

## PARTISAN POLITICS

### The Impact of Party in the Confirmation of Minority and Female Federal Court Nominees

*Lisa A. Solowiej, Wendy L. Martinek and Thomas L. Brunell*

#### ABSTRACT

Only a few studies of the lower federal court confirmation process consider the role of the race/gender of nominees in that process and none consider the intersection of party politics with those characteristics. We address this deficiency, arguing that the different electoral incentive structures of the two major parties have consequences for the treatment of minority and female nominees. The levels of minority and female support enjoyed by the Democratic Party, as well as the Republican Party's desire to shed its reputation as being insensitive to issues of importance to those constituencies, lead us to expect that the nominations of minorities and women will be handled most expeditiously under conditions of unified Republican control, followed by unified Democratic control, divided control with a Republican president and divided control with a Democratic president. Our empirical analysis provides partial support for this hierarchy and demonstrates the importance of considering the conditioning effect of partisan politics.

KEY WORDS ■ gender ■ judicial selection ■ partisan incentives ■ race

#### Introduction

Peltason's observation that 'the decision as to who will make the decisions affects what decisions will be made' (1955: 29) brings the practical consequences of representation into sharp focus. One key dimension of representation is the extent to which representatives and those they represent share similar backgrounds – what Pitkin (1967) refers to as descriptive representation.<sup>1</sup> Students of the courts have devoted considerable resources to understanding descriptive representation on the bench, as evidenced by the voluminous literature regarding the juxtaposition of race and gender

and the judiciary.<sup>2</sup> Recent political controversy and media attention has centered on the effects of the race and gender of nominees to the lower federal bench on the senatorial confirmation process. Surprisingly, while scholarly studies of the lower federal court confirmation process now constitute a veritable cottage industry, very few have explicitly considered the role of the race and gender of nominees (Bell, 2002a; Hartley, 2001; Martinek et al., 2002; Nixon and Goss, 2001) and none have considered these characteristics in light of the different incentive structures the two major American political parties face.

Understanding virtually any aspect of the legislative process in the US Congress, including senatorial confirmation, requires understanding the fundamental role parties play in the structure, activity and outcomes of that body. A key component of such an understanding is the idea that the two major parties have different constituents. Both parties are likely to pursue policies that please their respective traditional groups of supporters (e.g. Hibbs, 1977), but differences between those groups of supporters result in policy disagreement. The parties have differing electoral incentive structures and those differences are consequential for legislative behavior. One important cleavage is the differential advantage in minority – and, to a lesser extent, women’s – support enjoyed by the Democratic Party (Bibby, 2000; Carmines and Stimson, 1989; Chaney et al., 1998; Mueller, 1988). Past scholarship suggests that this cleavage translates into greater support on the part of Democratic legislators for issue positions favored by minorities and women, *ceteris paribus* (Black, 1979; Robinson, 1982). Undoubtedly, issues of racial and gender diversification in institutions of political power – such as the federal courts – fall under this rubric.

Democrats are not alone in their desire to attract electoral support from minorities and women. Republicans are eager to cultivate these increasingly important groups of voters and, whether due to electoral calculations or commitment to principles of equality, are loathe to appear obstructionist in their treatment of minority and female nominees to the federal bench. Republican senators may be especially sensitive on this point given historical perceptions of the Republican Party as less congenial to issues of concern to minorities and women. This concern could lead to even more expeditious handling of minority and female nominees by a Republican-controlled Senate during unified government, when the minority and female nominees nominated by the president are likely to be agreeable to Republican senators. However, Democrats arguably remain more committed to policies aimed at diversifying the bench than Republicans. This may make it more difficult for Democratic senators to oppose minorities and women when they are nominated by Republicans than for Republican senators to oppose such nominees put forth by Democrats. We hypothesize that unified Republican control is likely to be the most advantageous for the processing of non-traditional (minority, female) nominees, while divided control under a Democratic president is likely to be the least hospitable in terms of senatorial treatment.

In this article, we investigate the notion of partisan incentives as structuring the handling of minorities and women to the lower federal bench. We hope to make sense out of the contradictory findings in the limited existing literature on race and gender in the lower federal court confirmation process. We proceed with a brief overview of the relevant literature on confirmation politics, paying particular attention to what that literature says (or does not say) about the role of race, gender and party. We then turn to developing a theory of partisan incentives with regard to race and gender in the confirmation process. Next, we subject this theory to empirical verification using nominations to Article III district and circuit court vacancies from 1977 through 2000. Commencing this study with 1977 (the beginning of Carter's presidency) is particularly apt given that Carter took an avowedly proactive stance with regard to diversifying the federal bench (Goldman, 1997: 236–60, 269–74), which changed the shape of confirmation politics and made racial and gender considerations of perennial concern. We conclude with some thoughts regarding the import of these findings for the role of race and gender in judicial selection and the impact of party politics more broadly.

### Judicial Selection, Race, Gender and Party

While studies of Supreme Court nomination politics remain important given the Supreme Court's role in the judicial hierarchy,<sup>3</sup> academics and the public alike have come to realize that 'the lesser attention devoted to appeals and district court nominees belies the importance of these courts. For the vast majority of litigants in the federal judicial system, these courts effectively have the final say' (Martinek et al., 2002: 337). In the academic community this realization spawned a surfeit of recent scholarship focusing on confirmation politics at the lower federal court level (Bell, 2002a, b; Binder and Maltzman, 2002; Hartley, 2001; Hartley and Holmes, 1997, 2002; Martinek et al., 2002; Massie et al., 2004; Nixon and Goss, 2001).<sup>4</sup> This scholarship was spurred further by the increase in the contentiousness surrounding contemporary confirmation politics and the excruciatingly slow pace at which vacancies on the federal bench have been filled (cf. American Bar Association, 1997; Citizens for Independent Courts, 2000).

Common to virtually all of this recent work is an understanding that a focus on outcomes – that is, whether or not nominees are ultimately confirmed to the bench – is much too simplistic and obscures important features of confirmation politics. Indeed, while rates of confirmation have been stable and high, the length of time it takes nominees to be confirmed has increased (Citizens for Independent Courts, 2000). This is important because, in legislative politics, delay can often be tantamount to defeat (Calvert and Fenno, 1994; McCarty and Razaghian, 1999: 1124). This is especially true with regard to confirmation politics, since pending nominations expire

when Congress adjourns *sine die*. A more substantively informative focus is on the confirmation process, which scholars have turned to by examining explanations for the length of delay, typically focused on the time elapsed from nomination to confirmation (or final congressional action for unsuccessful nominees).<sup>5</sup>

While scholars modeling the confirmation process have considered a range of factors, few examine the race and gender of nominees (Bell, 2002a; Hartley, 2001; Martinek et al., 2002; Nixon and Goss, 2001) and the limited empirical evidence has been inconsistent. Bell (2002a) finds both race and gender to matter. In each case, the processing of such nominations took longer, though the effect for women holds only during divided government. Nixon and Goss (2001) also find that minority and female nominees are subject to longer confirmation processes, though they only look at vacancies on the US Courts of Appeals.<sup>6</sup> Hartley (2001), however, finds no evidence that minorities face greater delays than their non-minority counterparts, and only minor evidence to suggest that women nominees fare worse than male nominees. Finally, Martinek et al. (2002), examining both district and circuit court nominations, find race to matter sometimes and gender to matter not at all.

These contradictory empirical findings are empirically perplexing and normatively vexing. The central role of representation in democratic theory and the presumed translation of descriptive into substantive representation suggest that it is of the essence to understand what role, if any, race and gender play in the process by which the federal bench is staffed. Even setting aside any posited relationship between descriptive and substantive representation (Bratton and Haynie, 1999; Krislov, 1974; Mansbridge, 1999), the influence descriptive representation has on perceptions of the institutional legitimacy of courts remains. 'Participation of this variety [that is, descriptive representation] has a positive legitimizing effect on the functioning of democracy. It reflects a degree of openness in the political process' (Walker and Barrow, 1985: 597).

Media accounts have served to bring the issue of race and gender in that process to the fore of public and political debate. Most notably, the failures of Helene N. White (a nominee for a seat on the 6th circuit) and Ronnie White (a nominee to fill a district court vacancy) to secure confirmation resulted in a firestorm of criticism and, in the eyes of senatorial critics, illustrated the discrimination with which women and minorities contend when nominated for a seat on the federal bench.<sup>7</sup> Even a casual perusal of more recent media accounts of confirmation politics finds the issues of race and gender front and center.<sup>8</sup>

The conflicting results as to the effect of race and gender on confirmation politics do not present merely a scholarly conundrum. Their resolution requires a careful consideration of how the effects of race and gender may be conditioned by partisan incentives. The Republican and Democratic parties are fundamentally different in terms of their constituents and, hence,

their policy agendas (Berelson et al., 1954; Huckfeldt and Kohfeld, 1989). Generally speaking, Republicans and Democrats have the support of different groups within society, which is almost certainly rooted in common orientations to candidates and issues (Beck and Sorauf, 1992). Furthermore, parties tend to divide voters along socio-economic status, as well as urban–rural lines, by developing economic policies that reflect cleavages within society (Hibbs, 1977).

The electoral cleavages upon which the two major American parties rest include a racial division. Specifically, since the 1964 election between Goldwater and Johnson, when the issue of civil rights was prominent on the American political stage, Democrats have enjoyed the support of the vast majority of African Americans due to their close association with issues of importance to the African American community. In particular, it is the party that is traditionally seen as seeking to advance racial equality and integration (Beck and Sorauf, 1992). And, in fact, when Ronald Reagan won the presidency in 1984, in the aggregate he enjoyed a landslide, but received only 9 percent of the African American vote (Bibby, 2000). Even though other minority groups, such as Latinos and Asians, are not overwhelmingly Democratic, they do tend to support Democrats more so than Republicans (Bibby, 2000).

There are also partisan differences related to gender. Women became increasingly more likely to vote for Democrats than men in the 1980s (Bibby, 2000). Bibby attributes this to the new problems encountered by females since the 1960s, such as the increase in single-parent, female-headed households. Other scholars argue that the gender gap is a product of changes in partisan preferences among males rather than the result of women voting for Democratic candidates (Norrander, 1999). Whatever the cause of the so-called ‘gender gap’ (Weisburg, 1987), the Democratic Party does enjoy greater support among women and is perceived as being more supportive of women’s issues.

Considered collectively, these electoral differences suggest a differential advantage for the Republican Party in confirming non-traditional nominees, contingent on the *configuration* of partisan control of the presidency and the Senate. The nomination of a non-traditional nominee by a Republican president and the prompt handling of such a nominee by a Republican-controlled Senate is likely to have greater symbolic meaning and, therefore, greater potential beneficial effect for the Republican Party than for the Democratic Party in the case of unified government under Democratic control. Furthermore, while a non-traditional nominee will likely fare worse under divided government (regardless of party control), the traditional sources of support from which the Democratic Party draws (including women and minorities) make it difficult for a Democratically-controlled Senate to oppose a woman or minority to the federal bench made by a Republican president – even if the candidate is a conservative. Given the traditional sources of support for the Republican Party, though, a Republican-controlled Senate faces no such

constraints when a Democratic president nominates a non-traditional nominee. In short, there is an asymmetry in the incentives for a Republican Senate versus a Democratic Senate to process the nominations of women and minorities expeditiously.

This is not to say that nominees to the lower federal bench are exclusively or even primarily chosen on the basis of their electoral or symbolic value. The available evidence clearly demonstrates that both presidents and senators care about what individuals will do once on the federal bench (e.g. Giles et al., 2001), though there is variation across presidents as to the weight they place on policy concerns, relative to other factors (Goldman, 1997). The non-traditional Republican nominees will be much more conservative than those nominated by Democrats. Democrats will thus be caught between the Scylla of treating conservative nominees favorably and the Charybdis of treating non-traditional nominees unfavorably, regardless of whether they find themselves in that position because Republicans selected nominees for their electoral or symbolic value or as an incidental consequence of an ideologically motivated selection strategy on the part of Republicans.<sup>9</sup>

When we examine senatorial processing times for minorities and women under divided and unified government, we find preliminary empirical support for this supposition. Minority nominees are processed most quickly under unified Republican control, followed by unified Democratic control, divided control under a Republican president, and, finally, divided control under a Democratic president (see Table 1). Likewise Table 2, which reports the average confirmation duration for female nominees, lends evidence to

**Table 1.** Confirmation duration by minority status and divided government control

<i>Partisan control</i>	<i>Minority</i>	<i>Non-minority</i>
Unified Republican control	35 days (18)	28 days (272)
Unified Democratic control	58 days (98)	51 days (286)
Divided control – Republican president	63 days (26)	68 days (247)
Divided control – Democratic president	112 days (49)	98 days (195)

Cell entries are the number of days from nomination to confirmation less recess dates with the number of nominations appearing in parentheses.

**Table 2.** Confirmation duration by gender and divided government control

<i>Partisan control</i>	<i>Women</i>	<i>Men</i>
Unified Republican control	26 days (24)	29 days (266)
Unified Democratic control	53 days (80)	52 days (304)
Divided control – Republican president	76 days (40)	66 days (233)
Divided control – Democratic president	120 days (69)	93 days (175)

Cell entries are the number of days from nomination to confirmation less recess dates with the number of nominations appearing in parentheses.

support our theorized relationship between race and gender, on the one hand, and partisan control of government, on the other. Of course, Tables 1 and 2 do not control for other potential explanations, such as the quality of the nominee. In the next section we more rigorously test our theory regarding the juxtaposition of race and gender with party in the lower federal court confirmation process.

### Empirical Hypotheses

Our theoretical grounding lies in the respective parties' membership and traditional policy positions. This leads us to propose a hierarchy of divided and unified government influences, which differentiates between the types or varieties of divided and unified government:

H1: Minority nominees will experience the shortest processing times under unified Republican control, followed by unified Democratic control, divided control with a Republican president and divided control with a Democratic president.

H2: Female nominees will experience the shortest processing times under unified Republican control, followed by unified Democratic control, divided control with a Republican president and divided control with a Democratic president.

We would be remiss to suggest that these are the only factors likely to account for differences in duration of the confirmation process. One obvious factor to be considered is the qualifications of a nominee. Although there is no uniformly accepted measure of nominee quality, the American Bar Association's (ABA) rating is one especially attractive candidate. The ABA's involvement in the process has not been free of criticism. Despite the previous norm, president George W. Bush ended the practice of informing the ABA of the identity of nominees prior to their nomination. Nonetheless, the ABA continues to vet nominees, even though the process now begins once the president nominates an individual.<sup>10</sup> Further, for the time period under consideration here (1977–2000), presidential practice with regard to ABA involvement was consistent. Past research has demonstrated an empirical link between candidate quality as measured via ABA ratings and senatorial processing of nominees to the lower federal bench (e.g. Allison, 1996; Martinek et al., 2002), suggesting that it is a measure with empirical validity. Accordingly, we specify the following hypothesis:

H3: Higher ABA ratings will be associated with faster processing times for nominations to the lower federal courts.

In addition to the characteristics of nominees, there is ample evidence to suggest that the legislative fortunes of presidents fare better or worse

depending upon how long the president in question has served in office (e.g. Bond and Fleisher, 1990). The most favorable treatment is generally during the ‘honeymoon’ period, the ‘customary first-year grace period during which serious criticism of the president is generally considered off-limits’ (Cronin, 1975: 42; see also Peterson, 1990). As the presidential term progresses, presidents can expect to see a decline in legislative support. For example, the phenomenon of midterm loss – in which the president’s party loses seats in midterm elections (Alesina and Rosenthal, 1995; Campbell, 1966; Grofman et al., 1998) – suggests that presidents will find it more difficult to secure favorable treatment during their third year in office, with even less favorable treatment likely when a president finds himself in his fourth year (i.e. when the president is potentially a lame duck). Accordingly, we hypothesize:

H4: The further along a president is in his term of office, the slower the expected processing times for nominations to the lower federal courts.

Scholars have also devoted considerable attention to investigating the connection between presidential approval and presidential success in the legislature. Presidential approval is something presidents can draw on to realize their legislative goals (Kernell, 1986; Neustadt, 1960), whether those goals are the passage of legislation (Edwards, 1980) or securing confirmation of nominees (Krutz et al., 1998). While evidence of the connection between presidential approval and desired outcomes is mixed (Canes-Wrone and de Marchi, 2002; but see Yates, 2003), there is at least some support for the idea that presidential approval plays a role in senatorial treatment of nominees (Martinek et al., 2002), leading us to hypothesize:

H5: The higher a nominating president’s approval ratings, the faster the expected processing times for nominations to the lower federal courts.

Additionally, there are two court-related control variables essential for the construction of any model of the lower federal court confirmation process: senatorial courtesy and the type of court for which a nomination is made. ‘In its narrowest and most exact sense, “senatorial courtesy” requires that the body of senators be guided in its action on a nomination by the attitudes of the senators from the state immediately affected by such nomination’ (Cole, 1937: 1113). Practically, this means that presidents consult with home state senators in the selection of nominees to the district court bench – and, to a lesser extent, the appeals court bench (Chase, 1972; Goldman, 1967: 186–214; Hartley and Holmes, 2002):

Senatorial courtesy . . . may either benefit or adversely affect a nominee . . . depending on the party affiliation of the home-state senators, and the congruence of the party affiliations between the home-state senators and the President.

(Bell, 2002a: 594)

The president is advantaged when both home state senators are members of the presidential party. On the other hand, the president is disadvantaged

when both home state senators are members of the opposition party. Alternatively, when the nomination is for a vacancy on the appeals courts or partisanship of the home state senators is split between the parties, the effect of senatorial courtesy is apt to be less decisive. In the former case, this is likely to be true since circuits cover multiple states; in the latter case, this is probable since the two home state senators are likely to have different preferences in terms of the ideal candidate. These considerations lead to the following hypothesis:

H6: Nominations for a district court vacancy in which both home state senators are of the president's party should experience faster confirmation processing times, while nominations for a district court vacancy in which there is a partisan split between the home state senators should experience slower confirmation processing times.

Finally, we consider the effect of the type of court for which a nomination is made. 'Having a wider jurisdiction than the district courts and positioned above the district courts in the judicial hierarchy, circuit court judges hold a more powerful position than district court judges' (Allison, 1996: 9). Consequently:

H7: Nominations for a district court vacancy should experience faster confirmation processing times than nominations for a circuit court vacancy.<sup>11</sup>

In the following section, we gather these hypotheses into an integrated model of the lower federal court confirmation process and examine its utility from an empirical perspective.

## Data, Method and Results

To subject the model we have devised to empirical testing, and assess the utility of our theory regarding the race/gender of nominees and partisan control of government, we use nominations to Article III district and circuit court vacancies from the start of 1977 through the end of 2000.<sup>12</sup> As noted, this is an especially appropriate time frame with which to investigate the effect of the race and gender of nominees on the Senate's handling of nominations to the lower federal bench. While the lower federal court confirmation process began to undergo a significant shift, beginning in the 1960s, which led to greater politicization of the process (Bell, 2002b), heightened attention to issues of race and gender came only with the advent of the Carter presidency. Carter demonstrated a commitment to diversifying the lower federal courts that changed the confirmation process by placing the race and gender of nominees in the foreground of the process (cf. Goldman, 1997; Hartley and Holmes, 2002).

To examine the effects of race and gender, we include a series of dummy

variables. One set of dummy variables consists of four variables indicating whether the nomination is of a woman under each combination of unified and divided government: woman nominated under unified Republican control, woman nominated under unified Democratic control, woman nominated under divided Republican control (i.e. Republican president facing a Democratic Senate), and woman nominated under divided Democratic control (i.e. Democratic president facing a Republican Senate). A parallel set indicates whether the nomination is of a minority under each of these same possible combinations. Finally, we include one dummy variable indicating if the nomination is of a man under unified Republican control and another indicating if it is of a man under unified Democratic control. Based on the inclusion of the entire set of dummy variables related to race and gender, the comparison category, by default, is to white men under either of the partisan conditions of divided government.<sup>13</sup>

The variable for ABA rating is adopted from Martinek et al. (2002) as follows: 1 = not qualified, 2 = qualified/not qualified, 3 = qualified, 4 = qualified/well qualified, 5 = well qualified/qualified, 6 = well qualified or better. The year of the presidential term is measured as a series of three dummy variables corresponding to the second, third and fourth years of the presidential term (coded 1 if the nomination was made in that year or 0 otherwise), with the excluded category being the first year of a presidential term. Presidential approval is measured based on the month the nomination is made, with 0 indicating lowest approval and 100 indicating highest approval. Senatorial courtesy is measured as a trichotomy in which 1 indicates that the nomination is for a district court vacancy and neither home state senator is of the president's party, 2 indicates that the nomination is for either an appeals court vacancy or a district court vacancy in which the partisanship of the home state senators is split, and 3 indicates that the nomination is for a district court vacancy and both senators are of the president's party.<sup>14</sup> We also include an indicator for whether or not the nomination was for an appeals court vacancy, coded as 1 if that was the case and 0 otherwise. Finally, we include a dummy variable representing President Clinton's nominations, to control for the unusually conflictual nature of his nominations.<sup>15</sup>

Our substantive interest is in senatorial processing time for nominations made to the lower federal bench, i.e. confirmation duration.<sup>16</sup> As it is the most appropriate method, we employ the Cox Proportional Hazards model here.<sup>17</sup> The dependent variable is the hazard rate, with parameter estimates greater than 1 indicating a positive effect on the hazard rate and, accordingly, a shorter duration (i.e. faster processing by the Senate). Parameter estimates less than 1 indicate a negative relationship with the hazard rate and, hence, longer expected senatorial processing times. The hazard rate for the Cox Proportional Hazards model is as follows:

$$h(t|X_i) = h_0(t)\exp(X_iB)$$

where  $h_0(t)$  represents the baseline hazard function and  $X_i\beta$  the effect of the independent variables on the risk of experiencing an event (in this case, confirmation).

The parameter estimates (as well as their standard errors and  $p$ -values) for our model are reported in Table 3.<sup>18</sup> Additionally, Table 3 reports the percentage change in the hazard rate associated with changes in each of the independent variables that achieve statistical significance.<sup>19</sup> Substantively, higher percentage changes translate into faster processing times. Conditions of unified government do result in faster processing times in the Senate for men, as evidenced by the estimated hazard ratios greater than 1 corresponding to the indicator variables for men nominated under both unified Democratic and Republican control. However, the parameter estimate associated with unified Republican control is much greater in magnitude than that for unified Democratic control. Whereas unified Republican control results in an increase in the hazard rate of 447.3 percent (i.e. over a fourfold increase in the instantaneous likelihood of confirmation compared to men nominated under divided government), unified Democratic control results in a much smaller percent change of 131.8. This result can be explained as a consequence of the homogeneity of the Republican Party within Congress, as compared to that of the Democratic Party (Fleisher and Bond, 2000; Grofman et al., 1999; Merrill et al., 1999). Clearly, the more ideologically homogeneous a party, the more quickly members of that party can be expected to be able to come to a consensus.

With regard to the parameter estimates corresponding to women nominated under each of the four conditions of governmental control (e.g. unified Republican, unified Democratic, etc.), the pattern of effects comports with our hypothesized hierarchy. Women under conditions of both unified Republican and unified Democratic control are advantaged compared to their male counterparts under divided control. That is not surprising, of course, given the expected effect of divided and unified government in and of itself, but the magnitude of the effect for unified Republican control is much greater than that for the effect of unified Democratic control; a percentage change in the hazard rate of 646 in the former case compared to 195.9 in the latter. This finding no doubt reflects the likelihood that Republican presidents put up conservative female nominees who can easily be confirmed when Republicans also control Congress. Of further interest is the fact that the parameter estimate associated with divided Republican control (i.e. Republican president, Democratic Senate) demonstrates that women nominated under this condition are treated no differently from men nominated under any variant of divided control. Women nominated by a Democratic president facing a Republican-controlled Senate are disadvantaged relative to men nominated under conditions of divided government. In short, under conditions of divided government, women are better off when nominated by a Republican president than when nominated by a Democratic president.

Table 3. Cox Proportional Hazards model of confirmation duration

<i>Variable</i>	<i>Hazard ratio</i>	<i>Robust S.E.</i>	<i>p-value</i>	<i>% Δ in hazard rate<sup>a</sup> (lower bound, upper bound)<sup>b</sup></i>
<b>Men</b>				
Unified Republican control	5.47	0.690	0.000	+447.3 (+396.8, +502.9)
Unified Democratic control	2.32	0.266	0.000	+131.8 (+100.4, +168.2)
<b>Women</b>				
Unified Republican control	7.46	1.859	0.000	+646.0 (+473.8, +869.8)
Unified Democratic control	2.52	0.319	0.000	+195.9 (+113.9, +195.9)
Divided Republican control	1.15	0.180	0.192	-
Divided Democratic control	0.81	0.118	0.079	-18.5 (-25.6, -10.9)
<b>Minorities</b>				
Unified Republican control	0.48	0.188	0.031	-51.7 (-68.9, -25.0)
Unified Democratic control	0.94	0.122	0.306	-
Divided Republican control	1.19	0.244	0.202	-
Divided Democratic control	0.80	0.132	0.091	-19.8 (-28.4, -10.0)
ABA rating	1.15	0.025	0.000	+32.2 (+27.8, +36.8)
<b>Year of presidential term</b>				
Second year	1.06	0.107	0.269	-
Third year	0.61	0.069	0.000	-38.8 (-45.2, -31.7)
Fourth year	0.53	0.071	0.000	-47.0 (-54.2, -38.7)
Presidential approval	1.00	0.004	0.247	-
Senatorial courtesy	1.08	0.053	0.062	+16.4 (+8.0, +25.5)
Appeals Court nomination	0.67	0.053	0.000	-33.4 (-34.3, -33.4)
Clinton nomination	0.55	0.052	0.000	-44.7 (-46.7, -42.5)

Log likelihood = -6531.73; chi-square = 620.46;  $p < 0.001$ ;  $N = 1288$ .

<sup>a</sup> For dichotomous variables, the percentage change in the hazard rate is calculated based on a change from 0 to 1; for ABA ratings, a change from a qualified to a well-qualified/qualified rating; for senatorial courtesy, a change from the situation in which neither home state senator is of the president's party to the situation in which both home state senators are of the president's party.

<sup>b</sup> 95 percent confidence interval (lower bound, upper bound).

The pattern for minority nominees is slightly more difficult to discern. Minorities under unified Republican control fare worse than minorities facing either type of divided government. This finding runs counter to our a priori expectations. However, careful consideration of the recent nomination of Miguel Estrada suggests a possible explanation. Estrada, nominated by Bush and facing a Republican Congress, was filibustered several times by Democrats seeking to postpone his confirmation because of their fear that he would be an extreme right-wing judge.<sup>20</sup> Thus, because of the institution of unlimited debate in the US Senate, when a candidate is perceived by the minority party as an extreme ideologue the minority party can block, or at least postpone, the confirmation vote. Additionally, minorities under unified Democratic control and divided control with a Republican president are treated no differently from men under divided government. But, minorities nominated by a Democratic president under conditions of divided government are disadvantaged relative to non-minority nominees under divided government. Collectively, the results with regard to minorities and partisan control provide only partial support for the hierarchy we articulated but it remains the case that minorities nominated under conditions of divided Democratic control receive less favorable treatment than non-minorities.

The results with regard to our control variables are largely as expected. Higher ABA ratings are associated with higher hazard rates, meaning faster senatorial processing times. Furthermore, while the effect of a nomination being made in year two of a presidential term is no different from being made in year one, presidential nominations face less expeditious processing in year three and fare even worse in year four. Presidential approval manifests no effect on processing time, which is perhaps not surprising given the largely mixed results in the extant literature. Senatorial courtesy has the expected effect, with district court nominees who share partisanship with both home state nominees favored in processing. Finally, appeals court nominations take longer in the confirmation process compared to those for vacancies on the district court, as do nominations made by President Clinton.

## Conclusion

Prompted by the conflicting empirical evidence regarding the influence of the race and gender of nominees to the lower federal court on the confirmation process, we set out to re-examine how these nominee characteristics might matter based on party politics and the electoral incentives facing each party. The conflicting evidence in the extant literature begs for resolution given the fractious political debate regarding confirmation politics, as well as the intense political controversy regarding the role of race and gender. This debate has taken on a special intensity in light of normative

concerns regarding the effect of descriptive representation on substantive representation as well as perceptions of institutional legitimacy. By examining the role of parties in confirmations, we have also sought to extend our understanding of party politics and electoral incentives in the legislative process more generally.

Specifically, we suggested that differences in the supporters of each of the two major American political parties, particularly the differential levels of support enjoyed by the Democratic Party from minorities and women as well as the Republican Party's desire to shed its reputation as being less sensitive to issues of importance to minorities and women, translates into different incentives for the handling of minority and female nominees. These incentives, however, are structured by conditions of unified versus divided government and partisan control of the Senate. We expected that the nominations of minorities and women would be handled most expeditiously under conditions of unified Republican control, followed by unified Democratic control, divided control with a Republican president, and, finally, divided control with a Democratic president. The results of our empirical tests suggest that, indeed, women are most advantaged under conditions of unified Republican control and most disadvantaged under conditions of divided control with a Democratic president. With regard to minorities, however, we found such nominees to be disadvantaged when nominated by a Democratic president facing a Republican-controlled Senate and even more disadvantaged when nominated under conditions of unified Republican control. Considered collectively, these findings provide strong support for the notion that the race and gender of nominees can have the potential to shape the confirmation process in important ways but that effect is, at least in part, a conditional one dependent upon partisan politics and partisan control of government.

While these are important findings in their own right for our understanding of the lower federal court confirmation process, they are also of interest in that they represent an important extension of work by scholars such as Hibbs (1977). Building on the observation that the two major parties enjoy different bases of support, Hibbs found that parties tend to divide voters along socio-economic status, as well as urban-rural lines, by developing economic policies that reflect cleavages within society. The investigation undertaken here provides evidence that these partisan differences based on electoral cleavages can have legislative consequences beyond the province of economic policy.

### Notes

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- 1 Descriptive representation occurs when the backgrounds of representatives reflect the backgrounds of the group they are representing. Substantive representation occurs when representatives, regardless of backgrounds, advance the interests of the group they are representing. Evidence is mixed as to whether the former is necessary for the latter (Bratton and Haynie, 1999; Krislov, 1974; Mansbridge, 1999; Rosenthal, 1995).
- 2 This literature has focused on: (1) the consequences of different methods of judicial selection for the racial and gender composition of the bench (Bratton and Spill, 2002; Gryski et al., 1994; Uhlman, 1977) and, (2) how the race and gender of judges affect judicial decision-making (Songer et al., 1994; Uhlman, 1978; Walker and Barrow, 1985).
- 3 Work on the Supreme Court-level confirmation process examines the politics of scandal (Cameron and Segal, 1999), the effect of institutional constraints on presidential choice (Moraski and Shipan, 1999) and the influence of partisan politics on confirmation delay (Shipan and Shannon, 2001).
- 4 Krutz et al. (1998) also consider senatorial processing of circuit court nominations but only as one of a set of 'important' presidential nominations.
- 5 Nixon and Goss (2001) and Massie et al. (2004) are exceptions. Nixon and Goss focus on the time between the initial vacancy and confirmation of a nominee to fill it. Massie et al. focus on the time between a vacancy and the president's nomination of a candidate.
- 6 Nixon and Goss, in choosing to measure delay as the time between vacancy and the ultimate confirmation of a nominee, argue that doing so is necessary because 'the total time a vacancy persists is the best and most encompassing measure of presidential-Senate appointment negotiation difficulties' (2001: 250). We see incorporating characteristics of the final (successful) nominee as explanatory factors as problematic because many vacancies require the nomination of more than one individual.
- 7 Charles Babington and Joan Biskupic, 'Senate Rejects Judicial Nominee', *The Washington Post*, 6 October 1999. Dee-Ann Durbin, 'Abraham Criticized for Stalling Judicial Nominations', *The Lansing State Journal*, 9 November 1999.
- 8 Media coverage of President Bush's nomination of Miguel Estrada to a vacancy on the United States Courts of Appeals has not focused on Estrada's status as a minority, at least in terms of linking that minority status to Democratic opposition. Instead, women's and minority groups, who would be expected to support minority nominees, have opposed Estrada's nomination. Helen Dewar, 'Bush's Use of Clout Intensifies Senate Split', *The Washington Post*, 2 March 2003.
- 9 Ideally, we would include a measure of the ideology of the nominee in the (unlikely) event that Republican- or Democratic-nominated non-traditional nominees differ in some systematic way from traditional nominees, but there is no measure of nominee ideology suitable for this analysis. The traditional measure is the party of the appointing president (cf. Goldman, 1966, 1967; Songer and Davis, 1990; Songer and Haire, 1992), but it would be entirely collinear with the set of permutations of divided and unified government.

- Another measure, developed by Giles et al. (2001), uses Keith Poole's (1998) NOMINATE score of the nominating president, and the relevant senatorial NOMINATE scores in the presence of senatorial courtesy. Unfortunately, this would also be a linear combination of the set of permutations of divided and unified government and the presence or absence of senatorial courtesy.
- 10 Jonathan Groner, 'White House, ABA Both Pleased with Ratings Policy', *Broward Daily Business Review*, 13 August 2002.
  - 11 We considered that the dynamics underlying district and circuit court confirmation processes might be different, as Martinek et al. (2002) suggest, though separate estimation results in inefficient parameter estimates. However, auxiliary analysis indicates that the pattern of effects is constant across courts.
  - 12 Article III judges serve 'during good behavior', which means a life term. Article III courts include Puerto Rico but not Guam, the Northern Mariana Islands or the Virgin Islands. The data come from Martinek (2001).
  - 13 The choice to distinguish between men nominated under different variants of unified government but not men under divided government is based on the homogeneity and cohesiveness of the two parties. The Republican Party is more ideologically homogeneous than the Democratic Party (Fleisher and Bond, 2001; Grofman et al., 1999; Merrill et al., 1999), and, the more alike the members of a party are, the more quickly they can agree upon a nomination, *ceteris paribus*.
  - 14 We tried different approaches to measuring senatorial courtesy, including treating the situation in which both home state senators are not of the president's party the same as if the home state senators were split or the nomination was for an appeals court vacancy and including a dummy only for the situation in which both home state senators are of the president's party. Regardless of the strategy we employed, the substantive results were virtually the same.
  - 15 We ran a series of auxiliary regressions to explore fixed effects across presidential administrations. The results of those regressions confirmed the conventional wisdom that the process Clinton nominees faced was qualitatively different from that faced by the nominees of the three preceding presidents, leading to our inclusion of a control variable for Clinton nominations.
  - 16 The majority of nominations that are unsuccessful fail *sine die* at the end of the term. Presidents can renominate unsuccessful nominees in the next congressional term. Including renominations as part of a single duration involves using explanatory variables that are not constant over the confirmation duration (i.e. time-varying covariates). We could treat these nominations as two separate, but non-independent, observations by including an indicator variable if the observation is a renomination (e.g. Martinek et al., 2001), but in the current analysis this results in a violation of the proportional hazards assumption (the ratio of any two individual hazard functions is unrelated to time) necessary for the Cox Proportional Hazards model (Box-Steffensmeier and Zorn, 2001). Thus, we only include the initial nomination in this analysis. Arguably, it is only the first nomination that is informative, since renominated nominees tend to secure confirmation quickly during the next congressional session and including the renomination as an additional observation would artificially decrease the average length of time non-traditional nominees take in the confirmation process.
  - 17 See Box-Steffensmeier and Jones (1997). For applications of the Cox Proportional Hazards model concerning confirmation politics, see Binder and Maltzman (2002) and Nixon and Goss (2001).

- 18 Not meeting the proportional hazards assumption results in biased and inefficient parameter estimates. Thus, we used the residual-based test implemented using the *stphtest* routine in Stata 7.0 to test that assumption, finding no evidence of a violation.
- 19 See Box-Steffensmeier et al. (1997: 332) and Box-Steffensmeier and Jones (1997: 1434). The percentage change in the hazard rate was calculated using the *adjust* routine in Stata 7.0.
- 20 John P. MacKenzie, 'Behind the Estrada Filibuster', *The Washington Post*, 20 March 2003. Cox News Service, 'Republicans Fail to Force Estrada Vote', *Houston Chronicle*, 19 March 2003. Associated Press, 'The Nation: Effort to Halt Senate Filibuster on Estrada Vote Fails Again', *The Los Angeles Times*, 19 March 2003.

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LISA A. SOLOWIEJ is a PhD candidate in the Department of Political Science at Binghamton University. Her research interests include legislative behavior and procedures, political parties and the effectiveness of interest groups. Her dissertation examines the relationship between the House and Senate in the conference committee. Her work has been published in *Political Research Quarterly*. She is a past recipient (with Paul M. Collins) of the 2003 Congressional Quarterly Press Award from the Law and Courts Section of the American Political Science Association. ADDRESS: Department of Political Science, Binghamton University, P.O. Box 6000, Binghamton, NY 13902–6000, USA. [email: lsolowie@binghamton.edu]

WENDY L. MARTINEK is an Assistant Professor in the Department of Political Science at Binghamton University. She studies judicial politics and behavior with a particular focus on judicial selection and decision-making on the Courts of Appeals. Her work has been published in the *American Journal of Political Science*, *American Politics Research*, *Journal of Politics*, *Justice System Journal* and *Social Science Quarterly*.

ADDRESS: Department of Political Science, Binghamton University, P.O. Box 6000, Binghamton, NY 13902-6000, USA. [email: martinek@binghamton.edu]

THOMAS L. BRUNELL is an Associate Professor of Government, Politics and Political Economy at the University of Texas at Dallas. He studies elections, political parties and electoral systems. His work has been published in the *American Political Science Review*, *Journal of Politics*, *Legislative Studies Quarterly* and *Party Politics*. ADDRESS: Department of Political Science, Northern Arizona University, Flagstaff, AZ 86001, USA. [email: tom.brunell@NAU.EDU]

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