choice institutionalism as a starting point, scholars who study the judicial nomination and confirmation process have unearthed several political and institutional factors that a president has to account for when making nominations to fill vacant federal court positions. This literature pays close attention to the multiple Senate actors that can stall or kill nominations during the confirmation process, as well as how the president can avoid these adverse outcomes through the type of nominee he chooses. Many of the studies examined in this section are especially germane to this dissertation and will provide several key variables that will be used in the analyses performed herein.

Section 1.5.ii: "Chapter 3: An Historical and Descriptive Overview of the Use of Elevations to Staff the Federal Appellate Courts"

This chapter begins by providing an historical overview of how elevations were used from the end of the Civil War until 1969. Specific attention is given to the importance of the Republican and Democratic hegemonies that existed during this time and how they influenced who was chosen to fill appellate court positions. It also discusses how the use of elevations during these hegemonies was different from their use today. The important point to take away from this section of Chapter Two is that although elevations were used more extensively during the period of Republican hegemony, both Republican and Democratic presidents used elevations extensively and were rarely met with opposition in the Senate when district court judges were nominated for appellate court positions.

Next, I discuss how presidents from 1969 to 2008 have used elevations to staff the Courts of Appeals. I begin by discussing how they have been used within the broader context of judicial nominations and then dive more deeply into how these presidents have used elevations by exploring how each president has used elevations to fill appellate court vacancies. The purpose of these exploratory analyses is to discern possible explanations as to why different presidents decide to use elevations in some contexts to fill vacant appellate court positions and decide not to use elevations in others. These exploratory analyses are also designed to assess whether there are any patterns in how presidents use elevations in the time period. Based on the evidence unearthed in this chapter through the use of different hypothesis tests, I do find that there are interesting patterns in the way presidents have used elevations since 1969.

Section 1.5.iii: "Chapter 4: Who Gets Elevated? Assessing Individual and Institutional Factors that Shape Judicial Elevations"

The purpose of this chapter is to expand upon the discoveries made in Chapter Three by performing several multivariate analyses designed to assess that factors that go into the decision to elevate district court judges to the Courts of Appeals. This chapter also provides a theoretical framework designed to explain why presidents would decide to use elevations in particular contexts. Specifically, I argue that presidents use elevations as a means to thwart policy entrepreneurs who desire to delay or kill presidential nominations to particular appellate courts. Elevations are useful tools for thwarting policy entrepreneurs in the arena of judicial nominations because elevated judges have better qualifications than other possible judicial nominees. District court judges nominated to appellate court positions already have judicial experience - unlike most nominees from outside the federal judiciary. Furthermore, district court judges carry a "trump card" because the Senate has already confirmed them once before. Elevated judicial nominees are also more moderate than other nominees to the Courts of Appeals. This is evidenced by the fact that presidents often make elevations to ideologically moderate courts where the ideological balance of the court may change based on who is confirmed to a vacant position.

Based on the analyses performed in this chapter, I do find that presidents are likely to use elevations to appellate courts when the ideological composition of a court hangs in the balance. Also, elevated district court judges do have better credentials than other nominees to vacant appellate court positions. Furthermore, I find evidence that presidents take less time to make nominations when they elevate than when they do not, and I also find evidence that the amount of time between a nomination and confirmation is less for elevated district court judges than other nominees to the appellate courts. This conclusion is worth

noting because one can infer that the reason elevated nominees are confirmed more quickly is because policy entrepreneurs find themselves without ammunition to stall or kill these nominees.

Section 1.5.iv: "Chapter 5: The Effect of Elevation Strategies on the Nomination, Confirmation, and Preferences of District Court Judges"

Chapter Five of this dissertation moves away from the Courts of Appeals and focuses on how elevations may affect the president's ability to nominate and have confirmed individuals to the district courts who share his policy preferences. Again, an important assumption in the scant literature on elevations is that presidents use elevations to maximize their opportunities to fill vacant federal court positions with individuals who share their policy preferences. However, Chapter Four demonstrates that while presidents may use elevations strategically, they do not use them at all times to fill appellate court vacancies. Still, it is worth examining what ramifications there are in the district court nomination and confirmation process – if any – when the president uses elevations to fill vacant appellate court positions.

The analyses performed in this chapter are based on the idea that the elevation process enables the president to nominate individuals who share the president's preferences to vacant court seats and allows the president to nominate them and have them confirmed more quickly than other nominees to the district courts. My reasoning for this explanation is that the process of elevating district court judges to the Court of Appeals creates an environment that generates good will between the president and important Senate actors involved in the "advice and consent" process for district court judges – particularly home state senators. The creation of a vacancy in the district courts provides another opportunity for home-state senators to dispense patronage to supporters. While home-state senators can

dispense patronage by recommending individuals for appellate court nominations, the district courts are where the effects of senatorial courtesy are the strongest. Recall the discussion of the elevation of William Traxler earlier in this chapter. While it is impossible to know for sure, it is possible that Margaret Seymour's nomination may have been thwarted if it was not for the fact that President Clinton generated good will by elevating a close friend of Strom Thurmond to the Fourth Circuit Court of Appeals.

The analyses performed in this chapter provide evidence that presidents make nominations to district court positions more quickly than they do to other district court positions. These analyses also show that the Senate is more likely to confirm nominees to district court positions created via elevation more quickly than other nominees to district court positions. However, the analyses performed in this chapter do not provide evidence to conclude that district court nominees to seats created via elevation are closer to the president's policy preferences than other district court nominees.

Section 1.5.v: "Conclusion"

This chapter will provide closure to this dissertation by reviewing the findings in this dissertation and by discussing the implications of these findings. This chapter will also discuss how the findings in this dissertation fit within the broader literatures on New Institutionalism, the presidency, and the politics of "advice and consent." Finally, this chapter will discuss some of the shortcomings of this dissertation and also provide discussions for future research.

CHAPTER 2: NEW INSTITUTIONALISM, THE PRESIDENCY, AND THE POLITCS OF 'ADVICE AND CONSENT'

Section 2.1: Initial Assumptions and an Outline of this Chapter

Political institutions and the actions that different political actors take within those institutions are at the heart of this dissertation. Broadly speaking, I am interested in how the president uses elevations to shape the federal judiciary so that the federal judiciary, as an institution, reflects his policy preferences. However, the president can only use the institutional tools at his disposal – namely his nomination powers – to change the composition of the federal judiciary. The Senate also has a role in staffing the federal judiciary via its powers of advice and consent. The Senate is also constrained in the actions it can take to change the composition of the federal judiciary. Specifically, the Senate can only confirm or reject a judicial nominee, and cannot be assured that the president will nominate someone else who will be more aligned with its preferences. The Senate is also constrained in its actions by institutional norms and traditions – particularly the norm of senatorial courtesy – that have developed over time.

Therefore, to understand how the president may use judicial elevations to shape the composition of the federal judiciary, it is important to develop a theory that can describe and explain how the presidency as an institution and the Senate as an institution interact with one another when filling vacant seats in both the federal Courts of Appeals and the district courts. This theory must specifically address how institutions shape and constrain the different decisions that actors within those institutions are able to make.

The purpose of this chapter is to introduce a theory of institutions that is capable of describing and explaining this type of political behavior. The analyses that will be presented within this dissertation fit within the broad range of theory known as "new institutionalism."

This chapter will outline the applicability of new institutionalism to the empirical analyses that will be performed herein. Section 2.2 of this dissertation will introduce the tenets of new institutionalism and explain why new institutionalism provides an excellent theoretical foundation for understanding how institutional rules and norms shape the availability of choices the president has when he is faced with the decision to elevate a federal district court judge to the federal Courts of Appeals or to nominate an individual to the federal Courts of Appeals from outside the federal judiciary. In this section I will discuss the several variants of new institutionalism, but will focus on one variant – rational choice institutionalism – and elucidate the several reasons why this variant of new institutionalism is especially applicable to the research in this dissertation.

Section 2.3 of this chapter will shift the discussion from a broad analysis of new institutionalism to how presidential scholars have started to use new institutionalism as a fruitful theory within the presidency literature to describe and explain how the institutional rules and norms in the executive branch shape the decisions that presidents make. This section will begin by discussing how the presidency subfield has shifted away from more personal analyses of different presidents and began assessing how the rules and constraints of the presidency as an institution shape the decision making calculus of all presidents. I will conclude this section by showing where this dissertation fits within the growing institutional literature on the presidency.

Finally, section 2.4 of this chapter will discuss the extensive literature on the topic known among scholars as "advice and consent," and will show how this dissertation fits within the literature on this topic. The purpose of this section is twofold. First, I will discuss what this literature indicates about the roles that the Senate and the presidency, as

institutional actors, play in the process of judicial nominations and confirmations. Second, I will demonstrate that one weakness in the advice and consent literature is its failure to account for the role that the president plays in the process of advice and consent beyond his constitutionally sanctioned role of nominating individuals to the federal judiciary.

Section 2.2: New Institutionalism

Section 2.2.i: The Tenets of New Institutionalism

New institutionalist explanations of political behavior are based on the idea that "the state matters." New institutionalist models of political behavior "bring the state back in" to political research (Skocpol 1985, 28). Many argue that political scientists have never neglected the importance of the state (Fiorina 1995, 107; Immergut 1998, 5; Peters 1999, 4). What new institutionalism does do, however, is afford the state a greater role in affecting political and social decision making than it previously possessed in other dominant theoretical perspectives in political science. Indeed, the most fundamental tenet of new institutionalism in political science is that individual political choices are shaped and constrained by political institutions (Peters & Pierre 1998, 565).

It is important to properly define institutions in order to understand how they are capable of affecting political behavior. Peters and Pierre define institutions as "not just…manifest political organizations but also…aggregations of norms, values, rules, and practices that shape and constrain political behavior" (Peters & Pierre 1998, 565). Peters specifies that an institution must possess four distinct characteristics. First, an institution (whether formal or informal) must structure political interactions among individuals. Second, an institution must provide stability over time. Third, an institution must affect individual

behavior. Finally, an institution must be able to engender a sense of shared values among the individuals who are "embedded" within the institution (Peters 1999, 18).

New institutionalist scholars believe that institutions should serve as the starting points for understanding political behavior. Whereas behavioralist and rational choice explanations of political behavior emphasize that only individuals make political decisions and therefore need to be at the center of political analysis (this is known as methodological individualism), and that an individual's personal preferences are exogenous to the political process, new institutionalists believe that institutions shape individual behavior and ultimately define the availability of choices for political actors. Often the decisions that political actors can make are defined by an institution because the political actor is "embedded" within the institution (Granovetter 1985, 483). In short, new institutionalists believe that individual preference formation is endogenous to the political process. Institutions possess the power to affect preferences through what March and Olsen define as a "logic of appropriateness" (March & Olsen 1984, 741). The "logic of appropriateness" refers to the norms and rules that define acceptable behavior within an institution (Peters 1999, 25). These norms and rules are created by individuals within institutions; however, the relationship between institutional norms and individual preference formation is reciprocal. Individual institutional actors create institutional norms and rules which, in turn, shape the preferences of institutional actors as actors participate in multiple iterations of institutional interaction (Dowding 1994, 110; March & Olsen 1984, 738; Peters 1999, 17; Peters & Pierre 1998, 568).

New institutionalist scholars are not just concerned with how institutions shape individual behavior. They are also concerned with how the values, norms, and rules

embodied in institutions allow for political decisions to be made. New institutionalist scholars are especially concerned with how institutions are capable of overcoming collective action problems in political decision making, and understanding the inefficiencies that arise from how institutions solve these collective action problems (Immergut 1998, 7; Ostrom 1990, 14; Peters 1999, 17). These scholars also desire to understand how institutions change over time to account for the inefficiencies they create (Hall & Taylor 1996, 952; Peters & Pierre 1998, 567).

New institutionalism's emphasis on overcoming collective action problems stands in stark contrast to behavioralist and rational choice explanations of individual preference aggregation as the means of producing political outcomes. In fact, one of the reasons for the development of new institutionalism was to account for the weaknesses in the argument that individual political preferences could be aggregated into decisive political outcomes (Riker 1980, 443; Shepsle 1989, 135.) New institutionalist scholars argue that it is impossible for individual preferences to be aggregated into collective decisions. Aggregated individual preferences could only lead to a lack of consensus among the individuals who express their preferences for a particular political outcome, and the result of this aggregation of preferences would be chaos (Immergut 1998, 7). Instead, new institutionalist scholars argue that institutions, via their accepted structures and procedures, shape the types of decisions that actors within institutions can make and therefore shape the preferences orderings of the individuals within those institutions (Shepsle 1989, 136). As Immergut states, "Mechanisms for aggregating interests do not sum but in fact shape interests (Immergut 1998, 7)."

As I mentioned earlier, new institutionalists do not believe that the mechanisms an institution uses to filter preferences into political action are necessarily efficient. For

example, an important area of institutional inquiry attempts to understand how institutional rules create power asymmetries among different political groups which can affect levels of institutional representation (Hall & Taylor 1996, 941), or as William Riker states it, why institutions systematically exclude or include certain "tastes and values" (Riker 1980, 444). Another area of inquiry especially germane to scholars of rational choice institutionalism is how institutional arrangements – or the lack thereof – prevent rational utility-maximizing individuals from taking collectively superior courses of action (Hall & Taylor 1996, 945; Ostrom 1990, 2-5).

Section 2.2.ii: The Evolution of New Institutionalism

The label "new institutionalism" implies that at one point there existed an "old" institutionalism. This is indeed the case. In fact, along with the study of political philosophy, institutional analysis formed the foundation on which political science as an academic discipline was built. Like new institutionalism, old institutionalism was concerned with how the state shaped the behavior of individual political actors. However, scholars grounded in old institutionalism were concerned with only the formal aspects of the state. These scholars were specifically concerned with the law and constitutions, and the formal institutional structures that laws and constitutions sanctioned.

To this end, old institutionalists devoted their energies to writing extremely detailed explanations of the formal structures of government. The purpose of these analyses was normative. These scholars wished to determine which institutional structures produced the best types of government given the goals of a particular political system. These scholars were not interested in generating a body of theory, nor were they interested in developing concepts that could explain different structural aspects of a particular governmental system

(Peters 1999, 7). To be sure, some works in the old institutionalist tradition do contain what Peters describes as "proto-theory" (Peters 1999, 7), and several scholars in the old institutionalism tradition did attempt to compare the differences in formal structures among different countries. What was missing from this work, however, was a meaningful attempt to draw inferences from these comparisons and produce broad generalizations that could be used to explain different types of political phenomenon.[18]

The behavioral and rational choice revolutions of the 1950's, 1960's, and 1970's in political science sought to remedy these weaknesses inherent in the old institutionalist tradition. The scholars who introduced behavioralism and rational choice to political science believed that the old institutionalist tradition left no room for individuals to affect political processes. One of the most important assumptions of behavioralism and rational choice is methodological individualism, which is the belief that only individuals make decisions in political contexts, and therefore the individual should be the focus of political research (Immergut 1998, 6). For behavioralists, the focus of attention would be on the observable behavior of individuals, while for rational choice theorists, the focus of attention would be on how the rational individual maximizes his or her utility under conditions of interdependence (Immergut 1998, 12).

Furthermore, scholars versed in behavioralism and rational choice were explicitly concerned with theory development. These scholars believed that the only way for political

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[18] Peters succinctly summarizes how scholars compared formal institutional structures in the old institutionalist tradition. Instead of drawing inferences from the similarities and differences that existed between different state structures, Peters states that old institutionalists simply listed the details of different institutional structures one after the next, so that a common format for old institutional analysis would look like the following: "The formal institutional structure of country A is….The formal institutional structure of country B is…" (Peters 1999, 9). An excellent example of the application of old institutionalism as Peters describes it to the study of United States law is the work of Robert Cushman in the 1920's. See Cushman 1921, Cushman 1926a, and Cushman 1926b for examples.

science to advance as a scientific discipline was to generate general theories of political phenomena that were capable of being tested. This emphasis on the development of theory also led to a concomitant emphasis on more sophisticated methodological tools to test these theories.

While both behavioralism and rational choice have undoubtedly revolutionized how political scientists have described and explained political phenomena, both approaches raised many questions that led scholars to wonder if the these two approaches discounted the effect that the formal and informal institutions of the state have on the decision making calculus of political actors. The most important new institutionalist critique of behavioralism, as discussed earlier, is the concern with how behavioralists aggregate individual behavior into collective phenomena. New institutionalists also believe that the observation of "real" preferences may be impossible, and are interested in understanding the differences between real preferences and expressed preferences (Immergut 1998, 6-7).

Concern also arose among rational choice scholars as to why different models of rational individual action resulted in irrational political outcomes. Rational choice scholars were also concerned with the absence of context in which political actors made decisions within their models. For example, one of the most important puzzles for rational choice theorists was understanding the implications of Arrow's impossibility theorem, which states that it is impossible to generate a social welfare function that satisfies the preference orderings of all participants in a society (Hall & Taylor 1996, 942-43; Peters 1999, 48; Shepsle 1989, 136). What was disconcerting to rational choice scholars was the fact that Arrow's impossibility theorem was not consistent with empirical reality. The whole of politics was not in flux, and not all decisions made in politics were arbitrary (Shepsle 1989,

136). It became apparent that there needed to be a different analytical foundation to solve these different dilemmas.

New institutionalism arose out of these different dilemmas. New institutionalism, like its old institutionalism counterpart, begins political analysis with the state. Unlike old institutionalism, new institutionalism is theory-driven and emphasizes the rigorous testing of hypotheses using the most current methodologies. In essence – and especially in the rational choice institutionalism variant to be discussed later – new institutionalist scholars use the rich description of old institutionalist scholars and transform it into extended form games, which are then used to test the implications of how institutions affect political behavior based upon how these institutions sanction the ordering of political decision making in different political contexts. While this dissertation does not utilize a game-theoretic framework like many other analyses in the new institutionalist literature, one of the important assumptions undergirding this work is that the political actors involved in the process of advice and consent make strategic decisions that are partially affected by *when* they make decisions in the process of the advice and consent 'game.'

Section 2.2.iii: Variants of New Institutionalism and Rational Choice Institutionalism

New institutionalism is not a monolithic theory. Scholars have created several typologies of new institutionalism over the last 30 years. While Peters' (1999) typology of the variants of new institutionalism may serve as the most thorough and detailed typology, most scholars believe that there are there are three distinct variants of new institutionalism, and that new institutionalist scholarship in the social sciences, and political science in particular, fall within one of these three categories (Hall & Taylor 1996, 936; Immergut 1998, 15). These three variants are sociological institutionalism, historical institutionalism, and rational

choice institutionalism. In this section, I will provide a brief review of each variant of new institutionalism. I will specifically focus on the analytic foundations of rational choice institutionalism and demonstrate its applicability to the research conducted throughout this dissertation.

Sociological institutionalism originated within the subfield of organization theory in sociology at the end of the 1970's, and served as a counterpoint to the common belief that the reason bureaucratic organizations took on similar forms was because there was an inherent rationality and efficiency in those forms for accomplishing their specific tasks (Hall & Taylor 1996, 946). Sociological institutionalists, however, argued that there was no inherent rationality in institutions, and that the rules promulgated by organizations were not necessarily efficient. Rather, institutional form should be seen as the structuring of diffuse culturally accepted myths, ceremonies, norms, and values (Hall & Taylor 1996, 946; Immergut 1998, 15). To this end, sociological institutionalists are concerned with understanding why different organizations assume certain roles and symbols given different environments, why organizations take on similar forms across different cultures (known as institutional isomorphism), and how rules and norms are transmitted throughout organizations (DiMaggio & Powell 1991a, 150; Hall & Taylor 1996, 947; Peters 1999, 100-04).

There are very weak boundaries between organizations, institutions, and culture in sociological institutionalism (Peters 1999, 99; Hall & Taylor 1996, 947). Indeed, sociological institutionalists often use the terms "organization" and "institution" interchangeably. This conceptualization of institutions is much broader in scope than conceptualizations of institutions used in historical or rational choice institutionalism – especially in political

science. Whereas most political scientists tend to make a sharp contrast between institutional and cultural behavior, research based on the sociological institutionalism tradition tend to define culture itself as an institution (Hall & Taylor 1996, 947-48).

This has implications for how sociological institutionalists explain individual behavior. Sociological institutionalists assume that individuals are constrained by bounded rationality, and need to follow certain institutional or cognitive scripts to make decisions (Immergut 1998, 15). The role of the institution is to provide these scripts. Institutions provide culturally accepted scripts that not only pattern individual decision making through the creation of symbolic codes or norms of appropriateness (like the logic of appropriateness discussed earlier), but also provide a cultural justification of action for an individual because such action generates meaning for the individual and reinforces their societal conventions (Hall & Taylor 1996, 948; Immergut 1998, 15; March & Olsen, 1989; DiMaggio & Powell 1991b).

Historical institutionalism originated within political science during the 1970's and served as a counterpoint to structural functionalist explanations of political phenomena that were relevant at the time. Whereas structural functionalists believed that the social traits of individuals were the driving forces behind the operation of the polity as a system, historical institutionalists believed that it was the institutional organization of the polity that was in fact structuring the behavior and ultimately the political outcomes of the polity (Hall & Taylor 1996, 937).

The basic premise of historical institutionalism is that the political choices and policies made while an institution is being formed will have ramifications for how policy is implemented well into the future (Peters 1999, 63). To this end, historical institutionalists are

interested in the path dependency of political choices and the contexts in which these choices are made, and in the unintended consequences, or "critical junctures" in history that may result from those political choices (Collier & Collier, 1991; Immergut 1998, 19; Lecours 2005, 9; Peters & Pierre 1998, 571). Of special concern to historical institutionalists is how institutional formation creates different power asymmetries among different groups within a polity and how the critical junctures in history change which political groups have access to power (Hall & Taylor 1996, 938; Peters 1999, 64; Peters & Pierre 1998, 571).

Historical institutionalists define institutions in more broad terms than do sociological or rational choice institutionalists. Historical institutionalists, like rational choice institutionalists, conceptualize institutions as formal structures, rules, and procedures; however, they also subsume societal conventions like social class within their definition of an institution (Peters 1999, 66). What sets historical institutionalists' definition of institutions apart from other variants of new institutionalism is the emphasis placed on ideas as institutions (Hall & Taylor 1996, 938; Peters 1999, 66). For example, historical institutionalists have devoted a great amount of energy explaining how the political systems of Great Britain and the United States came to accept Keynesianism as an economic philosophy during the 1930's, and then how they embraced monetarism and supply-side economics as an economic philosophy during the 1980's (Peters & Pierre 1998, 570-71; Weir, 1989, 64).

Historical institutionalists are also eclectic in how they explain how institutions affect behavior. For historical institutionalists, behavior is explained through both the "cultural approach" used by sociological institutionalists, and the "calculus approach" used by rational choice institutionalists (Hall & Taylor 1996, 940). These two approaches to behavior are

explained in a two-tiered process. First, historical institutionalists claim that the formal organization of institutions ossifies into particular worldviews which shape preferences. These ossified worldviews then shape the strategies of action available to political actors (Hall & Taylor 1996, 940). Hattam's analysis of the development of the labor movement in both the United States and Great Britain exemplifies this approach to historical institutionalism, as she explains how the entrenched structural norms of government in these two nations shaped how the labor movements of each nation chose different paths to accomplishing their goals, and how these movements in each country met with particular successes and failures (Hattam, 1993, 11).[19]

Both historical institutionalism and sociological institutionalism have found niches in political science.[20] However, it is rational choice institutionalism that has proven to be the most applicable variant of new institutionalism for understanding the presidency. To be sure, several presidential scholars have utilized the historical institutionalist framework to understand how presidency has evolved over the course of history (see Skowronek, 2009 for a good review of presidential research in the historical institutionalism tradition). However, it

[19] Another example of how the historical institutionalist approach would apply in the American context would be to describe and explain how and why the NAACP decided to pursue action to eliminate 'Separate but Equal' through the Courts and not through Congress in the 1940's and 1950's. While this research idea is not relevant to this dissertation, it is definitely a good idea for those interested in the historical institutionalist variant of new institutionalism.

[20] There have been several works in political science that exemplify the application of sociological institutionalism and historical institutionalism to research in political science. For an excellent example of the application of sociological institutionalism to research in political science, I would highly recommend reading David Lowery and Virginia Gray's research on the population ecology of interest groups among the states (Gray & Lowery, 1996; Lowery & Gray, 1995). For an excellent application of historical institutionalism to research in political science, I would highly recommend Frank Baumgartner and Bryan Jones' research on how agenda setting affects public policy (Baumgartner & Jones, 1993; Jones & Baumgartner, 2005) and their subsequent research that develops a general theory of punctuated equilibrium in policy processes (Baumgartner et al., 2009; Jones et al., 2009).

has been the rational choice institutional framework that has revolutionized the research on the presidency over the last decade.

Rational choice institutionalism, like sociological and historical institutionalism, traces its roots to the 1970s. Some find the development of rational choice institutionalism ironic, as the development of new institutionalism is seen as a response to the atomistic and self-interested view of political behavior expounded in rational choice theory (Peters 1999, 44). However, rational choice theorists were also dissatisfied with this view of individual political behavior, and desired to find explanations of political behavior that solved some of the most perplexing puzzles in rational choice scholarship (Shepsle 1989, 134-35).

Rational choice institutionalism specifically developed among Congressional scholars who desired to understand how Congress could reach legislative outcomes that possessed stability and exhibited empirical regularities when Arrow's impossibility theorem predicted that it would be impossible, based on the preference orderings of congressional members, to arrive at equilibrium decisions (Hall & Taylor 1996, 942-43; Shepsle 1989, 136). These scholars turned to institutions as the answer to this conundrum. What these scholars found was that the structure and procedure expounded through institutional rules were capable of conferring agenda power on some individuals over others, and were also capable of restricting the range of choices available to political actors, which in turn allowed Congress to reach equilibrium outcomes. In his classic work, Kenneth Shepsle defined this equilibrium outcome as a "structure-induced equilibrium" (Shepsle 1979, 53; Shepsle 1989, 137).

The key to understanding rational choice institutionalism lies in recognizing the importance of institutional structure and procedure. Rational choice institutionalists still begin analyses with a certain set of behavioral assumptions about individual actors in the

political process, namely that political actors have a specific set of preferences and behave instrumentally to attain their preferences (Hall & Taylor 1996, 944-45; Peters 1999, 44). However, rational choice institutionalists state that the decision sets of political actors are constrained via institutional processes. In essence, the rules and norms of institutions identify who the important actors are and – more importantly – specify the sequence in which political actors make decisions. This enables rational choice scholars to conceptualize institutional decision making as an extensive form game where political actors are constrained decision makers, but are also aware that other political decision makers in the game are constrained by institutional rules (Cameron 2000, 75; Hall & Taylor 1996, 945; Peters 1999, 44; Shepsle 1989, 137). This permits political actors to engage in strategic interaction to determine political outcomes.

To this end, rational choice institutionalists define institutions as the "rules of the game" that "prescribe, proscribe, and permit behavior" (Lecours 2005, 9; Ostrom et al. 1994).[21] As mentioned earlier, the rules of the game serve two purposes: they constrain political actors, and they provide specific decision sets for those actors depending on the decision that needs to be made. Ideally, constraining political actors and providing them with specific decision sets will provide regularity and stability. Individual preferences are mapped into decisions that, ideally, are collectively desirable, and would otherwise be exceptionally hard to reach without the existence of such rules (Peters 1999, 45).

Also, as mentioned earlier, rational choice institutionalists still posit that individual political actors make decisions based upon their own interests and attempt to maximize their

[21] I would argue that this definition of institutions comes the closest to the definition of an institution in the 'old institutionalism' tradition, and that if it were not for the rich formal-legal analyses performed by the old institutionalists, the game forms developed by rational choice institutionalists would not be as well developed as they are. See Lecours 2005, 9-15, for an interesting discussion on this particular topic.

own utility given a particular institutional framework. Therefore, rational choice institutionalists do not believe that institutions actually shape behavior. Rather, rational choice institutionalists believe that rational political actors will attempt to utilize the institutional framework in which they must make a decision to their advantage, given the preferences of other political actors allowed to participate in a political decision and the rules of sequence in political decision making dictated by the institutional rules of play (Peters 1999, 45). From the perspective of rational choice institutionalism, individual preferences are still exogenous to the political process, but they are not manifested in political decisions. Rather, the choices made by political actors are an amalgam of both personal and strategic considerations (Immergut 1998, 13).

This dissertation will draw primarily from the rational choice institutionalism framework to explain the president's decision whether or not to elevate a federal district court judge to the federal Courts of Appeals. While I do not explicitly use a game theoretic framework for the analyses that will be conducted throughout this dissertation, one of the main contentions of this dissertation is that the president decides whether or not to elevate district court judges to the federal Courts of Appeals based upon strategic considerations. Furthermore, the process of advice and consent does follow a sanctioned, extensive form game. The rules of the nomination/confirmation process are sanctioned in Article II of the Constitution. Within the rational choice institutionalist framework, the president is conceptualized as an actor with personal preferences which he wishes to convert into public policy – in this case, elevating federal district court judges who share his preferences and then filling these newly vacated district court seats with new judges who also share his preferences. He is a constrained actor because his nominees must be confirmed by the

Senate; however, the Senate is also constrained by its own rules and norms (Cameron 2000, 75). The president must also account for the empirical realities of divided government, and the fact that different veto pivots within the Senate holding different ideological positions can affect who will get confirmed, and when they get confirmed. Therefore, the president needs to act strategically within this framework of constraints to shepherd a judicial nominee through the confirmation process and ultimately win one iteration of the advice and consent 'game.'

Section 2.3: New Institutionalism and Presidential Scholarship

New institutionalism and rational choice in particular, have greatly changed how scholars study and understand the presidency. The purpose of this section is to elaborate upon the evolution of presidential scholarship and emphasize how the application of rational choice institutionalism to presidential scholarship has enabled the presidency subfield to move away from its informal, descriptive, and atheoretical roots toward becoming a subfield that is theory-driven, highly analytic, and logically coherent.

Section 2.3.i: Richard Neustadt and Presidential Power

Richard Neustadt's theory of presidential power has served as the guiding force in presidential research for nearly fifty years. In his book, *Presidential Power* (1960), Neustadt explained how the president is unable to lead by command (Neustadt 1990, 87; Mayer 2009, 428). Presidents cannot lead by command because the powers enumerated in Article II of the Constitution are vague (as opposed to the Article I powers given to Congress, which are specific). This lack of constitutional authority creates quite the conundrum for the modern president because of the great expectations to lead and demonstrate a high degree of competence and accomplishment (Mayer 2009, 430-31; Moe & Howell 1999, 850). Since the

president is not capable of leading by command, he must rely on other strategies in order to provide leadership and accomplish his primary objectives.

Neustadt determines that the only way the president can lead is through the use of persuasion (Neustadt 1990, 101). For Neustadt, power and persuasion are synonymous. The president must specifically be able to execute his power of persuasion with Congress (Neustadt 1990, 102). The president must be a strategic actor who can navigate the several hurdles facing him on his way to accomplishing his tasks. To do so, he needs to be able to bargain and compromise in order to build coalitions within Congress that are willing to act upon his agenda (Neustadt 1990, 105-07). According to Neustadt, the president needs to muster all of the personal talents and resources at his disposal. Presidents who use personality, popularity, style, and skill in forming winning coalitions will be successful. Those who do not use these qualities will not be successful (Howell 2003, 9). Furthermore, presidents need to be cognizant of how and when they use these skills. Presidents who overuse their tools of persuasion run the risk of being unable to effectively lead (Waterman 2009, 478).

Richard Neustadt's theory of presidential power sparked a wave of behavioral literature that analyzed the personal characteristics of individual presidents and attempted to demonstrate that some personal qualities were more conducive to achieving effective leadership and policy success than others (Howell 2003, 9; Moe 1993, 238; Waterman 2009, 478). The assumption underlying this line of scholarship was that the strength of the presidency would wax and wane based on the personality of each president. It was the person who was president that was important, and not the office of the president, for determining presidential strength.

Section 2.3.ii: The Weaknesses of Neustadt's Theory of Presidential Power

Although Neustadt's theory of presidential power has served as the predominant paradigm in presidential research for many years, the process of time began to produce fissures in the ability of this theory to explain presidential power. First, Neustadt's theory of presidential power was established over 50 years ago. Many dramatic events – Vietnam, Watergate, Iran-Contra, President Clinton's impeachment, and 9/11, to name just a few – occurred over this time and left an incredible imprint on how the United States views the presidency. The climate of our national politics has also changed. Congress has become more polarized internally and has also become more confrontational with the president. Interest groups and the media have also contributed to the confrontational nature of American politics (Moe 1993, 343-45; Waterman 2009, 479). Presidents have found it to be much more difficult to bargain and compromise with Congress in this type of atmosphere.

Also, as mentioned before, Neustadt's theory of presidential power implicitly states that the power of the president will vacillate depending on the personality of the president who occupies the office. However, scholars have also recognized for several decades that the power of the presidency continually increased during the twentieth century. Scholars also recognize that the quality of presidents over the course of the twentieth century has not continually increased over the same time period (Moe 1993, 345; Waterman 2009, 479).

Finally, American government scholars began to believe that Neustadt's theory of presidential power demonstrated several analytic and theoretical weaknesses that prevented research on the presidency from keeping pace with other subfields in American government. Neustadt emphasized that the personal qualities of individual presidents were the key to understanding presidential success. However, this personal explanation of presidential power

did not fit with the evolution of the presidential office at the end of the twentieth century. Scholars began to notice that the presidency was becoming more institutionalized during this time, and that personal explanations of presidential power were not capable of explaining the decisions that presidents made (Moe & Howell 1999, 851).[22]

Also, Neustadt's personal explanation of presidential power, while rich in description, was often atheoretical in its approach and hence was not generalizeable (Moe 2009, 703). The inability of Neustadt's approach to provide a sound theoretical basis for the explanation of presidential action prevented the presidency subfield from advancing theoretically in the same way the Congressional and judicial subfields were able to advance throughout the 1970's, 1980's, and 1990's (Moe 2009, 706). It became apparent that a new theoretical framework would be necessary to account for the institutionalization of the presidency that happened at the end of the twentieth century, and to provide a solid theoretical foundation for the advancement of presidency subfield as a whole (Moe & Howell 1999, 851). New Institutionalism, and rational choice institutionalism in particular, would become the theoretical framework to fill this theoretical and analytical void.

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[22] What is meant by stating that the presidency is "becoming more institutionalized" is that the presidency has shown signs of developing values and stability for their own sake, and that these developments are ends in and of themselves (Ragsdale & Theis 1997, 1282). When presidential scholars state that the presidency has become more institutionalized, they are not referring to the president *per se,* but to his staff and the departments that are under the president's control. Over time these departments become harder to alter, survive internal and external challenges to their existence, and achieve self-maintenance. They also develop an identity and a certain way of acting (Ragsdale & Theis 1997, 1282). The Office of Management and Budget and the White House staff are often used as good examples of how the presidency has institutionalized (Rudalevige 2002). Notice that the institutionalization of the presidency does not refer to the president himself. Rather, it refers to the organization of the executive branch during modern times that allows the executive branch to effectively manage "…its staff and budget, the powers and responsibilities delegated to it by Congress, and the growth of agencies and commissions that collect and process information within [the executive branch].;" (Howell 2003, 11).

Section 2.3.iii: The Results of Applying New Institutionalism to the Presidency Subfield

The application of the new institutionalist framework to the study of the presidency has proven to be an effective means of resolving the problems that plagued the presidency subfield. First, the new institutionalist framework has been able to account for the institutionalization of the presidency over the last forty years. Second, new institutionalist theories enabled scholars to change their analytic focus away from individual presidents and the decisions that they make toward decisions that are common to all presidents. In this sense, institutionalist theories of the presidency are impersonal. It is not the person who is president that is important. Rather, it is the structures and incentives built into the presidency as an institution that are of importance (Moe 2009, 704).

As Terry Moe notes, however, institutional theories of the presidency can only take the researcher so far, for institutional analyses of the presidency that attempt to account for the vast complexity of the presidency as an institution quickly become unclear and fail to provide a basis for sound theory (Moe 2009, 704). To cope with this problem, presidency scholars have relied on rational choice theory to generate a body of research that is simple, clear, logically rigorous, and possesses great deductive power. In short, the application of rational choice institutionalism has enabled the presidency subfield to move away from its informal, descriptive, and atheoretical roots and toward becoming a subfield that is theory-driven, highly analytic, and logically coherent (Moe 1993; Moe & Howell, 1999; Moe, 2009).

To be sure, many scholars during the 1980's and 1990's began to emphasize the importance of the "institutional presidency" (Moe 1985; Nathan, 1983), while other scholars emphasized the importance of conceptualizing presidential decision making as "presidency-centered" as opposed to "president-centered" (Hager & Sullivan 1994, 1098). However, the

early research that incorporated the axioms of new institutionalism was not explicitly trying to use these axioms to understand the presidency as an institution. Rather, scholars incorporated the presidency along with other institutions like Congress, the courts, and the bureaucracy, to produce rational choice models that captured the logic behind the separation of powers. For example, in their analysis of political control of the bureaucracy, McCubbins et al. conceptualized the president as one of two principals that can wield authority over bureaucracy (McCubbins et al. 1987, 247). Likewise, Ferejohn and Shipan's formal model of how Congress can influence the policy decisions of the bureaucracy are altered by the ability of the president to successfully use his veto power, and for the veto power to sustain judicial review over the course of a sequential game (Ferejohn & Shipan 1990, 15). The purpose of this research was not to advance a specific understanding of decision making within an institutionalized executive branch. However, these research programs and others provided the foundation for the development of an institutional theory of the presidency (Moe 2009, 706).

The advent of the application of rational choice institutionalism to the study of the presidency occurred with the publication of Charles Cameron's influential text, *Veto Bargaining* (Moe 2009, 707). *Veto Bargaining* was an explicit attempt to apply rational choice institutionalism to the presidency and to move away from the more common personal approaches that preceded it (Cameron 2000, 3, 79). This, however, was not why this text was successful. *Veto Bargaining* is an important text for demarcating the beginning of the successful application of the rational choice institutional paradigm to the presidency subfield for many reasons. The first reason was that this text approached a quintessential Neustadtian topic – bargaining between Congress and the president – and by utilizing the rational choice

institutionalist approach, examines it from an entirely different perspective (Cameron 2000, 79). Second, his analysis reveals that the president is not as beholden to Congress as Neustadt would have suggested. Rather, via his rational choice theories of veto bargaining, Cameron shows that presidents use vetoes to engage Congress in strategic behavior (Cameron 2000, 19) and can use Congress' uncertainty of the president's preferences to force Congress to make concessions on particular bills (Cameron 2000, 158).

Since the publication of *Veto Bargaining,* several scholars have recognized the power and usefulness of rational choice institutionalism for understanding how the president makes decisions in strategic and interdependent environments and have followed Cameron's lead by generating rational choice models of presidency-centered behavior. The result has been what some have termed a "revolution" in the study of the presidency (Moe 2009, 707). What has also been impressive to observe is the multitude of presidency-centered topics in which presidential scholars have had success in applying rational choice institutionalism.

One such extension of the rational choice perspective within presidency research is the elaboration of a theory of presidential unilateral action. This theory, which attacks Neustadt's theory of presidential power head-on, posits that the ambiguity of Article II of the Constitution gives the president the power to change policy unilaterally without interference from either Congress or the judiciary (Moe & Howell 1999, 855). In his book *Power Without Persuasion*, William Howell uses this theory to develop a rational choice model of unilateral action. What Howell's model reveals is that the president is advantaged in unilateral policy making because he possesses a first-mover advantage. This means that Congress can only react to unilateral presidential directives. Finally, the empirical tests of his rational choice model support his contention that presidents frequently do change policy

unilaterally, and that Congress and the courts often let him do so without repercussions (Howell 2003, 13).

Another area of presidential research where the rational choice institutionalist approach has been useful has been in the study of presidential leadership. Brandice Canes-Wrone has been a leader in the application of rational choice institutionalism to this area of presidential scholarship. Her work analyzes two different angles of presidential leadership. First, she utilizes rational choice institutionalism to generate formal models that predict conditions when presidents are likely to set the national agenda by going public on certain issues. She finds that presidents are likely to go public on issues that are already popular with the public, and on issues where the public's position on those issues are closer to the president's position than to the position of Congress or the status quo (Canes-Wrone 2001a, 324; Canes-Wrone 2006, 26). Presidents can also influence the public agenda through the use of threats to go public on issues (Canes-Wrone 2001b, 193).

The second angle of her work focuses on presidential leadership and pandering to the public will. Again, Canes-Wrone uses rational choice institutionalism in a formal theoretic framework to predict conditions when the president will select policies that are popular and in the public interest, are unpopular but in the public interest, or when the president panders to the public will by choosing policies that are popular but not in the public interest (Canes-Wrone 2006, 121-22; Canes-Wrone et al. 2001, 540).

Another area of progress in presidency scholarship that uses rational choice institutionalism as its guide – and an area of scholarship that shares many characteristics with scholarship on judicial nominations and confirmations – is the growing body of literature on strategic appointments made by the president to administrative agencies within the executive

branch.[23] This line of literature is similar to the literature on the nomination and confirmation of federal judges because the president is given the power to make bureaucratic appointments while the Senate must confirm nominees to bureaucratic positions. The most notable similarities are that the Senate is likely to delay confirmation of appointees to bureaucratic positions when the Senate is more polarized, and when there is divided government (McCarty & Razaghian 1999, 1141).

The politics of bureaucratic appointments, however, are different than the politics of appointments to the federal judiciary. First, bureaucratic leaders can be removed from office by the president whereas federal judges have life tenure (Bell 2002, 592). Furthermore, Congress has the ability to restrict the resources of bureaucratic agencies if they make decisions that are not in line with the preferences of Congress. Nolan McCarty calls this situation the "appointments dilemma," and through a rational choice institutional framework, finds that the nomination and confirmation process often results in inefficient outcomes for both the president and Congress since the nomination of bureaucratic agents by the president who are further away from Congress' preferences will result in a decrease in agency resources that can keep that agency from accomplishing their tasks and goals (McCarty 2004, 414). Furthermore, bureaucratic agencies are also beholden to certain constituents who can raise "fire alarms" in Congress (McCubbins & Schwartz, 1984). Bertelli and Feldmann find that the appointment of political loyalists to bureaucratic agencies is only effective if the president, Congress, and relevant constituents all hold the same preferences.

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[23] To be sure, there are several other areas of presidency where rational choice institutionalism has been applied successfully. A full analysis of all of this literature is beyond the purpose of this dissertation. However, I would recommend for the interested reader Lewis' (2003, 2004, 2008) texts on how the president influences the design of bureaucratic agencies, and how he might politicize positions within the bureaucracy, and Rudalevige's (2002) text on political centralization.

If they do not, the president is better served appointing individuals who offset the preferences of bureaucratic constituents if he wishes to have policy implemented in a way that will reflect his preferences (Bertelli & Feldmann 2006, 32). The next section of this dissertation will discuss at length the several characteristics of the politics behind the nomination and confirmation of federal judges.

Section 2:4: Understanding the Politics of Advice and Consent

The literature on the nomination and confirmation of federal judges is similar in many ways to the literature on the nomination and confirmation of officers to the executive branch. However, there are some differences – most notably the fact that federal judges receive lifetime tenure for their posts and that most positions within the executive branch are not seen as being overly controversial. Judicial nominations, on the other hand, are often hot political issues. Furthermore, and of theoretical importance to this dissertation, both the president and Congress desire to use their institutional powers to shape the judicial branch so that it will reflect its preferences.

The literature reviewed in this section will assess several important lines of research that are germane to this dissertation. First, I will discuss why the literature on the nomination and confirmation of federal judges is different from the literature on the nomination and confirmation of officers to the executive branch. Second, I will review what current research has determined as factors that can increase or decrease the likelihood of a judicial nominee being confirmed. Third, I will discuss the importance of different institutional actors in the process of advice and consent. Finally, I will discuss the paucity of literature on the president's role in the process of advice and consent and explain how this dissertation will attempt to fill this void in the extant literature.

Section 2.4.i: Factors Affecting the Confirmation of Federal Judges

Scholars have devoted considerable attention to the factors that help, hinder, stop, or delay a judicial nominee in the confirmation process. This wealth of research has identified many individual, ideological, and institutional variables that explain why some judicial nominees are confirmed in the Senate while others are not confirmed. In this section I will review several of these variables, and several will be included in the statistical models performed in other chapters of this dissertation.

Several scholars have examined the individual characteristics of different judicial nominees to assess if particular characteristics assist a judicial nominee in being confirmed by the Senate. One of the most important characteristics of judicial nominees that can assist them in the confirmation process is their competency, which is consistently measured by the American Bar Association ratings of judicial nominees. Martinek et al. find that nominees with higher ABA ratings are more likely to be confirmed for both the federal Courts of Appeals and the federal district courts than nominees with low ABA ratings, although the marginal effect of a higher ABA rating on the likelihood of confirmation is smaller than the marginal effects of other variables (Martinek et al. 2002, 351). Results on the effect of ABA ratings on the duration of Senate confirmation show that nominees with higher ABA rankings are less likely to face delay in the Senate, but that the substantive effect of having a high ABA ranking is marginal. Both Binder and Maltzman, and Nixon and Goss find that nominees with higher ABA ratings are confirmed more quickly than nominees with lower ABA ratings (Binder & Maltzman 2002, 196; Nixon & Goss 2001, 263). Martinek et al. find that nominees with higher ABA ratings are significantly more likely to have shorter

confirmation durations than nominees with lower ratings. This holds true for nominees to both the federal Courts of Appeals and the federal district courts (Martinek et al. 2002, 354).

Two more individual-level variables commonly used in studies of judicial confirmation are race and gender. However, scholars have found mixed results as to whether race or gender affect whether a judicial nominee will be confirmed, or whether race or gender will delay a confirmation vote. Martinek et al. find that, although minority and female judicial nominees are less likely to be confirmed, the result is not statistically significant (Martinek et al. 2002, 350). They do find, however, that minority nominees to federal district court judgeships are significantly more likely to expect delays in being confirmed (Martinek et al. 2002, 355). Nixon and Goss find that women and minorities take significantly longer to be confirmed, but find this to be the case only for nominees who are replacing previous federal judges, and not for new seats created by Congress (Nixon & Goss 2001, 263). Likewise, Bell finds that minorities are likely to experience delays in confirmation, and female nominees are likely to experience delays in confirmation in the presence of divided government (Bell 2002, 600).

A final individual characteristic of judicial nominees that has been analyzed – and one especially relevant for this dissertation – is the effect of prior judicial experience on the likelihood of confirmation. This variable is typically measured by assessing whether the judge is a district court judge who has been nominated to be elevated to the federal Courts of Appeals.[24] This characteristic is important because it signals to the Senate that the potential

[24] Nominees to both the federal district courts and the federal Courts of Appeals can, of course, also be chosen from the ranks of state judgeships. However, I have yet to find any literature that empirically assesses whether these judges have a greater likelihood of being confirmed, or whether they experience greater delays in confirmation compared to nominees with no judicial experience or federal district court judges who are being

nominee possesses the requisite abilities to perform their jobs (Savchak et al. 2006, 481). Furthermore, Barrow et al. also note that the elevation of federal district court judges to the federal Courts of Appeals can place the Senate in a precarious position, for the Senate has already signaled through that nominee's confirmation to their district court position that they are competent to be a federal judge (Barrow et al. 1996). Unfortunately, Nixon and Goss are the only scholars to test directly the effect of elevation on confirmation success, and their test only assesses whether elevations affect nominations to existing judicial seats. That being said, they do find that judges elevated from the federal district courts are significantly less likely than other nominees to face delay in the confirmation process (Nixon & Goss 2001, 263).

Senators also have ideological incentives to hasten, delay, or kill the confirmation of certain judicial nominees (Binder & Maltzman 2002, 191). Senators are likely to prefer confirming judicial nominees who share their political views and to not confirm nominees who do not share their political views (Binder & Maltzman 2002, 191). However, there can be costs associated with stalling or not confirming certain nominees. Senators in states with judicial vacancies who thwart certain judicial nominees run the risk of having their preferred nominees meeting the same fate (Binder & Maltzman 2002, 191). In game theoretical terms, this outcome is called a "grim-trigger" strategy, whereby two players in a particular game will always cooperate if the other player cooperates, but will always defect once a player defects for the first time (Jacobi 2005, 198).

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elevated to the federal Courts of Appeals. This question is extremely interesting in its own right, and warrants more research.

Ideological incentives are commonly measured as the absolute ideological distance between certain relevant actors in the process of judicial confirmation. Scholars most commonly account for the ideological distance between a senator from a state where a vacancy has occurred and the president, and the ideological distance between a senator from a state where a vacancy has occurred and the judicial nominee, though other actors are also often accounted for (this will be discussed at length later in this section) (Binder & Maltzman 2002, 193; Binder & Maltzman 2004, 13; Primo et al. 2008, 478; Savchak et al. 2006, 474).[25] Analyses show when presidents and important senators are close ideologically the confirmation process is usually shorter and a nominee is more likely to be confirmed, whereas nominees are likely to confront delays and possibly not be confirmed when president and important senators are ideologically distant. These results are even more robust when ideological incentives are interacted with institutional realities like the presence of divided government (Binder & Maltzman 2002, 196; Binder & Maltzman 2004, 19; Epstein et al. 2006, 296).

A final ideological factor that may affect the confirmation of a judicial nominee is whether the judicial nominee will change the ideological composition of the court in which he or she will be appointed. These nominations are commonly called "critical nominations" (Binder & Maltzman 2002, 191; Ruckman 1993, 796). Most research on critical nominations focuses on the effect of nominations to the Supreme Court (Moraski & Shipan 1999, 1083;

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[25] Most research utilizes Poole and Rosenthal's DW-NOMINATE scores to identify the ideological distance between the president and members of Congress, and the distance between judicial nominees and members of Congress (Poole, 1998; Poole, 2009; Poole & Rosenthal, 1997). DW-NOMINATE scores are especially useful because they have been extended so that we now have ideological measures of not just members of Congress and the president, but Supreme Court Justices, appellate court justices, and district court judges as well (Boyd, 2010; Epstein et al. 2007; Giles et al. 2001). That being said, there are other measures that also measure ideological distances between institutional actors, though they are not as commonly used in studies of the lower federal courts (see Bailey, 2007).

Ruckman 1993, 801) and typically assess how the president can change the median of the Supreme Court by nominating individuals of different ideological dispositions (Krehbiel 2007, 235; Rohde & Shepsle 2007, 669). Critical nominations also occur in lower federal courts, and there is evidence that when there is divided government the Senate likely will stall the confirmation of critical nominations or not confirm critical nominees altogether, preferring the ideological composition of the lower federal court with the critical seat remaining unfilled (Binder & Maltzman 2002, 196; Rohde & Shepsle 2007, 668).

Finally, the Senate may find that they have institutional incentives to stall or stop the confirmation of judicial nominees (Binder & Maltzman 2002, 191-92). Foremost among the institutional incentives that can stall or stop confirmation is the presence of divided government. The presence of divided government affects both ideological incentives and other institutional opportunities to affect the outcome of judicial confirmation. For example, divided government will increase the number of senators on the Senate Judiciary Committee who are ideologically distant from both the president and the judicial nominee (Martinek et al. 2002, 345-46). Divided government can also affect the level of importance the Senate Judiciary Committee will place on the blue-slip process used to gauge whether or not home-state senators find judicial nominees to their home states as acceptable (Binder & Maltzman 2009; Sollenberger 2011, 102). Divided government increases the likelihood that a home-state senator will be ideologically distant from the president, and also increases the likelihood that the confirmation process will be stalled or killed in executive session, either by the right of the Senate majority leader from bringing the nominee to a floor vote in the Senate, or by allowing senators from the president's opposing party to filibuster nominees once a floor vote in the Senate is scheduled (Sollenberger 2011, 130-44).

Other institutional variables are also important in determining whether the Senate will confirm, stall, or kill a judicial nomination. One particularly important variable is whether the president makes a judicial nomination during a presidential election year. Research consistently demonstrates that the likelihood of a judicial nominee being confirmed dramatically decreases when the nomination is made during a presidential election year (Binder & Maltzman 2002, 196; Martinek et al. 2002, 354), especially when the Senate is controlled by the president's opposing party (Bell 2002, 600). This makes intuitive sense, for senators in the president's opposing party – especially when they control the Senate – are not going to confirm judges to the federal bench when there is a chance that their party may take over the presidency, in which case a president from their own party may be able to nominate someone to that position who is closer to their ideological preferences (Binder & Maltzman 2002, 197; Goldman & Slotnick 1999, 266; Massie et al. 2004, 150).

The amount of time left in a congressional session also affects the likelihood of a judicial nominee being confirmed in the Senate. The Senate is significantly unlikely to confirm a judicial nominee if it is close to the end of session. Furthermore, the likelihood can be even lower depending on the number of pending nominations for vacant positions (Binder & Maltzman 2002, 196). This can create difficulties for a nominating president, for research also shows that nominees who are renominated by a president are significantly less likely to be confirmed by the Senate than nominees who are nominated for a first time – especially if these nominees are to district court positions (Martinek et al. 2002, 356-57).

A final institutional variable that is often accounted for in analyses of judicial confirmations is the number of pending judicial nominations in the Senate at the time a new judicial nomination is made. Confirming judicial nominees in the Senate takes time; however,

the Senate only possesses a finite amount of time during each session to process judicial nominations. The accumulation of multiple judicial nominees awaiting confirmation in the Senate is likely to slow down the Senate confirmation process and decrease the likelihood that a nominee will be confirmed before the end of a congressional session (Martinek et al. 2002, 345). Research shows that the number of pending nominations significantly decreases the likelihood of confirmation to federal district courts (Martinek et al. 2002, 351). Research also demonstrates that the number of pending nominations does increase the time duration of the confirmation process; however, the substantive impact of the number of pending judicial nominations on the duration of the confirmation process is quite small (Binder & Maltzman 2002, 197; Martinek et al. 2002, 354).

Section 2.4.ii: Relevant Senate Actors in the Confirmation Process

The discussion above demonstrates that different ideological and institutional factors affect the fate of judicial nominees. However, with the exception of the role of home-state senators in the confirmation process, it does not account for other Senate actors that can help, hinder, stop, or delay a judicial nominee in the Senate confirmation process. To cope with this problem, more recent analyses of advice and consent have used a rational choice institutionalist framework to identify Senate actors who possess agenda-setting powers that can shape the dynamics of the Senate confirmation process.

In general, these models follow a distinct pattern first developed by Keith Krehbiel in his model of pivotal politics (Krehbiel, 1997). The first step is to identify which Senate actors with agenda-setting ability can shape the dynamics of the Senate confirmation process. These actors are often labeled as "veto-players" or "veto-pivots." Next, one-dimensional spatial models are developed that measure the ideological distances between the

president, relevant Senate actors, and judicial nominees. It is hypothesized that the likelihood of Senate confirmation will be greater when the ideological distance between the president and a relevant Senate actor is small. Furthermore, an important concept within this literature is the "gridlock interval," which is defined as the ideological distance between the president and a relevant Senate actor. It is hypothesized that a judicial nominee will not be confirmed if that nominee's ideological position falls within that gridlock interval Rohde & Shepsle 2007, 672).

Three common conclusions have been drawn from these spatial models regardless of the relevant Senate actor who is being analyzed in a particular study. First, research demonstrates that the political polarization that has occurred in American national politics over the last 25 years has increased the size of the gridlock interval between the president and the Senate actor being analyzed (Rohde & Shepsle 2007, 674). Second, larger gridlock intervals make it harder for the president to make a judicial nomination who is both closer to his policy preferences and who also does not fall within the gridlock interval (Primo et al. 2008, 475). Finally, because nominees consistently fall within a growing gridlock interval, it will be harder for the president to make a judicial nomination who will not be rejected by the Senate (Asmussen 2011, 596; Primo et al. 2008, 475).

While these conclusions have held true in several spatial analyses of the Senate confirmation process, an important question still remains for scholars to answer: who exactly are the important Senate actors in the Senate confirmation process? Several Senate actors have been analyzed, including home-state senators, the chairman of the Senate Judiciary Committee, the median Senator, the median of the majority of the Senate, and the filibuster pivot in the Senate (Binder & Maltzman, 2009; Primo et al. 2008; Rohde & Shepsle, 2007).

To date there is little consensus as to which actors should be included in these models (Williams, 2008; but see Primo et al. 2008). This dissertation is not designed to ultimately solve this problem. However, it is important to elaborate upon these different actors as several will be included in the empirical models that will be used herein.

Scholars demonstrate the home-state senators where judicial vacancies occur have varying degrees of influence on the fate of judicial nominees. There is little evidence that home-state senators affect the fate of judicial nominations to the federal Courts of Appeals (Binder & Maltzman 2004, 14; Primo et al. 2008, 488); however, there is evidence that home-state senators are important actors in the confirmation of federal district court judges when they are either of the same party as the president, or are ideologically distant from the president (Binder & Maltzman 2004, 15; Jacobi 2005, 202). While home-state senators do have some influence over the fate of judicial nominees, they do not have absolute control over whether a judicial nominee is confirmed. For example, Binder and Maltzman find that a home-state senator's influence on the selection of a judicial nominee is only important in the early stages of the nomination process. After this period, the Senate Judiciary Committee plays a more important role in the confirmation process (Binder & Maltzman 2004, 18).

The Senate Judiciary Committee consistently plays an important role within the literature on advice and consent. Scholars attribute this to the chairman's ability to set the agenda for the confirmation process – the chair can quickly move nominees to a floor vote in executive session, or they can sit on nominees they do not like, preventing them from being brought to the full Senate for a floor vote (Sollenberger 2011, 100-103). However, scholars have not agreed on the proper way to measure the Senate Judiciary Committee's effect on judicial nominations. Some have used the ideology score of the Senate Judiciary

Committee chairman (Primo et al. 2008, 473), while others have used the ideology scores of the Judiciary Committee median (Shipan & Shannon 2003, 660), or the ideological scores of other Committee actors, such as committee member with the most seniority (Bell 2002, 600), or the ideological scores of a home-state senator if they happen to sit on the Senate Judiciary Committee (Stratmann & Garner 2004, 257). In spite of the many ways in which the Senate Judiciary Committee is measured, the ideological score of the Senate Judiciary Committee has proven most useful, and there is evidence that not accounting for the ideological distance between the Senate Judiciary Committee chairman and the president – at least in advice and consent models of the federal Courts of Appeals – can lead to model misspecification (Primo et al. 2008, 483).

The remaining actors considered in the advice and consent literature are specific senators that can control the Senate's agenda once a nominee reaches the Senate floor. Scholars often measure the ideological distance between the president and the majority party median in the Senate as a predictor of how party control can affect the success of confirmation (Primo et al. 2008, 473). The ideological distance between the president and the Senate median has also been used to determine whether ideological distance affects the ability of the president to shepherd his judicial nominations through the confirmation process (Moraski & Shipan 1999, 1079). However, the median member of the Senate is typically only used in analyses of Supreme Court nominations and not for lower federal court nominations (Krehbiel, 2007; Moraski & Shipan, 1999). This makes intuitive sense. Supreme Court nominees are not usually subjected to prolonged delays in during the Senate confirmation process. These nominations are more salient than lower court nominations and can create costs for senators who attempt to delay the confirmation process (Rohde &

Shepsle 2007, 668). Therefore, the median Senate member is of great importance because the greatest hurdle a president faces during the confirmation process of a Supreme Court nominee is securing a majority of votes in the Senate.

Finally, many recent studies have analyzed the importance of the filibuster pivot in shaping the confirmation process. More recent results have demonstrated that the filibuster pivot may be the most important player in advice and consent games (Primo et al. 2008, 483; Rohde & Shepsle 2007, 672, but see Williams, 2008). These players are important not only because of their agenda setting powers, but also because in recent years these particular players have more recently been members of the president's opposing party. Indeed, the prevalence of divided government over the last forty years has made measuring divided government and indispensible component of any advice and consent model.

Section 2.4.iii: The Role of the President in the Literature on Advice and Consent

The last two sections have highlighted the many factors that affect the likelihood of a federal judicial nominee being confirmed, and the important Senate actors who may help or hinder the progress of a judicial nominee through the Senate confirmation process. While this robust literature successfully describes and explains the political and institutional factors in the Senate that shape the judicial confirmation process, there has been little research on how the president goes about deciding *who* will be nominated to vacant federal court judgeships.

To be sure, there is a wealth of descriptive literature on how the president goes about selecting nominees for judicial vacancies. Scholars have specifically focused their attention on the factors presidents consider when choosing nominees for vacant federal court positions. They have found that presidents often pursue several goals when selecting

judicial nominees. Among these goals are nominating well qualified individuals to staff the federal bench, nominating individuals who share the president's political preferences, nominating personal or professional friends as a reward, and nominating individuals who can bolster political support among a group of constituents (Baum 2008, 96-97; Goldman 1997, 3). However, with only a few exceptions which will be discussed herein, scholars have not attempted to assess empirically or theoretically the choices presidents make as to who will fill a judicial vacancy and why one candidate for a judicial vacancy is chosen over another.

The president is conceptualized the same way in all of the advice and consent literature that has been discussed to this point. Specifically, this literature conceptualizes the president as a strategic actor who wishes to nominate an individual to the federal judiciary who reflects as closely as possible his policy preferences (Krehbiel 2007, 232; Massie et al. 2004, 146; Moraski & Shipan 1999, 1071; Primo et al. 2008, 472; Rohde & Shepsle 2007, 666). However, the president must also be able to nominate an individual who will be confirmed by the Senate – what Chang refers to as "presidential anticipation" (Chang 2001, 322). While these models do provide analytic leverage in understanding the dynamics of the Senate confirmation process, they do not provide us with a solid understanding of the dynamics behind the president's decision of who will be chosen to fill a given court vacancy. Nor do these models help us to explain the political decisions that are made within the executive branch from the time a vacancy on the federal bench occurs to the time that a nominee is given to the Senate for consideration.

Massie et al. provide a first attempt to explain the politics of the nomination process by assessing the factors that affect the timing of judicial nominations. They note that the period of time between the occurrence of a judicial vacancy and a nomination is actually

longer than the period of time between a judicial nomination and Senate confirmation, and then attempt to determine which factors account for this fact (Massie et al. 2004, 146). Several of the variables used in their duration model of executive branch delay in judicial nominations are the same as the important variables used in assessing the determinants of delay in Senate confirmations (Massie et al. 2004, 150). Their results also show that many of the same factors that account for the speed of confirmation in the Senate also account for the speed on nominations in the executive branch. For example, the hazard of a judicial nomination being made rises exponentially when the length of time remaining in a Congress sharing the same party affiliation as the president decreases (Massie et al. 2004, 152). Divided government decreases the likelihood of a nomination, and this effect is compounded when the president must negotiate with ideologically distant home-state senators for vacant district court judgeships (Massie et al. 2004, 150).

Hendershot (2010) also attempts to understand the nomination process as well by trying to assess how the Senate may affect the decision making calculus of the president in historical terms. Hendershot's thesis is that the constraints the Senate places on the president in his choices for federal judgeships are temporal (Hendershot 2010, 329). In his analysis, he finds that there have been four distinct regimes of the nomination process since the beginning of the twentieth century (Hendershot 2010, 329). What is interesting about his analysis is that he finds that the nomination norms and procedures of the present day (i.e. how the Senate and the president interact with one another during the nomination process) is quite similar to Hendershot's second regime, which lasted from 1943 to 1976. The difference between the current regime and the previous regime, according to Hendershot, is that while the current and previous regimes are based on a norm of strong bargaining

between the president and the Senate, weakened party strength in the previous regime helped to accommodate inter-branch bargaining, while party polarization in the current regime hinders inter-branch bargaining and prevents smooth confirmations from occurring (Hendershot 2010, 340).

While these analyses of the nominations process are informative, they do not provide us with insight as to the types of bargaining that occur between the president and relevant Senate actors during the time between the opening of a judicial seat and the nomination of an individual to fill that seat. The purpose of this dissertation is to attempt to fill this gap in the extant literature on presidential nominations to the federal courts by examining an institutionalized choice that all presidents can and do make when they are deciding to nominate individuals to fill vacancies in the federal judiciary – whether or not to elevate a sitting federal district court judge to the federal Courts of Appeals, or to nominate an individual from outside the federal court system to fill a judicial vacancy. Like previous research, this dissertation will assume that presidents nominate individuals who approximate their personal preferences, within institutional and temporal constraints. However, this dissertation will move beyond this basic assumption and recognize that the president, knowing these institutional constraints, may try to use them strategically to his advantage in his quest to alter the composition of the federal judiciary to better reflect his preferences. To date, this would be the first attempt to do so.

Section 2.5: Conclusion

The purpose of this chapter has been to provide a broad overview of the theoretical background for understanding the politics behind the nomination and confirmation of individuals to fill federal court vacancies. As discussed at the beginning of this chapter, both

the executive and legislative branches of the American government have a say in the final outcome of who staffs the federal judiciary – the president through his power to nominate individuals to vacant court positions, and Congress through its powers of advice and consent. Therefore, both branches as institutions have the ability to shape the federal judiciary as an institution.

Because I am exploring institutional interaction, it is necessary to begin this analysis by articulating a theoretical framework that can describe and explain institutional interaction. New institutionalism is an ideal theoretical framework for understanding the types of institutional interactions that will form the foundation of this dissertation. New institutionalist explanations of political behavior help us to understand how institutions shape the preferences of political actors, and also help scholars gain leverage on how institutional rules and norms shape the decisions that institutional actors can make. Specifically, rational choice institutionalism provides scholars with useful analytical tools to explain institutional interaction and predict political outcomes with a high degree of accuracy and generality.

New institutionalism has been especially relevant in research on the presidency over the last twenty-five years. The presidency subfield has moved away from its personal, descriptive and atheoretical roots toward becoming a subfield that is institutional, steeped in theory, and can explain and predict a myriad of decisional outcomes. Rational choice institutionalism has been the analytical tool of choice for presidential scholars during this revolution in presidential studies. Scholars have used rational choice institutionalism to increase our knowledge in multiple areas of presidential decision making, including the strategic use of the president's veto power, the strategic use of unilateral action, the strategic

use of leadership and pandering, and the strategic use of nomination powers – particularly to positions within the executive branch.

The study of nominations to fill the federal judiciary is popular. This line of research reveals that there are multiple ideological and institutional factors that increase or decrease the likelihood that a given nominee to the federal judiciary will be confirmed or rejected, or that will increase or decrease the amount of delay that a given nominee will experience during the Senate confirmation process. Furthermore, this literature – which also uses rational choice institutionalism as its theoretical guide – has been highly successful at demonstrating how different Senate actors who possess agenda-setting power during the Senate confirmation process can assure that different judicial nominees are confirmed quickly or are delayed or ultimately defeated in the Senate.

What this literature on judicial nominations and confirmations is missing, however, are explicit attempts to provide an understanding of the decisions a president can make during the period between a judicial vacancy occurs and the time a president makes a formal nomination to a vacant judicial seat. Typically, scholars assume the president will nominate an individual whose preferences are as close to the president's preferences as possible, given institutional and temporal constraints. However, these analyses then move away from the president and focus specifically on how the arrangement of preferences in the Senate will affect confirmation outcomes. While there are ample opportunities to study other decisions a president can make during the nomination phase of an iteration of an advice and consent 'game,' this dissertation will focus on one decision common to all presidents – the decision whether or not to elevate federal district court judges to the federal Courts of Appeals. By doing so, this dissertation will strengthen the literature that utilizes new institutionalism to

understand presidential decision making, and will also assist in filling our gap in knowledge about the possible decisions a president makes when deciding who to nominate to fill vacant federal court positions.

CHAPTER 3: AN HISTORICAL AND DESCRIPTIVE OVERVIEW OF THE USE OF ELEVATIONS TO STAFF THE FEDERAL APPELLATE COURTS

Section 3.1: Introduction and Outline of this Chapter

Presidents of both political parties have used elevations throughout history to shape the federal judiciary to reflect their policy preferences. The first purpose of this chapter is to describe the use of elevations from the Civil War to the modern era. Following this discussion, the remainder of this chapter is devoted to describing how presidents since 1969 have used elevations to staff vacant federal appellate court positions. The reason for providing an in-depth discussion of how presidents serving during the era of divided government have used elevations is to provide a lens through which we may discern how presidents during this era may or may not use elevations strategically to shape the partisan composition of the federal Courts of Appeals.

The analysis herein reveals that presidents since 1969 have used elevations in different ways. What will become apparent is that presidents differ in when, where, and why they elevate district court judges to the Courts of Appeals. It will also become apparent that presidents do not always elevate district court judges to the federal Courts of Appeals who approximate their policy preferences. There are noticeable differences in how Republican and Democratic presidents use elevations. There are also noticeable differences in how Republican and Democratic presidents use elevations during periods of unified and divided government. Republican and Democratic presidents exhibit different patterns in their use of elevations across the several appellate districts, and they also exhibit different elevation patterns based on the number of home-state senators in their political party who may participate in the nomination and confirmation process. These differences are important and

will be useful in the following chapters as I develop an explanation for why presidents use elevations in different contexts.

Section 3.2 of this chapter will provide a brief historical overview of the use of elevations from the 1870s until 1969. This time period is interesting to examine because it was dominated by hegemonic control of the federal government – Republican hegemony from the end of the Civil War until 1931, and Democratic hegemony from 1932 until 1968. This section will demonstrate that using elevations to fill appellate court seats was a norm during this time. It is also important to understand how elevations were used during this time because the continued presence of unified government would make it easier for presidents to have their nominees confirmed in the Senate.

Section 3.3 of this chapter examines the use of elevations from 1969 to 2008. What becomes apparent is that presidents have continued to use elevations to fill vacant appellate court positions. What also becomes apparent is that different presidents tend to use elevations in different ways and in different contexts. I will specifically examine how different presidents use elevations when divided government is present, whether Republican and Democratic presidents use elevations differently, where elevations are most likely to occur, whether elevated judges exhibit the same ideological tendencies as other appellate court judges, and whether the party affiliation of home-state senators affects the use of elevations.

Section 3.4 will move away from a general analysis of how presidents have used elevations since 1969 to examine how presidents have used elevations during their tenures. Attention will be given to elevation patterns in the presence of unified or divided government, where specific presidents are likely to use elevations, and whether the elevated

judges of a presidential cohort are more or less extreme ideologically than other judges nominated and confirmed by the same president. Finally, Section 3.5 will provide a conclusion to this chapter and define the theoretical and empirical arguments that will be tested in later chapters.

Section 3.2: Elevations in Historical Perspective

Section 3.2.i: Elevations during Republican Hegemony

Abraham Lincoln's election on November 8, 1860 ushered in an era of Republican dominance of Congress and the presidency that would last for the next 72 years. Democrats would control the presidency for only 16 years between 1860 and 1932. The Republican hegemony of this period allowed Republicans to determine the ideological composition of the federal courts. During this period Republican presidents used many strategies to shape the ideological composition of the federal courts. Among those strategies was the use of elevations to shape the ideological composition of the Supreme Court, the federal Courts of Appeals, and the federal district courts.

The growth in importance of elevations to staff the federal courts in this period is a culmination of two different factors. First, the growth of the nation's population, the introduction of new states into the Union, and the expansion of the nation's economy necessitated the creation of new federal judgeships to meet the demands of a growing federal caseload. Republican dominated Congresses were more than willing to fill the demand for new judges across the nation, so long as a Republican president was able to nominate individuals to fill these new positions.[26] During this period of Republican hegemony,

[26] The obvious exception to this standard was the fact that Republicans presidents were compelled to nominate Democrats to vacant appellate positions in the South. This will be discussed later.

Congress passed significant legislation that expanded the size of the federal judiciary in 1869, 1891, and 1922. Several smaller authorizations to expand the federal judiciary occurred during this time as well (Barrow et al. 1996, 36). In total, Republican Congresses authorized the creation of 44 circuit court judgeships and 106 district court judgeships from 1869 to 1932 when Congress and the presidency were unified under Republican leadership, while only one appellate court judgeship and two district court judgeships were created when Republicans controlled Congress and Democrats controlled the presidency (Barrow et al. 1996, 36).

Elevations also became important during the period of Republican hegemony because it was during this period that Republicans decided the federal courts could be an ally in their efforts to promote economic nationalism (Gillman 2002, 515). To that time the federal courts were considered "bastions of localism" that reinforced the political and legal norms of the states (Gillman 2002, 517). However, Republican presidents and Senators both recognized that a federal court system sympathetic to the expansion of a national economy would be necessary to protect national commercial interests (Gillman 2002, 516).

The expansion of the federal judiciary during this period helped to solidify the federal court's position as an ally of national economic interests. So too did the expansion of the federal court's jurisdiction over economic matters (Curry 2007, 457; Gillman 2002, 517). However, the most important component of this strategy was to nominate and confirm federal judges who were sympathetic to the Republicans' strategy of economic nationalism. The process of staffing the federal bench with these supporters began in earnest under President Ulysses Grant. Grant's role as the first president to nominate federal judges based on national economic beliefs did not afford him many opportunities to elevate district court

judges to the Courts of Appeals. What he did accomplish was to increase the pool of district judges sympathetic to national economic interests for the Republican presidents who followed him to choose from. Whereas Grant only elevated 2.4% of his appellate court nominees, Rutherford Hayes elevated 10% of his appellate court nominees, and James Garfield and Chester Arthur elevated 23.8% of their appellate court nominees. Elevation rates among Republican presidents during the period of Republican hegemony never fell below 10%. Conversely, Democratic presidents in this period were not capable of elevating district court judges to the Courts of Appeals because they did not have a pool of Democratic judges to choose from. Grover Cleveland elevated 15.4% of his appellate court nominees in his second term, but made no elevations in his first term. Likewise, Woodrow Wilson only elevated 8.2% of his appellate court nominees.[27]

Section 3.2.ii: Elevations during Democratic Hegemony

The presidential election of 1932 ushered in an era of Democratic hegemony that would last for 36 years, excepting the eight year presidency of Dwight Eisenhower. Like the Republican hegemony that preceded it, Democratic control of both the presidency and Congress allowed the Democratic Party to alter the composition of the federal judiciary so that it would reflect its preferences. The Democratic presidents and Democratic congressmen of this period were especially concerned with nominating and confirming

[27] William McKinley elevated the lowest percentage of district court judges during the era of Republican hegemony (11.8%) followed by Warren Harding (12.8%). This makes sense, as these Republican presidents followed Democratic presidents. Still, these numbers are not an insignificant percentage of nominations to the Courts of Appeals. It should also be noted that Woodrow Wilson and especially Grover Cleveland did have a cadre of southern Democrats to elevate to the Courts of Appeals, as Republican presidents during this period were by necessity forced to nominate Democrats to vacant federal court seats in the South. That being said, neither Cleveland nor Wilson saw it fit to elevate this cadre of district court judges.

individuals to the federal courts who supported the New Deal policies of Franklin Roosevelt.

Like the Republican hegemony that preceded it, the Democratic hegemony relied on the expansion of the size of the federal bench to exert its influence on the ideological composition of the federal courts. Under unified Democratic government, Congress passed legislation to expand the size of the federal judiciary in 1938, 1940, 1949, 1961, 1966, and 1968. The omnibus judgeship bill passed in 1961, which authorized the creation of 10 appellate court judgeships and 63 district court judgeships, was the largest expansion of the federal courts to that point in time (Barrow et al. 1996, 54).

What is unique about the Democratic hegemony from 1932 to 1968 was the fact that Democratic presidents did not use elevations as extensively as their Republican counterparts. One reason for this is that, although he was president for 12 years, it took President Roosevelt longer to staff the federal judiciary with judges who shared his policy preferences. In all, 9.2% of Roosevelt's nominees to appellate court positions were elevated from their district court positions (Barrow et al. 1996, 61).[28] Only John Kennedy used elevations with less frequency (this will be discussed later).[29] Harry Truman only used elevations to fill 9.4% of appellate court vacancies while John Kennedy only used elevation strategies to fill 6.5% of

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[28] One reason why President Roosevelt was unable to use elevation strategies more is because Republican federal judges were leery of relinquishing their seats during his administration. The battle between President Roosevelt and the Republican stalwarts on the Supreme Court is well documented, and culminated in Roosevelt's ill-fated Court-packing plan in 1939. It is plausible to hypothesize that this struggle also took place in lower federal courts as well. Empirical evidence supports this claim. Roosevelt, more so than any Democratic president during this time, replaced more judges because of involuntary turnover (29.7%). Harry Truman's involuntary turnover rate is close behind Roosevelt's rate at 28.1%. Truman's rate of involuntary turnover replacement makes more sense than Roosevelt's, since by the end of his presidency it had been twenty years since there was a Republican president.

[29] It should be noted that Dwight Eisenhower used elevation strategies the most during the period of Democratic hegemony, using elevation strategies to fill 12.8% of the appellate court vacancies that occurred during his administration.

appellate court vacancies during his term. Lyndon Johnson used elevations the most during this period of Democratic hegemony, using elevation strategies to fill 11.4% of the appellate court vacancies that occurred during his administration.

A possible explanation for why the Democratic presidents of this era did not use elevation strategies to the extent that Republican presidents used elevation strategies in the period before is because of the absolute increase in the number of newly created judicial positions during this time, coupled with idiosyncratic traits of the presidents. The size of the federal judiciary more than doubled during this period (from 181 permanent judgeships to 432 permanent judgeships). Although almost all of the bills passed during this time were passed when there was unified Democratic government, the bills garnered uncharacteristically bipartisan support. Barrow et al. suggest that the reason for bipartisan support was because Republican senators expected to receive some of the patronage opportunities arising from the expansion of the federal judiciary. They produce evidence to show that this is true – especially for the bill passed during the Kennedy administration. The omnibus judicial bill passed in 1961 provided the greatest percentage increase in federal judgeships in the country's history. The sheer increase in volume afforded President Kennedy the opportunity to choose Republican judges to garner support among Republicans in the Senate. Indeed, only 6.5% of Kennedy's nominated appellate court judges were elevated from district courts, and he was more apt to nominate Republican judges more so than other Democratic presidents during this period (Barrow et al. 1996, 62).

The idiosyncratic qualities of presidents may also explain why Democratic presidents of this period did not elevate district court judges to the Courts of Appeals at the same rate as their Republican counterparts. It is well documented that Lyndon Johnson and especially

Harry Truman were prone to use judicial nominations as a means to reward personal loyalists (Stidham 1984, 551). It is possible that these presidents did not employ elevation strategies more than they did – despite having a large pool of Democratic judges to choose from – because they did not believe that the judges in the district courts were loyal enough to them to warrant elevating them to the Courts of Appeals.

Section 3.3: Elevations during the Era of Divided Government, 1969-2008

Presidents have continued to elevate district court judges to vacant judgeships on the Courts of Appeals since the onset of the divided government era. However, the use of elevations is not appear as uniform as it was during previous eras of unified government. Presidents continue to elevate district court judges who are primarily from their political party, and to elevate district court judges nominated to their positions by partisan predecessors in the White House. What is less clear is whether there are patterns in the use of elevations that are unique to the presence of divided government. It is also unclear whether increased polarization between parties in Congress and between Congress and the president have changed how presidents use elevations to shape the ideological contours of the federal courts. This section will examine which presidents were more or less likely to use elevations as a selection strategy for the nomination of appellate court judges from 1969 to 2008. Special attention is given to the possible importance of divided government. This section also looks at how these presidents used elevations across different circuits and concludes by examining whether judges elevated from the district courts to the Courts of Appeals are more or less extreme than appellate court judges who are nominated and confirmed from outside the federal judiciary.

First, it is important to note that Republican presidents have had more of their appellate court nominees confirmed to the Courts of Appeals between 1969 and 2008 than their Democratic counterparts. 66.38% of all confirmed appellate court judges between 1969 and 2008 were nominated to their position by a Republican president, while only 33.62% of all confirmed appellate court judges during this time were nominated by Democratic presidents. This should not be surprising. Only two Democratic presidents served between 1969 and 2008, and only account for 12 of the 39 years under study in this dissertation.[30]

Figure 3.1 shows the elevations of each president as a proportion of their total number of confirmed appellate court nominees. There is a good degree of variation in the use of elevations among the presidents analyzed in this dissertation, although it does appear that the last two presidents used in this analysis have been less likely to use elevations than the presidents who served before them. An initial glance at the data also shows that Republican presidents are more likely than their Democratic counterparts to elevate district court judges to vacant appellate court seats. 42.86% of all confirmed Republican nominees to the Courts of Appeals were elevated from the district courts. Only 29.06% of all confirmed Democratic nominees to the Courts of Appeals were elevated from the district courts. Table 3.1 provides a cross-tabulation of elevations by party of the nominating

[30] In the future I hope to extend the analyses performed in this dissertation to include President Obama's appellate court nominees. Ideally, this will provide greater insight in how Democratic presidents use elevations as a part of their strategy for making appellate court nominations. As of February 1, 2012, President Obama has filled twenty-three appellate court positions (excluding vacant positions on the Courts of Appeals for the Federal Circuit). To this point, twelve of his twenty-three confirmed appellate court nominees (52.17%) have been elevated from the district courts. His use of elevations to fill appellate court vacancies is much different from how Jimmy Carter and Bill Clinton used elevations. This will be discussed later in this chapter and in this dissertation's conclusion.

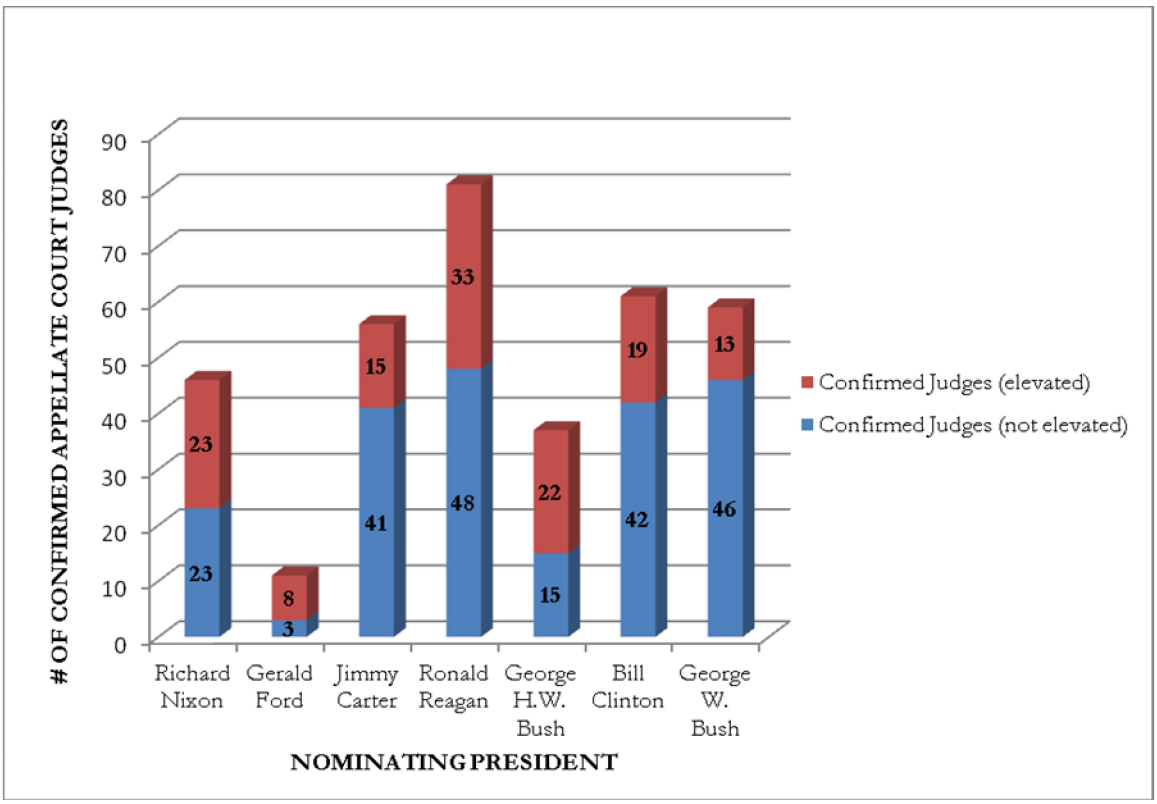

Figure 3:1. Number of Confirmed Appellate Court Judges by President, 1969-2008
Source: Federal Judges Biographical Database (Federal Judicial Center)

Table 3.1: Relationship between Elevations and Presidential Political Party

	Democratic Presidents	Republican Presidents	TOTAL
Elevated Appellate Court Judges	34 29.06%	99 42.86%	133 38.22%
Other Appellate Court Judges	83 70.94%	132 57.14%	215 61.78%
TOTAL	117 100%	231 100%	348 100%

$\chi^2 = 6.26$, df = 1, $p \leq .05$, Kendall's tau-b = .134

Source: Federal Judges Biographical Database (Federal Judicial Center)

president. A chi-squared test of association shows evidence that there is a significant association between the political party of a nominating president and the use of elevations to staff vacant appellate court positions (Pearson chi-square = 6.26, $p \leq .05$). In absolute terms, Ronald Reagan elevated the greatest number of district court judges to the Courts of Appeals (thirty-two elevations). The elevation rates of three Republican presidents – Gerald Ford, George H.W. Bush, and Richard Nixon – are all greater than or equal to 50% of their confirmed nominees.

Republican presidents are also more likely to use elevations during divided government than Democratic presidents. 57.57% of all Republican appellate court nominees confirmed by the Senate were confirmed during divided government. 70.1% of all elevations by Republican presidents occurred when there was divided government. Bill Clinton is the only Democratic president in the time period under study to elevate district court judges to appellate court positions during divided government. As will be discussed later, his elevation rate was lower during divided government than it is during unified government, although his overall elevation rate was also very low. In total, Bill Clinton's elevations during divided government account for 36.75% of all elevations made by Democratic presidents between 1969 and 2008. Table 3.2 presents a cross-tabulation of elevations made during unified and divided government. A chi-square test of association shows that there is a statistically significant association between divided government and elevations (Pearson chi-square = 12.06, $p \leq .001$). Table 3.3 presents a cross-tabulation of elevations made during unified and divided government based on the political party of the nominating president. As Table 3.3 demonstrates, there is a much greater association between divided government and elevations for Republican presidents than Democratic presidents.

Table 3.2: Relationship between Elevations and Divided Government

	Divided Government	Unified Government	TOTAL
Elevated Appellate Court Judges	83 47.16%	50 29.07%	133 38.22%
Other Appellate Court Judges	93 52.84%	122 70.93%	215 61.78%
TOTAL	176 100%	172 100%	348 100%

$\chi^2 = 12.06$, df = 1, $p \leq .001$, Kendall's tau-b = .186
Source: Federal Judges Biographical Database (Federal Judicial Center)

Table 3.3: Relationship between Elevations and Divided Government, by Political Party

Republican Presidents

	Divided Government	Unified Government	TOTAL
Elevated Appellate Court Judges	70 52.63%	29 29.59%	99 57.14%
Other Appellate Court Judges	63 47.37%	69 70.41%	132 42.86%
TOTAL	98 100%	133 100%	231 100%

$\chi^2 = 12.23$, df = 1, $p \leq .001$, Kendall's tau-b = .23

Democratic Presidents

	Divided Government	Unified Government	TOTAL
Elevated Appellate Court Judges	13 30.23%	21 28.38%	34 29.06%
Other Appellate Court Judges	30 69.77%	53 71.62%	83 70.94%
TOTAL	74 100%	43 100%	117 100%

$\chi^2 = .04$, df = 1, $p \leq .83$, Kendall's tau-b = .02

Source: Federal Judges Biographical Database (Federal Judicial Center)

Table 3.4: Relationship Between Elevations and Appellate Circuit

	1st	2nd	3rd	4th	5th	6th	7th	8th
Elevated Appellate Court Judges	7	18	17	10	17	17	10	10
	58.33%	54.55%	51.52%	41.67%	37.78%	45.95%	47.62%	40%
Other Appellate Court Judges	5	15	16	14	28	20	11	15
	41.67%	45.45%	48.48%	58.33%	62.22%	54.05%	52.38%	60%
TOTAL	12	33	33	24	45	37	21	25
	100%	100%	100%	100%	100%	100%	100%	100%

$\chi^2 = 28.43$, df = 11, $p \leq .01$, Kendall's tau-b = .076

Source: Federal Judges Biographical Database (Federal Judicial Center)

Table 3.4: Relationship Between Elevations and Appellate Circuit (Continued)

	9th	10th	11th	DC	TOTAL
Elevated Appellate Court Judges	17	3	5	2	215
	28.81%	13.04%	45.45%	8%	61.78%
Other Appellate Court Judges	42	20	6	23	133
	71.19%	86.96%	54.55%	92%	38.22%
TOTAL	59	23	11	25	348
	100%	100%	100%	100%	100%

Another way to assess how elevations are used is to look at *where* presidents are likely to use elevations to staff the Courts of Appeals. Table 3.4 presents a cross-tabulation of the use of elevations across appellate court circuits. Table 3.4 shows that elevations are not used with uniformity across all appellate circuits. Over 50% of the appellate court judges confirmed in the Second and Third circuits between 1969 and 2008 were elevated to their positions. In absolute terms, the Fifth and Ninth Circuits lag only behind the Second Circuit in the number of elevated judges on their courts. However, these two circuits are the largest circuits in the country and have had the most vacancies filled between 1969 and 2008. The total percentage of elevated judges in these two courts (37.77% and 28.81% respectively) is actually quite small. A chi-square test of association shows that there is a statistically significant association between the decision to elevate and the appellate circuits where an elevation occurs (Pearson chi-square = 28.43, $p \leq .01$). Presidents appear to not randomly elevate district court judges across the several appellate circuits.

A reasonable question to ask when looking at this data is the following: why is there such a difference in the use of elevations between Republican and Democratic presidents? While divided government does appear to have an effect when Republicans and Democrats use elevations, we do not yet know whether divided government affects the likelihood that a president will elevate a district court judge to the Courts of Appeals or nominate someone from outside the federal judiciary. Another way to assess elevations is to examine the types of judges who are elevated by looking at the extremity of their ideological positions. Are district court judges who are elevated to the Courts of Appeals more ideologically extreme than other confirmed appellate court nominees?

Table 3.5: Difference of Means Test of Ideological Extreme Scores: Elevated and Non-Elevated Appellate Court Judges

	All Presidents	Republican Presidents	Democratic Presidents
Elevated Appellate Judge (observations)	133	99	34
Elevated Appellate Judge (mean)	.311	.306	.323
Elevated Appellate Court Judge (standard deviation)	.165	.178	.178
Other Appellate Court Judge (observations)	215	132	83
Other Appellate Court Judge (mean)	.34	.368	.296
Other Appellate Court Judge (standard deviation)	.157	.164	.134
t-statistic	1.68	2.75	-1.04
p-value	0.05	0.01	0.15

Note: T-tests are one-tailed tests

Source: Judicial Common Space Scores

Table 3.5 presents the results of a t-test assessing the difference in the means of ideological extreme scores for elevated appellate court judges and the means of all other appellate court judges[31] The mean ideological extreme score for elevated district court judges is .311, while the mean ideological extreme score for all other confirmed appellate court judges is .34. This difference is not that large, but it is statistically significant ($t = 1.68$, $p \leq .05$ one-tailed test). Table 2.5 also presents t-tests comparing the differences in means for judges based on whether the judge was nominated by a Republican or a Democratic president, and provides some interesting results. First, elevated appellate court judges within the Republican cohort are less ideologically extreme than all other appellate judges nominated by Republican presidents. The mean ideological extreme score for elevated appellate court judges in the Republican cohort is .306, while the mean ideological extreme score for all other appellate court judges in the Republican cohort is .368. The difference in means between the two groups is statistically significant ($t = 2.75$, $p \leq .01$, one-tailed test). However, elevated judges within the Democratic cohort are *more* ideologically extreme than all other appellate court judges nominated by Democratic presidents. The mean ideological extreme score for elevated judges in the Democratic cohort is .323, while the mean ideological extreme score for all other appellate court judges in the Democratic cohort is .296. The difference in means between these two groups approaches but does not reach statistical significance ($t = -1.04$, $p \leq .15$, one-tailed test).

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[31] Ideological extreme scores are measured via the use of Judicial Common Space scores discussed in Chapter 1 of this dissertation. Judicial Common Space scores range from -1 to +1, where negative values represent more liberal judges and positive values represent more conservative judges. Ideological extreme scores are calculated by taking the absolute value of a judge's Common Space Score.

Table 3.6: Relationship between Elevations and the Number of Home-State Senators in the President's Party

	No Home State Senators	One Home State Senator	Two Home State Senators	TOTAL
Elevated Appellate Court Judges	32 44.44%	65 45.77%	33 30.56%	130 40.37%
Other Appellate Court Judges	40 55.56%	77 54.23%	75 69.44%	192 59.63%
TOTAL	72 100%	142 100%	108 100%	322 100%

$\chi^2 = 6.54$, df = 2, $p \leq .05$, Kendall's tau-b = -.114

Source: Lower Federal Court Confirmation Database

Table 3.7: Relationship between Elevations and Number of Home-State Senators in President's Party, by Party

Republican Presidents

	0 Home State Senators	1 Home State Senator	2 Home State Senators	TOTAL
Elevated Appellate Court Judges	28 48.28%	48 54.55%	20 30.30%	96 45.28%
Other Appellate Court Judges	30 51.72%	40 45.45%	46 69.70%	116 54.72%
TOTAL	58 100%	88 100%	66 100%	212 100%

$\chi^2 = 9.23$, df = 2, $p \leq .01$, Kendall's tau-b = -.139

Democratic Presidents

	0 Home State Senators	1 Home State Senator	2 Home State Senators	TOTAL
Elevated Appellate Court Judges	4 28.57%	17 31.48%	13 30.95%	34 30.91%
Other Appellate Court Judges	10 71.43%	37 68.52%	29 69.05%	76 69.09%
TOTAL	14 100%	54 100%	42 100%	110 100%

$\chi^2 = .04$, df = 2, $p \leq .98$, Kendall's tau-b = .01

Source: Lower Federal Court Confirmation Database

A final way to analyze the use of elevations is to determine how senatorial courtesy may affect a president's decision whether or not to elevate. Even though there is a debate in the literature about whether the preferences of home-state senators matter in the nomination of federal judges (see Jacobi, 2005; Primo et al. 2008), home-state senators still possess an institutionalized role on the nomination and confirmation processes via the blue slip process. Table 3.6 presents the results of a chi-square test assessing the level of association between the use of elevations and the number of home-state senators in the president's party. Table 3.7 also shows the level of association between the use of elevations and the number of home-state senators in the president's party based on whether the nominating president was a Republican or a Democratic president.

There is a statistically significant association between elevations and the number of home-state senators in a president's party, although the association is not large ($\chi^2 = 6.54$, $p \leq .05$). However, when broken down by the party of the nominating president, the level of association between elevations and the number of home-state senators is much greater for Republican presidents compared to Democratic presidents (for Republican nominees, $\chi^2 = 9.23$, $p \leq .01$; for Democratic nominees, $\chi^2 = .04$, $p \leq .98$). Chi-square tests of association for all nominees and for Republican nominees shows that the model predicts fewer elevations than observed when one home-state senator is in the president's party, and predicts more elevations than observed when both home-state senators are from the president's party. The null chi-square model for Democratic nominations predicts almost perfectly the number of elevations based on the number of home-state senators that are in the president's party.[32] This raises the question why split party control of a state's Senate delegation affects the use

[32] These tables are available in Appendix A.

of elevations for Republican presidents but not Democratic presidents. This question will be examined in more detail in the next chapter.

Section 3.4: A Survey of the Use of Elevations by Specific Presidents

The previous section discussed some of the descriptive trends in the use of elevations during the divided government era. The purpose of this section is to take a closer look at the use of elevations by looking at how individual presidents in the divided government era have used elevations. Closer examination of how individual presidents have used elevations will enable one to see both the similarities and differences in the ways these presidents used elevations to fill vacant appellate court positions.

Section 3.4.i: Richard Nixon

Richard Nixon was the first president to use elevations in the era of divided government. The Republican Nixon never saw his party reach majority status in either the House of Representatives or the Senate during his tenure. Democrats maintained a sizeable majority in the Senate during his tenure. They controlled 57 seats in the Senate during the 91st Congress and the 93rd Congress, and 55 seats during the 92nd Congress.

As demonstrated in Figure 2.1, Nixon aggressively used elevations to fill vacant positions on the Court of Appeals. Nixon filled 46 appellate court positions during his presidential tenure. 50% of his nominees confirmed by the Senate during his tenure were elevated from the district courts. In many ways, President Nixon's use of elevations to staff the Courts of Appeals is similar to how they were used by his last Republican presidential predecessor, Dwight Eisenhower. While President Eisenhower did not elevate as many district court judges to the Courts of Appeals as Nixon, his elevation rate was still 40%. Also, like Eisenhower, Nixon made a habit of elevating his own nominees to the district courts to

the Courts of Appeals. Eleven of the 23 district court judges Nixon elevated to the Courts of Appeals were also nominated by Nixon to their district court positions (47.83%). Likewise, eleven of the eighteen district court judges Eisenhower elevated to the Courts of Appeals were also nominated by Eisenhower to their district court positions (61.1%). Of course, Eisenhower by necessity had to elevate more of his own district court nominees because the pool of Republican judges to choose from in the district courts had shrunk after 20 consecutive years of Democratic control of the White House.[33]

Richard Nixon's elevated appellate court judges were much more ideologically moderate than his other nominees to appellate court judgeships. The mean ideological extreme score of Nixon's elevated judges is .230, while the mean ideological extreme score for the rest of Nixon's appellate court judges is .294. The difference of means between these two groups is statistically significant ($t = 1.37$, $p \leq .08$, one-tailed test). President Nixon elevated district court judges to the Courts of Appeals in every circuit during his tenure except the District of Columbia Circuit Court of Appeals. President Nixon also was more willing than later Republican presidents to elevate district court judges to the Courts of Appeals who were nominated to their district court position by a Democratic president. 13.04% of Nixon's elevated appellate court judges were nominated to their district court judgeships by Democratic presidents.

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[33] It cannot be overemphasized as to how depleted the pool of Republican district court judges was during the early years of the Eisenhower administration. One good example of the type of Republican district court judge President Eisenhower had to choose from to elevate to the Courts of Appeals is James Alger Fee. Judge Fee was nominated by Herbert Hoover and confirmed to be a district court judge for the U.S. District of Oregon in December, 1931. At the time he was forty-three years old. Judge Fee was nominated by President Eisenhower to the Ninth Circuit Court of Appeals in April, 1954, and was confirmed seventeen days after his nomination. At the time of his confirmation, Judge Fee was sixty-five years old. He only served five years on the Ninth Circuit Court of Appeals, as he died in 1959 at the age of seventy.

Nixon filled 38 appellate court positions during his first presidential term and eight appellate court positions during his abbreviated second presidential term. 73.91% of Nixon's elevations occurred during his first term in office, while 26.09% of his elevations occurred during his second term. In all, 44.74% of the appellate court vacancies that occurred during Nixon's first term were filled via elevation. Elevations, however, accounted for 75% of Nixon's confirmed appellate court nominations in his second term. All of the district court judges elevated to the Courts of Appeals in Nixon's second term were nominated by Nixon to their district court judgeships. Nixon only changed the ideological median of one circuit court from a liberal to a conservative direction during his presidential tenure: The Tenth Circuit Court of Appeals. Like many of the presidents analyzed in this chapter, Nixon used an elevation to shift the ideological median of the Tenth Circuit when he elevated William Edward Doyle to the Tenth Circuit in April, 1971. It should also be noted that William Edward Doyle was a cross-over elevation, having been nominated to the U.S. District Court for the District of Colorado by John Kennedy in 1961.

Section 3.4.ii: Gerald Ford

Like Nixon before him, Gerald Ford made all of his nominations for federal judgeships during divided government. Furthermore, Gerald Ford faced one of the most Democratic Congresses of the era of divided government. Democrats maintained firm control of the House of Representatives throughout Ford's term. 57 senators were caucusing with the Democratic Party when Ford assumed the presidency. That number would increase to 62 by the end of his term. Much of the Democratic edge in Congress was a result of the Watergate scandal that brought Gerald Ford into the presidency in the first place, and the

effects of Watergate are believed to have an effect on President Ford's judicial selection strategies (Barrow et al. 1996, 70).

Gerald Ford's elevation rate of 72.7% easily dwarfs the elevation rates of all other presidents during the era of divided government in spite of the fact that he was only able to fill eleven vacancies on the Courts of Appeals. It has been argued elsewhere that the Democratic stranglehold on the 94th Congress, coupled with President Ford's weak standing with the electorate after his pardoning of President Nixon kept Ford from being an assertive chief executive, and compelled him to make moderate judicial nominations that would be palatable to Democratic senators (Barrow et al. 1996, 82). While there may be some truth to this assertion, a more thorough analysis of President Ford's nomination history shows that there may have been other factors that led him to elevate as many district court judges to the Courts of Appeals as he did.

First, Gerald Ford followed the judicial selection pattern used by Richard Nixon – and especially Nixon's pattern of elevations in his second term. As mentioned earlier, Nixon used elevations extensively for the few appellate court nominations he made in his second term, and all of the appellate court judges who were elevated were Nixon appointees to the district courts. Of the eight elevations made by Ford, all but one of the nominees elevated to Courts of Appeals were nominated to their district court judgeships by Richard Nixon.

Another interesting pattern in Ford's elevations is that, despite his alleged weakness as chief executive, he did not elevate any district court judges to the Courts of Appeals who were nominated to their district court judgeships by Democratic presidents. Furthermore, Ford's nominees to the Courts of Appeals were more ideologically extreme than Nixon's nominees. The mean ideological extreme score for all of Nixon's appellate court nominees is

.262, while the mean ideological extreme score for all of Ford's appellate court nominees is .294. This difference is not statistically significant, however (t = .59, $p \leq$ .28, one-tailed test). The district court judges Gerald Ford elevated to the Courts of Appeals were more ideologically extreme than the rest of Ford's appellate court nominees. The mean ideological extreme score of Ford's elevated appellate court judges is .323, while the mean ideological extreme score for the rest of Ford's appellate court nominees is .217. This difference is not statistically significant (t = -.86, $p \leq$ .21, one-tailed test), but substantively the distance between the mean ideological extreme scores of the two groups is larger than it is for any other presidential cohort under analysis.[34] Finally, there is a statistically significant difference between the mean ideological extreme scores of Ford and Nixon's elevated appellate court judges (t = 1.44, $p \leq$ .08, one-tailed test).

An interesting explanation for why Ford's elevated district court judges may be more ideologically extreme than Nixon's judges is because of the opportunities Ford had to shift the ideological compositions of multiple appellate courts. Nixon was able to nominate judges to every appellate court during his presidency. Ford was only able to nominate judges to six different circuits: the Second, Fourth, Fifth, Seventh, Eighth, and Ninth circuits. However, his nominations changed the ideological compositions of two of those courts. This was twice the number of courts Nixon was able to change, but in less than half the time. What is interesting is that Ford elevated both judges that would change the median of the Seventh and Eighth Circuit Courts of Appeals from a liberal to conservative direction. This trend of using elevations to change the ideological median of an appellate court will be evident for other presidents as well. It is probable that, when faced with the opportunity to change the

[34] The small sample size for Gerald Ford's nominees may play a factor in this statistic.

ideological alignment of a given court, the Senate – especially during divided government – is more likely to confirm judges who are being elevated over nominees coming from outside the federal judiciary. This possibility will be discussed and tested more extensively in Chapter Four of this dissertation.

Section 3.4.iii: Jimmy Carter

Jimmy Carter is the only president since 1969 to serve his entire term during unified government. Democrats maintained strong majorities in both the House and the Senate during Carter's presidency. Democratic control of the Senate was especially strong during Carter's presidency. Democrats controlled 61 seats in the Senate during the 95th Congress. The size of their majority in the Senate dropped to 58 during the 96th Congress.

President Carter filled 56 appellate court judgeships during his presidency. Surprisingly, his elevation rate is one of the lowest during the divided government era. He elevated only 15 district court judges to the Courts of Appeals during his tenure (26.79% of all appellate court appointees). Furthermore, 33.33% of Carter's elevated appellate court judges were nominated to their district court positions by Republican presidents. Based on the historical use of elevations to reshape the judiciary discussed earlier in this chapter, it appears odd that Carter did not use elevations as a means to shape the ideological composition of the federal judiciary as did his predecessors in previous eras of unified government. However, there are two specific reasons why Carter may have been unwilling to use elevations as extensively as his predecessors.

First, an important pledge made by Carter during his presidential campaign was that if elected president he would utilize a judicial selection strategy that gave precedent to merit over partisan considerations. He also emphasized the need to have more women and

minorities on the federal bench. Once in office, Carter established merit boards in each state to handle the selection of possible federal court nominees. These boards removed senatorial prerogatives in the recommendations of nominees (Barrow et al. 1996, 71). The members of these boards had the opportunity to select potential nominees who were not already federal judges and who may have gone unnoticed if senators were able to choose possible judicial nominees from their home states. Diversifying the federal judiciary would also preclude Carter from elevating district court judges to the Courts of Appeals because at the time there was only a small pool of female and minority judges to choose from.

The second reason why Carter may not have elevated more district court judges was because of the passage of Public Law 95-486, which authorized the greatest expansion of the federal Courts in United States history. This law provided for the creation of 35 appellate court judgeships. The creation of new judgeships was seen as necessary to alleviate growing caseload pressures. However, the passage of the bill provided a wellspring of patronage for senators and elites of both parties. The bill was passed with bipartisan support, and was considered among many in Congress as "a beautiful Christmas tree just spangled with judges" (Barrow et al. 1996, 71). The creation of merit selection panels and an emphasis on diversity, coupled with the wellspring of judicial patronage created by Public Law 95-486 may well have precluded Carter from elevating more district court judges than he did.

Jimmy Carter's elevated appellate court nominees were more ideologically extreme than his other appellate court nominees. The mean ideological extreme score of Carter's elevated appellate court judges is .31, while the mean ideological extreme score for the rest of Carter's appellate court nominees is .278. However, the difference of means between the two groups is not statistically significant (t = -.657, $p \leq .26$, one-tailed test). Carter elevated

district court judges to the Courts of Appeals in all circuits except the Fourth, Seventh, and Tenth Circuits. Most of his elevations occurred in the Fifth and Ninth Circuits – four in each circuit. Carter changed the ideological median of five circuits during his tenure: the Fourth, Fifth, Eighth, Ninth, and Tenth. Elevated district court judges were used to shift the median court member in the Fifth and Ninth circuits.

Section 3.4.iv: Ronald Reagan

Ronald Reagan is the first of three presidents in this analysis (Bill Clinton and George W. Bush being the other two) who served as presidents during both unified and divided government. Republicans never gained control of the House of Representatives during Regan's tenure; however, Republicans did control the Senate from the beginning of the 97th Congress in 1981 until being replaced by a Democratic majority in the 100th Congress in 1987. Republicans enjoyed a 53-47 majority in the Senate at the beginning of the 97th Congress. The size of the Republican majority increased to 55 in the 98th Congress, before dropping back to 53 in the 99th Congress. Democrats seized control of the Senate after the 1986 midterm elections and held a 55-45 majority over Republicans in the Senate for the rest of President Reagan's term.

President Reagan filled more appellate court positions (78) than any other president from 1969 to 2008. President Reagan also frequently used elevations to fill vacant appellate court positions. 42.31% of the appellate court vacancies filled by Reagan were filled by elevating district court judges to the Courts of Appeals. Reagan also elevated district court judges to vacant appellate court positions in every circuit during his presidency. President Reagan only elevated one district court judge who was nominated to his position by a Democratic president (Jesse Eschbach, who was nominated to the U.S. District Court for

the Northern District of Indiana by President Kennedy). President Reagan also followed and even outpaced Richard Nixon in his proclivity to elevate his own cohort of district court nominees to the Courts of Appeals. 54.55% of President Reagan's elevated nominees to appellate court positions were nominated by Reagan to their district court judgeships. Reagan's elevated appellate court judges are similar to the elevated nominees of other presidents in the fact that they are more moderate than his other appellate court nominees. The mean ideological extreme score of Reagan's elevated judges is .304 while the mean ideological extreme score of his non-elevated appellate court judges is .349. A t-test comparing the difference of means of the ideological extreme scores of Reagan's elevated and non-elevated appellate court nominees approaches but does not quite reach statistical significance ($t = 1.02$, $p \leq .15$, one-tailed test).

Reagan filled thirty-one appellate court positions during his first term and forty-seven positions during his second term. His elevation rate was higher in his first term. The elevation rate for his first term was 54.84% (seventeen out of thirty-one positions), while his elevation rate in his second term was 34.04% (sixteen out of forty-seven positions). This is surprising given that by the beginning of his second term Reagan would have had an impressive cadre of his own nominees in the district courts to elevate. The percentage of elevations for Reagan's second term is a bit misleading, however. Control of the presidency and the Senate was divided during the last two years of Reagan's second term, and there are noticeable differences between Reagan's elevation rates during unified and divided government. Reagan made many more nominations during unified government compared with divided government (sixty-three as opposed to fifteen). His elevation rate during unified

government was 39.68%. However, his elevation rate during divided government increased to 53.33%.

Reagan was also likely to elevate district court judges to the Courts of Appeals when that nomination would change the ideological direction of an appellate court's median member. Ronald Reagan changed the ideological direction of more appellate courts than any other president being analyzed in this study. The First Circuit Court of Appeals was the only appellate court that did not have a conservative median ideology when Reagan left office.[35] Reagan elevated district court judges to vacancies in the Second, Fifth, Sixth, Ninth, and Eleventh circuit courts that switched the ideological median of those courts from a liberal direction to a conservative direction. Furthermore, an elevated district court judge was one of several judges nominated and confirmed at the same time that changed the ideological composition of the Third Circuit Court of Appeals.

Section 3.4.v: George H.W. Bush

All of George H.W. Bush's appellate court nominations were made during divided government. When Bush entered the White House in 1989 the size of the Democratic Senate majority was 54 and rose to 55 by the end of the 101st Congress. Democrats also maintained a sizeable majority in the House of Representatives. Democrats maintained their control of the Senate after the 1990 midterm elections. Their majority in the Senate started with fifty-four members and grew to fifty-eight members before President Bush was defeated in the 1992 presidential election.

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[35] Specifically, Reagan changed the ideological composition of the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia circuits from liberal to conservative, as measured by the median justice in each court. The median member of the Seventh Circuit Court of Appeals was already conservative when Reagan began his first presidential term.

George H.W. Bush filled 38 appellate court positions during his tenure. His elevation rate (57.89%) is the second highest elevation rate of all presidents from 1969 to 2008. Only one of Bush's elevated district court judges was nominated to their district court position by a Democratic president. Bush only elevated 7.89% of his own district court nominees to appellate court positions. A logical explanation for why he elevated so few of his own district court nominees is that he only served one presidential term. However, 44.74% of his elevated appellate court judges were appointed to their district court positions by Ronald Reagan. After Reagan staffed the district courts with a large number of young, ideologically conservative judges it is likely that President Bush found the opportunity to elevate these judges hard to resist (Barrow et al. 1996, 82).

President Bush's elevated appellate court nominees were more ideologically moderate than his other appellate court nominees. The mean ideological extreme score for Bush's elevated appellate court nominees is .353, while the mean ideological extreme score for the rest of Bush's appellate court nominees is .393. However, the difference of means between the two groups is not statistically significant ($t = .765$, $p \leq .22$, one-tailed test). President Bush elevated district court judges to the Courts of Appeals in every circuit except for the Tenth Circuit. Bush changed the median member from a liberal to a conservative position in the First Circuit.[36] President Bush changed the median of the First Circuit through the use of elevation when he elevated Michael Boudin from the U.S. District Court for the District of Columbia to the First Circuit Court of Appeals in May of 1992.

[36] After Ronald Reagan's eight years of staffing the appellate courts, The First Circuit Court of Appeals was the only circuit left where the median member of the court had a liberal Judicial Common Space score.

Section 3.4.vi: Bill Clinton

Bill Clinton is the second president between 1969 and 2008 to nominate appellate court judges during both unified and divided government. Democrats controlled the White House and both houses of Congress during the 103rd Congress. Democratic control of Congress would only last for two years, as Republicans would take over both houses of Congress in the 1994 midterm elections. Republicans controlled fifty-three seats in the Senate at the beginning of the 104th Congress. The number of Republican senators would rise to a peak of fifty-five at the beginning of the 106th Congress before falling to fifty-four by the end of Clinton's second term in office.

President Clinton filled 62 appellate court positions during his two terms as president. Only Ronald Reagan filled more appellate court positions from 1969 to 2008. Clinton's elevation rate for his entire presidency was 30.65%. President Clinton's elevated appellate court nominees were more ideologically extreme than his other appellate court nominees. The mean ideological extreme score of Clinton's elevated appellate court nominees is .334 while the mean ideological extreme score of Clinton's other appellate court nominees is .313. This difference, however, is not statistically significant (t = -.816, $p \leq .20$, one-tailed test). He elevated district court judges to appellate positions in all circuits except for the First, Sixth, and Tenth circuits. Like Jimmy Carter, Bill Clinton elevated several district court judges who were nominated to their judgeships by Republican presidents. His 31.58% cross-over elevation rate is the second highest of all president in the time frame under study. Unlike Carter, Clinton elevated more of his own district court nominees to the Courts of Appeals (31.58% of his elevations). The reason is likely because Clinton served

two presidential terms. All elevations where Clinton elevated one of his own district court nominees occurred during his second term.

President Clinton filled 29 appellate court positions during his first term in office, and thirty-three positions in his second term. 42.11% of Clinton's elevations occurred during his first term in office, while 57.89% of his elevations occurred during his second term. In all, 27.59% of the appellate court vacancies that occurred during Clinton's first term were filled via elevation. Elevations accounted for 33.33% of Clinton's confirmed appellate court nominations in his second term. A possible explanation for Clinton's lack of elevations during his first term is that, after twelve consecutive years of Republican control of the White House, the pool of district court judges for possible elevation was unappealing. Based on the evidence of the use of elevations by Presidents Nixon and Reagan in their second presidential terms, it is surprising that Clinton's elevation rate was not significantly higher in his second term. One possible explanation is that a hostile Republican Senate would not have confirmed possible candidates for elevation based on their previous judicial records. As mentioned earlier, all elevations where Clinton elevated one of his own district court nominees occurred during his second term. Of the five remaining elevations that occurred during Clinton's second term, *all* of the judges chosen to be elevated were nominated to their district court positions by Republican presidents. Even so, the fact that these judges were nominated to their district court judgeships by Republican presidents did not ensure that they would be readily confirmed in the Republican-controlled Senate.[37]

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[37] An example of Republican delay of elevated appellate court nominees who were nominated to their district court positions by Republican presidents is the confirmation battle over (now) Associate Justice Sonia Sotomayor when she was nominated to fill a vacancy on the Second Circuit Court of Appeals. With the support of both New York senators, Sotomayor was nominated to the U.S. District Court for the Southern District of New York by George H.W. Bush on November 27, 1991. She came out of the Senate Judiciary

President Clinton filled 18 appellate court positions during the brief period of unified government at the beginning of his first presidential term. He would fill 44 appellate court positions during divided government. Six of the eighteen appointments to the Courts of Appeals made by Clinton during unified government were elevations (33.33% of all appointments during unified government). Clinton elevated thirteen district court judges to the Courts of Appeals under divided government (totaling 29.55% of all positions filled during this time). Clinton changed the court median from a conservative to a liberal position in three different circuits: The Second Circuit, the Sixth Circuit, and the Ninth Circuit. Only one elevation was used to change the ideological direction of these courts. The elevation of Fred Parker to the Second Circuit Court of Appeals changed the ideological median of that court from a score of .135 to a score of -.036.

Section 3.4.vii: George W. Bush

George W. Bush was the third and final president in the period under study to nominate appellate court judges during both unified and divided government. Republicans maintained control of the House of Representatives from Bush's inauguration in 2001 until Democrats took over the House in the 2006 mid-term elections. Party control of the Senate, however, shifted from Republican to Democratic control five months after Bush came into office. On June 6, 2001 Senator James Jeffords of Vermont changed his party affiliation from

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Committee with unanimous consent and was easily confirmed in the Senate via unanimous consent agreement on August 11, 1992. Bill Clinton nominated Sotomayor to fill a vacancy on the Second Circuit Court of Appeals on June 25, 1997. Sotomayor was again supported by both senators from New York (one a Democrat, the other a Republican). However, Sotomayor faced intense scrutiny from Republican senators during confirmation. An op-ed piece published in the Wall Street Journal posited that President Clinton, wishing to name the first Hispanic to the Supreme Court, was elevating Sotomayor to the Second Circuit Court of Appeals for the sole purpose of elevating her again to the Supreme Court. Sotomayor faced intense questioning during Senate Judiciary Committee hearings about her positions on a multitude of legal questions, and once she was advanced out of committee a secret hold was used to keep her nomination from coming to a Senate floor vote. After being convinced by New York Republican senator Al D'Amato to drop the secret hold, she was confirmed by the Senate on October 2, 1998, by a 67-29 vote.

Republican to Independent and caucused with Senate Democrats, giving them a 51-49 majority. They would maintain control of the Senate for the remainder of the 107th Congress. Republicans regained control of the Senate after the 2002 midterm elections, maintaining a 55-45 majority until the Democrats retook the Senate in the 2006 midterm elections.

George W. Bush's elevation rate is the lowest among all presidents during the period 1969-2008 at 22.03%. The mean ideological extreme scores of Bush's elevated nominees is much more moderate than the ideological extreme scores of Bush's other nominees to the appellate courts. The mean ideological extreme score of Bush's elevated nominees is .355 while the mean ideological extreme score of his other appellate court nominees is .424. A t-test assessing the difference of means shows there is a statistically significant difference between the means of Bush's elevated appellate court judges and his other appellate court nominees ($t = 1.71$, $p \leq .05$, one-tailed test). President Bush's use of elevations was not uniform across appellate circuits. He elevated district court judges in only six of the twelve appellate courts used in this analysis.[38] He only elevated one Democratically nominated district court judge to the Courts of Appeals (Barrington Parker to the Second Circuit Court of Appeals in 2001). President Bush only elevated two of his own district court nominees to the Courts of Appeals. Four of the judges he elevated were nominated to their district court judgeships by George H.W. Bush, and six of the judges he elevated were nominated to their district court judgeships by Ronald Reagan.

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[38] President Bush nominated judges to every appellate circuit under analysis during his tenure. He elevated district court judges to appellate court positions in the Second, Third, Fifth, Sixth, Seventh, and Eighth Circuits.

69.23% of George W. Bush's elevations occurred during his first term in the White House. Elevations accounted for 26.47% of all of Bush's confirmed nominations to the Courts of Appeals in his first term. 30.77% of his elevations occurred in his second term. Elevations accounted for only 16% of his confirmed nominations to the Courts of Appeals in his second term. George W. Bush also used elevations more during divided government compared to unified government. 69.23% of his elevations occurred during divided government. Nine of his 13 elevations occurred during the period of divided government that occurred during his first term in office, and six of those elevations occurred during the first year of his first term. President Bush only changed the partisan composition of one appellate circuit during his White House tenure.[39] Bush used an elevation to change the ideological direction of this court with the elevation of David McKeague from the United States District Court of the Western District of Michigan to the Sixth Circuit in 2005.

Section 3.5: Conclusion

This chapter provides an historical account of how presidents have used elevations throughout America's history to shape the composition of the federal judiciary. Both Republican and Democratic presidents used elevations during periods of one-party

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[39] This fact struck me as especially surprising since President Bush had fifty-nine of his appellate court nominees confirmed during his tenure. What is even more surprising is how he was able to change the ideological composition of the Sixth Circuit. The median of the Sixth Circuit was already conservative when Bush came to office. The median switched to a liberal direction after several conservative judges on the Sixth Circuit left their positions. What ensued was a battle between the president and the home-state senators from the circuit (primarily the senators from Michigan) over the acceptability of a myriad of possible judicial nominees that lasted for nearly two years. The deadlock between the president and Michigan's home-state senators involved multiple filibusters of nominees and the withdrawal of several nominations, and an attempt by Republican leadership in the Senate to eliminate the use of the filibuster during judicial confirmations (this was known as the "Nuclear Option." See Binder et al. 2007 for an excellent analysis of the politics behind this tactic), and the ultimate acceptance of a compromise by a group of moderate Senators known as the Gang of Fourteen. Democratic members of the Gang of Fourteen agreed to forego the use of filibusters in future confirmation hearings, while Republican members of the Gang of Fourteen agreed to not vote with their party on implementation of the Nuclear Option.

hegemony that were common in the United States prior to 1969. While Republican presidents made more effective use of elevations during the era of Republican hegemony from the end of the Civil War until 1932, Democratic presidents also made use of the elevations. In doing so, Democrats were also able to shape federal judiciary to reflect their policy preferences.

Presidents who have served during the era of divided government have also used elevations to staff the federal judiciary. Analysis of the use of elevations by these presidents reveals several important points. First, the Republican presidents of the divided government era have been more likely to use elevations than their Democratic counterparts. However, Republican presidents have served more time under divided government than Democratic presidents. Indeed, Bill Clinton is the only Democratic president in this study to serve under divided government. The intersection of presidential party affiliation and divided government appears to have an important effect on whether a president decides to elevate a district court judge to the Courts of Appeals or to nominate someone from outside the federal judiciary.

Second, the location of an appellate court vacancy appears to have an effect on whether a president will use an elevation to fill a vacant appellate court position. Elevations are not distributed equally across the several appellate circuits. A possible explanation for this may be because of the party of home-state senators associated with particular appellate court seats. Presidents often have to bargain and negotiate with home-state senators of both parties if party control of a state's Senate delegation is divided, regardless of whether divided government is present. This proposition will be examined more closely in Chapter Four.

Third, elevated district court judges are significantly more moderate than other judges nominated to the Courts of Appeals. Again, however, there is a difference between Republican and Democratic presidents. Democratic nominees to the Courts of Appeals who are elevated are more extreme than their other nominees, though the difference between the two groups is not significant. Again, this puzzle will be explored in more detail in Chapter Four.

Section 3.4 of this chapter takes a closer look at the elevation patterns of the individual presidents who have served from 1969 to 2008. This analysis shows that presidents have used elevations differently under different circumstances. These presidents differ in where there are likely to use elevations. Of particular note in this section is how two-term presidents use elevations in their first and second terms. Another interesting observation from this section is how presidents consistently use elevations to fill vacant appellate court positions that change the ideological median of different appellate courts.

The analyses conducted in this chapter help to describe and explain some of the factors that may be important in explain why presidents decide to elevate district court judges. Chapter Four will delve more deeply into the use of elevations during the era of divided government by assessing current theoretical explanations for the use of elevations, and provide a theoretical and empirical assessment of the use of elevations taking into account the discoveries found in this chapter.

CHAPTER 4: WHO GETS ELEVATED? ASSESSING INDIVIDUAL AND INSTITUTIONAL FACTORS THAT SHAPE JUDICIAL ELEVATIONS

Section 4.1: Introduction and an Outline of this Chapter

The purpose of Chapter Three was to provide a descriptive analysis of factors that affect a president's decision to elevate a district court judge to the federal Courts of Appeals, and to reflect on how these factors have changed since the onset of the era of divided government beginning in 1968. The main point to take from Chapter Three is that although some presidents since 1968 appear to use elevations to shape the federal appellate courts in their image (Presidents Nixon and Ford, and H.W. Bush serve as good examples), there are other factors unique to the current era of divided government that affect whether or not a president will elevate a district court judge to the Courts of Appeals when an appellate court vacancy occurs.

The purpose of Chapter Four is to analyze more extensively and systematically the factors affecting the president's decision to use elevations to fill appellate court vacancies. The analyses in this chapter will be more extensive than the analysis in Chapter Three because it will test other possible factors that are a part of a president's decision making calculus when he is faced with the opportunity to fill a vacant appellate court position. It is also systematic because it will move beyond the Chapter Three's descriptive framework to statistically analyze these factors that may affect a president's decision to use elevations to fill vacant appellate court positions. Throughout this chapter, the analyses I present are based on the argument that presidents decide to use elevations because they serve as an informational signal to important actors in the Senate as to both the quality and the ideological predisposition of a particular nominee.

Section 4.2 of this chapter will provide a review of the literature on "advice and consent" within the context of appellate court nominations. It will move beyond the broad overview presented in Chapter Two to discuss a common conceptual framework used in current models of advice and consent – the gridlock interval – and how it helps scholars to understand how a president makes decisions as to who will be chosen to fill vacant appellate court positions. Section 4.2 will also discuss the current arguments as to why presidents may choose to elevate district court judges to vacant appellate court positions instead of nominating someone from outside the federal judiciary.

Section 4.3 presents the theoretical argument that I will use in this chapter. This argument incorporates certain aspects of the gridlock interval discussed in Section 4.2 of this chapter and also some of the discoveries made in Chapter Three. As mentioned earlier, the thrust of this argument is that presidents in the divided government era use elevations as an informational device to assuage fears that an appellate court nominee will either be unqualified or that a nominee will be too partisan for the tastes of important senators involved in the nomination process or for the Senate as a whole. I will also provide hypotheses in Section 4.3 derived from this argument that will be tested in this chapter.

Section 4.4 will provide a description of the data and variables that will be used in this chapter. This section will also discuss the estimation techniques that will be used in this chapter. Section 4.5 will provide a discussion of the results derived from the analyses that will be performed in this chapter. Finally, Section 4.6 will provide a conclusion and discussion of the findings of this chapter, and a discussion of the implications of these findings.

Section 4.2: Reviewing the Literature on the Nomination and Confirmation of Federal Appellate Court Judges

Section 4.2.i: The President's Agenda and Appellate Court Nominations

The Courts of Appeals do not have the same level of exposure as the United States Supreme Court. In fact, most people are not aware of their importance, let alone the ramifications that the decisions made by these courts can have on public policy (Epstein & Segal 2005, 51; Goldman 1997, 2). While it is true that presidents are not as concerned about who they nominate to federal appellate courts compared to the Supreme Court, presidents do implement processes to make sure the people they nominate to appellate court positions fulfill their agendas. Goldman classifies the agendas a president tries to accomplish in the nomination of federal appellate judges into three different categories. The first category is the president's personal agenda. Judicial nominees who are chosen because they are friends or associates of presidents are said to fulfill the president's personal agenda. These nominees are not chosen because of their policy positions, but are instead chosen to exercise the president's ability to dispense political patronage (Goldman 1997, 3).

The second category is the president's partisan agenda. Presidents promote partisan agendas when they make nominations that assist party leaders, enhance relationships and heal rifts with senators, enhance the president's reputation, or cater to a constituency (Goldman 1997, 3). For most of American history presidents made nominations based on partisan agendas. However, the importance of partisan agendas as a motive for nominations has decreased since the 1970's due to the weakening of national political parties (Goldman 1997, 4). Instead, most of the post-World War II presidents – and especially the presidents of the divided government era – have relied on a policy agenda to choose who will be nominated to vacant appellate court positions.

Presidents driven by a policy agenda nominate individuals to appellate court vacancies who they believe will reinforce their policy goals through their judicial decisions (Goldman 1997, 4). The classic example of the use of a policy agenda in the nomination of appellate court judges is Ronald Reagan's insistence that all nominees to federal court positions have a firm anti-abortion position. To be sure, it is possible that presidents nominate individuals to appellate court vacancies who can fulfill multiple agendas, and the lines between these agendas can become blurred. While it is assumed that nominations made to fulfill personal or partisan agendas will not reinforce the president's policy agenda, it is likely that at times the judicial nominee, once confirmed, will make judicial decisions that will in fact support their nominating president's policy agenda (Goldman 1997, 4).

Judicial scholars understand that this may occur and account for it accordingly. Essentially, these scholars forego performing analyses on the personal and partisan agendas of presidents and pursue analyses grounded on the assumption that presidents make their nominations to federal appellate court positions based on a policy agenda. Specifically, scholars assume that presidents are goal-oriented actors when they decide who will be nominated to a vacant appellate court position, and that the goal a president is trying to accomplish is to seek out judicial nominees who share the president's policy preferences (Massie et al. 2004, 146; Songer 1982, 107). The analyses performed in this chapter will also be based on the assumption that a president desires to nominate individuals to the Courts of Appeals in order to fulfill his policy preferences.[40]

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[40] While this assumption is the foundation of much research on judicial nominations and also this dissertation chapter, it should be stated up front that while this assumption is convenient for scholars to make, much more research needs to be done to determine if it is applicable in all models of judicial nominations. The research performed herein signals that Democratic presidents may not use elevations for the same reasons that Republican presidents use them. A possible reason for this may be that Democratic presidents are still more apt

Of course, I must state again that although scholars assume that presidents make nominations to vacant appellate court judgeships based on their policy preferences, they are constrained in who they can nominate because their nominees must be confirmed by the Senate. As was discussed in Chapter Two of this dissertation, the president is the first mover in the nomination/confirmation game. If a president nominates someone to the Courts of Appeals who is viewed as unqualified or too ideologically extreme, the president runs the risk of having his nominee rejected. Rejection of a nominee by the Senate can have adverse consequences for the president. At minimum rejection means that the president and his staff must restart the nomination process, which can force the president to expend valuable time and resources. At worst a rejection may diminish the president's capability to negotiate with the Senate or diminish the president's standing in the eyes of the American public. Therefore, accounting for the preferences of the Senate in relation to the president's preferences and the preferences of the individual the president desires to nominate to a vacant appellate court position is of great importance if the president wishes to have his judicial nominees confirmed quickly and painlessly.

Section 4.2.ii: Modeling the Presidential Nomination Process

Initial analyses of the presidential nomination process began by trying to understand the timing of presidential nominations. Operating on the assumption that presidents

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to choose appellate court nominees based on partisan agendas than policy agendas. The classic example of this type of nominating behavior is Jimmy Carter and Bill Clinton's emphases on nominating women and racial minorities to federal court positions. While there is a wealth of research demonstrating that the preferences of women and minorities are highly and positively correlated with the preferences of the Democratic party, and that this level of correlation may indirectly result in judicial decisions by these individuals that reflect the preferences of their nominating president, it is not a stretch of the imagination to assume that the emphasis by Democratic presidents to nominate women and minorities to federal court positions can be construed as forwarding the president's partisan agenda. As will be discussed later, I believe this is an important reason why there is a disparity in the way Republican and Democratic presidents use elevations to staff the Courts of Appeals.

nominate judges based on policy considerations, Massie et al. (2004) analyze all federal court nominations between 1977 and 1999 and find that both political and institutional factors affect the timing of nominations to federal court positions. A president is more likely to make nominations to federal courts more quickly when there is unified government and, in the case of district court judges, when a home-state senator is in his political party. Presidents are particularly likely to make a nomination when a midterm election approaches and there is unified government (Massie et al. 2004, 151).

Analyzing the timing of appellate court nominations is one way to study how a policy-driven president attempts to achieve his goal of shaping the federal courts to reflect his preferences; however, the bulk of research on this topic moves beyond the timing of nominations to assess how the preferences of the Senate affect who the president can nominate and have confirmed in the Senate. Scholars have turned to formal theoretical analyzes to determine the conditions whereby a president is able to nominate individuals to appellate court positions who are close to the president's policy preferences but are also able to be confirmed in the Senate. Specifically, scholars have used two-dimensional "gridlock" models to determine these conditions.

Gridlock models have become an important theoretical device for understanding presidential decision making over the last decade (Cameron 2000; Howell 2003). The formal mathematics used to develop gridlock models can be difficult to understand at times, but the intuition behind the models is quite simple. Gridlock models place the policy positions of the president, courts, and the Senate into a one-dimensional policy space. Presidents are conceptualized as being utility maximizers who desire to shift the ideological position of a court closer to his preferences by nominating someone to a court vacancy who shares his

preferences. However, he cannot do this unless the actors in the Senate are at least indifferent to the new ideological position of the court. If a Senate actor prefers the status quo position of the court to the new position created by confirming the judicial nominee, the nominee will be rejected and the status quo position of the court will be maintained (Asmussen, 2011; Moraski & Shipan, 1997; Primo et al. 2008; Rohde & Shepsle, 2007). Assuming that all actors have symmetric, single-peaked preferences, the gridlock model provides uniform conclusions about the fate of a nominee based on the location of the president, court, and Senate in the one-dimensional policy space. If the president is located within the gridlock interval – which is conceptualized as the distance between the two Senate actors used in a given model in the one-dimensional policy space – the president will be able to successfully move the court closer to his position if the status quo of the court does not lie between the two Senate actors used in the model. If the status quo of the court lies between these two actors, the president will not be able to change the court's position (Primo 2008, 474-75).[41]

The important implication of the gridlock model is that as the distance between the two "pivotal" Senators used in the gridlock model move further from one another in a one-dimensional policy space it will become harder for the president to make a nomination that will be confirmed in the Senate (Primo et al. 2008, 475). However, there are questions as to which senators should be used in gridlock models. Although Primo et al. recommend that

[41] To be sure, the actual conclusions that can be derived from the gridlock model are much more nuanced than what is being discussed here. The president can change the preferences of the court only as long as the most distant Senate actor from the president is indifferent to the new position of the court. There are many excellent pieces on the nuances of the gridlock model that are well worth reading (see for example Asmussen 2011, Howell 2003, and Rohde & Shepsle 2007) that discuss the gridlock model in much greater detail. This section is not designed to be an exhaustive analysis of the ins and outs of the gridlock model. Rather, it is included to show how many scholars have modeled judicial selection in recent years and, ultimately, to demonstrate that in future research my model of judicial elevations may also be amenable to such formal theoretic analysis.

scholars use the filibuster pivot and the median senator of the majority party of the Senate, scholars still continue to use other Senate actors in their models (Primo et al. 2008, 475). Some have even gone so far as to say that it does not matter who is used, and the fact that *any* senator can stall or kill a nomination in the Senate can bias the empirical results derived from these models (Williams, 2008). Furthermore, research also demonstrates that Senate actors will be willing to expand their range of acceptable nominees to courts based on individual characteristics of the nominee. For example, Asmussen finds that the range of acceptability for a given senator may be larger if the nominee for an appellate court position is a woman or a racial minority – especially if the nomination is made by a Republican president (Asmussen 2011, 601).[42]

Although there has been a proliferation of literature using gridlock models to explain judicial nominations and confirmations, these models rarely provide explanations for the delay or outright rejection of a judicial nominee. Instead, these models merely demonstrate that making an acceptable nominee will become more difficult as the political parties in the Senate continue to polarize. There is empirical evidence that this is indeed the case (Rohde & Shepsle, 2007). However, these models do not tell us how or why a given senator will decide to block a given nominee. Also, since it is extremely difficult to find a judicial nominee with an ideological disposition that will maintain the status quo of a given court, these models cannot account for why presidents are still capable of nominating judges that are confirmed despite the fact that they will change the status quo of a given court (Rohde & Shepsle 2007).

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[42] Asmussen's research also provides an example of the diversity of pivotal senators used in gridlock models. Asmussen uses the forty-first and sixtieth senators based on an ideological rank-ordering of senators (Asmussen 2011, 596). In essence, she uses *both* possible filibuster pivots in her model. Although these two senators have been used in other models of gridlock (see for example Howell, 2003) to my knowledge her research is the only research that uses these two specific senators in the context of judicial nominations.

One interesting explanation for why a given senator would block a judicial nominee is that the senator in question may be a policy entrepreneur (Kingdon, 1984; Krutz et al. 1998; Schneider et al. 1995). Policy entrepreneurs in Congress are risk takers who care deeply about issues and the actions taken by government (Krutz et al. 1998, 872). However, policy entrepreneurs face a tough task in thwarting judicial nominees because these nominees are presented to the Senate with the presumption that they will be confirmed (Krutz et al. 1998, 872). To overcome this hurdle, policy entrepreneurs follow two courses of action. First, entrepreneurs portray the nominee in negative terms to the public and other senators. This is usually done by emphasizing that a nominee is either unqualified, is ideologically extreme, or both. Second, the entrepreneur attempts to expand the scope of conflict surrounding a nominee by persuading other senators that there is real controversy surrounding a given nominee (Krutz et al. 1998, 872; Schattschneider 1960, 16).[43]

However, presidents do have courses of action that they can follow to counter the actions of policy entrepreneurs and secure confirmation. Foremost among these courses of action is to nominate individuals that are highly qualified, are considered to be more moderate in their preferences than other potential nominees, and who have also been confirmed in the Senate to other positions (Krutz et al. 1998, 873). Elevated judicial nominees meet all of these criteria. As will be discussed in the next section, the rationale discussed in the scant literature on the elevation of district court judges to the Courts of Appeals highlights these facts, and can also provide an explanation as to why presidents use elevations in different contexts.

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[43] Again, the nomination and eventual confirmation of Justice Sonia Sotomayor to the Second Circuit Court of Appeals provides an excellent example of this type of behavior. Please refer to the brief explanation of her confirmation struggle in the Senate outlined in footnote 27 in Chapter Three for a discussion about her struggle for confirmation to the Second Circuit Court of Appeals.

Section 4.2.iii: Explanations for Using Elevations to Fill Vacant Appellate Court Positions

As mentioned above, there is very little literature on the use of elevations to fill vacant appellate court positions. The first real attempt in the literature to understand elevations was made by Deborah Barrow, Gary Zuk, and Gerard Gryski in their book *The Federal Judiciary and Institutional Change* (1996). In this book, Barrow et al. conceptualize elevation as one of three ways in which the president can use judicial nominations to generate institutional change in the federal judiciary.[44] Presidents can use elevations to effectuate change in the federal judiciary because the elevation of a district court judge to the federal Courts of Appeals will then create a new position to be filled in the district courts.

The assumption of Barrow et al.'s work is that the individual the president elevates to the Courts of Appeals will have preferences that are aligned with the president's preferences (Barrow et al. 1996, 8). However, the analyses performed in Chapter Three of this dissertation find that elevated district court judges are slightly but significantly more moderate than appellate court nominees who come from outside the federal judiciary. Barrow et al. do not account for this fact. Indeed, they do not perform analyses that use presidential and judicial preference estimates at all. This begs the question: why do presidents elevate district court judges who are slightly but significantly more moderate than appellate court nominees who are chosen from outside of the federal judiciary?

Although it is not a specific hypothesis tested in their research, Barrow et al. do provide an explanation for why elevations may be appealing for presidents in different

[44] The other ways Barrow et al. conceptualize institutional change in the federal judiciary is via natural turnover of judges on the federal bench over the course of a president's term, and the use of omnibus judgeship legislation to expand the size of the federal judiciary. Deeply intertwined with these two other agents of institutional change and with elevations is the use of cross-party nominations and their effect on institutional change within the federal judiciary (Barrow et al. 1996, 7-8).

contexts. Their explanation is useful because it illustrates the benefits that a president can accrue by elevating a district court judge, but it also delineates the resources a president can use to thwart attempts by policy entrepreneurs to stall or kill the president's judicial nominees in the Senate. First, the president can thwart a policy entrepreneur by elevating a district court judge to the Courts of Appeals because the elevated nominee has already been through the process of a Senate confirmation when he or she was confirmed to their district court position (Barrow et al. 1996, 9). Barrow et al. consider this fact to be a "trump card" for the president because the Senate would already have detailed insight as to the qualifications and temperament of the nominee. If they were to fail to confirm the nominee, then the Senate would implicitly be stating that they were wrong in their assessment of the nominee when they were confirmed for their district court position. Furthermore, elevated nominees are considered to be high-quality candidates in any regard because of their previous judicial experience as a federal district court judge.[45]

Second, as discussed above, a president can thwart the actions of policy entrepreneurs intent on thwarting a judicial nomination by showing that these judges are not too ideologically extreme to be elevated to the Courts of Appeals. Although Barrow et al. do not examine whether this is the case in their research, the results of Chapter Three of this dissertation supply some evidence that this is indeed so. This may also explain why, based on the analysis in Chapter Three, presidents are likely to elevate district court judges to the Courts of Appeals when the nominee – if confirmed – will change the ideological direction

[45] A t-test comparing the means of the ABA ratings for elevated and non-elevated appellate court judges does show that there is a statistically significant difference ($t = -3.65$, $p \leq .001$, one-tailed test).

of the court. This situation seems to be the most obvious one in which a policy entrepreneur would attempt to thwart a judicial nomination.

The only other piece of literature on judicial elevations also provides support for this assertion. Savchak et al. (2006) provide the only extensive empirical analysis of the factors that may lead a president to decide to elevate a district court judge to a vacant appellate court decision as opposed to nominating someone from outside the federal judiciary. The results of their study further confirm that elevations provide important information for both the president and senators involved in the confirmation process. The authors specifically find that the district court judges most likely to be elevated are those who had higher ABA ratings at the time of their nomination to their district court position. They also find that the president is likely to elevate district court judges who are close to him ideologically; however, they also find that district court judges are not necessarily able to control their own fate when it comes to being elevated to the Courts of Appeals. Presidents are able to glean the preferences of district court judges via their written opinions, but based on Savchak et al.'s analysis a district court judge does not help his or her chances of being elevated to the Courts of Appeals by publishing more of his/her court opinions (Savchak et al. 2006, 486).

This conclusion may bolster the argument that elevations can thwart a policy entrepreneur if a policy entrepreneur wishes to stall or kill a judicial nomination. Presidents can gather from a district court judge's published record whether or not his preferences and the preferences of a given district court judge are compatible, but a district court judge may harm their own chances of elevation if they are too proactive in the publication of opinions that may be construed as ideologically extreme. The results of Barrow et al.'s analyses and Savchak et al.'s analyses provide some insights as to when and why a president will use

elevations to staff the Courts of Appeals. But they leave open the possibility that there are other contextual factors that a president may consider when he decides to use elevations to fill vacant appellate court positions. The rest of this chapter is designed to assess some of those factors to see if they affect the president's decision to elevate district court judges to vacant appellate court positions.

Section 4.3: Theory and Hypotheses

Based on the discussion above, it is apparent that presidents do not simply elevate district court judges to an appellate court position whenever there is an appellate court vacancy. This is especially true during the divided government era. Presidents use elevations strategically to fill vacant appellate court positions. Presidents get the added benefit of nominating someone to fill a vacant district court position after an elevated nominee to the Courts of Appeals is confirmed. However, I argue that this is only an artifact of the strategic nominating process used to fill appellate court positions. Then, the question that still needs to be answered is *how* do presidents use elevations strategically to fill vacant appellate court positions?

My explanation for how presidents use elevations strategically to fill vacant appellate court positions draws on two different propositions discussed earlier in this chapter. First, according to Savchak et al. elevations provide informational cues as to the qualities and qualifications of an elevated nominee (Savchak et al. 2006, 480). District court judges nominated to fill vacant appellate court positions possess several qualities that can positively affect whether they are confirmed in the Senate. First, their judicial record can assure the president that if nominated and confirmed these judges will judge in a way that reflects the president's preferences. Second, the record of district court judges provides information for

senators about the qualifications and predispositions needed to become an appellate court judge. Finally, district court judges have already been confirmed by the Senate once before, which can make it difficult for senators to reject the nomination. These factors will make it harder for the Senate to reject an elevated appellate court nominee.

Second, presidents can use elevations to thwart the activities of policy entrepreneurs. As discussed earlier, the onus of blocking a nomination rests on policy entrepreneurs in the Senate, for judicial nominees reach the Senate with the expectation that they will be confirmed. Presidents can thwart a policy entrepreneur's activity by elevating a district court judge because an elevated district court judge is highly likely to be deemed both qualified and ideologically acceptable. These are two "trump cards" a president must play if he is to thwart a policy entrepreneur during judicial confirmations. This leads me to the first hypothesis that will be tested in this chapter:

Hypothesis 1: District court judges nominated to the Courts of Appeals are more likely to be more qualified than nominees from outside of the federal judiciary.

Remember, however, that presidents must also nominate individuals who are less ideologically extreme than another nominee. The results of a t-test in Chapter Three of this dissertation show that elevated judges are slightly but significantly more moderate than nominees who come from outside the federal judiciary. However, it is difficult to test this difference in a more detailed statistical model without establishing when and where we can observe when a president nominates a district court judge to a vacant appellate court position as opposed to nominating someone from outside the federal judiciary.

An obvious point at which the president may be more likely to elevate a district court judge to a vacant appellate court position is when there is divided government. The analyses performed in Chapter Three of this dissertation demonstrated that presidents were more

likely to use elevations when divided government was present. This makes sense because when divided government is present there is a greater likelihood that more senators will be skeptical of the nominees a president sends to the Senate to be confirmed. This should also increase the chances that there will be more policy entrepreneurs in the Senate who desire to thwart the confirmation prospects of any given appellate court nominee. This leads to my second hypothesis:

Hypothesis 2: The president is more likely to elevate district court judges to vacant appellate court positions during divided government.

Policy entrepreneurs can attempt to thwart the confirmation of an appellate court nominee if there is unified government, however. There is evidence that nominees to appellate court positions can be stalled or killed in the Senate even if there is unified government because of the fact that any one senator can filibuster a nominee, and 60 senators are required to invoke cloture to stop the filibuster (Rohde & Shepsle, 2007). One factor that may affect whether the president needs to elevate a district court judge to counter a policy entrepreneur is whether or not the parties in the Senate are polarized. The two parties in the Senate have indeed become more polarized during the divided government era (Jones, 2001; Theriault & Rohde, 2011). This makes it more difficult for the president to nominate someone to an appellate court position who can either maintain the status quo of a given court, or move the policy preferences of a court closer to his own policy positions. In this case, the gridlock interval discussed above can provide insight as to whether polarization in the Senate precipitates the use of elevations to make sure nominees are confirmed. This leads to the third hypothesis of this chapter:

Hypothesis 3: The likelihood that a president will elevate district court judges to the Courts of Appeals increases as the size of the gridlock interval in the Senate increases.

A final way in which we can observe when a president may need to thwart a policy entrepreneur by nominating a more moderate person to the federal appellate courts is when the ideological composition of an appellate court hangs in the balance. Recall that in Chapter Three of this dissertation, several presidents opted to elevate district court judges to vacant appellate court positions when that particular nomination would change the ideological composition of that court. Also recall that there was a lot of variation in *where* presidents use elevations. For example, presidents rarely use elevations in the Tenth Circuit Court of Appeals. This circuit has remained staunchly conservative throughout the divided government era. However, more district court judges have been elevated to the Second and Third Circuits than have been nominated from outside the federal judiciary. Based on appellate court medians calculated by Epstein et al. (2007), these circuits are two of the most volatile circuits in that their ideological compositions have changed several times during the divided government era. There is a great possibility that policy entrepreneurs will try to make their presence known during these confirmation battles more than during other confirmation battles because of what is at stake. Elevating district court judges in these situations can thwart entrepreneurial activity because the judges that are elevated may be more moderate than other alternatives. This leads to my fourth hypothesis:

Hypothesis 4a: The likelihood that a president will elevate a district court judge to a vacant appellate court position increases when the elevation will change the ideological direction of the court.

Hypothesis 4b: Presidents are less likely to elevate district court judges to vacant appellate court positions on either highly liberal or highly conservative courts.

Section 4.4: Data, Variables, and Methods Used in this Chapter

Section 4.4.i: Dataset Used in this Chapter

The data for this chapter include all confirmed appellate court judges from 1969 to 2008. The unit of analysis is the individual judge. The primary data source for the data in this chapter is the Bibliographical Directory of Federal Judges database located on the website for the Federal Judicial Center. The Bibliographical Directory contains information on the names of all appellate court nominees confirmed during this time, the circuit to which the nominee was nominated and ultimately confirmed, the name of the nominating president, the date the vacancy was created, the name of the appellate court judge who previously held the position, the date of confirmation, and the demographic and background features of the candidates (most notably race and gender).

Supplemental data on the process for each appellate nomination and confirmation were derived from the Lower Federal Court Confirmation Database created by Wendy Martinek (2004), the Attributes of U.S. Federal Judges database created by Zuk, Barrow, and Gryski (2004), and the final editions of the Senate Judiciary Committee's *Legislative and Executive Calendar*. These datasets provided me information as to the specific processes involved in each nomination and confirmation, and data on Senate party composition and polarization. They also provided me with more data on the background attributes of confirmed nominees.

In all, 321 nominated and confirmed appellate court judges were included in the dataset. The dataset does not include appellate court judges for specialized federal courts like the Court of Appeals for the Federal Circuit. Also, individuals who were nominated and confirmed to the Circuit Court of Appeals for the District of Columbia were excluded from

this analysis. Although they were used in several of the analyses conducted in Chapter Three of this dissertation, they were excluded from the analyses here because there are no home-state senators involved in the nomination and confirmation processes for these appointments.

Section 4.4.ii: Dependent Variables Used in this Chapter

Table 4.1 provides descriptive statistics for the dependent variable and the independent variables that are used in this chapter. The first dependent variable measures whether a confirmed appellate court nominee was elevated from the district court or was nominated from outside the federal judiciary. The variable is a dichotomous variable that is coded as '1' if the nominee was elevated and '0' if the nominee was not. An overview of the descriptive statistics in Table 4.1 shows that the majority of nominees to the Courts of Appeals from 1969 to 2008 were individuals who were not already judges in the federal court system. However, a substantial minority of appellate court vacancies were filled by elevations.

To measure the time duration between the creation of an appellate court vacancy to a presidential nomination to fill that vacancy, and the time duration between a nomination and the confirmation of appellate court judges I counted the number of days between each event. An examination of Table 4.1 shows that it takes much longer for a president to make a nomination to a vacant appellate court position than it does for the Senate to confirm a nomination.

Table 4.1: Descriptive Statistics

Dependent Variables	Mean	Std. dev.	Min	Max
Elevation	.405	.492	0	1
Time from Vacancy to Nomination (days)	315.74	340.33	1	2606
Time from Nomination to Confirmation (days)	97.2	90.83	7	640
Independent Variables				
Court Median Common Space Score	.179	.121	.0005	.585
ABA Rating	1.71	.461	0	2
Gridlock Interval	.717	.124	.4715	.944
Divided Government	.523	.5	0	1
District Court Pool	.537	.207	0	1
Percentage of Vacant Seats in District	.091	.105	0	.5
Republican President	.657	.475	0	1
Female Appellate Court Judge	.153	.36	0	1
Minority Appellate Court Judge	.125	.331	0	1
# Home-State Senators in President's Party	1.11	.742	0	2

Section 4.4.iii: Independent Variables Used in this Chapter

Several independent variables will be used in the models in this chapter. Below are explanations of all of the independent variables, and the data sources from which the independent variables are drawn:

ABA Ratings: This variable is coded as '0' if the American Bar Association Standing Committee on the Judiciary rates an appellate court nominee as 'unqualified.' It is coded as '1' if the appellate court nominee was rated as 'qualified.' It is coded as '2' if the appellate court nominee was rated as 'very-well qualified' or as 'extremely well qualified.' Data for district court nominees between 1989 and 2008 were gathered from data available on the website for the American Bar Association.[46] Data on the ABA ratings of judges before 1988 were gathered from the database created by Zuk, Barrow, and Gryski (Attributes of United States Federal Court Judges), which provides a wealth of background information on confirmed judicial nominees.[47] I expect the coefficient for this variable to be both positive and statistically significant.

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[46]http://www.americanbar.org/groups/committees/federal_judiciary/resources/ratings_for_judicial_nominees.html.

[47] Only one appellate court nominee in the dataset (Thomas Joseph Meskill, who was nominated by Gerald Ford and confirmed to fill a position on the Second Circuit Court of Appeals in 1975) was rated as 'unqualified.' All other nominees were either rated as 'qualified,' 'well-qualified,' 'extremely well-qualified,' or received a split vote by the ABA as to their qualifications. I decided to use the three point scale instead of dichotomizing the variable in order to capture what little variability Judge Meskill's 'unqualified' rating may add to this analysis. Nominees rated as 'very well-qualified were coded as 'well-qualified' in this dataset because the ABA stopped using this classification for judges in the 1970's. Several of the nominees received split decisions from the ABA as to their qualifications. For example, Rhesa Barksdale (nominated by George H.W. Bush and confirmed to the Fifth Circuit Court of Appeals in March 1990) was rated as 'well-qualified/qualified' by the ABA. In these instances, the nominee was assigned their value on this variable based on what the majority ABA rating was (in Judge Barksdale's case she was given a 'well-qualified rating). Ideally, I would be able to have a coding scheme that makes use of these split decisions to add more variance. However, the data available in the Zuk et al. database used for coding this variable codes the variable based on the coding scheme used herein, and I was unable to gather other information on this variable that had this type of variation prior to 1989. While it is an issue that should be considered for future research, I do not believe it will have too great of an effect on my results.

Appellate Court Median: This variable measures the median of a given appellate court at the time that a confirmed judicial nominee was nominated. The appellate court medians were calculated by Epstein et al. (2007) and the data can be retrieved from the Judicial Common Space Online Appendix (2011). The variable was constructed by determining the median member of a given appellate court at the time of the judicial vacancy. The scores assigned to the different appellate court judges when constructing this variable were the judges Judicial Common Space scores which were constructed by Giles et al. (2001) and then refined by Epstein et al. (2007). Court medians with negative values represented courts that were more liberal, while court medians with positive values represented courts that were more conservative. The scores for this variable in my dataset are the absolute values of a court's median. This was done so that I could measure whether a given appellate court was ideologically extreme (regardless of whether it was liberal or conservative) or ideologically moderate. Based on the hypotheses presented above, I expect the coefficient for this variable to be negative and statistically significant.

Divided Government: This variable is a dichotomous variable that is coded as '1' if the nominee was confirmed during divided government and coded as '0' if the nominee was confirmed during unified government. Data for this variable was gathered from Martinek's "Lower Federal Court Confirmation Database (2004). Based on the hypotheses discussed above, I expect the coefficient for this variable to be both positive and statistically significant.

Gridlock Interval: I followed Primo et al.'s protocol for constructing gridlock intervals in advice and consent games. Primo et al. conclude that the best way to measure the gridlock interval in advice and consent games for appellate court nominations and confirmations is to

use the filibuster pivot and the median member of Senate majority party. To this end, I rank-ordered each Senate from 1969 to 2008 and determined the 60th Senator in that rank ordering (if the president was a Democrat) and the 40th Senator in that rank ordering (if the president was Republican). The same process was used to determine the median member of the Senate majority party.

Republican President: Recall that the analyses performed in Chapter Three found that Republican presidents were more likely to use elevations than their Democratic counterparts. To control for this factor, a dichotomous variable is included in this analysis that assumes a value of '0' if the appellate court nominee was nominated by a Democratic president and a value of '1' if the appellate court nominee was nominated by a Republican president. Based on the findings in Chapter Three of this dissertation, I expect for this variable to be both positive and statistically significant.

Size of the Candidate Pool: Previous research is mixed on whether or not a president is more likely to elevate a district court judge to the Courts of Appeals when he has a large pool of fellow partisans in the district courts to choose from. First, presidents rarely – if ever – nominate individuals to the Courts of Appeals who come from outside the bounds of a given appellate court's jurisdiction.[48] Different appellate court seats have traditionally "belonged" to different states. At times presidents have chosen to nominate individuals to appellate courts who did not come from the state to which a particular state "belonged." However, this is rare because Senators are typically extremely protective of these seats and

[48] All of the confirmed nominees in my dataset resided within the jurisdiction of the appellate court they were ultimately confirmed to serve on.

the patronage these seats provide.[49] It is well documented that presidents are likely to elevate district court judges who were nominated to their district court position either by the president attempting to elevate the district court judge or by a previous president who was in the same political party as the president making the nomination. However, Chapter Three of this dissertation and previous research demonstrates that presidents often elevate district court judges who are from the opposing party but also share the president's preferences. Still, it is reasonable to predict that presidents will be more likely to elevate a district court judge when the pool of partisans in the district courts is large rather than small. To empirically test this notion, I created a variable that measures the percentage of district court judges in the state where an appellate vacancy occurs who were nominated by the president making the nomination or by previous presidents who shared the nominating president's party affiliation. I expect the coefficient for this variable to be positive; however, I will not make a prediction as to the statistical significance of this variable.

District Court Vacancies: It is likely that presidents will not elevate district court judges to the Courts of Appeals when there are a number of vacancies on a particular court that need to be filled. District courts – and especially during the divided government era – have had to endure an unprecedented explosion in caseload. Elevating a district court judge who sits on a district court that has multiple vacancies may be impractical because the creation of a new district court vacancy may add undue caseload pressures on that court. To measure this variable, I calculated the percentage of vacant seats in the district courts that belong to a particular state where an appellate court vacancy occurs. Data for this variable was derived

[49] Thirty-four (9.77%) of the confirmed nominees in my dataset were not residents of the state to which a given seat "belonged." George H.W. Bush engaged in this activity the most during the timeframe of this analysis (16.22% of his confirmed nominees) with Richard Nixon coming in a close second (15.22% of his confirmed nominees).

from the Archive of Federal Judicial Vacancies – 1981-2011 which is available on the website for the United States Courts (2011c). Data for district court vacancies prior to 1981 was calculated by reconstructing the district court compositions in the states where an appellate court vacancy occurs and then determining the percentage of vacant seats in those courts at the time that the president makes his appellate court nomination. I expect this variable to yield a negative coefficient; however, I do not have any expectations about the statistical significance of this variable.

Race and Gender: Two variables were created to code the race and the gender of confirmed nominees to vacant appellate court positions. If the career path of Justice Sonia Sotomayor is any indication it may be that presidents are more likely to elevate female and minority nominees during the divided government era. Research shows that women and minorities face greater hurdles to being confirmed to district court positions but not to appellate court positions (Martinek et al. 2002, 358). Furthermore, Asmussen demonstrates that the nomination of women provides the president leverage to nominate a female who may be closer to his preferences as opposed to a male. However, the emphasis placed on diversifying the federal courts did not begin until the Carter administration, and there is no evidence that presidents will always elevate a female or minority district court judge over a more qualified white male. The variables for race and gender are dichotomous variables that are coded as '1' if the confirmed nominee is a female or a minority and '0' if they are not. I expect the sign of these coefficients to be positive but I have no reason to assume that either will be statistically significant.

Number of Home-State Senators in the President's Party: This variable is coded as '0' if there are no home-state senators from the president's party in the state where a district court

vacancy occurs. It is coded as '1' if there is one home-state senator from the president's party, and coded as '2' if both home-state senators are in the president's party. Information on the party affiliation of Senators who served on the 91st through the 110th Senate was gathered from the Bibliographical Directory of the United States Congress and from the Statistics & Lists of the United States Senate. Supplemental data on the number of home-state senators in the president's party was gathered from Martinek's Lower Federal Court Confirmation Database (2004).

Presidential Election Year: This variable will be included in the Cox models used in this chapter. This has been proven to be an important control variable in models explaining the timing of presidential nominations and Senate confirmations (Binder & Maltzman 2002, 2009). The variable is a dichotomous variable coded '1' if the nomination or confirmation takes place in a presidential election year and '0' if the nomination or confirmation takes place in any other year.

Section 4.4.iv: Estimation Techniques Used in this Chapter

The dependent variable used in this chapter is a dichotomous variable. Logistic regression is an appropriate binary regression model for dichotomous dependent variables. The logistic regression models used in this chapter will determine the probability that a given confirmed appellate court nominee was either elevated to his or her position or that a confirmed appellate court nominee was chosen from outside the federal judiciary. The independent variables in the logistic regression model will determine the probability that a given confirmed nominee was elevated, given the values of other independent variables. I use robust standard errors in the model and cluster the standard errors on the circuit where a nominee was confirmed. This is appropriate based on conclusions drawn from Chapter

Three pertaining to the variation in the rate of elevation within different appellate courts (Zorn 2006, 339).

I use the Cox Proportional Hazard model to test whether the independent variables described above have a significant effect on the time duration between the creation of an appellate court vacancy and the nomination of someone to fill that vacancy, and the time duration between the nomination of someone to an appellate court vacancy and that person's confirmation in the Senate. A Cox proportional-hazards regression model is used because there is no theoretical expectation regarding the distribution of time until an event of interest. The coefficients of a Cox model indicate whether each variable increases or decreases the hazard rate of an event occurring at time *t*. In the context of judicial nominations and confirmations, a positive coefficient means that a variable increases the probability of an event occurring at time *t*, while a negative coefficient means that a variable decreases the likelihood of an event occurring at time *t*.

Section 4.5: Results

Section 4.5.i: Effects of Competency and Ideology on the Likelihood to Elevate

Table 4.2 presents the results of the logistic regression model. The first column of Table 4.2 shows the logistic regression coefficients for all variables in the model. The second and third columns of Table 4.2 show the coefficients for logistic regression models for Republican-only elevations and Democratic-only elevations, respectively.[50]

[50] The Republican-only model and especially the Democrat-only model should be interpreted with caution because of the much smaller sample sizes in each. The reason why I feel it necessary to include these models is because of the fact that, based on the analyses performed in Chapter Three of this dissertation, I wanted to more thoroughly assess whether Democratic presidents used elevations in a strategic manner.

Table 4.2: Logistic Regression Analysis of Likelihood of Being an Elevated Appellate Court Judge

Independent Variables	Full Model	Republican-Only	Democratic-Only
Court Median Common Space Score	-2.46**	-4.25***	1.5
	(1.04)	(1.12)	(1.34)
ABA Rating	.851***	.705	1.28**
	(.352)	(.484)	(.584)
Gridlock Interval	-2.87*	-1.77	-2.38
	(1.49)	(2.51)	(5.93)
Divided Government	1.14***	1.21***	.739
	(.415)	(.421)	(1.6)
District Court Pool	1.08*	1.46**	-.229
	(.576)	(.644)	(1.31)
Percentage of Vacant Seats in District	.057	-1.05	1.98
	(1.22)	(1.15)	(1.43)
Republican President	.850**		
	(.186)		
Female Appellate Court Judge	-.223	-.14	-.239
	(.377)	(.611)	(.401)
Minority Appellate Court Judge	.589	.445	.692
	(.368)	(.973)	.648)
# Home-State Senators in President's Party	-.364**	-.54**	.049
	(.186)	(.263)	(.305)
constant	-.769	-.184	-2.51
log-likelihood	-196.901	-127.574	-63.922
Wald chi-square	36.25	271.34	39.26
likelihood > chi-square	.000	.000	.000
% predicted with model	67.91	67.77	67.27
% predicted without model	59.5	54.5	69.09
% reduction in error	20.77	29.16	0
N	321	211	110

Source: Author's Data
*** p < .01; ** p < .05; * p < .10
Cell entries are estimated coefficients, with robust standard errors, clustered on circuit, in parentheses

The overall fit of the full model is very good. The Wald chi-square statistic is highly significant, so we can reject the hypothesis that all of the variables in the model are jointly equal to zero. The full model also does a respectable job of predicting whether or not an appellate court judge was elevated to his or her position. The full model provides a 20.77% increase in the ability to predict whether an appellate court judge was elevated to his or her position over predicting elevation based on the modal category of the dependent variable. In the full model, the coefficient measuring nominee competence and the coefficient measuring the appellate court's median ideology at the time of nomination are both correctly signed and statistically significant.

The overall fit of the Republican-only model is also very good. Its Wald chi-square statistic is highly significant, so we can reject the hypothesis that all of the variables in this restricted model are jointly equal to zero. This model does a better job than the full model of predicting whether or not an appellate court judge was elevated to his or her position. The Republican-only model provides a 29.16% increase in the ability to predict whether an appellate court judge was elevated to his or her position over predicting elevation based on the modal category of the dependent variable. What is interesting about this model is that the median of a given appellate court is a powerful predictor of whether a Republican president will use an elevation to fill a vacant appellate court position. The competency of the judge is not a statistically significant predictor of whether an appellate court judge was elevated to his or her position. Another interesting finding in this model is that Republican presidents are more likely to elevate a judge based on the size of the candidate pool in the district courts.

There is a good overall fit to the Democratic-only model. Its Wald chi-square statistic is significant, so we can reject the hypothesis that all of the variables in the model are jointly equal to zero. However, this model does a poor job of predicting whether a given appellate court judge was elevated to his or her appellate position. In fact, predicting elevation based purely on the dependent variable's modal category explains elevation better than the model itself. What is interesting about this model is that Democratic presidents are more likely to elevate appellate court judges to their positions based on their credentials. However, the fact that this model does not succeed in successfully predicting which appellate court judges will be elevated reinforces the findings in Chapter Three that suggest it is very possible Democratic elevations are a random event.

With the exception of the gridlock interval, all coefficients are correctly signed and the theoretical variables are all significant in each of the three models described in Table 4.2. The gridlock interval coefficient is incorrectly signed and is only significant in the full model. However, I believe that this outcome is because it is collinear with divided government variable. The correlation between these two variables is .75 ($p \leq .001$). Further tests show that there is collinearity between these two variables. I reran the full model two more times and excluded the variable for divided government and for the gridlock interval in the different models. The results did not change substantively in the divided government-only model. Furthermore, the coefficient for the gridlock interval in the gridlock-only model was positive but did not quite reach statistical significance. Further post-estimation diagnostics

lead me to conclude that the full model with only the variable for divided government is the best model for future analyses.[51]

Table 4.3 and Figure 4.1 provide more substantive insights into the effect of a judge's ABA rating and the median ideology of the appellate court where the judge was confirmed on the likelihood of that judge being elevated. Table 4.3 presents the likelihood of an appellate court being elevated based on several ideal-types. There is a very high likelihood that confirmed appellate court judges who were highly qualified and being nominated to fill a position on an ideologically moderate court were elevated to their positions – especially during divided government. Conversely, it is very unlikely that a confirmed appellate court judge with an average ABA rating who was nominated to an ideologically polarized appellate court was elevated to that position – especially when there is unified government. Figure 4.1 displays the predicted probability an appellate court judge was elevated as the values of appellate court medians vary its observed range. Holding all variables at their means (or modes for dichotomous variables), there is nearly a 50% likelihood that nominees to courts with the lowest court medians were elevated to their positions. However, there is slightly less than a 20% chance that an appellate court nominee to was elevated to their position in courts where the median is extremely high.

Finally, Table 4.4 shows the effect of discrete changes in the values of the independent variables in the model on the probability of an appellate court judge being an elevated judge. The first two columns display the change in the probability of being an elevated judge over the full range of values of the independent variables. The last two

[51] Collinearity diagnostics, tables for the two models discussed, and post-estimation diagnostics can be found in Appendix B.

Table 4.3: Predicted Probability of Being an Elevated Appellate Court Judge Based on ABA Rating

Ideal Type	Probability of Being Elevated (95% CI)
ABA Rating = 2, Minimum Court Median Divided Government	.69 (.52, .86)
ABA Rating = 2, Minimum Court Median Unified Government	.41 (.29, .54)
ABA Rating = 1, Maximum Court Median Divided Government	.49 (.32, .65)
ABA Rating = 1, Maximum Court Median Unified Government	.23 (.10, .36)
ABA Rating = 2, Minimum Court Median Divided Government	.34 (.15, .56)
ABA Rating = 2, Minimum Court Median Unified Government	.14 (.01, .28)
ABA Rating = 1, Maximum Court Median Divided Government	.18 (.05, .32)
ABA Rating = 1, Maximum Court Median Unified Government	.07 (-.01, .14)

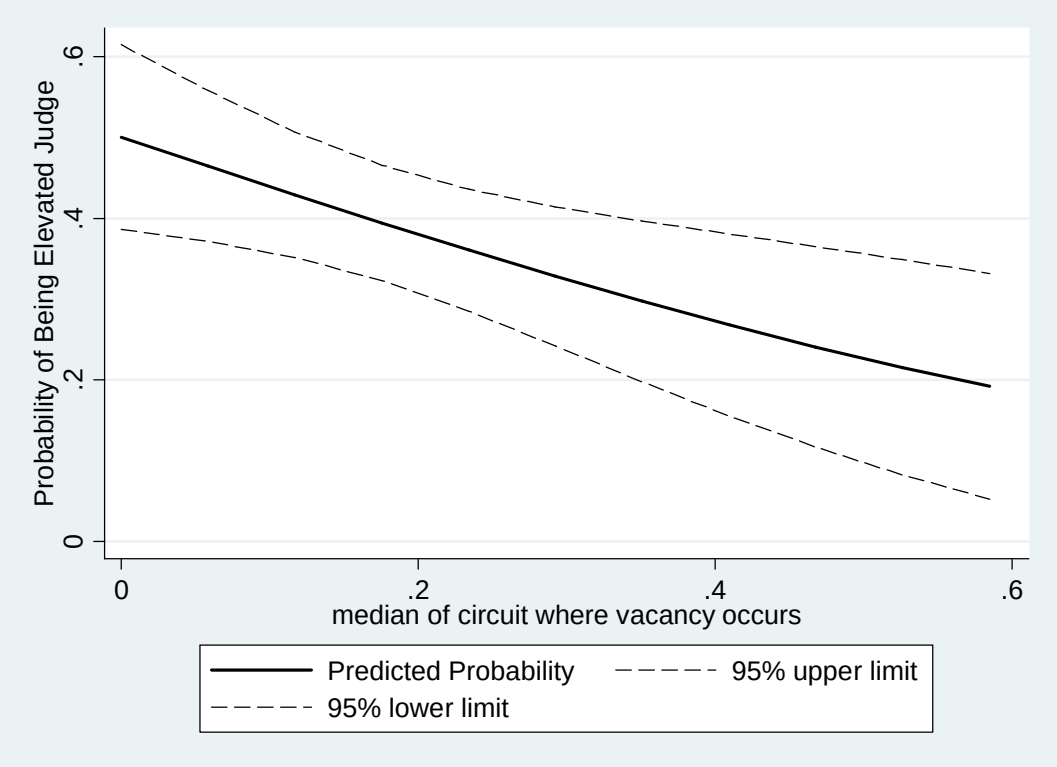

Figure 4.1: Probability of Being an Elevated Judge by Appellate Court Median

columns show the change in the probability of being an elevated judge based on a one standard deviation increase in the continuous variables in the model. Table 4.4 shows that the variables having the greatest effect on the probability of being an elevated appellate court judge are the variables measuring ABA ratings, the gridlock interval, and divided government. The effect of ABA ratings on the probability of being an elevated appellate court judge is especially large. Moving from being "unqualified" to being "well-qualified" increases the likelihood that a confirmed appellate court judge was elevated to his or her position by .40.

Section 4.5.ii: Elevations and the Timing of Nominations and Confirmations

The last section demonstrates that competency and the ideology of a given appellate court have an effect on whether an appellate court judge was nominated to his or her position. The purpose of this section is to see if district court judges who are nominated to fill vacant appellate court positions are more likely to be nominated and confirmed more quickly than other appellate court nominees. In essence, I want to discover if being elevated to the appellate courts – as an *independent variable* – has an effect on the timing of presidential nomination and Senate confirmation.

Table 4.5 displays the results of three Cox proportional hazard models used to assess whether elevated appellate court judges are nominated to their positions more quickly by presidents than other appellate court judges. The model in the first column represents a model including the gridlock variable and excluding the dichotomous divided government variable. The model in the second column uses the divided government variable and excludes the gridlock interval variable. The model in the third column includes both the divided government and the gridlock interval variables.

Table 4.4: Discrete Changes in Probability of Being an Elevated Appellate Court Judge

Independent Variables	Min	Max	Mean	Std. Dev
Court Median Common Space Score	.69	.43	.62	.55
ABA Rating	.25	.65		
Gridlock Interval	.74	.43	.63	.54
Divided Government	.31	.59		
District Court Pool	.44	.70	.56	.61
Percentage of Vacant Seats in District	.59	.59	.59	.59
Republican President	.38	.59		
Female Appellate Court Judge	.59	.53		
Minority Appellate Court Judge	.38	.52		
# Home-State Senators in President's Party	.68	.51		

Table 4.5: Timing of Presidential Appellate Court Nominations, 1969-2008

Independent Variables	Model 1	Model 2	Model 3
Elevated District Court Judge	.328**	.297**	.306**
	(.135)	(.136)	(.140)
Court Median Common Space Score	-.699	-.741	-.909
	(.754)	(.787)	(.761)
Gridlock Interval	-.712**		-2.56***
	(.299)		(.666)
Size of District Court Pool	-.161	-.213	-.125
	(.311)	(.323)	(.272)
Female Appellate Court Nominee	-.388***	-.395***	-.397***
	(.132)	(.135)	(.144)
Minority Appellate Court Nominee	-.041	-.041	-.024
	(.105)	(.117)	(.098)
Republican President	.254**	.168	.444***
	(.124)	(.129)	(.112)
# Home-State Senators in President's Party	.107	.110	.095
	(.095)	(.093)	(.090)
Divided Government		.057	.484***
		(.094)	(.185)
Presidential Election Year	-.483***	-.482***	-.474***
	(.120)	(.114)	(.108)
N	321	321	321
Log-likelihood	-1520.564	1521.270	-1517.307
Chi-square	77.94***	88.33***	109.35***

Source: Author's Data

*** p < .01; ** p < .05; * p < .10

Cell entries are coefficient estimates, with robust standard errors, clustered on state, in parenthesis.

Calculated using *stcox* method in STATA 10. Breslow Method used for ties.

The overall fit for the three models is very good. The Wald chi-square statistics for the three models are large and statistically significant, so we can reject the hypothesis that the variables used in all three models are jointly equal to zero. The elevation variable is positive and statistically significant in all three models, which means that district court judges who are elevated to appellate court positions are nominated more quickly than other appellate court judges. It could be that the restricted pool of candidates to choose from in district courts makes locating a potential appellate court nominee much easier than having to sift through the multitude of possible nominees from outside the federal judiciary. Figure 4.2 displays a Kaplan-Meier graph showing the survival estimates of elevated and non-elevated appellate court judges over time based on the results of the full model.

An important assumption in the Cox model is that the effects of the independent variables on the hazard rate are proportional over time. If an independent variable affects the hazard rate differently over the course of time it can bias the results of the Cox model. The proper way to resolve this is to interact the time-dependent variable with the natural log of time. For the sake of parsimony these models are not presented here but have been placed in the appendix. The first model had no time-dependent variables. The gridlock interval introduced time-dependency into the second and third models, and only affected the elevation coefficient in the third model.

Table 4.6 displays the results of three Cox proportional hazard models used to assess whether elevated district court judges are confirmed in the Senate more quickly than other appellate court judges. The three models displayed in this table are arranged in the same fashion as the models presented in Table 4.5. The Wald chi-square statistics for these three models are statistically significant, so we can reject the hypothesis that all of the variables in

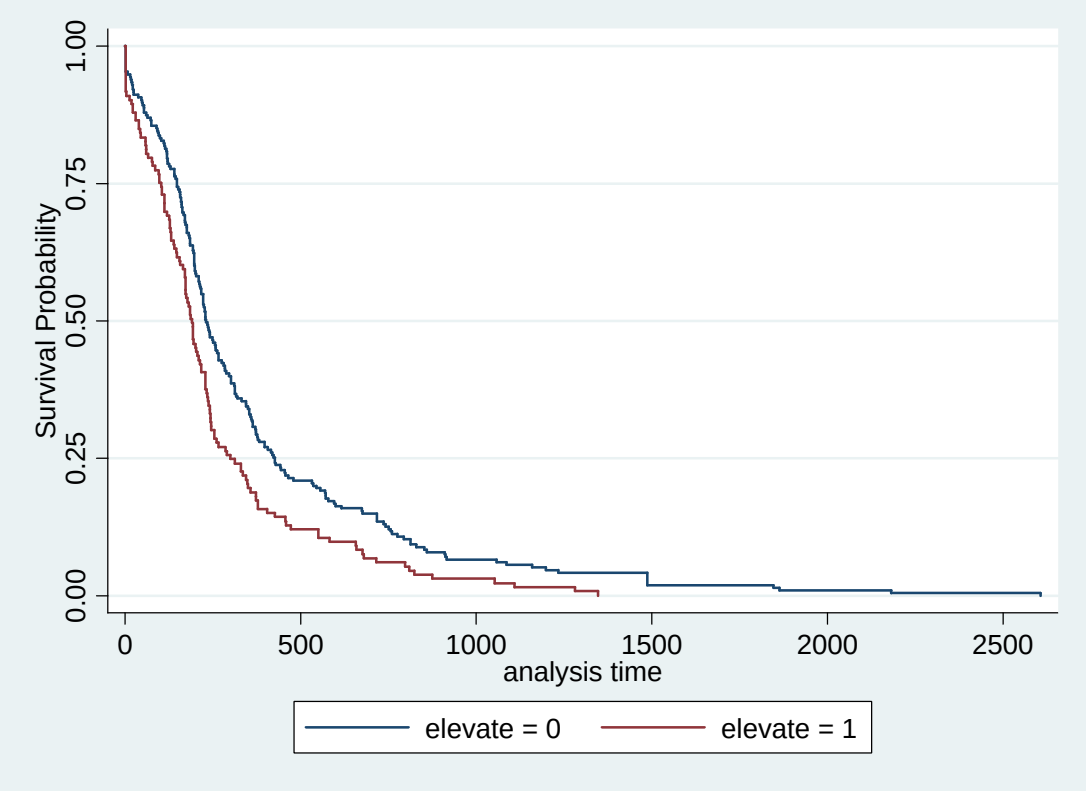

Figure 4.2: Kaplan-Meier Estimates of the Likelihood of Nomination Survival – Elevated and Non-Elevated Appellate Court Judges

Table 4.6: Timing of Senate Confirmation of Appellate Court Nominees, 1969-2008

Independent Variables	Model 1	Model 2	Model 3
Elevated District Court Judge	.253**	.307***	.252**
	(.103)	(.108)	(.101)
ABA Ratings	.003	.043	.003
	(.090)	(.089)	(.090)
Court Median Common Space Score	-.984	-.636	-.989
	(.815)	(.850)	(.781)
Gridlock Interval	-.3.77***		-3.80***
	(.856)		(1.01)
Percentage of Vacant Seats in District	-.626	-.670	-.624
	(.570)	(.539)	(.572)
Female Appellate Court Nominee	-.417***	-.416***	-.416***
	(.109)	(.101)	(.109)
Minority Appellate Court Nominee	-.155	-.162*	-.155
	(.142)	(.095)	(.142)
Republican President	.788***	.391**	.790***
	(.252)	(.139)	(.280)
# Home-State Senators in President's Party	.459	.605**	.457
	(.312)	(.309)	(.300)
# Home-State Senators in President's Party (squared)	-.303**	-.344**	-.303**
	(.140)	(.135)	(.137)
Divided Government		-.628***	.008
		(.146)	(.121)
Presidential Election Year	.137	.105	.137
	(.140)	.141	(.139)
N	321	321	321
	-	-	-
Log-likelihood	1496.818	1504.597	1496.817
Chi-square	84.5***	69.16***	84.58***

Source: Author's Data

*** p < .01; ** p < .05; * p < .10

a. Cell entries are coefficient estimates, with robust standard errors, clustered on state, in parenthesis.

Calculated using *stcox* method in STATA 10. Breslow Method used for ties.

these models are statistically different from zero. Again, these three models provide evidence that the Senate confirms elevated district court judges more quickly than it does other appellate court nominees. These Cox models are more informative of the theoretical expectations discussed in this chapter, for if presidents use elevations to thwart policy entrepreneurs then we would expect that elevated district court judges would be confirmed more quickly than other appellate court nominees. Figure 4.3 displays a Kaplan-Meier graph showing the survival estimates of elevated and non-elevated appellate court judges over time based on the results of the full model.

Further analyses were performed to determine if any of the variables in these models were time-dependent and in violation of the Cox proportionality assumption. The variables in this model in violation of the Cox proportionality assumption were almost exactly the same variables as the ones used in the earlier Cox regression model. Again, the effects of interacting the time-dependent variables with the natural log of time did not affect the substantive conclusion that the likelihood of an elevated district court being confirmed at time *t* is still greater than the likelihood of other appellate court nominees being confirmed by the Senate at time *t*.

Section 4.6: Conclusion

The purpose of this chapter is to discern why a president elevates district court judges to the Courts of Appeals in certain contexts but chooses to nominate individuals from outside the federal judiciary to vacant appellate court positions in other contexts. Based on the literature on policy entrepreneurs, I have posited that the reason a president decides to elevate district court judges to the Courts of Appeals is because he desires to thwart the attempts of policy entrepreneurs to stall or kill his potential nominees. Presidents can thwart

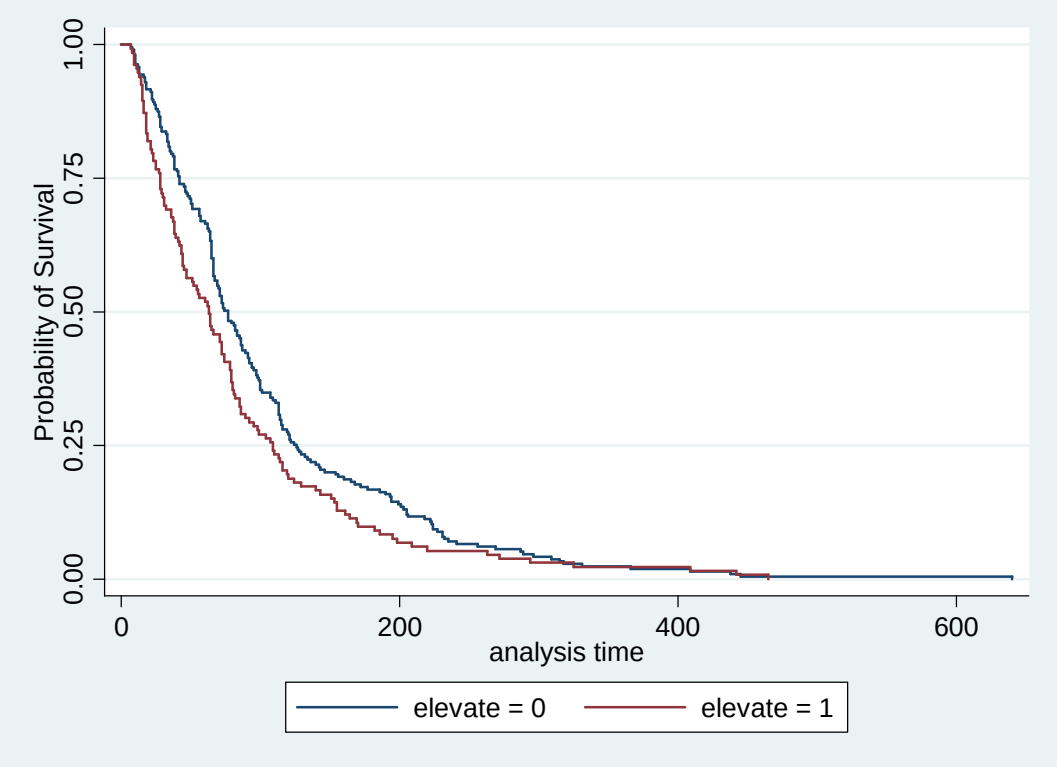

Figure 4.3: Kaplan-Meier Estimates of the Likelihood of Confirmation Survival – Elevated and Non-Elevated Appellate Court Judges

policy entrepreneurs by nominating judges who are both highly qualified and ideologically moderate. Although I do not test directly whether elevated judges are more ideologically moderate, I do the next best thing – I test whether presidents elevate judges to appellate courts where the ideological composition of those appellate courts hang in the balance.[52] The results of the analyses performed in this chapter show that presidents do indeed use elevations in this context. I also test whether presidents elevate judges who are more qualified than other judges nominated to appellate court vacancies. Again, the results of the analyses performed herein demonstrate that elevated judges are considered more qualified than judicial nominees chosen from outside the federal judiciary.

The most confounding result in this chapter is that presidents are *less* likely to elevate district court judges to the Courts of Appeals as the size of the gridlock interval increases. I fully expected my analyses to provide evidence to the contrary. Gridlock intervals measure polarization. It would make sense that presidents would be more likely to use elevations as the size of the gridlock interval increases because the information conveyed to the Senate would show that the elevated nominee is a quality nominee who is potentially more moderate than another choice. However, this result is similar to other results in the advice and consent literature that tests the effect of gridlock on the choice of an appellate court nominee. Assessing why my models turned out the way they did is an interesting question, but it is much too large a question to resolve in this dissertation. However, this puzzling outcome warrants more research in the future.

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[52] However, recall from Chapter Three of this dissertation that a t-test of ideological extreme scores demonstrated that elevated appellate court judges are in fact statistically significantly less extreme than other appellate court judges.

After assessing whether competency and ideological extremity affect whether or not a president use elevations to fill vacant appellate court positions I use elevations as an independent variable to determine if elevated district court judges are nominated and confirmed more quickly than other appellate court nominees. The results of the Cox proportional hazard models used in this chapter demonstrate that they are. The results in the Senate confirmation model are especially informative, since this is where we would expect to see the most substantive delay. If policy entrepreneurs in the Senate wished to stall or kill presidential nominations then this is the model where we would most likely see an effect. Although the nomination model is also informative, there are other factors that may be at work in the nomination process. For example, it is possible that presidents only decide to elevate after they have been unsuccessful in getting previous nominees to a particular appellate court seat confirmed. One weakness of the Cox model of nominations in this chapter is that it does not account for whether or not the nominee was the president's first choice. However, the coefficients for elevated district court judges in this model remain robust over different specifications, so I do not believe that it is spurious to conclude that elevated district court judges are nominated more quickly than other potential nominees. Still, the fact that other decisions may go into the *timing* of nominations is important and warrants research as well.[53]

Above all, the most important implication of this chapter is that presidents do not simply elevate district court judges to the Courts of Appeals whenever they wish. The presence of divided government and polarization in the Senate also play an important part in

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[53] The most comprehensive accounts of the timing of presidential nominations are performed by Binder & Maltzman (2009) and Massie et al. (2004). However, neither research projects examines directly the use of elevations.

the decision to elevate. These factors, coupled with the other results discerned in this chapter, demonstrate that particular conditions affect when a president elevates district court judges to the Courts of Appeals. Elevations may be a savvy way for the president to increase the number of federal court seats he can fill, but he cannot and does not use elevations whenever he has the chance.

Chapter Five will use what has been discovered in this chapter to assess how the president fares when he nominates individuals to fill the district court vacancies created via elevation. Although presidents do not use elevations at all times to fill vacant appellate court positions, it is still possible that by using elevations the president can help his own cause by making the confirmation battle with the Senate over his nominee to the newly created district court position much smoother than it otherwise may be.

CHAPTER 5: THE EFFECT OF ELEVATION STRATEGIES ON THE NOMINATION, CONFIRMATION, AND PREFERENCES OF DISTRICT COURT JUDGES

Section 5.1: Introduction and an Outline of this Chapter

This chapter examines the second stage of the elevation process: the selection of federal district court judges to fill seats that are created by elevating a previous district court judge to the federal Courts of Appeals. This chapter addresses two types of phenomena. The first is how elevations affect the timing of presidential nomination and Senate confirmation of district court judges. The second is whether nominees to district court vacancies created via elevation are closer ideologically to their nominating president than other district court nominees.

For a president, the ideal situation is to quickly nominate and have confirmed individuals to vacant district court positions who reflect his policy preferences regardless of how a particular district court seat was vacated. However, the president must contend with different Senate actors who have the ability to thwart his attempts to nominate and have confirmed individuals to the district courts. It is also possible that the dynamics of the nomination and confirmation processes can have an effect on the preferences of district court nominees who are ultimately confirmed by the Senate. This possibility is no less important for individuals nominated by the president and confirmed by the Senate for district court vacancies created via elevation than for individuals nominated and confirmed to district court seats that were vacated for other reasons. Presidents elevate district court judges to the Courts of Appeals for different reasons, and are involved in extended bargaining and negotiations with different Senate actors during this process – especially with the Senators from the state where a judicial vacancy has occurred. It is possible that the

dynamics of the nomination and confirmation processes for those chosen to fill district court vacancies created via elevation are different than the dynamics for those chosen to fill other district court seats. It is also possible that those chosen to fill seats created via elevation exhibit differences in their preferences compared to those chosen to fill district court seats vacated for other reasons.

This raises several questions as to how elevation strategies may affect who the president is capable of nominating to the district courts, whether that nominee is nominated and confirmed promptly, and whether a confirmed nominee reflects the preferences of his or her appointing president. Does the extended negotiation between presidents and home-state senators expedite or delay the nomination and confirmation processes? Do other Senate actors have an effect on these processes? Are those nominated and confirmed to district court seats vacated because of elevation more moderate or extreme than other district court judges?

The purpose of this chapter is to answer these questions. This chapter is divided into five sections. Section 5.2 reviews the literature on district courts, covering why district courts are important, the dynamics of district court nominations and confirmations, and the preferences district court judges exhibit in their decision making. Section 5.3 discusses how elevation strategies may affect the nomination and confirmation processes and how they may also affect the preferences of district court judges. I will offer several hypotheses in this section that will be tested. Section 5.4 discusses the data that will be analyzed in this chapter along with descriptions of the different variables and estimation techniques that will be used to test my hypotheses. Section 5.5 provides the results of my analyses. Finally, Section 5.6 will provide a discussion of the implications of the findings of this chapter.

Section 5.2: A Review of the Literature on Federal District Courts

Section 5.2.i: Why Study Federal District Courts?

Unfortunately, the federal district courts are often overlooked in the judicial literature. Although the district courts are at the bottom of the federal judicial hierarchy, they fulfill several important functions – both procedural and political – within the federal judicial branch that allow judges to affect the development of policy.

First, district courts serve as the gatekeepers of the federal judicial system. It is in the district courts that parties involved in legal disputes first get their chance to argue their positions. Parties introduce evidence and witnesses in district courts that will shape the court's record that will determine how district court judges arrive at particular legal decisions (Lyles 1997, 3-4). District courts also fulfill another gatekeeping function by deciding whose interests will be represented in the federal judicial system (Lyles 1997, 3; Rowland & Carp 1996, 5; Rowland & Todd 1991, 177). Judges possess the power to authoritatively allocate values and resources, and the specific decisions these judges make determine which values and resources will receive precedence in the federal courts (Rowland & Carp 1996, 5). According to Lyles, district court judges can allocate values and resources by either representing the unrepresented or underrepresented in society, or by stimulating and legitimizing the policy decisions of dominant political coalitions (Lyles 1997, 3).

Second, although district court judges do not have the ability to shape public policy the same way that the Supreme Court or even the federal Courts of Appeals do, the decisions and applications of law by district court judges often frame the questions that are asked if a case is appealed to a higher court. Furthermore, a district court judge's

interpretation of the facts in a dispute can affect the flow of information in a case as it moves through the federal judicial hierarchy (Lyles 1997, 4; Rowland & Carp 1996, 5).

To be sure, however, district court judges *do* affect public policy. Scholars recognize that the primary function of a district court judge is to be a "fact finder." District court judges are usually constrained by the facts of specific cases, which often demarcate which laws should be applied in a given context (Lyles 1996, 448). However, scholars have developed theories and models that are capable of describing and explaining conditions where district court judges can use discretion both in how they interpret facts and in how they apply law to facts in a dispute (Hendershot & Tecklenburg, forthcoming). Furthermore, although litigants can appeal different procedural decisions that defined the facts in a dispute in the federal district courts, the facts themselves as discovered by district court judges are often beyond the review of appellate courts (Rowland & Carp 1996, 3).

District court judges also affect policy through their interpretation of judicial policy formulated in the courts above them in the federal judicial hierarchy. While it is true that the Supreme Court – and to a lesser degree the Courts of Appeals – generate the bulk of judicial policy, the majority of their opinions only provide guidelines for lower courts to follow. It is the job of the district courts to implement these policies and guidelines. District court judges are therefore given the opportunity to shape the technical implementation of these policies and guidelines. District court judges can even evade implementing these policies and guidelines in light of the facts they discover in certain cases (Lyles 1996, 447). Therefore, depending on the specificity of a legal policy or guideline, district court judges are given the opportunity to use their discretion in implementing a legal guideline or policy as they see fit.

Extant research finds that this is indeed the case (Baum 1980, 222; Johnson 1987, 336). Research also finds that district court judges rely on their "stream of tendency" – which consists of instincts, traditional beliefs, and acquired convictions – to make judgments on their interpretation and application of law (Carp & Rowland 1983, 6). Often there are several political factors that can shape a district judge's stream of tendency, including party affiliation, the preferences of the president who appoints a particular judge, and the preferences of the citizens in the state where the district is located (Carp & Rowland 1983, 6).

Finally, the decisions made in district courts are important in the stream of federal judicial policy development because the decisions made in district courts are rarely appealed (Johnson & Songer 2002, 657). Between 2008 and 2010 only 5.78%, 6.7%, and 6.93% of cases decided in district court were appealed to the Courts of Appeals (United States Courts 2011a, 2011b). Furthermore, the resolution of a case on appeal is often based on the questions and findings made in district courts (Lyles 1997, 4). It is clear that the allocation of justice in the federal courts most often takes place in district court, and if we are to believe in the accuracy of Harold Laswell's (1936) famous definition of politics – who gets what, when, and how – then scholars need to account for the importance of district court judges in judicial decision making.

Section 5.2.ii: The Dynamics of the District Court Nomination and Confirmation Processes

Scholars have traditionally conceptualized the nomination and confirmation process for district court judges differently than the nomination and confirmation process for appellate court judges. Traditional conceptualizations of the district court nomination and confirmation process tend to emphasize two aspects of the process that differ from the

process of nominating and confirming appellate court judges: the weakened role of the president and the heightened role of home-state senators.

Although the president will often choose a district court nominee based on his policy preferences, the president will also choose district court nominees based on other criteria. The most important factor a president will use for selecting district court judges is partisanship (Stidham et al. 1988, 550). Presidents often nominate individuals to district court vacancies to reward loyalists from their political party or to appease different groups within a political coalition so as to heal any rifts that may occur within that coalition (Goldman 1997, 4). Second, presidents often choose district court nominees based on broad agendas designed to alter the composition of the district courts in ways that do not involve policy or partisan criteria. The two most notable examples of this type of presidential behavior were efforts to diversify the district courts by nominating more women and minorities to these courts, or to emphasize merit-based criteria as fundamental criteria for district court selection. To be sure, presidents most frequently nominate individuals to the district courts who reflect their policy preferences (Stidham et al. 1988, 558), but it is important to note that presidents do consider many factors when deciding who they will nominate to vacant district court judgeships.

Second, home-state senators are presumed to have a greater influence over who is nominated to vacant district court positions than over vacancies that arise on the Courts of Appeals. The norm of senatorial courtesy is presumed to be greater for nominations to vacant district court positions because the boundaries of district courts do not cross state lines. This norm dictates that other senators will defer to home-state senators in matters internal to their home states, and the traditional wisdom is that since district court

jurisdictions are bounded by state lines, home-state senators (and especially home-state senators in the president's party) possess a veto over the president that constrains who he can choose for vacant district court positions (Binder & Maltzman 2009, 60).

The most common mechanism a home-state senator can utilize to exert his or her influence in the nomination of a district court judge is the blue slip, which gives home-state senators the opportunity to state openly their acceptance of, or aversion to, a given nominee (Binder & Maltzman 2009, 36).[54] The Senate Judiciary Chairman will issue blue slips to home-state senators where a vacancy arises once the president has nominated an individual to fill that district court position. Nominations to vacant district court positions often will not be recommended by the Senate Judiciary Committee to the entire Senate if a home-state senator does not agree with the president's nominee. Even if a nominee who receives a negative blue slip does make it out of the Senate Judiciary Committee, there is evidence that the nominee will face considerable hardship once deliberation of their nomination takes place in the entire Senate, and defeat in the Senate is generally the outcome (Johnson & Songer 2002, 658). Although the strength of the norm of senatorial courtesy and the strength of the blue slip process have fluctuated over time (Sollenberger 2011, 101), they are still considered important and powerful checks on who the president can nominate for vacant district court judgeships.

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[54] The blue slip is, literally, a blue piece of paper issued by the Chairman of the Senate Judiciary Committee to home-state senators so that they can formally state their opinion about a given judicial nominee (Binder & Maltzman 2009, 35). Historically, a home-state senator had to return a blue slip to the Senate Judiciary Chairman that stated his or her dislike of a given nominee in order to signal to the Senate Judiciary Committee and to the Senate as a whole that a particular nominee was unacceptable. However, current blue slip practice dictates that an unreturned blue slip also means that a home-state senator finds a nominee to be unacceptable (Binder & Maltzman 2009, 36; Sollenberger 2011, 108). Also, blue slips were only traditionally given to home-state senators of the president's party. However, recent Senate Judiciary chairmen have also begun to issue blue slips to home-state senators who are not in the president's party (Sollenberger 2011, 108).

While scholars still accept that there are differences between the nomination and confirmation process for district court and appellate court judges, current research shows that these roles are not as different as once thought. Current research has shifted toward understanding structural incentives that motivate presidents to consult broadly with other actors in the Senate when making a nomination. As discussed earlier, the chairman of the Senate Judiciary Committee can affect who the president will nominate to the district courts via the weight they give to the blue slip. One of the most important implications of this change is that presidents now must account for the preferences of home-state senators who are not in their political party. One home-state senator who is not in president's political party can force the president to compromise on his choice for a district court nominee, and recent research shows that presidents must be wary of ideologically distant home-state senators when making district court nominations (Binder & Maltzman 2009, 74).[55] Presidents must also be willing to negotiate with home-state senators even if both of the home-state senators are not in his political party.[56] Since the president now needs to negotiate with senators from outside his party, it is likely that these negotiations will take longer, especially when the individual chosen to be a district court nominee is farther from

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[55] One of the most prominent examples of this type of behavior by a home-state senator who is ideologically distant from the president was alluded to in Chapter 1 of this dissertation. Jesse Helms (R-NC), maybe the most conservative senator to serve over the last forty years, blocked the confirmation of all nominees for positions in North Carolina and to seats held by North Carolina on the Fourth Circuit Court of Appeals during the Clinton administration.

[56] This fact may account for a variable in the advice and consent literature that continually is found to have no substantive impact on nomination and confirmation of district court judges or on their decision making patterns: the influence of home-state elites. It is traditionally assumed that the president will consult home-state elites from his party when no home-state senators are from his party (Johnson & Songer, 2002; Goldman, 1997; Rowland & Carp, 1996) . However, I have yet to find a model in which this variable is significant or has any substantive impact. One reason for this may be that most analyses examine nominations and confirmations that have taken place since it has become standard for the president to consult with home-state senators from both political parties. Since variables measuring the preferences of home-state elites continually prove to be insignificant in models of judicial nomination they will not be included in this chapter.

the president's preferences and when the preferences of the nominee are farther from the preferences of the judge the nominee may possibly replace.

As discussed earlier, the traditional view of senatorial courtesy holds that other senators will defer to the positions of home-state senators when a district court vacancy occurs in their state (Jacobi, 2005). However, current research shows that this may not be the case anymore. In particular, confirmation battles over district court judges have intensified as the degree of party polarization in the Senate have increased (Hendershot 2010, 342). What is surprising in recent scholarship on the nomination and confirmation of district court judges is that polarization accounts for greater variation in the time duration of the Senate confirmation process and the likelihood a district court judge will be confirmed than the presence of divided government. Indeed, the presence of divided government is insignificant in models of district court nominations and confirmations (Binder & Maltzman 2009; Scherer 2001, 210-11)).

Section 5.2.iii: The Preferences of District Court Judges: Whose Preferences do they Reflect?

Arguably the most important questions in the literature on district courts are whether or not district court judges make decisions that reflect the preferences of their nominating presidents, and whether or not the nomination and confirmation process has any effect on their preferences after they assume their positions. In spite of the emphasis given to the constraints placed on the president and the greater influence given to home-state senators in the nomination and confirmation process of district court judges, the literature demonstrates that district court judges decide cases in ways that reflect the preferences of their appointing presidents, and not the preferences of home-state senators involved in the nomination and confirmation process.

The literature on district court decision making points to the preferences of a district court's nominating president as being the most important predictors of a district court judge's decision making calculus across a variety of procedural and substantive legal issues. Procedurally, Rowland and Todd find that Ronald Reagan's district court appointees were more likely to deny a party standing to sue in district court compared to the district court appointees of Presidents Carter, Ford, and Nixon (Rowland & Todd 1991, 180). Rowland and Todd also find that Reagan appointees to district courts were significantly more likely than Carter, Ford, or Nixon appointees to reject the standing claims "underdog" claimants on social regulation and personal remuneration (Rowland & Todd 1991, 181).[57]

The substantive decisions made by district court judges also reflect the policy preferences of their appointing presidents. Rowland et al.'s analysis of the criminal justice decisions of district court judges appointed by Presidents Nixon, Carter, and Reagan shows Carter appointees were twice as likely to support criminal defendants than Reagan appointees, with Nixon's appointees lying between these presidential cohorts (Rowland et al. 1988, 195-96). Stark differences also exist in the decision making of different presidential cohorts in district courts on abortion cases. Alumbaugh and Rowland find that Carter appointees only resisted hearing 13% of abortion cases between 1983 and 1989, while Reagan appointees were resistant to hearing 77% of abortion cases during the same time period (Alumbaugh & Rowland 1990, 160). Differences between Republican-appointed and Democratic-appointed district court judges also exist in how they decide cases involving regulation of the economy and the environment. While Carp and Rowland find a substantial

[57] Rowland and Todd use Sidney Ulmer's conceptualization of "underdogs" and "upperdogs" for their analysis. Ulmer classifies governments and corporations as upperdogs, and labor unions and individuals as underdogs (Ulmer 1978, 903).

degree of intra-party variation in the liberal disposition of cases involving economic regulation based on regional economic characteristics, they still find that district court judges appointed by Democratic presidents consistently decide economic regulation cases more liberally than district court judges appointed by Republican presidents (Carp & Rowland 1983, 97-98). Ringquist and Emmert find that district court judges appointed by Democratic presidents are likely to levy fines on businesses in violation of environmental laws that are over twice as large as fines levied by Republican-appointed district court judges (Ringquist & Emmert 1999, 26).

What is surprising in the literature on district court decision making is that decisions do not reflect the preferences of home-state senators. Furthermore, there is no evidence that the Senate via the nomination and confirmation process affects how district court judges make decisions (however, see Hendershot & Tecklenberg, forthcoming). Johnson and Songer specifically test whether the decisions made by district court judges over a wide array of policy-specific litigation reflect either the preferences of their appointing presidents or the preferences of home-state senators involved in the nomination and confirmation process. Their results show that while the effect of either of these actors is modest, the decisions of district court judges reflect the preferences of their appointing presidents significantly more than the preferences of home-state senators (Johnson & Songer 2002, 665).

The Senate as a whole also does not appear to affect district court decision making via their powers of advice and consent. Scherer tests this proposition directly by assessing whether or not the district court appointees of Presidents Regan and Clinton under divided government were more moderate in their decision making compared to their appointees made during unified government across a wide range of policy issues. She finds no statistical

difference in the decision making of judges chosen during unified and divided government (Scherer 2001, 210-211). She also finds that the judges analyzed in her study decided cases in line with the preferences of their appointing presidents, and that the Senate had no significant effect in moderating the decisions of district court judges (Scherer 2001, 212).

Section 5.3: The Effect of Elevations on the Nomination, Confirmation, and Preferences of District Court Judges

The literature reviewed in the previous section shows that the nomination and confirmation process is a dynamic one that involves varying degrees of bargaining and negotiation with different Senate actors who affect who the president nominates to the district courts. In particular, the president must bargain and negotiate with home-state senators, regardless of their party affiliation. The president must also pay attention to the weight the Senate Judiciary Committee chairman places on the acceptability of a district court nominee to particular home-state senators.

Scholars use the length of time between the creation of a court vacancy and the president's nomination of an individual to fill that vacancy as a proxy for the extent of negotiation and bargaining that occurs between the president and relevant Senate actors who can affect who gets nominated to vacant district court positions (Binder & Maltzman 2009; Massie et al., 2004). The duration between a president's nomination of a judge to the federal courts and that nominee's confirmation or rejection by the Senate also serves as a proxy for the level of debate that exists within the Senate (Bell, 2002; Binder & Maltzman 2002, 2009; Hendershot 2010).[58] As discussed throughout this dissertation, elevations necessarily involve

[58] The length of time for the Senate to confirm a federal judge includes the amount of time it takes for a nominee to move through committee, the length of time it takes for the Senate majority leader to schedule a floor vote on the nominee in executive session, and the length of time that may be spent debating the particular nominee on the Senate floor before a confirmation vote is held.

extended negotiations between the president and the Senate because these actors must work together to fill not one, but two different judicial vacancies. During this time, it is likely that presidents and home-state senators will develop a better understanding of each others' preferences and will also be prepared to anticipate what types of nominees to the district courts will be acceptable for each party involved in the bargaining and negotiating process. Home-state senators can also serve an informational role for presidents who elevate district court judges to the Courts of Appeals (Savchak et al. 2006, 490). Home-state senators who work with the president when an elevation takes place can anticipate that a district court vacancy will take place in their state and can more quickly develop a list of potential judicial nominees that will be acceptable to them and to the president as well. This is especially true since both parties may be more amenable to trade-offs made when an elevation takes place.[59] The combination of extended negotiations between the president and home-state senators when an elevation occurs, the trade-offs that may occur when an elevation takes place, and the informational role in the nomination process leads me to the first hypothesis that will be tested in this chapter:

Hypothesis 1: It will take a shorter amount of time for a president to nominate an individual to a district court vacancy created via elevation than to nominate an individual to a district court vacancy that was created by other means.

It is also possible that, since the negotiations that take place after an elevation between the president and home-state senators may produce the nomination of a individual to a district court position that is agreeable to both actors, the Senate as a whole will also find the nominee as acceptable and will usher that nominee more quickly through the confirmation process. This leads me to the second hypothesis:

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[59] The two examples used in Chapter 1 of this dissertation lend support to this assertion.

Hypothesis 2: It will take a shorter amount of time for the Senate to confirm a nominee chosen to fill a district court vacancy created via elevation than a nominee chosen to fill a district court vacancy created via other means.

An analysis of the duration between specific events in the nomination and confirmation process can help us understand the degree and effectiveness of the bargaining and negotiation that takes place between these events, but they do not tell us anything about which Senate actors – if any – affect the preferences of the district court judges nominated by the president and confirmed by the Senate. As discussed earlier, research demonstrates that district court judges consistently make decisions that are in line with the policy preferences of their appointing president, and that Senate actors do not have an effect on their decision making.

However, Chapter Four of this dissertation demonstrates that presidents are more likely to use elevations when they must bargain and compromise with senators from states where Senate control of that state is divided between the two parties. Furthermore, ideologically distant home-state senators have more influence in the district court nomination and confirmation process than they did in the past (Hendershot 2010, 337; Binder & Maltzman 2009, 70). Therefore, it is likely that not only must presidents bargain with senators who are ideologically distant from their preferences, but home-state senators who are from different parties must also negotiate with one another in order to agree whether a presidential nominee to the district courts is acceptable. Since Chapter Four reveals that elevations are more likely in states where Senate control is divided, and since presidents must account for ideologically distant senators when making nominations, I will also test the following hypothesis:

Hypothesis 3: All things being equal, district court judges who are confirmed to fill seats created via elevation will be less ideologically extreme than district court judges chosen to fill seats by other means.

Section 5.4: Data, Variables, and Methods Used in this Chapter

Section 5.4.i: Dataset Used in this Chapter

The data for this chapter is composed of all district court judges confirmed from 1969 to 2008. The unit of analysis for the dataset is the individual judge. Data were collected from the Bibliographical Directory of Federal Judges database located on the website for the Federal Judicial Center. The Bibliographical Directory supplied information on the name of each district court judge confirmed during this time, the district in which the judge was confirmed, the name of the nominating president, the date the vacancy was created, the date the individual was nominated for the vacant position, and the date the nominee was confirmed by the Senate. The time duration (in number of days) was then calculated between the date the district court seat was vacated and the date the president nominated someone to fill that seat, and between the date a nomination was made and date the Senate confirmed the nominee. District court judges nominated and confirmed to the district court for the District of Columbia and territorial seats such as Puerto Rico and Guam were excluded from the database because there are no home-state senators involved in the nomination and confirmation process. In all, 1,393 district court nominees were confirmed by the Senate between 1969 and 2008.

Section 5.4.ii: Dependent Variables Used in this Chapter

Table 5.1 provides descriptive statistics for the dependent variables and independent variables used in this chapter. Four dependent variables will be used in this chapter. The first two dependent variables in this chapter measure the time duration between two events. The first dependent variable measures the number of days between the creation of a district court vacancy and the nomination of the individual to fill that vacancy by the president. The

Table 5.1: Descriptive Statistics

Dependent Variables	Mean	Std. Dev	Min	Max
District Court Nominee Extreme Score	.323	.157	.009	.635
Time from Vacancy to Nomination (days)	352.21	382.28	1	4,701
Time from Nomination to Confirmation (days)	86.22	73.14	1	541
Independent Variables				
Seat Created via Elevation	.093	.291	0	1
Divided Government	.548	.498	0	1
Ideological Distance - President and Senate Judiciary Chairman	.462	.317	.098	.904
Blue slip Strength	2.61	1.53	0	4
# Home-State Senators in President's Party	1.09	.759	0	2
Ideologically Distant Home-State Senator	.341	.474	0	1
Ideological Distance - President & District Court Nominee	.196	.176	0	.926
Party Polarization	.558	.043	.4628	.6252
Republican President	.650	.477	0	1
ABA Ratings	1.55	.513	0	2
Presidential Election Year	.161	.367	0	1
Ideological Distance - Previous Judge & District Court Nominee	.175	.141	0	.775

Source: Author's Data

second dependent variable measures the number of days between the nomination by a president to a vacant district court position and the confirmation of that nominee by the Senate.

The last dependent variable is designed to measure the preferences of district court judges and their relationship to their appointing president and different Senate actors. It measures a district court judge's level of ideological extremity (which will be called a district court judge's "extreme score" throughout the rest of this chapter). The data for ideological point estimations of each district court judge was generated by Christina Boyd (Boyd, 2010). These data are calculated based on the procedure used by Giles et al. (2001) and Giles (2008) to estimate ideological point estimates for judges on the federal Courts of Appeals, and extended by Epstein et al. (2007) to Supreme Court justices. The coding scheme utilizes first dimension DW-NOMINATE scores produced by Keith Poole to measure the preferences of presidents and members of Congress (Poole 1998, 2009). District court judges nominated where senatorial courtesy is not present are assigned the ideological point estimate of their appointing president. If there is one home-state senator from the president's party when the nomination is made the district court judge is assigned the point estimate of that home-state senator. If there are two home-state senators from the

President's party when the nomination is made the district court judge is assigned the average value of the two home-state senators.[60]

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[60] I feel it necessary to state that I do have reservations about this particular variable as applied to district court judges. The coding scheme as applied to appellate court judges has withstood a battery of validity tests over the years, and the article in which the variable was formally introduced has become one of the most cited journal articles in *Political Research Quarterly* over the last decade (Giles, 2008). Furthermore, many important judicial scholars have stated that the application of the Giles, Hettinger, and Peppers' coding scheme should be used for district courts as well (Epstein et al. 2007, 306). However, I believe that the problem with this particular variable as applied to district court judges is that it makes too great of an assumption about the ability of

The values for district court judges based on this coding scheme range from a value of -.595 to a value of .635. Negative values represent judges who are more liberal, while positive values represent judges who are more conservative. Extreme scores were calculated for each judge by taking the absolute value of each judge's ideological point estimate. This allows us to measure the extremity or moderation of each district court judge regardless of their conservative or liberal orientation.

Section 5.4.iii: Independent Variables Used in this Chapter

Several independent variables will be used in the models in this chapter. Below are explanations of all of the independent variables that will be used, and the data sources from which the independent variables are drawn:

Seat Created via Elevation: This variable is a dichotomous variable that is coded '1' if the district court judge in the analysis filled a district court vacancy that was created because the previous judge was elevated to the federal Courts of Appeals, and coded '0' if the district court judge filled a district court vacancy that was created by other means. Data for this variable was gathered by verifying who preceded each district court judge in the Federal Judicial Center's Bibliographical Directory of Federal Judges and the reason why he/she vacated his/her seat.

Divided Government: This variable is a dichotomous variable that is coded as '1' if the nominee was confirmed during divided government and coded as '0' if the nominee was

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senatorial courtesy to affect the ideological positions of district court judges. Based on the evidence in the literature (as discussed at length earlier in this chapter), It appears that home-state senators have little to no effect on the decision making of district court judges; yet this variable assumes that they do. Furthermore, I am not aware that there have been any tests to verify the validity of this variable. That being said, this is the only ideological point estimate of district court judges available for scholars to use. Hendershot and Tecklenburg (forthcoming) have recognized this and are in the process of developing ideological point estimates for district court judges. Unfortunately, the variable is not yet ready for use. Therefore, I will use Boyd's variable in the empirical tests used throughout this chapter.

confirmed during unified government. Data for this variable was gathered from Martinek's "Lower Federal Court Confirmation Database (2004). Based on the hypotheses discussed above, I expect the coefficient for this variable to be both positive and statistically significant.

Ideological Distance – President and Senate Judiciary Committee Chairman: This is a continuous variable measuring the absolute value of the ideological distance between the president and the Senate Judiciary Chairman. The ideological point estimates for the president and the Senate Judiciary Committee Chairman are each individual's first dimension DW-NOMINATE scores.

Blue Slip Strength: This variable measures the weight each Senate Judiciary Chairman gives to the blue slip process during the presidential nomination process. Data for this variable was gathered from Sollenberger (2011) and is based on whether the Chairman would use the blue slip to stop committee action on a nominee. The variable is coded as '0' if the blue slip could not stop committee action, '1' if a committee action could be stopped by both home-state senators returning a negative blue slip, '2' if committee action could be stopped if both home-state senators returned a negative blue slip or failed to return a blue slip, '3' if committee action could be stopped if one home-state senator returned a negative blue slip, and '4' if committee action could be stopped if one home-state senator returned a negative blue slip or did not return his or her blue slip (Sollenberger 2011, 100).

Number of Home-State Senators in the President's Party: This variable is coded '0' if there are no home-state senators from the president's party in the state where a district court vacancy occurs. It is coded '1' if there is one home-state senator from the president's party, and finally coded '2' if both home-state senators are in the president's party. Information on

the party affiliation of Senators who served on the 91st through the 110th Senate was gathered from the Bibliographical Directory of the United States Congress and from the Statistics & Lists of the United States Senate.

Ideologically Distant Home-State Senator: This is a dichotomous variable that is coded '1' if a home-state senator where a district court vacancy occurs is ideologically distant from a nominating president. To assess whether a home-state senator is ideologically distant from a nominating president, I utilize the coding scheme also employed by Binder and Maltzman (2009). Their method for determining whether a home-state senator is ideologically distant from the president is to calculate the distance between the president and each home-state senator. A home-state senator is considered an ideologically distant home-state senator if his or her score is greater than one standard deviation above the mean ideological distance between the president and the home-state senators (Binder & Maltzman 2009, 69).

Ideological Distance – President and District Court Nominee: This is a continuous variable that measures the absolute value of the ideological distance between the president and his nominee for a vacant district court position. The ideological point estimates for the president are that president's first dimension DW-NOMINATE score. The ideological point estimate for the district court nominee is his or her ideological point score as estimated by Christina Boyd (Boyd, 2010). Note that Boyd's ideology scores and DW-NOMINATE scores are all part of the same common space so measurement issues are not present when comparing these two actors.

Party Polarization: This is a continuous variable that measures polarization between the two parties in the Senate. It is calculated by adding together the DW-NOMINATE scores of all members of the Senate from each party for each Congress and then dividing the totals by

the number of Senators in each party. The level of party polarization is then calculated by taking the absolute value of the difference between the average ideology scores of the two political parties.

Republican President: Recall that the analyses performed in Chapter Three of this dissertation found that Republican presidents were more likely to use elevations than their Democratic counterparts. To control for this factor, a dichotomous variable is included in this analysis that assumes a value of '0' if the appellate court nominee was nominated by a Democratic president and a value of '1' if the appellate court nominee was nominated by a Republican president.

ABA Ratings: This variable is coded '0' if the American Bar Association Standing Committee on the Judiciary rates a appellate court nominee as 'unqualified.' It is coded '1' if the appellate court nominee was rated as 'qualified.' It is coded as '2' if the appellate court nominee was rated as 'very-well qualified' or as 'extremely well qualified.' Data for district court nominees between 1989 and 2008 were gathered from data available on the website for the American Bar Association. Data on the ABA ratings of judges before 1988 were gathered from the database created by Zuk, Barrow, and Gryski (Attributes of United States Federal Court Judges), which provides a wealth of background information on confirmed judicial nominees.

Presidential Election Year: This variable will be included in the Cox models used in this chapter. This has been proven to be an important control variable in models explaining the timing of presidential nominations and Senate confirmations (Binder & Maltzman 2002, 2009). The variable is a dichotomous variable coded '1' if the nomination or confirmation

takes place in a presidential election year and '0' if the nomination or confirmation takes place in any other year.

Ideological Distance between Previous Judge and Nominee: This is a continuous variable that measures the distance between the previous judge and the judicial nominee by determining the ideological point estimate for each judge and then calculating the absolute value of the difference of these two scores. The ideological point estimates are the point estimates created by Christina Boyd and were discussed in detail in the previous section of this chapter.

Section 5.4.iv: Estimation Techniques Used in this Chapter

Two hazard models will be estimated to test the hypotheses that district court nominees chosen to fill seats vacated because of elevation are nominated more quickly by the president and confirmed more quickly by the Senate. A Cox proportional-hazards regression model is used because there is no theoretical expectation regarding the distribution of time until an event of interest. The coefficients of a Cox model indicate whether each variable increases or decreases the hazard rate of an event occurring at time *t*. In the context of judicial nominations and confirmations, a positive coefficient means that a variable increases the probability of an event occurring at time *t*, while a negative coefficient means that a variable decreases the likelihood of an event occurring at time *t*.

An important assumption of the Cox model is that the effect of an independent variable on the underlying hazard rate is proportional over time and therefore constant. If this assumption does not hold, then non-proportionality is present in the model and needs to be accounted for. The proper method for accounting for independent variables in a Cox model that are non-proportional is to interact the time-varying variable with the natural

logarithm of time. Non-proportionality was a greater problem in the Cox models analyzed in this chapter than those in Chapter Four. Therefore, the Cox models presented in this chapter will include log-time interactions with the variables that violate the assumption of proportionality.

Since the extreme score is a continuous variable, an ordinary least squares regression model will be used to test the hypothesis that district court nominees chosen to fill district court vacancies created via elevation are more moderate than district court nominees chosen to fill seats that are created via other means. The coefficients of this model will explain how a one-unit change in an independent variable in the model will change the value of a district court judge's extreme score.

Section 5.5: Results

Section 5.5.i: Elevations and the Timing of Presidential Nominations to Federal District Courts

Table 5.2 displays the results of the Cox regression model measuring the effect of different variables on the probability of the president making a nomination at time *t*. The overall fit of the model is very good. The Wald chi-square statistic is large and is highly significant, so we can safely reject the hypothesis that the all of the coefficients in the model are jointly equal to zero. All of the variables in the model are statistically significant except for the variable measuring the ideological distance between the president and the chairman of the Senate Judiciary Committee chairman. However, the weight the Senate Judiciary Committee chairman gives to the blue slip does have a significantly negative effect. This makes sense, for there are examples where a president and Senate Judiciary Committee chairman are close

Table 5.2: Timing of Presidential District Court Nominations, 1969-2008

Independent Variables	Coefficients	Standard Errors
Seat Created via Elevation	.263***	(.122)
Ideological Distance - President and Senate Judiciary Committee Chair	.051	(.162)
Blue Slip Strength	-121***	(.022)
# Home-State Senators in the President's Party	.447***	(.152)
# Home-State Senators in the President's Party (squared)	-.226***	(.065)
Ideologically Distant Home-State Senator	-.177***	(.063)
Republican President	.149**	(.064)
Party Polarization	-5.97***	(.804)
Divided Government	.149**	(.089)
Ideological Distance - President and District Court Nominee	-.462***	(.180)
Presidential Election Year	.183**	(.088)
N	1393	
Log-Likelihood	-8627.183	
Chi-Square	162.75***	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Cell entries are regression coefficients with robust standard errors, clustered on state of nomination, in parentheses

Calculated using the *stcox* method in STATA 10

ideologically but the Senate Judiciary Committee chairman nonetheless would stall district court nominees if home-state senators did not agree with the nomination.[61]

The variable for elevations is both positive and statistically significant, meaning that presidents do make nominations to vacant district court positions created via elevation quicker than they do for other district court vacancies. Figure 5.1 provides a graphical representation of the probability of the president nominating an individual to a vacant district court judgeship at time *t* based on whether the seat was vacated via elevation or by other means. Figure 5.1 shows that the probability of nomination for seats created via elevation at time *t* is greater than the probability of nomination for seats created by other means at the same time.

. Interacting the time-varying independent variables with the natural log of time produces results that lend further support to the claim that district court nominees chosen to fill seats created via elevation are nominated more quickly than nominees to other district court positions. The elevation variable does vary over time. However, the results in Table 5.3 show that the elevation coefficient is larger and reaches a greater level of significance when it is interacted with the natural log of time. If we accept the conceptualization of the time duration between the creation of a district court vacancy and the nomination of an individual to fill that vacancy as a period of negotiation and bargaining between relevant political actors, then the results of this analysis provide evidence that the bargaining process between

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[61] Two excellent examples come to mind. The first was when Richard Nixon was president and James Eastland was Senate Judiciary Committee chairman. Nixon and Eastland were close ideologically and were reputedly good friends; however, Eastland was nonetheless a Democrat, and still made sure that all home-state senators found a nominee acceptable before they could move through the Judiciary Committee. Another example is when Joe Biden was Senate Judiciary Committee chairman during President Clinton's first two years in office. Even though Biden and Clinton were both Democrats Biden still required the consent of all home-state senators regardless of political party before he would bring a nominee up for a vote in committee (Sollenberger, 2011, 100).

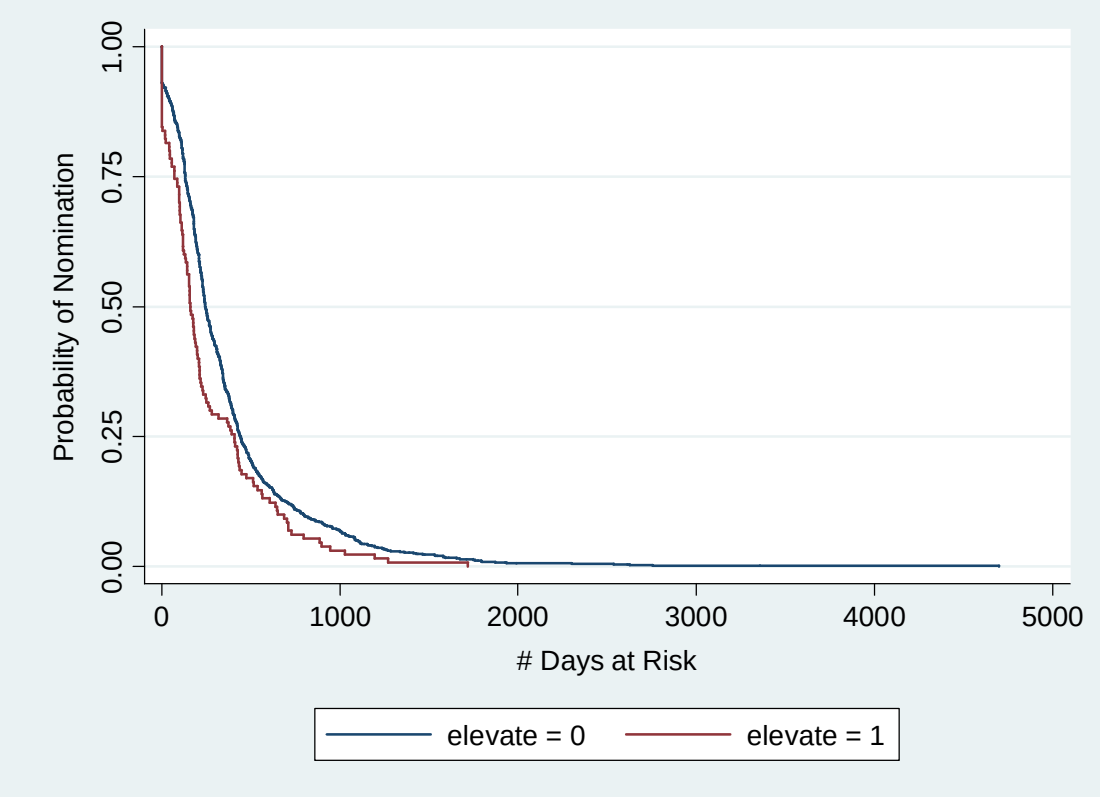

Figure 5.1: Probability of Presidential Nomination to District Court Seat (by Elevation)

Table 5.3: Timing of Presidential District Court Nominations, with Log-Time Interactions, 1969-2008

Independent Variables	Coefficients	Standard Errors
Seat Created via Elevation	.752***	(.233)
Seat Created via Elevation*ln(time)	-.103**	(.044)
Ideological Distance - President and Senate Judiciary Committee Chair	.507**	(.250)
Ideological Distance - President and Senate Judiciary Committee Chair*ln(time)	-.084**	(.038)
Blue Slip Strength	-.124***	(.022)
# Home-State Senators in the President's Party	.682*	(.355)
# Home-State Senators in the President's Party*ln(time)	-.048	(.062)
# Home-State Senators in the President's Party (squared)	-.220	(.149)
# Home-State Senators in the President's Party (squared)*ln(time)	-.001	(.026)
Ideologically Distant Home-State Senator	-.178***	(.062)
Republican President	.138**	(.063)
Party Polarization	-6.21***	(.773)
Divided Government	.285***	(.092)
Ideological Distance - President and District Court Nominee	-1.80***	(.469)
Ideological Distance - President and District Court Nominee*ln(time)	.262***	(.093)
Presidential Election Year	.685***	(.178)
Presidential Election Year*ln(time)	-.105**	(.035)
N	1393	
Log-likelihood	-8615.616	
Chi-Square	331.55***	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Cell entries are regression coefficients with robust standard errors, clustered on state of nomination, in parentheses

Calculated using the *stcox* method in STATA 10

presidents and home-state senators is more efficient when the nominee is chosen to fill a district court position created by elevation. This could be because these actors, after having worked together during the first phase of the elevation process, have a better understanding of each other concerning the qualities they desire in a potential judicial nominee. Another explanation could be that the nomination of individuals to fill district court vacancies created by elevation represents a "tit-for-tat" scenario, whereby the party who sacrifices his or her preferences in the stage where a district court judge is elevated to the Courts of Appeals is rewarded with the ability to choose their desired nominee for the newly created district court position. This possible explanation is particularly interesting, especially since the actor would have time during the first stage of the elevation process to choose a candidate to fill the district court vacancy once the elevated district court judge vacates their position.

Section 5.5.ii: Elevations and the Timing of Senate Confirmations to the Federal District Courts

Table 5.4 displays the results of the Cox regression model measuring the effect of different variables on the probability of the Senate confirming a district court nominee at time *t*. The overall fit of this model is also very good. The Wald chi-square statistic is very large and is significant, so we can safely reject the hypothesis that the all of the coefficients in the model are jointly equal to zero.

The elevation variable in this model is positive but is not statistically significant ($p \leq .102$). Figure 5.2 presents a graphical representation of the probability of the Senate confirming a district court nominee at time *t* based on whether the nominee is filling a district court position created via elevation or whether the position was created by other means. However, the elevation variable does not vary proportionally over time in this model. Table 5.5 presents the results of a Cox regression model of Senate confirmations with log-

Table 5.4: Timing of Senate Confirmation of District Court Nominees, 1969-2008

Independent Variables	Coefficients	Standard Errors
Seat Created via Elevation	.156	(.095)
Ideological Distance - President and Senate Judiciary Chairman	-.796***	(.238)
Senatorial Courtesy	.237***	(.079)
Ideologically Distant Home-State Senator	-.102	(.070)
Republican President	.248***	(.064)
Divided Government	.190	(.118)
Party Polarization	-12.56***	(1.12)
Ideological Distance - Previous Judge and District Court Nominee	.108	(.191)
ABA Ratings	.067	(.065)
Presidential Election Year	.004	(.075)
N	1379	
Log-Likelihood	-8348.818	
Chi-Square	548.89***	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Cell entries are regression coefficients with robust standard errors, clustered on state of nomination, in parentheses

Calculated using the *stcox* method in STATA 10

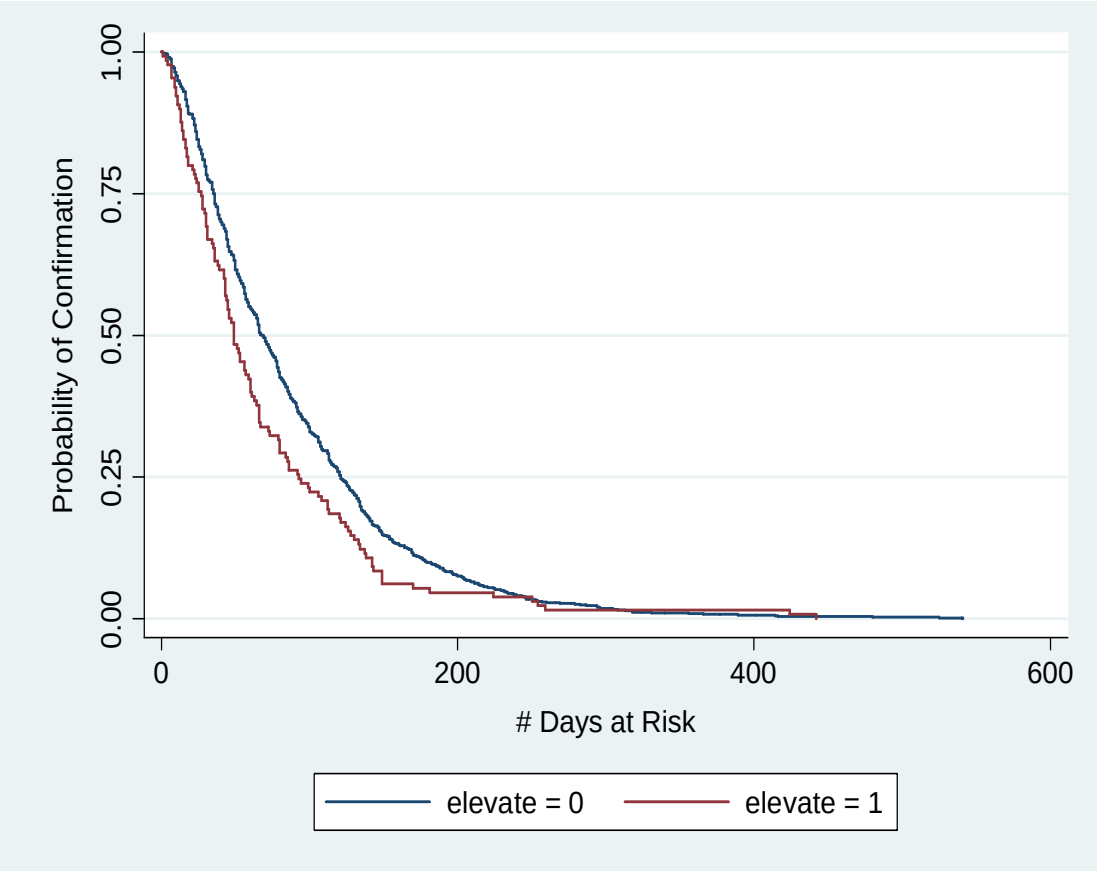

Figure 5.2: Probability of Senate Confirmation to District Court Seat (by Elevation)

time interactions for all variables that do not vary proportionally over time. When the elevation variable is interacted with the natural log of time its effect becomes larger and the coefficient becomes statistically significant. Substantively, the results in Table 5.5 show that district court nominees chosen to fill seats created via elevation are more likely to be confirmed sooner than other nominees, but that this likelihood decreases over time.

What this model makes abundantly clear is that polarization in the Senate is the driving force behind the Senate's delay in confirming district court judges. Specifically, the probability of the Senate confirming a district court nominee at time *t* decreases as polarization in the Senate increases. Other factors contributing to the delay of confirmation in the Senate are the distance between the president and the Senate Judiciary Committee chairman, and the ideological distance between the previous district court judge and the nominee chosen to replace that judge. Although elevations may be an important factor for how quickly the president chooses a district court nominee.

Section 5.5.iii: Elevation's Effect on the Preferences of District Court Judges

The results of the effect of elevations on the extreme scores of district court judges are displayed in Table 5.6**.** The overall model fit is very good. The F-statistic is sufficiently large and is highly significant so we can reject the hypothesis that the independent variables in the model have no effect on a district court judge's extreme score. The R-squared statistic shows that the model explains 43% of the variance in a district court judge's extreme score. Turning to the theoretical variable of interest, the sign of the coefficient for seats created via elevation is signed in the proper direction. However, the coefficient for the variable is small and also statistically insignificant. Technically, all things being equal, individuals who fill

Table 5.5: Timing of Senate Confirmation of District Court Nominees, with Log-Time Interactions, 1969-2008

Independent Variables	Coefficients	Standard Errors
Seat Created via Elevation	.712**	(.348)
Seat Created via Elevation * ln(time)	-.140*	(.082)
Ideological Distance - President and Senate Judiciary Chairman	-2.93***	(.584)
Ideological Distance - President and Senate Judiciary Chairman * ln(time)	.589***	(.129)
Senatorial Courtesy	-.354	(.318)
Senatorial Courtesy * ln(time)	.143*	(.083)
Ideologically Distant Home-State Senator	-.159	(.330)
Ideologically Distant Home-State Senator *ln(time)	.034	(.081)
Republican President	.265***	(.054)
Divided Government	-.170	(.110)
Party Polarization	-46.66***	(4.02)
Party Polarization * ln(time)	8.49***	(1.0)
Ideological Distance - Previous Judge and District Court Nominee	-1.33*	(.772)
Ideological Distance - Previous Judge and District Court Nominee * ln(time)	.350*	(.181)
ABA Ratings	-.085	(.223)
ABA Ratings * ln(time)	.036	(.053)
Presidential Election Year	.046	(.065)
N	1379	
Log-Likelihood	-8269.685	
Chi-Square	1467.27***	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Cell entries are regression coefficients with robust standard errors, clustered on state of nomination, in parentheses

Calculated using the *stcox* method in STATA 10

Table 5.6: OLS Regression Results, by Extreme Score, 1969-2008

Independent Variables	Coefficients	Standard Errors
Seat Created via Elevation	-.002	(.013)
Ideological Distance - President and Senate Judiciary Chairman	.076***	(.019)
# Senators in President's Party	-.332***	(.012)
# Senators in President's Party(squared)	.103***	(.007)
Divided Government	-.065***	(.010)
Party Polarization	.523***	(.100)
Ideologically Distant Home-State Senator	-.050***	(.007)
ABA Ratings	-.022***	(.007)
Nominated by Republican President	.016***	(.006)
Constant	.250***	(.055)
F-Statistic	340.18***	
R^2	.43	
N	1387	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Cell entries are regression coefficients with robust standard errors, clustered on state of nomination, in parentheses

federal district court judgeships created via elevation have extreme scores that are .001 points less than individuals who fill district court vacancies created by other means.

Based on this regression model, party polarization in Congress and the number of home-state senators in the president's party have the greatest effect on a district court judge's extreme score. A one unit increase in polarization in Congress produces a .523 increase in a district court judge's extreme score. A one unit increase in the number of home-state senators produces a .332 decrease in a district court judge's extreme score. However, the squared term for home-state senators shows that having two home-state senators in the president's party increases a district court judge's extreme score by .103.

Section 5.6: Conclusion

The purpose of this chapter is twofold. The first purpose of this chapter is to assess how elevations affect the nomination and confirmation processes of those chosen to fill judicial vacancies on the federal district courts. The results of the analyses performed in this chapter reveal that presidents are less likely to delay their choice of a nominee to fill a district court vacancy created via elevation than when a district court vacancy is created by other means. The Senate is also less likely to delay the confirmation of nominees to vacant district court positions created by elevation compared to vacant district court positions created via other means; however, they are not significantly more likely to do so. To be sure, as the analyses in this chapter attest to, there are many factors that cause a president to hasten or delay the nomination of a district court judge. There are also many factors that will hasten or delay a district court nominee's confirmation in the Senate. However, the analyses performed in this chapter demonstrate that the filling of district court vacancies that are created via elevation have a substantive and significant effect on the timing of presidential nominations.

The second purpose of this chapter is to determine if district court judges chosen to fill vacant seats created via elevation are more or less extreme than other district court judges. The analyses performed in this chapter clearly demonstrate that they are not. Although district court judges who fill seats created via elevation are less extreme than other district court judges, the effect of elevation strategies on their extreme scores is extremely small and is not at all significant in the models presented in this chapter.

The results of the analyses of the timing of presidential nominations and Senate confirmations are important results to be considered in future research. If scholars continue to conceptualize the time duration between specific events in the process of advice and consent, then it is important to recognize the importance of elevations within this process. Future research needs to examine more thoroughly the process of judicial selection for seats that are vacated by elevating sitting district court judges to positions on the Courts of Appeals. What does this process look like? Do presidents and home-state senators already have in mind possible nominees to fill the vacancy that occurs in district courts when a district court judge is elevated? If so, then what is the structure of the bargaining and negotiations that go on between the president and home-state senators? Does it resemble a pure trade-off scenario where a party in the negotiation process who acquiesces to the elevation of a district judge who is not aligned with them ideologically gets the opportunity to name a replacement who does reflect their policy preferences? A combination of more qualitative analysis and formal theory may be useful in answering these questions.

More work should also be done to assess what other factors in the nomination and confirmation process affect the ideological dispositions of district court judges. The reason why this line of research is infrequently pursued is that we do not have appropriate data.

This chapter offers a first attempt at this puzzle using a new measurement of district court judge ideology. However, I will reiterate my belief that although there are currently no other alternative measures of district court judge ideology available, the measure used in this chapter has several weaknesses that may have affected the results of this chapter and may make it unsuitable for use in certain contexts. Future research on determinants of district court judge ideology needs to develop a measure of ideology that possesses a highly degree of validity in multiple contexts. While there are some current attempts to do so (see especially Hendershot & Tecklenburg, forthcoming) the opportunity for the development of better measures of district court ideology is still great.

CHAPTER 6: CONCLUSION

Section 6.1: Introduction

The purpose of this dissertation is to examine how presidents use elevations to fill vacant appellate court positions. While there is a wealth of research on the nomination and confirmation of federal judges, there is a dearth of research on elevations and how presidents may use them strategically to change the partisan composition of the federal courts. Elevations are a unique way for the president to shape the ideological composition of the federal judiciary because elevating a district court judge to the Courts of Appeals allows the president to fill an appellate court position with a judge who – ideally – shares his preferences, and also affords him the opportunity to fill the newly created district court position with another judge who also shares his preferences.

When viewed in this light, an important question comes to mind: Why does a president not use elevations whenever he gets the chance to fill appellate court vacancies? This dissertation is an attempt to answer to this question. While the decision to elevate district court judges to the Courts of Appeals has traditionally been conceptualized as a strategic decision, this dissertation reveals that elevations are indeed strategic, but are strategic in a way that has not been identified in previous research. Presidents are constrained institutional actors when they are given the chance to nominate federal judges. Their nominees – to appellate courts as well as district courts – must make it through the Senate confirmation process if they are to become federal judges. Although it may be ideal for presidents to use elevations whenever they have the opportunity to fill appellate court vacancies, institutional constraints coupled with current political contexts may preclude presidents from elevating district court judges to the Courts of Appeals whenever they

choose. The analyses performed in this dissertation shed new light on when and why presidents may use elevations to fill appellate court vacancies.

Section 6.2: Important Findings in this Dissertation

The analyses in this dissertation have produced important results that not only will help scholars to have a better understanding of process behind the nomination and confirmation of federal judges, but will also add to our understanding of the institutional constraints that affect the decisionmaking of all presidents. This section's purpose is to review some of the more important findings in this dissertation and to place these findings within the larger literature on the institutional presidency and the judicial nomination/confirmation process.

Section 6.2.i: Important Findings from Chapter Two

Chapter Two discusses the theoretical framework used for this dissertation. Decisionmaking is at the heart of this dissertation, but the type of decisionmaking I am most interested in understanding is *strategic* decisionmaking. The concepts developed in the New Institutionalist literature – and especially in the rational choice institutionalist literature – accommodate the assessment of strategic decisionmaking in a multitude of contexts. This body of literature stresses the importance of effect institutions have on preference development and on the choices institutional actors can make.

New Institutional concepts have greatly benefitted the presidency subfield. As discussed in Chapter Two, the growing literature on the presidency that uses New Institutionalist concepts as its guide has revolutionized how scholars study the presidency. One area where its effect is pronounced is in how we study the nomination and

confirmation processes – especially when we are studying judicial nominations and confirmations.

The literature on judicial nominations continues to grow, but often this research foregoes assessing who the president chooses to fill vacant court positions to understand how different Senate actors affect whether a nominee gets confirmed or whether they can delay the confirmation process. The important conclusion to take from this chapter is that more research needs to be performed on the nomination process. Scholars are gaining a better understanding of *when* presidents make judicial nominations, but we still do not have a good explanation of *who* presidents choose and *why* they choose them. This dissertation posits one possible answer to this puzzle.

Section 6.2.ii: Important Findings from Chapter Three

Chapter Three serves several purposes. First, this chapter demonstrates that presidents have historically used elevations to fill appellate court vacancies. It also shows that presidents have traditionally used elevations to fill the federal courts with judges who reflect the president's preferences. However, presidents have traditionally been able to freely use elevations because most of our nation's history has been dominated by different party hegemonies. This has not been the case since 1969.

The bulk of this chapter is devoted to surveying the use of elevations by presidents since 1969. The results of these analyses reveal interesting systematic patterns in how presidents use elevations to fill vacant appellate court positions. First, it is apparent that presidents are likely to elevate district court judges to the Courts of Appeals when divided government is present. Republican presidents are also more likely to use elevations than Democratic presidents. There is an association between the number of home-state senators

in a president's party and the likelihood to elevate a district court judge; however, this association is also only relevant for Republican presidents and not Democratic presidents. Presidents do not use elevations uniformly across appellate circuits. Rather, they tend to use elevations more in some circuits and less than others. Finally, presidents tend to elevate district court judges who are more moderate than individuals nominated for appellate judgeships who come from outside the federal judiciary.

The surveys of individual presidents performed in Chapter Three provide insight as to when and why different presidents may have used elevations to fill appellate court vacancies. These surveys reveal there are several reasons why different presidents used elevations. However, an interesting trend was uncovered through these surveys – presidents often use elevations to fill appellate court vacancies when the ideological direction of the appellate court hangs in the balance. I believe this is the most important finding of Chapter Three, as it is an important component of the models that are built and tested in Chapter Four of this dissertation.

Section 6.2.iii: Important Findings from Chapter Four

Chapter Four moves away from the description of Chapter Three to provide more rigorous tests of the relationships between the variables uncovered in Chapter Three and how these variables may influence the president's decision to use elevations to fill appellate court vacancies. In this chapter I posit that the president uses elevations strategically to thwart policy entrepreneurs who may attempt to prevent one of his appellate court nominees from being confirmed. Elevated district court judges have the benefit of already being confirmed by the Senate once before. These individuals are already experienced jurists and have a judicial record that is difficult to disparage.

Presidents are therefore likely to use elevations when the stakes of the nomination are high. An obvious time when this happens is when the addition of a judge to an appellate court changes the ideological direction of that particular court. This can explain why elevated judges are more moderate than other nominees to the appellate courts and why there is not constant variation in the use of elevations across appellate circuits.[62]

The tests performed in Chapter Four provide support for my hypotheses. Elevated judges are more likely to have higher ABA ratings. They are also more likely to be nominated to appellate courts that are more moderate. This evidence lends support to the hypothesis that a president's most important tools to counter entrepreneurs is by nominating individuals who are well qualified and ideologically moderate.

Analyses of time duration between the creation of a vacancy and nomination, and between nomination and confirmation, also provide support for my hypotheses. If an entrepreneur is successful in his or effort to thwart a judicial nomination, we should see evidence that it takes longer for the president to make these nominations and for the Senate to confirm them once they are nominated. The survival analyses performed in Chapter Four show that elevated judges are actually nominated and confirmed more quickly than other appellate court nominees. If entrepreneurs attempt to thwart a president's elevated nominee to an appellate court position, the evidence presented in Chapter Four demonstrates that, all else being equal, these entrepreneurs are generally not successful.

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[62] As mentioned Chapter Four, most elevations occurred in circuits that were split ideologically during the time frame of this study.

Section 6.2.iv: Important Findings from Chapter Five

Chapter Four demonstrates that presidents use elevations strategically, but not necessarily as a tool to fill the federal courts with judges who share his preferences. Still, it is important to assess if and how elevations have any effect on who the president chooses to fill district court positions created via elevations, whether these nominees are thwarted in the confirmation process, and whether these judges actually do share their nominating president's preferences. The purpose of Chapter Five is to answer some of these questions.

Systematic analysis of district courts is one of the weaker areas of judicial inquiry. Analyzing them in any meaningful way has been difficult. Still, these judges – the gatekeepers of the federal courts – can make judicial decisions that have important policy implications. Although throughout American history it has traditionally been assumed that home-state senators played the most important role in the selection of district court judges, very little systematic evidence has been formulated to show that this is the case. Presidents consider their nominations to district courts to important. Judicial scholars believe this to be true as well, and have devoted much effort to understand the dynamics of the nomination and confirmation of district court judges.

The purpose of Chapter Five is to answer two simple questions: Are those individuals chosen to fill district court positions created via elevation nominated and confirmed more quickly than other district court nominees? Also, are these nominees more closely aligned with their nominating president's preferences than other district court nominees? In this chapter I posit that these district court judges were nominated and confirmed more quickly than other district court nominees. I also posit that their preferences are more closely aligned with their nominating president than other nominees.

The reason for this is quite simple and is alluded to in my discussion of the elevation of Judge William Traxler in Chapter One of this dissertation: The elevation of a moderate district court judge with excellent qualifications and broad appeal to multiple Senate actors in the confirmation process will engender a sense of good will among these senators – and especially with the home-state senators involved in the selection process. This good will, which is created through productive bargaining on the candidate to fill the appellate court position, will allow the president to nominate someone to the district court who he may not be able to nominate in other contexts.[63]

The analyses performed in Chapter Five do lend support for the contention that judges chosen to fill district court vacancies created via elevation are nominated and confirmed more quickly than others who are nominated and confirmed to the district courts. However, I find no support for the contention that those chosen to fill district court vacancies created via elevation are closer ideologically to their nominating president than other nominees to district court positions. While I still harbor beliefs about the inadequacy of the measure of district court judge ideology used in this chapter, there is no way to properly determine that there is a difference between these two types of nominees to the district courts.

Section 6.3: Implications and Suggestions for Future Research

This dissertation began with the assertion that federal judges do not have a say in whether they can climb the judicial career ladder. This dissertation also began by implying that some judges – Justice Sotomayor in my example – climb the judicial career ladder for

[63] I will again bring up the example of Margaret Seymour. Although we will never have the chance to run a counterfactual analysis of her nomination and confirmation, it is probable that Seymour – and African-American female in South Carolina – may never have had the chance to become a federal judge if it were not for the elevation of Judge Traxler and only Judge Traxler.

political reasons and not because of qualifications. The findings of this dissertation demonstrate that in actuality the best judges *do* move up the judicial career ladder. This, however, comes with a caveat: The best judges move up the career ladder *depending on the circuit where the opportunity to move up the judicial career ladder occurs.* District court judges whose districts answer to ideologically volatile circuit courts stand a greater chance of being elevated than judges in districts that are staunchly liberal or conservative. Justice Sotomayor climbed the judicial career ladder in one of those volatile circuits: She advanced from the District Court for the Southern District of New York to the Second Circuit Court of Appeals. Had she been a judge in a district presided over by the Tenth Circuit Court of Appeals, it is possible she still might be a district court judge.

The results of this dissertation also show that elevations are used much more systematically by Republican presidents than by Democratic presidents. This could be because Republican presidents – but not Democratic presidents – recognize the usefulness of elevations for filling appellate court vacancies. One way in which I want to expand this research is to incorporate President Obama's confirmed nominees into my dataset so I can have more observations for Democratic presidents. President Obama has made more extensive use of elevations than the Democratic presidents in this study. One reason for this could be that he has had to thwart more policy entrepreneurs than his Democratic predecessors. Although he has made all of his appellate court nominations during unified government, he has still had to appease Republican senators who have made it known publically that they will not be satisfied with any of the president's judicial nominees.

The research in this dissertation can be used as a foundation for other research on appellate court nominations. First, I believe that the results herein can serve as a foundation

for modeling formally the decision to elevate. The most confounding result in this dissertation was the fact that the gridlock interval was highly significant in all of my analyses but was incorrectly signed. Modeling elevations formally may explain why this was the case, and may also answer some other questions that this dissertation raises. For example, Asmussen (2011) finds that Senators will allow presidents to nominate women to appellate court positions who are more ideologically extreme because they are afraid that they will induce costs if they thwart their nominations. However, the results of my analyses show that being a female does not predict whether an appellate court judge was elevated. Are women being shut out of the opportunity to climb the judicial career ladder? If so, then why? Does the intersection of race and gender play a part in the ability to climb the judicial career ladder? These are all important questions, and extending the results of this dissertation to these areas via formal theoretical analysis may be a good place to start looking for answers to these questions.

Another line of inquiry for future research that comes from this dissertation is how the use of elevations shapes the ideological contours of the judiciary over time. This dissertation does show that presidents do not always use elevations to shape the ideological composition of the federal judiciary. However, elevations do have an impact, and especially have an impact on certain appellate courts. The question is: what kind of impact? Does the frequent elevation of moderates to ideologically volatile appellate circuits ensure that they will always be ideologically volatile? Does it ensure that some appellate circuits will always be liberal or conservative? If so how is this cycle broken? How do elevations affect the partisanship of district courts? Remember, this dissertation did not find an answer to this question; however, better measures may be designed to answer this question in a better way.

Section 6.4: Concluding Remarks

This dissertation is designed to assess whether presidents use elevations strategically to shape the ideological dimensions of the federal judiciary. What this dissertation uncovers is that presidents do use them strategically, but not in the way initially assumed. Elevations allow presidents to fill appellate court vacancies that would otherwise be difficult to fill. Elevated district court judges are highly qualified and more moderate ideologically, which enables presidents to thwart policy entrepreneurs who may try to kill his nominees. Elevations also help presidents to have their appellate court and district court nominees confirmed more quickly. This is an interesting empirical finding but it is also practical, considering that the amount of time it has taken to nominated and confirm federal judges has skyrocketed over the last twenty years. By understanding when, where, and why presidents use elevations to fill appellate court vacancies, this dissertation contributes to our knowledge of the judicial nomination and confirmation processes. It also helps us to understand an important puzzle facing pundits and political scientists alike: why presidents make the decisions that they do.

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APPENDIX A: SUPPLEMENTAL TABLES FOR CHAPTER THREE

Table A.1: Relationship between Elevations and Number of Home-State Senators in President's Party (Republican-only)

	No Home-State Senators	One Home-State Senator	Two Home-State Senators	TOTAL
Elevated Appellate Court Judges	30	40	46	116
	(31.7)	(48.2)	(36.1)	(116)
Other Appellate Court Judges	28	48	20	96
	(26.3)	(39.8)	(29.9)	(96)
TOTAL	58	88	66	212
	(58)	(88)	(66)	(212)

$\chi^2 = 9.23$, df = 2, $p \leq .01$, Kendall's tau-b = -.139

Source: Lower Federal Court Confirmation Database
Note: Numbers in parentheses are the expected frequencies for each cell.

Table A.2: Relationship between Elevations and Number of Home-State Senators in President's Party (Democrat-only)

	No Home-State Senators	One Home-State Senator	Two Home-State Senators	TOTAL
Elevated Appellate Court Judges	10	37	29	76
	(9.7)	(37.3)	(29)	(76)
Other Appellate Court Judges	4	17	13	34
	(4.3)	(16.7)	(13)	(34)
TOTAL	14	54	42	110
	(14)	(54)	(42)	(110)

$\chi^2 = .044$, df = 2, $p \leq .98$, Kendall's tau-b = .008

Source: Lower Federal Court Confirmation Database
Note: Numbers in parentheses are the expected frequencies for each cell.

APPENDIX B: SUPPLEMENTAL MATERIALS FOR CHAPTER FOUR

The first three tables in Appendix B are added so to display the possibility that there may be issues of collinearity between variables "gridlock interval" and "divided government." This is not an uncommon problem in the literature, and a common solution is to drop one of the variables in favor of the other (see Asmussen 2011; Binder & Maltzman 2002, 2009; Primo et al. 2008). Usually divided government is dropped in favor of a measure of gridlock because the research is a test of a formal theoretical model that is founded on a gridlock interval and not on the presence of divided government. However, the models in Chapter Four of this dissertation are not based exclusively on the gridlock interval. Nor am I testing hypotheses derived from a formal theoretical model based on the gridlock interval.

That being said, the tables presented in Appendix B show that collinearity may be a problem in the full model presented in Chapter Four. The coefficient for the gridlock interval variable is large but incorrectly signed. Table B.1 displays the results of two logistic regression models where, in turn, the gridlock interval variable and the divided government variable have been removed. The divided government model produces similar results to the full model presented n Chapter Four. The coefficient for the gridlock interval in the gridlock interval model is large and correctly signed when the divided government variable is removed; however it is not statistically significant ($p \leq .19$).

The collinearity checks performed in this Appendix show that there is enough collinearity between the gridlock interval variable and the divided government variable to justify the need to be cautious in interpreting the results in Chapter Four – at least when interpreting the gridlock interval variable. Table B.2 shows there is a large, positive correlation between these two variables. Table B.3 displays further collinearity diagnostics

and displays evidence that there is fairly strong collinearity between the two variables but probably not enough to discount Chapter Four's results.

Further measures were taken to assess which models are a better fit given the data used. A first step was to compare the McKelvey & Zaviona's R^2 statistic, which is recommended to use in situations like this one where I am trying to assess which model is a better fit given the data (Long & Freese 2006, 155). The value is greater for the divided government model than the gridlock interval model. I also assessed the difference in the Bayesian Information Criterion (BIC) of the two models. This statistic compares the performance of non-nested models. The model with the lower BIC provides a better fit for the pattern of observed outcomes (Clarke, 2001; Primo et al. 2008, 478). The BIC for the divided government model is less than the BIC for the gridlock interval model, which means that the divided government model is a better fit for the pattern of observed outcomes. The difference in BIC scores is 5.643. Based on Raftery's (1995) scheme for interpreting the differences in BIC scores, there is "positive" to "strong" support that the divided government model is a better fit for the observed outcome than the gridlock interval model.

Table B.1: Logistic Regression Analysis of the Likelihood of Being an Elevated Appellate Court Judge (Gridlock Model and Divided Government Model)

Independent Variables	Gridlock Model	Divided Government Model
Gridlock Interval	1.46	
	(1.10)	
Divided Government		.663**
		(.277)
Court Median Common Space Score	-2.10***	-2.34**
	(.885)	(.934)
ABA Rating	.885**	.863**
	(.350)	(.357)
District Court Pool	.939*	.973*
	(.570)	(.573)
Percentage of Vacant Seats in State	-.381	-.091
	(1.21)	(1.24)
Republican President	.445**	.541***
	(.227)	(.183)
Female Appellate Court Judge	-.259	-.267
	(.355)	(.362)
Minority Appellate Court Judge	.555	.581
	(.349)	(.362)
# Home-State Senators in President's Party	-.323	-.340*
	(.203)	(.188)
constant	-3.05	-2.36
log-likelihood	-200.792	-197.9703
Wald Chi-Square	1555.37	4050.44
likelihood > chi-square	.000	.000
% predicted with model	66.98	66.98
% predicted without model	59.5	59.5
reduction in error	18.46	18.46
McKelvey & Zaviona's R^2	.127	.149
BIC	-1393.335	-1398.978
N	321	321

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Table B.2: Correlation Matrix - Gridlock Interval and Divided Government

	Gridlock Interval	Divided Government
Gridlock Interval	1.00	
Divided Government	.7532 (.000)	1.00

Source: Author's Data

Note: Significance of correlation coefficient in parentheses.

Table B.3: Collinearity Diagnostics

Independent Variables	VIF	Tolerance	Eigenvalue
Gridlock Interval	4.12	.2426	7.2961
Divided Government	2.94	.3401	.9434
Court Median Common Space Score	1.06	.9458	.8454
ABA Rating	1.04	.9576	.6157
District Court Pool	1.12	.8953	.3779
Percentage of Vacant Seats in State	1.09	.9148	.3229
Republican President	1.98	.5054	.2901
Female Appellate Court Judge	1.04	.9590	.1632
Minority Appellate Court Judge	1.10	.9128	.0319
# Home-State Senators in President's Party	1.06	.9432	.0041
Mean VIF for All Variables	1.66		

Source: Author's Data

Note: Statistics generated using the *collin* command in STATA 10.

Table B.4: Timing of Presidential Nominations with Log-Time Interactions(Divided Government Model)

Independent Variables	Coefficient	Standard Error
Divided Government	-.026	(.119)
Elevated Judge	.268	(.146)
Court Median Common Space Score	1.90	(2.08)
Court Median * ln(time)	-.530*	(.315)
District Court Pool	-.062	(.320)
# District Court Vacancies	-.503	(.563)
Minority Judge	-.049	(.126)
Female Judge	-.357***	(.138)
# Home-State Senators in President's Party	.086	(.084)
Republican President	2.18***	(.776)
Republican President * ln(time)	-.391***	(.149)
Presidential Election Year	-.313	(.486)
Election Year * ln(time)	-.038	(.078)
N	321	
log-likelihood	-1511.02	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Note: Standard Errors are robust standard errors, clustered on appellate circuit

Estimated using the *stcox* command in STATA 10

Table B.5: Timing of Presidential Nominations with Log-Time Interactions (Gridlock Interval Model)

Independent Variables	Coefficient	Standard Error
Gridlock Interval	-1.16**	(.465)
Elevated Judge	.295**	(.144)
Court Median Common Space Score	2.04	(2.06)
Court Median * ln(time)	-.555*	(.311)
District Court Pool	.007	(.308)
# District Court Vacancies	-.412	(.559)
Minority Judge	-.047	(.110)
Female Judge	-.345**	(.136)
# Home-State Senators in President's Party	.078	(.084)
Republican President	2.54***	(.868)
Republican President * ln(time)	-.434***	(.159)
Presidential Election Year	-.363	(.483)
Election Year * ln(time)	-.029	(.077)
N	321	
log-likelihood	-1509.016	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Note: Standard Errors are robust standard errors, clustered on appellate circuit

Estimated using the *stcox* command in STATA 10

Table B.6: Timing of Presidential Nominations with Log-Time Interactions (Full Model)

Independent Variables	Coefficient	Standard Error
Divided Government	.431***	(.163)
Gridlock Interval	-2.78***	(.549)
Elevated Judge	.267*	(.144)
Court Median Common Space Score	-.889	(.723)
District Court Pool	-.013	(.277)
# District Court Vacancies	-.221	(.521)
Minority Judge	-.027	(.111)
Female Judge	-.345**	(.146)
# Home-State Senators in President's Party	.071	(.083)
Republican President	2.71***	(.887)
Republican President * ln(time)	-.432***	(.168)
Presidential Election Year	-.495***	(.096)
N	321	
log-likelihood	-1508.33	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Note: Standard Errors are robust standard errors, clustered on appellate circuit

Estimated using the *stcox* command in STATA 10

Table B.7: Timing of Senate Confirmations with Log-Time Interactions (Gridlock Interval Model)

Independent Variables	Coefficient	Standard Error
Gridlock Interval	-8.67***	(2.42)
Gridlock Interval * ln(time)	1.03**	(.526)
Elevated Judge	1.17*	(.662)
Elevated Judge * ln(time)	-.218	(.173)
ABA Rating	.184	(.611)
ABA Rating * ln(time)	-.044	(.145)
Court Median Common Space Score	-.671	(.883)
# District Court Vacancies	-.483	(.627)
Female Judge	-2.15***	(.678)
Female Judge * ln(time)	.381***	(.132)
Minority Judge	-.140	(.146)
Republican President	3.64***	(.612)
Republican President * ln(time)	-.642***	(.125)
# Home-State Senators in President's Party	.419	(.295)
Home-State Senators (squared)	-.274**	(.130)
Presidential Election Year	.343	(.746)
Election Year * ln(time)	-.068	(.166)
N	321	
log-likelihood	-1485.104	

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Note: Standard Errors are robust standard errors, clustered on appellate circuit

Estimated using the *stcox* command in STATA 10

Table B.8: Timing of Senate Confirmations with Log-Time Interactions (Full Model)

Independent Variables	Coefficient	Standard Error
Gridlock Interval	-27.9***	(4.93)
Gridlock Interval * ln(time)	5.65***	(1.03)
Divided Government	4.88***	(.777)
Divided Government * ln(time)	-1.18***	(.186)
Elevated Judge	.628	(.706)
Elevated Judge * ln(time)	-.083	(.182)
Court Median Common Space Score	-.595	(.783)
ABA Rating	.005	(.540)
ABA Rating * ln(time)	.003	(.128)
# District Court Vacancies	-.114	(.613)
Female Judge	-1.90**	(.784)
Minority Judge	-.116	(.139)
Republican President	5.17***	(.841)
Republican President * ln(time)	-.990***	(.163)
# Home-State Senators in President's Party	.608***	(.228)
Home-State Senators (squared)	-.341***	(.099)
Presidential Election Year	.652	(.754)
Election Year * ln(time)	-.141	(.173)
N		
log-likelihood		

Source: Author's Data

*** $p \leq .01$; ** $p \leq .05$; * $p \leq .10$

Note: Standard Errors are robust standard errors, clustered on appellate circuit

Estimated using the *stcox* command in STATA 10

VITA

Mikel Norris was born in Dayton, Ohio on October 8, 1976 and grew up in Ellicott City, Maryland and Mount Vernon, Ohio. While growing up in Maryland Mikel was first exposed to politics and developed a passion for politics that still endures. After graduating from Mount Vernon High School in 1995 he attended Ohio University where he graduated with a degree in political science in 2000 and was active member and officer in the Phi Alpha Delta pre-law fraternity. After graduation Mikel worked for One Group Mutual Funds and JP Morgan Asset Management – excepting a period of time in 2002 where he moved to Denver, Colorado to tour with his college rock band. Mikel left work in 2005 to attend Marshall University, where he received a Master's degree in political science in 2007. He enrolled at the University of Tennessee in 2007 to receive a doctoral degree in political science. While at the University of Tennessee he served as the American Politics representative for the Political Science Graduate Student Association for two years and then served as the president of the Political Science Graduate Student Association during the 2010-2011 academic year. In 2011 he received the John Shanks Award for Excellence in American Politics. He passed his comprehensive exams in August, 2010, and defended his dissertation in March, 2012.

Along the way he became a member of Pi Sigma Alpha and the Fruit Cult. He also gained a great appreciation for the Baltimore Orioles, the Washington Redskins, Ohio State football, fly fishing, the Lemonheads, Sonic Youth, savvy retirement planning, all types of pizza, the Simpsons, the X-Files, Fender music equipment, STATA statistical software, and Garamond font.