Keeping Appointments: The Politics of Confirming United States Attorneys

Abstract

U.S. Attorneys are the gatekeepers of federal law, but unlike judges or executive agency officials, there have been no systematic studies of their unique confirmation process. While prospective U.S. Attorneys are nominated by a president and confirmed by the Senate, the rules governing interim appointments differ significantly from traditional executive nominations politics by allowing the participation of the courts if stalemate persists. Examining all presidential nominations of U.S. Attorneys between 1987 and 2010, we explore the effect that institutional rules as well as political contexts and nominee characteristics have on both senatorial delay and the eventual success of these nominations. Ultimately, we find evidence that the rules governing the appointment of U.S. Attorneys make confirmation both faster and more likely even while traditional sources of obstructionism remain potent. The findings have broad implications for the study of appointments and confirmation politics.

United States Attorneys are the chief federal law enforcement officers in their judicial district. The choices they make about which cases to prosecute, the charges to pursue, and what plea bargains to accept can dramatically affect the implementation and efficacy of federal law within their jurisdiction. These decisions are not politically inert. Applications of federal law are a question of public policy and there are numerous examples of presidential initiatives, such as the war on drugs, for which the cooperation of U.S. Attorneys are a critical element. Yet, despite the breadth and importance of their discretion, political scientists have given relatively little attention to these actors.

The greatest influence on how U.S. Attorneys perform their duties is likely the means by which they are selected. For example, the literature on state prosecutors (who are often selected and retained at the polls) has found that selection methods affect prosecutorial decision making; indeed, Gordon and Huber (2009) note that "it is a truism that the desire to secure reelection motivates prosecutors to secure high conviction rates" (136). Outside of the prosecutor's office, a broad base of literature on other political actors suggests that selection methods affect individual behavior once in office (e.g. Mayhew 1974; Brace and Boyea 2008). While presidents nominate potential U.S. Attorneys, the Senate must confirm such nominations. This requirement introduces the necessity of bargaining as well as the possibility of partisan obstruction and inter-branch rivalry. It is this process that ultimately influences the kind, quality, and character of U.S. Attorneys.

Despite the importance of this selection mechanism to the performance of their duties, to our knowledge, there has been no systematic, empirical attempt to explain the forces that shape the nomination and confirmation of U.S. Attorneys. The relative lack of knowledge concerning the appointment of U.S. Attorneys stands in stark contrast with the wealth of scholarship that has demystified the politics of appointing federal judges (Bell, 2002; Binder and Maltzman, 2002, 2004, 2009; Maltzman and Shipan, 2008; Martinek, Kemper and Winkle, 2002; Scherer, Bartels and Steigerwalt, 2008; Shipan and Shannon, 2003) and appointments to executive agencies (Bond, Fleisher and Krutz, 2009; Krutz, Fleisher and Bond, 1998; McCarty and Razaghian, 1999; Nixon, 2001). If the selection of U.S. Attorneys is found to be influenced by politics similar to judicial

and executive agency appointments, it would imply that these offices are policy relevant, political, and a likely site of conflict.

Examining the politics of appointing U.S. Attorneys using insights from prior studies is profitable, but these nominations also have several unique characteristics. First, a failure of the system to produce an appointee may result in a district court appointing an interim U.S. Attorney. As such, all three branches of government must be considered, at least in potential, to be involved in the decision-making process. Furthermore, the presence of a 2006 rules change which briefly gave the President unilateral power to fill vacancies in U.S. Attorney offices, provides a unique opportunity to examine the effects of changing institutional procedures on the speed and outcome of the process. Such rules provide incentives for the actors to move carefully and swiftly if they wish to keep their influence over appointments. As a result, the unique structure of the U.S. Attorney appointment process can provide insights into how potential reforms could influence the character of all other executive nominations.

In the following sections, we explore U.S. Attorney appointments by combining insights from prior literature with predictions concerning the unique features of their nominations process. First, we summarize the present literature on U.S. Attorneys and discuss how recent changes have increased the importance of their selection and confirmation. Next, we examine the 2006 rules change which increased the ability of the executive to unilaterally appoint U.S. Attorneys as well as its influence on the confirmation process. Here, we also discuss the mixture of institutional, local, and ideological factors that influence the confirmation process and we outline our expectations of their effects. Finally, we introduce, execute, and evaluate empirical models of the U.S. Attorney nominations process in order to test our expectations. Ultimately, our results show that politics and institutional features do influence the speed and outcome of the nominations process. Not only do we find that U.S. Attorney nominations tend to proceed faster overall, we still find evidence for partisan obstructionism as well as a dramatic shift in favor of the President as a result of shifting the rules in the executive's favor.

U.S. Attorneys

The United States Department of Justice provides the federal government with nearly all of its legal representation. In order to accommodate both the size and the geographic nature of this caseload, the Department of Justice relies upon a United States Attorney in each of the 94 judicial districts (Eisenstein 1974). In their district, each U.S. Attorney supervises the investigation and prosecution of alleged violations of federal law. The resulting workload yields both infamous and mundane examples. U.S. Attorneys have led investigations in a number of high-profile cases including the Watergate scandal, the trial of Aaron Burr, the Chicago Seven, the Birdman of Alcatraz, and Al Capone (Executive Office 1989, 7). Yet, while salient cases attract much public attention, they are a small minority of the work of these political actors; the large number of legal actions in which U.S. Attorneys participate underscores their importance to American law and public policy. In just 2010, U.S. Attorneys filed 68,591 cases against 91,047 defendants in criminal cases and filed 83,599 civil cases (Executive Office 2011).

U.S. Attorneys influence policy implementation. By choosing which cases to prosecute, the charges to pursue, and what plea bargains to accept, U.S. Attorneys can use their immense discretion to exert control over the application of federal law in their district. Indeed, in a pioneering study of United States Attorneys, Eisenstein (1978) argues that "more than anyone else, [U.S. Attorneys] decide whether to prosecute or not, on what charges, and with what effect. United States Attorneys profoundly shape the number, type, and effectiveness of federal criminal prosecutions and federal law enforcement generally" (14).

In practice, U.S. Attorneys' exercise of discretion is dependent upon a combination of local and national factors. For example, Eisenstein (1978) claims that "[U.S. Attorneys] perform their legal duties in their home territories and plan to remain in the community and pursue a legal or political career when they leave office. Thus, local claims on their attention, time, and politics come to rival the demands of national policy and headquarters directives" (*x*). More recently, Whitford (2002) finds that U.S. Attorneys' caseloads are a function of both national and local considerations; in other words, U.S. Attorneys implement administration policy subject to the constraints of

their geographic locality. Because presidents seek to make policy in part by influencing U.S. Attorney actions, noncompliance with administration goals will frustrate the president's efforts and the uneven application of the law across district boundaries. Perry (1998), for example, argues that U.S. Attorneys are caught between the demands of the law and a national administration that may push for more aggressive prosecutions for certain offenses or in certain areas of law. Likewise, national political concerns may lead U.S. Attorneys to conduct politically-motivated prosecutions; Gordon (2009) demonstrates that federal corruption prosecutions in the Clinton and George W. Bush administrations were politically biased.

Two large trends in the American criminal justice system have elevated the the influence of U.S. Attorneys. First, over the past century, criminal law has become increasingly federalized. Indeed, Barkow (2009) notes that over 40 percent of the federal criminal laws enacted since the Civil War were created since 1970, and sentences have risen dramatically as well. While the federalization of criminal law has had a number of important implications, one striking result has been the shift of an increasing number of offenses into the jurisdiction of U.S. Attorneys (Clymer 1997; Heller 1997).

Second, as a number of scholars (e.g. Galanter 2004) have noted, fewer and fewer cases are settled through trials, and pretrial negotiations have become increasingly important. Through their ability to charge defendants, negotiate and accept plea deals, and recommend sentences, U.S. Attorneys have an unparalleled role in the implementation of federal criminal law. Indeed, Barkow (2009) states that, "[i]n the current era dominated by pleas instead of trials, federal prosecutors are not merely law enforcers. They are the final adjudicators in the vast majority of cases" (871). Though formally members of the executive branch, their discretion gives U.S. Attorneys a quasi-judicial role.

This discretion is especially important because it is, in most cases, an unchecked power. Barkow (2009) argues that

> It is only in the rare 5% of federal cases that go to trial that an independent actor reviews prosecutorial decisions. In the 95% of cases that are not tried before a federal

> judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies (871).

As such, no individual or entity within their judicial district can force a U.S. Attorney to prosecute a case or accept a plea. Outside of the district, the U.S. Department of Justice can do little to direct formally a U.S. Attorney's caseload.

This became particularly clear in 2006, when senior officials in George W. Bush's Department of Justice directed seven U.S. Attorneys to resign. While the administration publicly stated that these individuals were dismissed for "performance-related" reasons, (DoJ, 2008), a 2008 investigation by the Department of Justice "found significant evidence that political partisan considerations were an important factor" in these dismissals (325). Most notably, many critics suggested that the Bush administration sought the resignations from these prosecutors for their failure to exercise prosecutorial discretion in ways that aligned with the administration's partisan goals (Eggen, 2007).

Confirming U.S. Attorneys

As the 2006 example illustrates, Washington's only formal mechanism of control over U.S. Attorneys is the fact that they serve at the pleasure of the president; faced with a U.S. Attorney exercising discretion in ways that contradict administration goals, an administration's only option is to remove that U.S. Attorney from office. Given that removal is the only effective check on a U.S. Attorney's actions, the selection of these actors is of the utmost importance; in Perry's (1998) words, "The difficulty of controlling U.S. Attorneys once appointed means that a president is well advised to avoid adverse selections as much as possible" (146). To avoid adverse selection, presidents have increasingly sought to appoint loyal co-partisans. For example, the administration of George W. Bush made an "unprecedented, determined, and multi-faceted" push towards appointing only nominees who shared the administration's goals, and asked those who did not comply

with their policy goals to leave office. (Eisenstein, 2008, 242).

To a large extent, the selection process is structured to allow presidents to select their federal prosecutors carefully. Indeed, the confirmation process is a hybrid of the processes used to confirm federal judges and high-level executive branch officials. Like these individuals, U.S. Attorneys are nominated by the president and confirmed by the Senate; like most federal judicial nominations, U.S. Attorneys are subject to the blue slip process in which home state senators of the president's party are able to recommend (or block) nominations to positions within their state. Unlike federal judges, of course, U.S. Attorneys do not serve for life; rather, they serve for a fixed, four-year term with the possibility of remaining in office longer during the selection of their successor. Traditionally, like other executive branch officials, they voluntarily resign once a new president takes office even if their term has not yet expired.

Though the general presidential nomination-senatorial confirmation (with blue slip) process has been in place for over a century, the institutional rules governing the selection of the interim U.S. Attorney – the individual who performs the duties of the office pending senatorial confirmation of a new U.S. Attorney – have changed markedly over time. After the Civil War, the judges of the U.S. Circuit Court governing the judicial district needing an interim appointee were given the authority to appoint an interim U.S. Attorney; this process continued until 1898, when the judges of the local U.S. District Court were given the power to appoint an interim U.S. Attorney (Feinstein 2007).

The practice of allowing District Court judges to select interim appointees for vacant U.S. Attorney offices continued until 1986 when Congress reformed the process to lessen the role of the judiciary and increase the role of the executive branch in the selection of interim U.S. Attorneys. At this point in time, Congress created a procedure whereby interim U.S. Attorneys were selected initially by the Attorney General. However, this power was not unchecked. If the Senate failed to confirm a U.S. Attorney within 120 days of the vacancy, the District Court was again given the opportunity to select a new interim appointee (Feinstein 2007). Thus, under this process, any executive-appointed interim U.S. Attorney may only serve for a limited period of time.

It is this unique process that was amended by Congress in 2006. In a reform to the PATRIOT

Act, Congress briefly changed the process, giving the Attorney General unilateral and unchecked power to appoint an interim U.S. Appointee. By removing the U.S. District Court from the process of appointing an interim appointee, this reform greatly expanded executive branch power because it allowed the Attorney General's interim appointees to serve indefinitely. It was under this set of rules that the vacancies created by the 2006 resignations were filled. However, the controversy surrounding the resignations, coupled with congressional displeasure with the rules change, led Congress to reinstate the 1986 procedures in the spring of 2007.

The present process of selection is unique among the many examples of executive nominations in that filling a vacancy could include all three branches of government. If the president and Senate together take more than 120 days to confirm a nominee, then the Attorney General's nominee loses her interim position and the judges of the relevant U.S. District Court are empowered to select their own individual to serve until the confirmation process is complete. Unlike the Attorney General's nominee, however, individuals selected by the U.S. District Court serve until the Senate confirms a new appointee. If the Senate never confirms a new nominee, then the District Court's appointee will remain the U.S. Attorney for that district until a new presidential term begins.

While rare, District Courts do occasionally select U.S. District Attorneys. For example, in 2008 Gregory J. Fouratt was appointed as a U.S. Attorney by the U.S. District Court of New Mexico because President George W. Bush and the Senate had not produced a confirmed appointee. During the same administration, the U.S. District Court in Maine appointed Paula Silsby as a U.S. Attorney within its jurisdiction. Importantly, these court appointments stick. Despite requests from Senator Olympia Snowe, George W. Bush never submitted a new nomination to the Senate to fill the vacancy occupied by Paula Silsby (Eisenstein 2008). As such, while the cases of District Court appointments may be rare, the possibility exists for and enters the calculation of every U.S. Attorney nomination.

Theory and Expectations

Under the present institutional rules, the time between a vacancy and the confirmation of a new U.S. Attorney affects not only *how long* the interim U.S. Attorney serves but also *who appoints* that individual. As a result, the process through which interim U.S. Attorneys are selected highlights the importance that the passage of time plays in the nomination and confirmation processes that prospective U.S. Attorneys undergo. While extant research indicates that time plays an important role in the process of judicial (Binder and Maltzman 2009) and executive (McCarty and Razaghian 1999) nominations, time is truly of the essence when considering the confirmation process experienced by U.S. Attorneys.

Because of the unique institutional rules governing the appointment of U.S. Attorney nominations, they are likely to proceed more quickly than judicial and executive nominations. After all, unlike traditional nominations, should the Senate refuse to confirm the President's nominee, the District Court's nominee will take office until the Senate acts. This is a stark choice. Because both the President and the Senate would prefer to keep their influence over the nominations process, we expect that presidents will choose candidates more carefully and that the Senate will work more quickly so that a District Court appointment is less likely to occur.

Such institutional rules provide Senators with a stark choice, but it is not the case that the Senate has ceded its authority over nominations. Conflict remains and political context will still influence the speed and outcome of the nominations process. Among the many relevant factors, ideological disagreement is likely to be the most significant predictor of delay. If senators are concerned about filling vacancies with individuals who more closely share their policy views, then their actions should reflect the relative ideological disagreement it has with the President and with the relevant U.S. District Court.

Specifically, we expect that under circumstances in which the relevant U.S. District Court is further away from the Senate than the President, delay and failure may be more likely to occur. As noted in the literature on executive nominations to agencies, there are some situations in which some senators may prefer the application of policy under the existing structure (stalemate or a va-

cancy) than the policy output under the potential nominee (McCarty and Razaghian, 1999). When the court is further away from the Senate than the President, the potential discrepancy between the nominee who can pass confirmation and the reversion point of stalemate is likely to be at its largest. Given the procedural opportunities for obstruction in the Senate such as holds and the filibuster, just a few members of the Senate are capable of slowing or stopping a nomination.

This theoretical expectation is also based on existing literature concerning delay in judicial appointments. Prior research suggests that the Senate weighs the ideology of the court without the nominee against the perceived ideology of the court with the present nominee; when a new appointee would tip the partisan balance, the confirmation process is lengthier (Scherer, Bartels and Steigerwalt, 2008; Binder and Maltzman, 2009). Research by Bell (2002) suggests that senators may use delay explicitly to shape the character of the judiciary. Because U.S. Attorneys are the gatekeepers of federal law within their districts, one may influence the kinds of decisions that courts can make by exercising care over who chooses cases.

To measure the ideology of the U.S. District Court, we rely upon federal district court judge ideology data collected by Boyd (2010) and expanded by the authors using data provided by the Federal Judicial Center (2012). Using methodology established by Giles, Hettinger, and Pepper (2001) and Epstein et al. (2007), these scores rely upon Poole's (1998; 2009) common space scores of the ideology of home state senators and the president to create an estimate of the policy preferences of U.S. District Judges.[1] To determine the ideological distance between the U.S. District Court and the Senate, we computed the distance between the median judge and the median Senator using common-space scores (Poole, 1998, 2009).

As discussed above, the procedures for appointing interim U.S. Attorneys changed in 2006

[1]Briefly, the Common Space score of the District Court judge is the president's score if there are no same-party home state senators, the same-party home state senator's Common Space score if there is one same-party home state senator, and the average of the two Senators' Common Space scores if both Senators are from the president's party.

when the Senate amended the PATRIOT Act. The two key features of the reform are the removal of the judiciary's role in selecting interim appointees and the indefinite extension of interim appointees service beyond the old 120 day limit. By providing the Attorney General the power to select interim appointees indefinitely, an administration could effectively sidestep both the Senate and the judiciary entirely by instigating stalemate in the confirmation process and allowing for otherwise unconfirmable interim appointees to serve as U.S Attorneys during the gridlock. While Congress's final reaction to the 2006 rules change—speedy, bipartisan repeal—demonstrates its displeasure with the increased power it gave to the executive branch, less clear is the effect that the rules change had on congressional behavior while it was in effect. Unilateral executive control over the reversion point can dramatically change the institutional process through which nominees are considered.

During this rules change period, we expect that U.S. Attorney nominations are likely to pass through the Senate more quickly and with a greater expectation of final confirmation. The logic is simple. First, because the same actor has the power to both nominate and appoint an interim U.S. Attorney, any problematic appointment could be settled beyond the confines of the traditional nominations process. Second, for those nominations proceeding within the traditional process, the reversion point of any lengthy confrontation with the Senate would be a presidential interim appointment of the executive's choosing. Under such rules, if the Senate does not confirm the nominee quickly, it runs the risk that the President will use the window provided by stalemate to appoint someone less desirable to the position in an interim capacity; however, if the Senate quickly confirms the nominee, then the only way for the president to fill the position with someone less desirable would be for the President to force the newly appointed nominee to step down. The intense media scrutiny of the 2006 U.S. Attorney firings suggests that such blatant politically motivated firings are quite unpopular.[2]

[2]Of course, the net effect of this rules change, regardless of the Senate's action, is positive for the executive branch. Indeed, the rules change essentially forces the Senate to approve any presidential nominee, lest the executive branch fills the seat with someone much less desirable.

The Political Environment

The institutional rules which govern the confirmation of U.S. Attorneys provides an important starting point for our exploration of the variance in the confirmation process experienced by prospective U.S. Attorneys; in order to obtain unbiased estimates of the effect of the rules change on congressional behavior, these other factors must be simultaneously considered. Eisenstein's (1978) study of the appointment process uncovered a number of elements, including the identity of the senators and the nature of the district, which affect the confirmation of U.S. Attorney nominees (35-6). We expect that these factors, coupled with recent political trends and the characteristics of the nominee, should affect the time a U.S. Attorney waits before he or she is confirmed and the probability that the nominee is actually confirmed by the Senate.

We begin by discussing the broader political environment. Like many judicial nominees, U.S. Attorneys pass through the blue slip procedure used to select appointees to the U.S. District and Circuit courts. As Binder and Maltzman (2009) note, the blue slip process can significantly aid a nominee. By allowing home state senators the opportunity to provide the President input on the selection of the nominee, the presence of a senator from the President's party should result in a more expedient confirmation for a prospective nominee. Thus, the model includes a dichotomous variable to indicate the presence of a senator of the President's party.

Of course, in addition to the relationship between the president and home state senators, the level of ideological disagreement between the Senate and the president should also affect the delay experienced by potential U.S. Attorneys. Indeed, numerous studies of executive (McCarty and Razaghian 1999) and judicial (Shipan and Shannon 2003) nominations have noted that the level of ideological disagreement between the Senate and the president affect the amount of delay experienced by nominees. Here, we expect that increased disagreement leads to an increase in the amount of time a nominee must wait before confirmation. Following the practices of prior studies (Bell, 2002; Binder and Maltzman, 2009; Nixon, 2001; McCarty and Razaghian, 1999) we rely on a dichotomous indicator for divided government to assess policy disagreement between the two

branches.

Beyond its relationship with the President, the internal characteristics of the Senate chamber should also affect the duration of delay; following prior research (Binder and Maltzman, 2009; McCarty and Razaghian, 1999), we expect that polarization should effect the experience of a prospective U.S. Attorney. With increased polarization comes gridlock and a more laborious legislative process. As a result, we expect that, as the chamber becomes more polarized, the amount of time a nominee must wait before confirmation should also increase. To measure polarization, we follow McCarty, Poole, and Rosenthal (2006) by taking the absolute difference in mean scores of the Democratic and Republican parties in the chamber along the first dimension of the NOMINATE scores.

Literature on presidential success Neustadt (1990) suggests that a president's standing with the public will affect their ability to execute an agenda successfully, and prior research on the Senate confirmation process (Martinek, Kemper and Winkle, 2002; Scherer, Bartels and Steigerwalt, 2008) suggests that, as a president's popularity increases nationally, the amount of delay experienced by the nominees should decrease. To measure presidential popularity, we use data compiled by the American Presidency Project on the average approval ratings for each president. For each nominee, we use the average monthly approval rating for the president in the month in which he submitted the nomination to the Senate.

Finally, the timing of the nomination matters. When a president begins a term of office, they are given a degree of deference to pick their own team (Mackenzie, 1981). If a nomination is delivered to the Senate at the beginning of a term, we expect that this deference will translate into faster confirmation times. We consider nominations made within the first 9 months of a president's first term to be early nominations. [3] Alternatively, the presidential election cycle has the potential to

[3]While there is variation in the literature, a common measure is 90 days for early nominations. Our longer measure is a means of comparing the initial set of U.S. Attorney nominations, which may occur long after the 90 day mark, with late term nominations.

slow nominations down. Not only do these election years keep key actors busy campaigning, but it is also the case that in presidential election years there may be doubts about how long a candidate would be able to serve if confirmed. Furthermore, under the informal "Thurmond" rule, the Senate may prefer to not even take up nominations within six months of a lame duck presidency.

The District

In contrast to many executive branch appointees who face the Senate confirmation process, U.S. Attorneys are assigned to work in particular judicial districts; as Eisenstein (1978) suggests, characteristics of the judicial district may help or hinder a nominee's progress through the Senate. First, beyond the unique set of institutional rules which govern their confirmation process, U.S. Attorneys differ from many other executive branch employees given their geographic location. While presidents attempt to make policy by directing the actions of U.S. Attorneys nationally, scholars have recognized that U.S. Attorneys are responsive to local trends as well. Indeed, Eisenstein (1978) argues that "U.S. attorneys frequently feel they owe their position to local political personalities and interests" (*x*).

To examine local-level concerns, we assess the extent to which district-level political characteristics affect the length and eventual outcome of the process experienced by a prospective U.S. Attorney. We assess the effects of three factors. First, we expect that the Senate is more likely to quickly confirm nominees to serve in judicial districts that are highly populated. Every state is guaranteed at least one judicial district, and judicial districts are rarely reapportioned or created. As a result, the number of citizens in each judicial district varies widely. Given that more populous districts also contain more voters who can voice disapproval with federal law enforcement in the next presidential election, we expect that nominees to head offices in more highly populated districts should experience quicker confirmations. Using county-level data compiled for each year by the U.S. Census Bureau,[4] we calculated the population of each judicial district (divided by

[4]See: http://www.census.gov/support/USACdataDownloads.html for these data.

100,000).

Second, Eisenstein (1978) repeatedly highlights the size of the U.S. Attorney's office as a key factor in the explanation of the work conducted by U.S. Attorneys; he finds that U.S. Attorneys who lead bigger offices conduct less hands-on legal work and spend more of their time performing managerial work. Moreover, larger offices handle more cases; in these districts, longer confirmation delay allows the interim U.S. Attorney more opportunities to direct the handling of more cases. As a result, we expect that nominees to lead U.S. Attorneys offices in busier districts should be confirmed more quickly. We requested and received information about the number of Assistant U.S. Attorneys in each district in every year in our study from the Executive Office of U.S. Attorneys.[5]

Finally, we look at the political leanings of the district. As discussed above, previous research indicates that the nominees of popular presidents (measured on a national level) are more typically confirmed more quickly. This may be true at the local level, as well. Beyond a popularity "bump" that a president may receive from his national popularity, a president who has great support at the district level may expect an easier confirmation process for his nominee. To assess this popularity, the model includes the percent of the vote that the incumbent president received in the most recent presidential election.

[5]The Executive Office of U.S. Attorneys changed slightly the way in which they measure the number of Assistant U.S. Attorneys in the data they provided to us over time. Before 1992, the measure is the number of Full Time Equivalent U.S. Attorneys; after 1992, the measure is simply the number of Assistant U.S. Attorneys. While, in practice, the measures are very similar, we normalized by year to avoid the possibility that the measurement change affects our empirical results. We standardized the size of all U.S. Attorney's Offices by year to form our measure.

The Nominee

Of course, every nominee provides a diverse set of qualifications, life experiences, and personal characteristics. Studies of executive (e.g. Nixon 2001) and judicial (Scherer, Bartels and Steigerwalt, 2008; Shipan and Shannon, 2003; Asmussen, 2011) delay have noted the effects that individual-level characteristics (such as the nominee's qualifications) have on the time it takes for the Senate to act on a presidential nomination. In this study, we examine three characteristics of U.S. Attorneys. First, because they have already faced and finished the intense vetting required for successful confirmation, we expect that nominees who have been previously confirmed should benefit from their experience with the process. As a result, we expect that individuals who have previously been confirmed will be confirmed more quickly.

Second, a recent study by Asmussen (2011) has noted that presidents will often select female or minority nominees in order to press for or defray attention from more ideologically extreme candidates than the Senate would otherwise consider. Presidents may use a similar strategy with the appointment of U.S. Attorneys. As a result, we expect that the female and/or minority nominees will experience a more lengthy and difficult confirmation processes.

Third, one may look for indications of candidate quality. In the absence of recommendations by the American Bar Association (a measure commonly employed in studies of judicial delay), we turn to the nominee's legal training. U.S. Attorneys who serve within a district come from the ranks of lawyers to practice there. Because of these local ties, we include a variable for whether the individual graduated from a home state law school. We expect that individuals with such strong local ties may experience quicker confirmations. All of our expectations are stated in Table 1 together.

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Data and Methods

Our data encompass all formal U.S. Attorney nominations between the years 1987 and 2010. These data are taken directly from the comprehensive list of nominations found on the Library of Congress's legislative information website.[6] The period starting in 1987 covers the era of nominations that generally fall into the "post-Bork" era of heightened partisanship (Carter, 1994). For each formal nomination, we collected both the nomination date as well as the date and nature of any final action (successful confirmation, failure, or a nomination that was "returned" at the end of a session). We use this information to construct a measure of delay, or how long it takes each nomination to reach a decision. Nominations that do not receive a vote by the end of a Congress are considered censored observations.[7]

Models of delay seek to explain the amount of time which passes between two events. Here, we are interested in the amount of time that passes between the president's initial nomination and the Senate's final action on a nominee. A common modeling approach to questions of this nature is to use a survival, or duration, model. These models were generally created for use in medical

[6]See http://thomas.loc.gov/home/nomis.html for more details and data.

[7]The decision to define the population of interest by nominations rather than the vacancy in office comes with several advantages but also a few drawbacks. Importantly, using formal nominations implies a continuity of institutions and individual-level data that does not exist for vacancies, which may stretch beyond presidential terms or Congresses and include more than one potential nominee. Furthermore, using the formal nomination limits the focus of the investigation to senatorial delay and makes the analysis comparable to recent studies of judicial (Binder and Maltzman, 2002, 2004; Shipan and Shannon, 2003) and bureaucratic nominations (McCarty and Razaghian, 1999). The drawback to using this definition of population is that it does not include information on either the pre-nomination politics or U.S. Attorneys who have served in a purely interim capacity. We leave to future work a full examination of pre-nomination politics

studies to measure the time until the "death" of a subject given variations in treatment, but the basics of the model are readily adaptable to questions of delay in executive nominations. One of the advantages of a survival model is that they can easily incorporate censored data. Because of these traits, survival models have been used in a variety of studies of nomination delay (McCarty and Razaghian, 1999; Nixon, 2001; Shipan and Shannon, 2003). Specifically, following prior studies (McCarty and Razaghian, 1999), we employ a Weibull survival model. While similar in many respects to the Cox proportional hazards model, the Weibull model has the advantage of an improved ability to handle "tied" observations; given that many cases are tied in the number of days delayed, the Weibull model is particularly appropriate (Box-Steffensmeier and Jones, 2004).

We are also interested in the outcome of each confirmation. While less than ten of the nominees in our data were rejected on the Senate floor, a sizable proportion of the observations in our data are censored. These censored observations represent individuals who were never explicitly rejected by the Senate; instead, they were never given an up-or-down vote on the floor of the Senate and, as a result, were "delayed to death." The dependent variable in our second analysis is dichotomous and indicates whether or not an individual failed to be confirmed by the U.S. Senate, either because he never received a vote or because the Senate voted to reject his nomination; this is about 15 percent of our sample. Given the dichotomous nature of the dependent variable, we use logistic regression to estimate the probability that a nominee will not be confirmed by the Senate.[8]

[8]There is a slight difference in the number of observations between the Weibull model and the logistic regression. This happens because a handful of nominees were confirmed on the day they were nominated. Because they experienced no delay, they are excluded from the Weibull model but included in the logistic regression.

Results and Analysis

Figure 1 is a Kaplan-Meier curve that shows the proportion of U.S. Attorney nominees remaining after a given number of days has passed since the formal nomination. The table indicates that approximately 20 percent of nominees remain unconfirmed after 100 days under consideration. While nontrivial, these numbers are considerably faster nominations than expectations stemming from bureaucratic (McCarty and Razaghian, 1999) and judicial nominees (Hendershot, 2010) would have suggested. The fact that these nominations proceed much faster by comparison may be due to the unique institutional arrangement wherein both presidents and senators are encouraged to move quickly through the process lest a District Court make the decision for them. While these nominations do progress more quickly, the fact that curve in Figure 1 never intersects with the 0 percent line indicates that there does exist a small percentage of cases that never reach a vote. The rate of censorship (at 13.3 percent), however, is also rather low by comparison to prior findings for judicial and executive nominations.

< Figure 1 About Here >

Figure 2 shows the average time in days that it took the Senate to reach a decision on U.S. Attorney nominations. Each box represents the inter-quartile range of the data (upper and lower bounds) while the bar in the middle of each box represents the average time in days that each nomination took. Where applicable, the distance 1.5 times the inter-quartile range is marked with whiskers while outliers are indicated with dots. Hendershot (2010) and Binder and Maltzman (2009) have convincingly shown that judicial nominations have been increasingly subject to delay over time. Within these data, no clear time trend emerges; it appears that, unlike other types of presidential appointees, U.S. Attorneys have experienced neither systematically quicker nor lengthier delays, on average, in the U.S. Senate over the past two decades. Figure 2 does seem to suggest limited periodicity within the data that roughly corresponding to the presidential election cycle. Such a pattern could be explained though the existence of early term presidential advantages and a slowdown effect for presidential election years.

< Figure 2 About Here >

Looking at the data from the point of view of the presidents, Table 2 shows the proportion of all U.S. Attorney nominations that resulted in confirmations, censorship, and failure for each president within the data set. Looking at the table, one can observe that presidents have had varying rates of success over time.[9] For example, there is nearly a 19-point difference between the success rates of Clinton and George W. Bush when observing both over their full two terms. Cases of actual failure where a nomination has been withdrawn by the president or rejected by the Senate are quite rare. Indeed, only four nominations in our data failed outright in the Senate.

< Table 2 About Here >

Table 3 shows the results of our Weibull survival model. Rather than showing the raw estimated coefficients, we present the estimate of the hazard ratios in the table for each of our key variables. The hazard ratio can be thought of as increasing or decreasing the hazard of ending the nominations process with the baseline for comparison being 1.00. A hazard ratio of 2 indicates that a unit increase in the independent variable will make the nominations process two times faster while a ratio of .50 suggests that a nomination will take twice as long. In this manner, the value's distance from "1.0" is used to assess the direction of the relationship. The ln(p) term is a shape parameter for the Weibull with $H_0 = 0$. The significant value of .30 suggests that the hazard is monotonically decreasing. In general, the model appears to be both appropriate and a good fit.

< Table 3 About Here >

We begin by examining the effects of institutional rules on the delay experienced by nominees. Consistent with our expectation, the model suggests that the ideological placement of the District

[9]When examining the table, one should remember that our data include only the latter part of the Reagan administration and the beginning of the Obama administration.

Court relative to the Senate and President matters. The hazard ratio, which is statistically significant, indicates that when the Senate is closer to the President than it is to the District Court, the process moves *more slowly*. The likely explanation for this result is that the existence of a more extreme reversion point may make delay more profitable to opposition senators, only a few of whom need engage in dilatory tactics to significantly slow the process.

Our second expectation about the effect of the rules of the confirmation process is also supported by the data. As expected, individuals who were nominated during the period of time under which the PATRIOT Act allowed the Attorney General to appoint interim U.S. Attorneys indefinitely were confirmed more quickly. These results imply that when senators are unable to benefit in any way from stalemate and delay, nominations proceed quickly through to confirmation. As such, executives are greatly advantaged even within the traditional nominations process by the unhindered ability to appoint interim office holders.

The effects of the broader political environment are mixed. Divided government, as expected, is associated with more confirmation delay, and the nominees of popular presidents are confirmed more quickly. However our model provides no evidence that either increased polarization, the election cycle, or the presence of a blue slip Senator has any reliable effect on the amount of time a prospective U.S. Attorney must wait before they receive a vote on the floor. However, early term nominees are confirmed more quickly as compared to later nominees.

Contrary to expectations, district-level characteristics appear to exert little sway over the confirmation process. Moreover, the model provides no evidence that either the district's support for the incumbent president its size or the size of the office affect the amount of confirmation delay. As such, delay would appear to be more related to rules and larger political contexts.

Moving to the effects of individual nominee characteristics, we do find that female nominees experience longer confirmation processes. However, no relationship is found with minority candidates. As such, these results partially comport with the findings of prior research on other kinds of executive nominees. Lastly, with their strong local ties individuals coming from a home state law school are in fact confirmed more quickly. As such, we do find evidence that nominee characteris-

tics can influence the speed of confirmation.

< Table 4 About Here >

Our estimates of the probability of a nominee's failure before the Senate tell a clearer story; when it comes to the success or failure of an individual nominee, national-level concerns matter far more than individual or district-level considerations. Indeed, the model results indicate that institutional rules and the political environment matter much more than the characteristics of the nominee or the district.

The model results indicate that a number of political factors exert a powerful (and almost overwhelming) influence on the success of a nomination. Increased polarization, early nominations and the presence of divided government all tend to increase the probability that an individual nomination will fail. On the other hand, as presidential popularity increases, the likelihood of a failed nomination decreases. Again, there appears to be no relationship with the presidential election cycle. Overall, these findings comport well with expectations derived from prior studies of the nominations process.

One interesting, and counter-intuitive, result is the finding that while a an early nomination is likely to be decided quickly, it is also more likely to fail. This result could suggest that the advantage of an early term nomination has less to do with deference toward the president and more to do with the efficiency gained by considering early nominations quickly and together. It must be noted, however, that presidents may in fact prefer a faster failure to a slow one as it provides an earlier opportunity to find the next nominee.

Turning to the effects of institutional rules, we find that nominations occurring when the ideological distance between the Senate and the President was less than compared to the Court were *more likely* to fail. Again, this anticipated results is likely stemming from the fact that the strategic actions of a few members can reinforce a favored reversion point. To those senators who prefer the position of the court over the President's choice, failure will likely lead to a nominee with a more favorable disposition.

Contrary to expectations, the estimated coefficients indicate that nominations made during the period of time in which the PATRIOT Act rules change was in effect were no less likely to fail. This occurs despite the fact that such nominees are considered relatively faster than nominees from the more traditional process. One explanation for these findings is that while senators may gain nothing extra from delay, a failure may still constitute a symbolic win regardless of who the interim appointee is.

Discussion and Conclusions

U.S. Attorneys influence policy as the gatekeepers to the application of federal law. While the political value of these actors has increased over time, their importance was clearly demonstrated by the ideologically-motivated firing of several U.S. Attorneys under during the administration of George W. Bush. Despite their importance to federal law and in enforcing presidential policy priorities, little scholarly work has focused on the unique selection and retention of these political appointees. To our knowledge, this study is the first to investigate the nominations process of U.S. Attorneys and in doing so it seeks to bridge the gap between the extensive knowledge of judicial and bureaucratic appointments and the relatively little that is known about the selection and politics behind the appointment of U.S. Attorneys.

In comparison to studies of judicial and bureaucratic appointments, we find that nominations of U.S. Attorneys tend to proceed faster and fail less often in the aggregate. The speed and success of these nominations may demonstrate the influence of their unique institutional features, namely the participation of the District Courts but for a limited time the rules also allowed near unilateral action for executives. Within the past decade there have been multiple attempts to change the institutions surrounding the nominations process as a response to strategic obstruction and the failure of the executive nominations process to fill vacancies. Studying subsets of nominations that proceed more quickly, such as U.S. Attorneys, is one means by which scholars and participants can evaluate the potential influence of reform. Broadly, the speedy confirmation of U.S. Attorneys under both

the present rules and especially during the period of greater presidential authority demonstrate the value of addressing stalemate by creating provisions for interim appointments.

While U.S. Attorney nominations tend to proceed relatively fast and with an expectation of success, there is still significant variation with respect to confirmation delay and failure. Similar to other kinds of nominations, we find that political contexts such as divided government and polarization contribute to delay and/or failure respectively for U.S. Attorney nominations. Also as expected, presidents tend to do better with U.S. Attorney nominations when their popularity is high. In a further connection with prior studies of nominations, we also find that female nominees are more likely to be delayed, though not fail, in their confirmation.

Ultimately, the analysis illustrates how changes in institutional rules can dramatically affect government action and inaction. In particular, we find that, given the power to unilaterally and indefinitely fill a vacancy with a nominee of its choice, the executive branch can expect heightened deference from the Senate toward its nominees. As a result, the amount of delay experienced by a nominee is not simply a function of ideological disagreement between the legislative and judicial branches; rather, the institutional rules governing the selection of interim U.S. Attorneys force Senators to consider their level of disagreement with the U.S. District Court in addition to their policy disagreements with the president as they consider whether or not to delay a presidential nominee. By giving more power to appoint interim nominees to the executive branch, the confirmation process was significantly changed; still, further research should examine whether the nominees confirmed under that regime had were different in any meaningful way.

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Tables and Figures

Variable Name	Confirmation Delay	Eventual Confirmation
The Rules		
Senate is Closer to President than Court	Slower	Less Likely
Rules Change Period	Faster	More Likely
The Political Environment		
Blue Slip Senator	Faster	More Likely
Divided Government	Slower	Less Likely
Polarization	Slower	Less Likely
Presidential Approval	Faster	More Likely
Early Nomination	Faster	More Likely
Presidential Election Year	Slower	Less Likely
The Nominee		
Female Nominee	Slower	Less Likely
Minority Nominee	Slower	Less Likely
Home State Law School	Faster	More Likely
The District		
Incumbent President Support	Faster	More Likely
Population	Faster	More Likely
Office Size	Faster	More Likely

Table 1: Summary of expected relationships between explanatory variables and nomination outcomes.

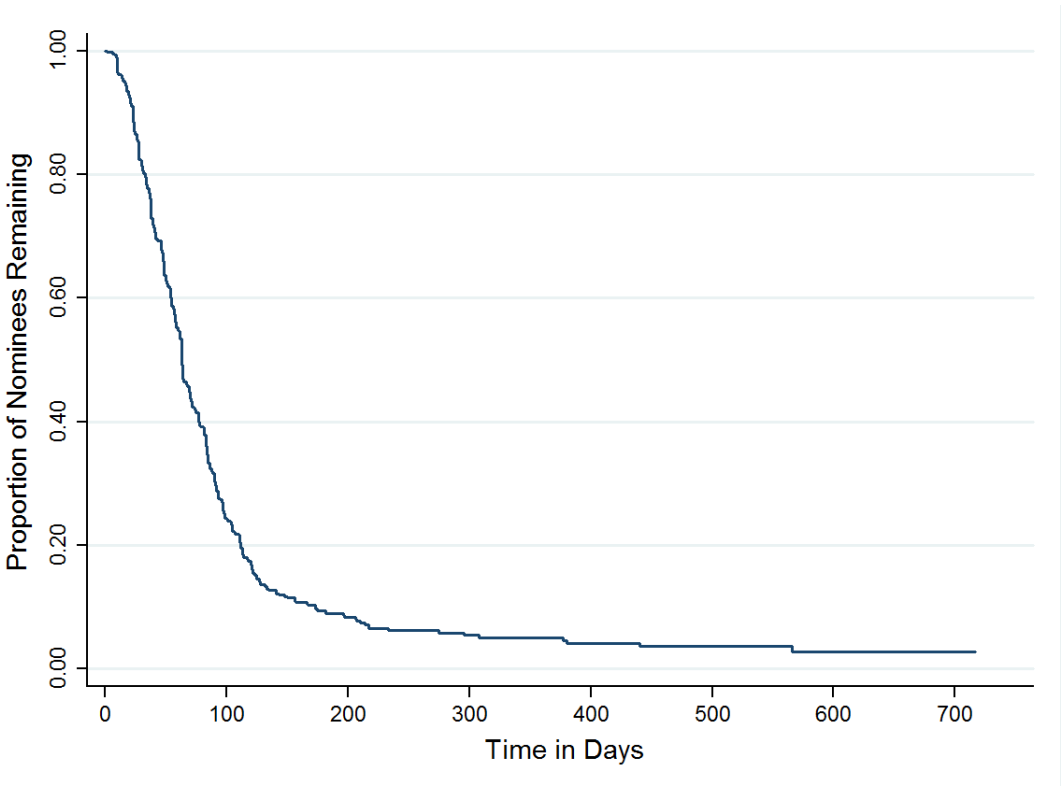

Figure 1: Kaplan-Meier curve for the amount of time to decision on U.S. Attorney Nominations

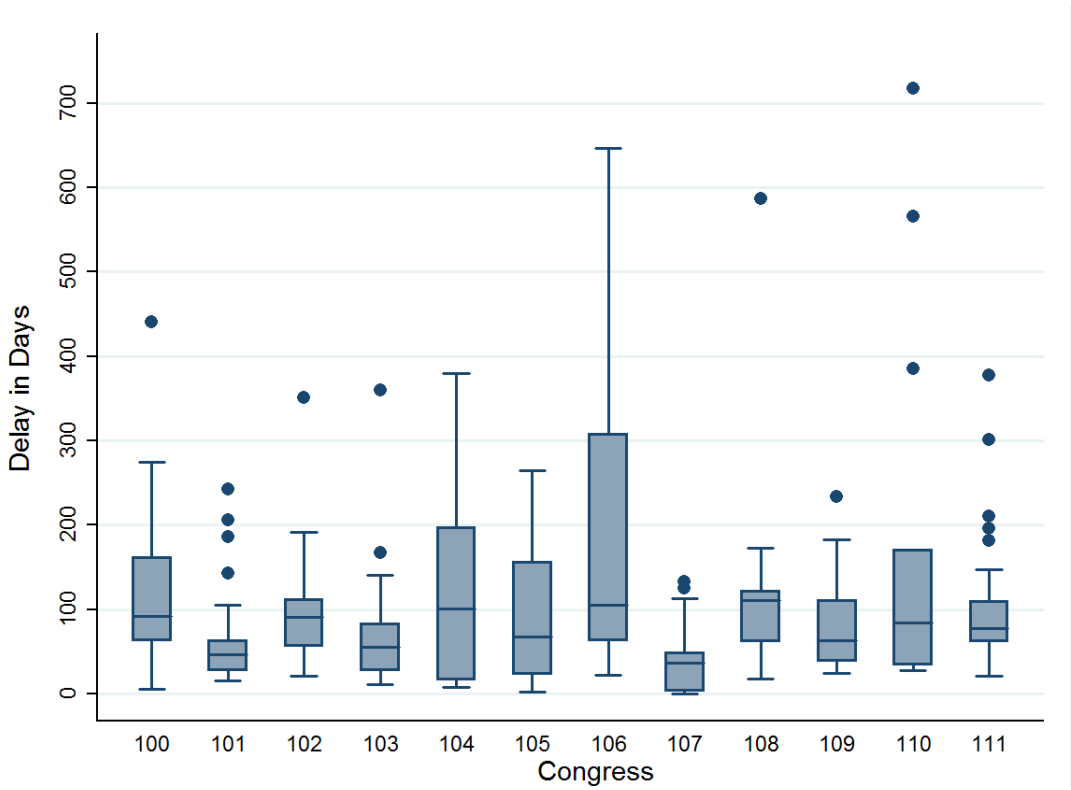

Figure 2: Boxplot showing distribution of delay experienced by prospective U.S. Attorney Nominations in the Senate

President	Confirmed	Censored	Failed	Total
Reagan	92.9%	7.1%	0%	28
H.W. Bush	85.0%	15.0%	0%	60
Clinton	93.9%	6.1%	0%	132
W. Bush	75.1%	23.2%	1.7%	181
Obama	95.0%	3.7%	1.3%	80

Table 2: Outcome of U.S. Attorney Nominations 1987 – 2010, by President

	Hazard Ratio	Standard Error	P-value
The Rules			
Senate is Closer to President than Court	0.66	0.09	0.00
Rules Change Period	1.95	0.62	0.04
The Political Environment			
Blue Slip Senator	1.03	0.13	0.84
Divided Government	0.50	0.08	0.00
Polarization	0.23	0.20	0.09
Presidential Approval	1.02	0.01	0.00
Early Nomination	2.03	0.25	0.00
Presidential Election Year	0.78	0.19	0.32
The Nominee			
Female Nominee	0.76	0.10	0.04
Minority Nominee	1.00	0.16	0.98
Home State Law School	1.28	0.14	0.02
The District			
Office Size	0.90	0.07	0.19
Population	1.01	0.00	0.05
Incumbent President Support	1.00	0.01	0.81
Constant	0.00	0.00	0.00
ln(p)	0.30	0.00	0.00
N	433		
Log Likelihood	-503.25		

Table 3: Duration of Nomination Decisions, 100^{th} to 111^{th} Congresses. The model is a Weibull survival model. The outcome variable is the amount of time, in days, between the date of the nomination and the Senate's final action on the nominee.

	Coefficient	Standard Error	P-value
The Rules			
Senate is Closer to President than Court	1.20	0.51	0.02
Rules Change Period	-1.46	1.28	0.26
The Political Environment			
Blue Slip Senator	0.41	0.44	0.35
Divided Government	4.20	0.64	0.00
Polarization	6.14	3.03	0.04
Presidential Approval	-0.08	0.01	0.00
Early Nomination	1.57	0.41	0.00
Presidential Election Year	0.25	0.65	0.71
The Nominee			
Female Nominee	0.19	0.48	0.69
Minority Nominee	-0.08	0.58	0.89
Home State Law School	-0.44	0.36	0.22
The District			
Office Size	0.25	0.30	0.41
Population	-0.02	0.01	0.06
Incumbent President Support	-0.02	0.02	0.43
Intercept	-4.35	2.68	0.11
N	439		
Log likelihood	-116.38		

Table 4: Probability of Failure, 100^{th} to 111^{th} Congresses. The model is a logistic regression. The outcome variable takes a value of 1 when the nominee failed to be confirmed by the Senate, either because she was rejected in a floor vote or because the Senate never scheduled a vote on her nomination.