More Things Change, the more they stay the Same: A Rational Actor Approach to Studying Federal Judicial Nominations

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Research Question

The partisan nature of federal court nominations has varied from one administration to the next. For example, during both of his terms President Grover Cleveland, a Democrat, appointed a total of thirty-seven judges to the lower federal courts. Of these thirty-seven nominees, thirty-six identified themselves as Democrats and one as an Independent, resulting in 97.3% of nominees being from the President’s party. In contrast, after assuming the presidency following Richard M. Nixon’s resignation, Republican Gerald Ford selected nominees from his party only 79% of the time, nearly 20% less than Cleveland. While these two administrations represent extreme cases, the variation in the remaining cases is from 82.2% (Taft) to 96.4% (Franklin Roosevelt) (Evans 334). Why are some Presidents more partisan than others in their nomination of lower federal court judges?

This paper is limited to the U.S. federal court system, and will not be concerned with judicial appointments in other presidential systems. Data analysis will begin with nominations made during the 1885 term of Grover Cleveland and end with the 1976 terms of Jimmy Carter. Measurements of this percent relationship will be taken over the period that a President remains in office, most usually either four or eight years. Nominations to the district and appellate courts in the U.S. will be analyzed, excluding nominees to the U.S. Supreme Court. The number of these courts various depending upon time period. The term proportion of federal court appointees refers to the percentage of total nominees to the district and appellate courts from the President’s party. Finally, the phrase president’s party is the party affiliation of a President upon entering office.

The importance of this question is related to the nature of judicial appointments. After nominees are selected by the President and his staff and confirmed by a majority in the Senate, they are institutionally shielded from the everyday political pressures faced by
elected policymakers. Are individuals who serve on the federal bench nominated merely because of political connections and activism in the President’s party, or do presidents discriminate between individuals on the basis of their willingness to be unbiased, neutral interpreters of the written law? Given the variation between administrations, factors other than a potential nominee’s party identification do appear to affect whether or not he or she will be nominated in some cases. Identifying these factors is the purpose of this paper, and will help to predict just how partisan an incoming President will be in his nominations.

An answer to this question is important to reformers in the legal community who find either a zero or inverse correlation between presidential party affiliation and a nominee’s knowledge of the written law. Put differently, individuals who believe that a nominee’s loyalty to the President’s party tends to have a detrimental effect on an accurate, balanced interpretation of the law would want to know what conditions allow for a more bipartisan selection process of judges, such as that undertaken by President Ford. Once these conditions are know, critics will then be able to either propose or enact measures that allow for a more bipartisan selection of lower federal court judges.

Voters comprise another group that would be interested in the answer to this question. If voters know what conditions lead certain presidential candidates to select a higher percentage of nominees with similar policy values, then they would be either more or less likely to vote for a particular candidate. Conversely, if a presidential candidate knew these conditions, then he or she would be more likely to either avoid or embrace revealing then to the public.

Finally, this question and its answer(s) are important to students of political science who have been engrained with the more well-known theory of judicial selection – the Systemic Model – which argues that the formal, established steps and procedures endured by all potential federal court nominees ultimately determines which candidates are nominated by the President. This theoretical model does not directly address variation in partisanship between presidents, but instead mentions party involvement on the part of judiciary candidates as a variable helpful to getting noticed by a President and considered for nomination.
To address this question, this paper adopts a Rational Actor Model of analysis commonly used to study the formation of cabinets and legislatures in European parliamentary democracies (Laver and Shepsle 3). While Laver and Shepsle apply rational actor concepts to analyzing portfolio distributions in newly-elected parliamentary governments, the model’s concepts can be adopted to study national elections in presidential systems as well. In short, this modified model assumes that presidents are self-interested, rational actors whom have a short-term goal of getting reelected, and a longer-term objective of influencing public policymaking beyond their stay in office. Nominating individuals to sit on the federal bench is a readily available way to accomplish this longer-term goal, and as a result presidents nominate individuals with similar policy preferences over a wide range of issues. These individuals with similar policy values tend to be members of the President’s political party.

In order to be reelected to a second term, and have more opportunities to nominate federal court judges, Presidents need to ensure that their behavior in nominating judges during their first term does not offend the median voter. This median voter represents a large segment of the voting block, whose support is necessary to any President seeking reelection. Blatant partisanship in the nominating process is one way in which presidents can offend this voting block, and therefore must temper their interest to influence public policies during their first term. However, after being reelected to a second term, presidents are immediately relieved of any concern for accomplishing their short-term objective again, and can now focus on selecting only those individuals most willing to enact similar policy preferences on the federal bench. As a result, this paper argues that the longer a President remains in office, the more partisan he is in nominating federal judges.

**Two Theoretical Approaches to Analyzing Federal Judicial Nominations**

Why are some presidents more partisan than others in nominating federal court judges? In answering this question, two theoretical approaches will be discussed. The Systemic Model approaches this question by emphasizing that the formal procedures and steps that all potential nominees must undergo largely determine which potential candidates are nominated by a President. These formal processes remain constant over
administrations, and therefore the model does not address directly the variation in
partisanship between presidents. Second, the Rational Actor Model argues that all
presidents are rational actors interested in accomplishing a short-term goal of getting
reelected to a second term, and a longer-term goal of influencing public policies beyond
the conclusion of their second term. Ultimately, variation in partisanship between
presidents is explained by a Chief Executive’s balancing of their two objectives.

The Systemic Model delineates the formal procedures in place that facilitate the
filling of a vacancy on the federal bench (Ball 165). This process is established in Article
II, Section 2 of the Constitution, which reads “The President shall nominate, and, by and
with the advice and consent of the Senate, shall appoint . . . judges of the Supreme
Court.” Eventually, this section was interpreted by Congress to include nominations to
the district and appellate courts as well.

However, aside from the Constitutional test establishing the Chief Executive’s
authority to nominate federal court judges, the President’s ability to narrow the pool of all
potential candidates down to a few finalists is limited. In fact, at the federal court level
this winnowing process is most often initiated by a senator from the President’s party, a
close advisor, a local party organization, and influential judge, or the judicial candidate.
After the President and his team of advisors narrow down this field to one finalist, the
candidate undergoes an intense screening process conducted by a senator from the
President’s party, the Justice Department, the F.B.I., the Committee on the Federal
Judiciary of the American Bar Association, numerous interest groups, and the President.
The selection process is concluded with the confirmation of one candidate by the Senate
Judiciary Committee and a majority of senators (Richardson and Vines 58).

While the President does have a role to play in each of these steps, he in no way
assumes the dominant role given to him in the Rational Actor Model. In fact, while this
first approach offers an in-depth description of the numerous variables, or actors,
involved in the formal and informal processes of nomination, it is not primarily
concerned with explaining varying levels of partisanship between administrations
concerned with explaining varying levels of partisanship between administrations.
Instead of attempting to generalize and offer basic assumptions about the process or a
specific actor involved, it stresses the nature of numerous factors that, depending on time
period ad administration, may or may not play a crucial role in the process. While this model does include political party involvement as a variable in the winnowing down of all interested candidates to a few finalists, it does not identify variables that explain why some presidents are more partisan than others in the nomination process.

A second theoretical approach is the Rational Actor Model, adopted from Laver and Shepsle’s analysis of the making and breaking of European parliamentary democracies and modified to make sense in relation to the research question of this paper. In sharp contrast to the first approach, which diffuses power in the nomination process across an array of actors and institutions, this theory establishes the President as the dominant, rational actor in the nomination process. Presidents are self-interested, rational actors with a short-term goal of getting reelected, and a long-term objective of affecting public policymaking beyond the conclusion of their second term. Due to the increasingly active role of the federal courts in the area of public policymaking, presidents identify their Constitutional role of nominating federal judges as a readily available means to accomplish this long-term goal.

The Rational Actor Approach assumes that a potential nominee’s party identification is a fairly accurate indicator of his or her public policy preferences, and that presidents assume a candidate with the same party affiliation is either a perfect or near perfect agent of his policy preferences on the federal bench. As a result, presidents act rationally to achieve their goals when they nominate individuals with the same party affiliation. However, this long term objective of influencing public policies is not necessarily complimentary to a President’s short-term goal of winning reelection. In fact this long-term objective is best accomplished by a very high degree of presidential partisanship in the nomination process, which in turn threatens the President’s favorability with the median voter in society. This median voter’s interests and preferences represent those of a large percentage of the voting block, whose support is necessary to win reelection. Once reelection is achieved term limits automatically dispels any further concern for this short-term goal, allowing Chief Executives to focus wholeheartedly on achieving to the fullest their long-term objective of influencing public policymaking. Hence, the longer a President remains in office, the more partisan he is in nominating federal court judges.
A Balancing of Short and Long-Term Objectives

A Rational Actor Analysis of federal judicial nominations is adopted from studies on the formation of European parliamentary democracies, and has been modified to make sense as a model used to analyze this question. The Rational Actor Model is composed of a few basic assumptions. First, it assumes that presidents are self-interested, rational actors with a short-term goal of getting reelected and a long-term objective of implementing and influencing public policies after the end of their second term. From this, presidents recognize that their Constitutionally-assigned role of nominating federal judges is one of the most readily available ways to accomplish this long-term goal.

Second, political party affiliation is the primary way that presidents identify which potential candidates are most likely to implement their public policy agenda once on the federal judiciary. In other words, presidents view nominees from the same political party as either perfect or near-perfect agents of their general policy agenda. The potential federal judge knows this agenda and his party identification is a good indicator of whether or not he or she will implement the agenda.

Therefore, presidents act rationally to achieve their long-term goal when they nominate individuals with the same party affiliation to serve on the federal judiciary. However, the frequency with which a particular President does this varies as a result of balancing both his short and long-term objective. In other words, once elected to a first term a Chief Executive is motivated to not only carry out his long-term objective of implementing his policy agenda, but being re-elected to a second term as well. In order to accomplish this short-term objective, he must ensure that he does not ostracize a large segment of the popular voting block by being perceived as blatantly swinging the ideological policy preferences of the federal courts to his own agenda. In other words, it must at least appear somewhat bipartisan in choosing which individuals he nominates to the federal court during his first term.

However, after being reelected to a second term, a President has immediately eliminated any concern for achieving his short-term objective again. He is constitutionally forbidden from attempting to accomplish this goal again, and therefore does not have to concern himself with tempering his partisanship in order to bolster his
chances for reelection. As a result, the longer that a President remains in office, the more partisan he is in his nomination of federal court judges.

While this contention is the primary hypothesis of this paper, the Rational Actor Model used implies that the other independent variables might also have a causal relationship with presidential partisanship. For example, after being reelected presidents are provided with more opportunities to nominate federal judges. Therefore, the more opportunities that a President has to fill federal court vacancies, the more partisan he is in nominating judges.

Third, since presidents must be concerned about their standing with the median voting block in accomplishing their short-term goal of reelection, the amount of popular and electoral votes won during the election may affect levels of partisanship during their first term. In other words, a landslide election can insinuate to presidents that they have a national mandate to influence federal court policies, regardless of how partisan they are in the process. As a result, the higher the amount of electoral and popular votes garnered during their first election, the more partisan presidents are in their nomination of federal judges.

Finally, presidents during either their first or second term maximize their short and long-term utility by nominating individuals who are confirmed, and not rejected the U.S. Senate. Usually, votes against confirming a particular nominee come from senators whom are members of the opposing political party. When nominees get barraged and weighted down in lengthy confirmation hearings Presidents are hindered to further influence policies over the long term, and receive negative media overage that weakens their standing in public opinion polls. Therefore, the more average number of seats controlled by the President’s party during an administration, the more partisan presidents are in nominating federal judges.

Using Linear Regression to Measure Causal Relationships

Both the dependent and independent variables used are all ratio variables, revealing the exact distance between two or more quantities. In the data found in Table One, the dependent variable (partisanship) is tabulated and listed for 17 presidential administrations (Evans 334-335, Carp and Stidham 90). Following the dependent variable are the values for five independent variables; length of time in office (in years), number
of federal judiciary vacancies filled, percentage of popular votes won during the election, number of electoral votes won during the election, and the average number of Senate seats held by the President’s party during his administration (squire et al. 539-543, Evans 334-335, Carp and Stidham 90).

Table One

<table>
<thead>
<tr>
<th>NOMINATE</th>
<th>PARTY IDENTIFED</th>
<th>JUDICIAL IDENTIFED</th>
<th>POPULAR VOTES</th>
<th>HANSEN</th>
<th>SENATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cleveland</td>
<td>1.00 97.3</td>
<td>6 41</td>
<td>48 48.5</td>
<td>218</td>
<td>38.8</td>
</tr>
<tr>
<td>Harrison</td>
<td>2.00 97.9</td>
<td>4 45</td>
<td>56 67.9</td>
<td>338</td>
<td>49.0</td>
</tr>
<tr>
<td>McKinley</td>
<td>2.00 95.5</td>
<td>4 35</td>
<td>54 59.8</td>
<td>271</td>
<td>45.1</td>
</tr>
<tr>
<td>T. Roosevelt</td>
<td>2.00 95.8</td>
<td>6 74</td>
<td>41 56.4</td>
<td>336</td>
<td>50.0</td>
</tr>
<tr>
<td>Taft</td>
<td>2.00 92.2</td>
<td>4 60</td>
<td>52 51.6</td>
<td>324</td>
<td>56.0</td>
</tr>
<tr>
<td>Wilson</td>
<td>1.00 94.8</td>
<td>6 91</td>
<td>50 41.9</td>
<td>458</td>
<td>62.0</td>
</tr>
<tr>
<td>Harding</td>
<td>2.00 97.7</td>
<td>2 92</td>
<td>58 61.0</td>
<td>406</td>
<td>59.0</td>
</tr>
<tr>
<td>Coolidge</td>
<td>2.00 94.1</td>
<td>6 78</td>
<td>51 54.1</td>
<td>380</td>
<td>61.0</td>
</tr>
<tr>
<td>Hoover</td>
<td>2.00 85.5</td>
<td>4 62</td>
<td>55 58.3</td>
<td>444</td>
<td>53.0</td>
</tr>
<tr>
<td>F. Roosevelt</td>
<td>1.00 94.4</td>
<td>2 184</td>
<td>51 47.4</td>
<td>475</td>
<td>60.0</td>
</tr>
<tr>
<td>Truman</td>
<td>1.00 90.1</td>
<td>8 131</td>
<td>61 49.5</td>
<td>383</td>
<td>51.3</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>3.00 94.1</td>
<td>6 101</td>
<td>53 55.2</td>
<td>440</td>
<td>44.3</td>
</tr>
<tr>
<td>Kennedy</td>
<td>1.00 99.8</td>
<td>2 123</td>
<td>44 69.9</td>
<td>103</td>
<td>67.0</td>
</tr>
<tr>
<td>Johnson</td>
<td>1.00 99.2</td>
<td>6 187</td>
<td>59 61.1</td>
<td>486</td>
<td>66.0</td>
</tr>
<tr>
<td>Nixon</td>
<td>2.00 95.7</td>
<td>5 230</td>
<td>56 63.4</td>
<td>301</td>
<td>41.0</td>
</tr>
<tr>
<td>Ford</td>
<td>2.00 97.0</td>
<td>3 62</td>
<td>61 44.4</td>
<td>444</td>
<td>44.3</td>
</tr>
<tr>
<td>Carter</td>
<td>1.00 24.7</td>
<td>4 56</td>
<td>53 50.1</td>
<td>297</td>
<td>63.0</td>
</tr>
</tbody>
</table>

The first hypothesis claims that the longer a President remains in office, the more partisan he is in nominating federal court judges. Second, the more opportunities that a President has to fill federal court vacancies, the more partisan he is in nominating judges. Third, the higher the percentage of popular votes garnered during the election, the more partisan a President is in nominating judges. Finally, the higher the average number of Senate seats controlled by the President’s party during his administration, the more partisan he is in the nomination process.

I will use a stepwise linear regression analysis to test the effect of each independent variable on partisanship in judicial nominations. Stepwise linear regression produces significance and strength of association values for only those variable(s)
correlated with the dependent variable, listing each in decreasing order by strength of association.

Ultimately, the validity of each hypothesis depends upon measures of significance produced by a stepwise regression test. First, the adjusted r-square value is a percentage that calculates how much of the variation in the dependent variable is explained by the independent variables (Babbie, Halley, Zaino 282). For example, an adjusted r-square value of .125 means that 12.5% of the dependent variable’s change is being explained by the independent variables. As a result, the closer this value is to 1.000, the greater the causal relationship between the dependent and independent variables.

Second, the t-value in regression analysis is used to determine the likelihood that a particular correlation is statistically significant (George and Mallery 362). According to this value, the relationship between an independent and dependent variable is significant if the t-value is greater than 2. Hence, I expect to have a t-value of more than 2 for each independent variable.

Third, the standardized beta coefficient reveals both the strength and direction of the relationship between two variables (George and Mallery 353). This value ranges from between +1 and -1. The closer the value is to either +1 or -1, the stronger the relationship between variables. The sign preceding the number indicates whether it is a positive or negative relationship.

Finally, the significance, or probability value, measures the likelihood that a given relationship could have occurred by chance (George and Mallery 360). This value ranges from .000 to 1.000. Most researchers state that in order for a relationship to be statistically significant, there must be a significance value of less than .05, or less than a five percent likelihood that the observed outcome occurred by chance.

**One Out of Six**

The only hypothesis that proved to be statistically significant was the first one, which started that the longer a President remains in office, the more partisan he is in his nomination of federal court judges. After running linear regression analysis for this hypothesis, an adjusted r-square value of .125 emerged. In other words, according to this value 12.5% of the variation in the dependent variable (partisanship) is explained by how
long a President remains in office. While this value appears small, failing to explain 87.5% of the dependent variable’s change, it was the highest r-square value recorded for any hypothesis.

Meanwhile a t-value of 3.164 suggests that there is a strong likelihood the relationship between partisanship and length of administration is statistically significant. The standardize beta coefficient was .373, indicating a positive relationship of moderately weak strength between the dependent and independent variable. Finally, a significance value of .002 indicates that there is a very miniscule chance—.02% or one in five hundred—that the given outcome between both variables occurred by random chance. The second hypothesis, which argued that the more opportunities a President has to fill federal court vacancies, the more partisan he is had a T-Value of .639, clearly below the standard for a statistically significant argument. The standardized beta coefficient of .077 indicates a very weak, positive relationship. The standardized beta coefficient of .077 indicates a very weak, positive relationship between the dependent and independent variable. Finally, a significance value of .526 means that there is a 52.6% chance that the outcome between both variables happened by chance. A scatter plot this relationship is found in Graph Two below:

The third hypothesis suggests that the more popular votes a President won during the election, the more partisan he is in nominating federal court judges. This invalid hypothesis had a t-value of .257, indicating little likelihood a statistically significant relationship existed between variables. Meanwhile, a beta coefficient of -.031 means that a very weak, negative relationship exists. As for the relationship’s statistical significance, a value of .798 indicates that there is a high likelihood this already weak
relationship occurred by chance. A best-fit line graph of this relationship is displayed in Graph Three on the following page:

The fourth hypothesis, an extension of the previous one, contended that the more electoral votes won by a President during the election, the more partisan he is in nominating judges. This hypothesis exuded on of the two weakest relationships, with a t-value of .196, a beta coefficient of .025, and a significance of .845. An Excel Spreadsheet graph of this relationship is displayed in Graph Four on the next page:

Meanwhile, the weakest of all relationships occurred in the fifth hypothesis, which claimed that the more average member of U.S. Senate seats controlled by the President’s party, the more partisan the President is in nominating federal court judges. This final relationship had a t-value of -.093, a beta coefficient of -.011 and a very high significance value of .926. This last value suggests that there is an almost 100% likelihood the observed outcome between both variables occurred by chance. A best-fit line graph of this relationship is displayed in Graph Five on the following page:
So What?

Why are some President more partisan than others in nominating federal court judges? Five independent variables were tested in an attempt to answer this question, generating five hypotheses. After running stepwise linear regression analysis on all of these variables, the first hypothesis emerged as the only valid hypothesis. Again, this hypothesis argued that the longer administration remained in office, the more partisan the President is in nominating federal court judges. The t values, standardized beta coefficients and significance values of the four other relationships tested proved that they all were invalid.

This result appears to validate the concept of presidents as rational actors in the nomination of federal judges, balancing their desire to influence public policymaking with the more immediate concern to win reelection. This presidential rationality is not affected by the number of popular or elector votes won by a President during the election, which insinuates that Chief Executives do not feel validated to leave their imprint on the federal judiciary merely because of a comfortable victory margin. Here, presidents realize that it is impossible to claim a mandate to rule based upon a national election, where a variety way for a variety of reasons. Ultimately, this fact dissuades presidents from basing their reelection chances on a constantly fluctuating, fickle voting population.

Surprisingly, Senate make-up also does not have a statistically significant effect on the nominating calculus of presidents, in spite of the fact that the power to reject candidates and threaten a President’s short and long-term interest rests in the hands of senators. On the other hand, this reality does bolster the unwritten notion of senatorial deference to a President’s nomination preferences. The logic behind this informal political rule was seen recently during then-Senator John Ashcroft’s confirmation
hearings for Attorney General. While numerous Senate Democrats found fault in Ashcroft’s public actions as a senator, Republicans countered that it is tradition for senators to allow the President to carry out the legislative agenda and policies he was elected on. This same reasoning might be the primary reason why senators give deference to judicial nominees as well.

However, it is still unclear why presidential partisanship did not increase as the number of opportunities to nominate federal judges increased as well. The number of vacancies that a President must fill should, in general, increase with the number of years a President is in office. One possible explanation for disproving this hypothesis is that, in the 17 administrations examined, a higher percentage of vacancies on the federal bench occurred during a President’s first term as opposed to second term.

While the first hypothesis is valid, explaining 12.5% of the variation in the dependent variable, the remaining 87.5% of variation in partisanship remains unexplained. While there could be other independent variables explaining this variation that were not found and tested, this remaining variance might also be the result of systemic randomness suggested by the Systemic Model. However, since presidents are long-term objective, the Rational Actor Model suggests that this variance be explained by the identification of other independent variables through further testing. In the end, one future challenge to improving the validity of this paper’s conclusions would be to identify these variables, as well as increase the number of actual cases, or administrations used to generate findings.

References:


Babbie, Earl, Red Halley, and Jeannie Zaino. Adventures in Social Research: Data
Analysis Using SPSS for Windows 95/98.

Carp, Robert A. and Ronald Stidham. The Federal

Richardson, Richard J., and Kenneth N. Vines. The

Ball, Howard. Courts and Politics: The Federal
