

Advice and Consent Revisited: The 107th Senate and the Jeffords' Switch

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Abstract

McCarty and Razaghian (1999) have found that the more divided and polarized the executive and legislative branches were from 1885-1996, the more difficult it was for presidents to push domestic agency nominations through the Senate. This manuscript builds on that thesis by incorporating what they excluded—foreign policy-related nominations within the Departments of Defense and State—and furthermore by asking whether the same rules discovered in the domestic case apply to nominations within the foreign realm. I will test the hypothesis that the switch from unified to divided government during the 107th Senate increased the length of time required to confirm a presidential nominee. Using survival analysis and controlling for the September 11th attacks and the Jeffords' switch, I find that, unlike McCarty and Razaghian found, divided government does not seem to play a role in shaping the confirmation process, specifically the speed with which nominees are confirmed.

Introduction

In its interactions with other institutional powers within the American governmental system, the presidency is endowed constitutionally with an array of privileges, yet is simultaneously checked externally by those same actors. The president has the power to nominate whomever he or she wishes provided that nominee can win the approval of a majority of the Senate. However, this give and take between the executive and legislative branches over the politics of nominations is difficult to grasp simply because the president's over ninety percent success rate for confirmations makes examining the relationship more intricate (Krutz, Fleischer and Bond 1998).

Many studies throughout the literature have highlighted the presidency's constant battle with the Senate to win confirmation for their nominees to the federal bench (Binder and Maltzman 2002; Bell 2002), to the Supreme Court (Shipan and Shannon 2003), to the lower levels of the judiciary (Martinek, Kemper and Van Winkle 2002). Outside of nominations to the federal courts, McCarty and Razaghian (1999) Derouen, Peake and Ward (2005) focus on the nature of the relationship between the president and Congress—whether the two branches are divided along partisan lines and how polarized they are. They find that as the interaction between the presence of divided government and polarization increases, so too does the likelihood that confirmations will take longer to get through the Senate. These findings confirm what conventional wisdom holds, but ultimately leave unanswered several valuable questions. Their focus on the domestic side of the nomination process seems an attempt not only at parsimony but to avoid the sheer number of nominations filtered through the Senate's Foreign Relations and Armed Services Committees. While McCarty and Razaghian (1999), specifically, and the others above as well, have made a valuable contribution to the literature, their failure to

include nominations to the State Department and the Department of Defense provides an opening that will serve as motivation for this study.

In this study, I begin to answer whether the process of foreign policy related nominations mirrors the pattern described in the domestic case in McCarty and Razaghian. The number of foreign nominations far outweighs the number of domestic cases, making data collection of the former more difficult. One compromise is to examine the 107th Senate. After Jim Jeffords left the Republican majority in the Senate and became an independent aligned with the Democrats on procedural votes, the 107th ceased to be unified with President George W. Bush, only four months removed from inauguration himself. This is the perfect situation in which to get a first glance at the process through which foreign nominations are run in the Senate. The two years of this Senate term provide the parsimony necessary. The modest time span covered limits what otherwise would be an enormous N in a span comparable to McCarty and Razaghian's. Yet, they provide the variation in party control of the Senate required to draw parallels to the domestic nominations conclusions already described. Through a duration analysis I provide evidence of the negative influence of divided government on the duration of the all non-military officer nomination confirmations. The outcome is not noticeably different from the results of McCarty and Razaghian, at least with regard to the signs and significance of the independent variables.

This study proceeds as follows. In the next section, I briefly discuss the implications the differences in patterns of domestic to foreign and defense nominations could have for the two presidencies thesis. I then provide a theory and hypotheses that bridge the gap between what, on the one hand, McCarty and Razaghian found in the domestic case and, on the other, what is still applicable and what remains to be controlled for on the foreign side. Following that, I describe

and specify my model before offering interpretations of the results. Finally, I conclude and remark on what could be done to improve this study and what questions still remain.

Do Nominations to Foreign Relations Posts Follow the Same Pattern?

Wildavsky's (1966) *two presidencies thesis* contended that the president had a fair amount of leeway from Congress in how he or she could shape the nation's foreign policy. If this were to hold in the nomination context, then one would expect to find little variation in the duration of each foreign policy-related confirmation—that president's nominees would win confirmation quickly and without much fanfare or controversy. On the other hand however, if one follows Fleischer, et al.'s (2000) reading of Wildavsky, then one may very well come to expect that the president cannot “dominate” Congress (Neustadt 1990) or the courts (Ducat and Dudley 1989; Yates and Whitford 1997) on issues of foreign policy or their attendant nominations, especially in times of deep division within either house of Congress. It is this type of situation—a highly charged partisan environment—that lends itself well to this study. If a highly divided Senate can be shown to have basically yielded to the president on foreign policy nominations (more so than in the case of other nominations), then the *two presidencies thesis* may still have a leg to stand on when applied to the nominations context. But, should divided government pull even nominees to foreign relations posts into the fray, then perhaps the foreign situation is not that different from the domestic one McCarty and Razaghian (1999) described. In that case one begins to see even further evidence of the unraveling of *two presidencies* during the more recent presidencies (Fleischer and Bond 1988; Fleischer, et al. 2000), but this time in the context of nominations before the Congress.

Theory and Hypotheses¹

The 107th Senate, as alluded to earlier, is an interesting lens through which to view this question in that the executive and legislative branches were both unified and divided, yet remained partisan throughout. Republican Jim Jeffords' switch to Independence, after five months toeing the Bush administration's congressional line, tipped the balance of power in the Senate out of the hands of the vice president and tenuously toward the fifty Democrats with whom he aligned himself on procedural votes. This switch has proven to be a focal point in other studies looking at how successful individual members are at avoiding being "rolled" (Den Hartog 2005) and at the effect the switch had on Democratic and Republican aligned firms in the stock market before and after the switch (Den Hartog and Monroe 2005). For two reasons this presents a significant opportunity in this particular study: 1) Because there were confirmations under both a unified and a divided Senate, there is a chance to observe variation in the durations of confirmations that may be attributable to the presence of divided government.² That baseline provides a basis for comparison that may make the results generalizable in between-Congress examinations. 2) It allows for a way of getting around the multitude of data in the foreign sphere. McCarty and Razaghian (1999) had over 3500 domestic agency/department observations in a dataset that reached over one hundred years. There is no doubt that the numbers of nominations have grown over time, but the foreign policy-related nominations over just the two years examined here reached half of what McCarty and Razaghian had in domestic nominations in over one hundred years.

¹ Please see the Appendix for a more thorough explanation of the operationalizations of the variables considered.

² This also provides a simple way of controlling for the effects of party while holding other variables constant. The membership does not change with the Jeffords' shift, just the control of Congress. As such, this study does not suffer from the problems other studies have with changing membership over time (Or, stated differently, with the varying levels of majority power over time.).

It could be argued, regarding the 107th Senate, that it was not all that different before or after the Jeffords switch because the Senate was so narrowly divided between the two parties either way. However, what it did do was provide the slim Democratic majority with the ability to set not only the rules and the agenda, but lead the committees where the vetting of nominees takes place. This factor cannot be overlooked. Without unanimous consent of the committee, no nominee could make it to the floor of the Senate for a vote. With a slight strength in numbers, Democrats could delay as long as they liked and avoid the filibuster they rely upon in some cases as the minority party in the 108th and 109th Congresses. Though Democrats may have had the ability to delay confirmations, did they use that power when they were in control? Did divided government matter to the processing of confirmations after the Memorial Day recess of 2001? I hypothesize that divided government did not make a noticeable impact on the nomination politics of the post-Jeffords' switch Senate, slowing down the confirmation process and otherwise delaying the Bush agenda in areas where these nominees were of importance.³ The Republican majority managed to win confirmations for the majority of George W. Bush's early nominees during his honeymoon period and a slow summer gave way to a changing environment after 9-11. Where divided government may not have influenced the speed with which nominations were processed, 9-11 certainly made senators scrutinize the nominees appearing before them, especially in foreign policy areas, more than before. In addition, lower level nominations, the bulk of which are foreign service or public health nominations, could potentially have been placed on the backburner while more important legislation [with regard to

³ Since I use only one Senate, differentiating between divided government and polarization (using NOMINATE scores) is not helpful. The values of polarization would simply mirror those of divided government, just on a different scale. Whereas McCarty and Razaghi had as many NOMINATE scores as they did Congresses, I would have only two: one for divided government and the other for united.

the attacks] took up the limited time of Senators. September 11 should slow down the rate at which confirmations are occurring in its wake.

Aside from these factors, I carry over several others from the McCarty and Razaghian framework. Hierarchy among different nominees was operationalized in the form of several indicator variables. This model accounts for nominations to circuit courts, district courts, cabinet secretaries, second tier secretaries (under, deputy and assistant secretaries) and foreign posts (made up mostly of State and Defense Department nominees). These are compared to the baseline other category consisting mostly of foreign service, public health and other lower tier nominations. In other words, these indicators tap the heightened scrutiny under which the above nominations are subjected. Re-nominations within a four year window should also have the same impact in this context as it does in the McCarty and Razaghian study. If someone has already run the gauntlet of the confirmation process successfully, then it is reasonable to expect that it will not be harder the second time. I also model for administration effects: the first one hundred days of the Bush presidency and a counter for the number of days that have elapsed during the administration—from inauguration day forward. Things should be easier for Bush nominees during the first one hundred days not only because of the honeymoon effect, but because those one hundred days correspond closely to the time before the switch in power in the Senate. The day counter will provide the main measure of time in the model. Congressional session—first or second—as well as Congressional workload are accounted for in the model also. Workload should lower the pace at which confirmations occur and the session simply accounts for any trends happening across or within the two years. Finally, unlike McCarty and Razaghian, I account for the effects of presidential approval. One would expect to see that as presidential approval rises, the likelihood of confirmation would increase as well.

Data and Methods

In gathering the data for the durations of the foreign policy-related confirmations during the 107th Senate, I consulted both the *Journal of the Executive Proceedings of the Senate of the United States* and the online collection of presidential nomination materials at www.thomas.gov. The focus here is on all of President Bush's non-military nominations during the 107th Congress. All secretaries of the branches of the Armed Forces were considered as were their lower level counterparts. This analysis excluded those offices requiring nomination for promotion creating an N of 3206 nominations.

The dependent variable, duration, the Senate workload and the number of days the president has been in office are simple count variables. The remaining variables (divided government, first one hundred days of the Bush presidency, 9-11, foreign, circuit court judges, district court judges, secretaries, second tier secretaries, Senate session, and re-nomination) are simple dichotomous variables. Presidential approval is measured as the average approval rating in the month before nomination. Since the dependent variable is the length of time (in days) between the point at which the president makes the nomination to the point of Senate confirmation, the best approach is to use survival analysis (Box-Steffensmeier and Jones 1997). McCarty and Razaghian point out that ordinary least squares is not equipped to deal with the censoring of the dependent variable. As they did in their case, a parametric Weibull regression will be used to obtain the findings (Cleves, Gould and Gutierrez 2002).

Results

Figure 1 reveals the estimated hazard rate of the model, and importantly, it mirrors the rate implied in McCarty and Razaghian (1999). As the duration between nomination and

confirmation increases, the hazard rate increases and survival (not being confirmed in this case) decreases. For the purposes of interpretation, this means that if the coefficient of an independent variable is negative, it implies a decrease in the hazard rate and thus an increase in survival (not being confirmed).

[Insert Figure 1 about here.]

As Table 1 (below) indicates, most of the variables are significant, though some were not in the proper direction. The divided government variable is significant and in the hypothesized direction. Stated differently, as Jeffords de-aligned from the GOP, thus dividing government between the executive and legislative branches, confirmation remained relatively unaffected. The 9-11 variable was similarly significant and in the hypothesized direction. In spite of the rally around the president in the wake of the attacks, nominations took longer to reach confirmation in the Democratic-controlled Senate. Presumably this meant that either nominations were being more closely scrutinized and/or that the bulk of low level nominations waited until more the important things made their way through the legislative process. The indicator variables I added to this discussion provided mixed results. All were significant with the exception of the district court judge dummy variable, though it performed in the hypothesized direction. Nominations to circuit courts and lower level secretary positions received more scrutiny and both had higher levels of not being confirmed. Cabinet secretaries most likely enjoyed the benefit of President Bush's first one hundred days in office, avoiding a drawn out confirmation process. The foreign indicator variable was significant as well and indicated that nominations to those posts also avoided hold ups in the confirmation process. This lends some credence to the *two presidencies* thesis discussed above. The presidential approval variable also reaches statistical significance and behaves in the expected direction. Decreasing

approval triggers longer confirmations. Finally, both the workload and re-nomination variables failed to reach statistical significance.

[Insert Table 1 about here.]

Though the results in this model are solid concerning most of the main independent variables, there were some underlying collinearity problems that may have driven the outcome. The Senate session counter variable was highly correlated with several other variables and the divided government and first one hundred days variables were nearly perfectly collinear. A second model was run, dropping not only the Senate session indicator, but the first one hundred days variable as well. In the absence of the first one hundred days variable, the model was virtually unchanged. To check this still further, the first one hundred days variable was reinserted and divided government was dropped in a third model that performed as well as, if not better than the other two. All the variables were at least significant at the .05 level and notably, the first one hundred days variable was significant and in the right direction. In other words, Bush enjoyed quick confirmations during his first one hundred days in office. No doubt this was aided in part by the fact that Republicans controlled the Senate. The September 11th variable maintained a similarly sized coefficient. Finally, a model was considered using a data set reduced to the nominations confirmed before the intervention of the 9-11 attacks. Like the two other alternate models, the results were virtually unchanged. However, in this model, divided government was not significant, casting further doubt on the impact of the Jeffords' switch on the advice and consent process between the executive and legislative branches.

Conclusions⁴

Though the divided government hypothesis was upheld in the original model, one must wonder in the face of the collinearity problems there how powerful it really was. It did do well in the second model though to the detriment of other variables. Unfortunately, the third model did the best of the three and that was the one that dropped divided government. Part of the problem still lies in collinearity issues. While most other variable relationships avoided the customary threshold for multicollinearity, there were some that were close. This most likely has to do with the abundance of time period indicator variables. Most were moderately correlated but usable considering the sample size of over 3000.

Let me close by discussing some of the implications of the findings presented here. Expanding upon what McCarty and Razaghian and Binder and Maltzman have found, this study incorporates nominations to foreign posts into the literature. The results reveal that foreign nominations were not subjected to the same level of scrutiny as domestic nominations. They had a statistically significant confirmation duration smaller than the domestic nominations. Again, this does lend some credence to the *two presidencies* thesis that the Senate allows the president the discretion to select competent nominees to fill those posts. However, drawing such generalizations from this snapshot is difficult given some of the events that occur during this two year span. This examination certainly needs to be expanded to incorporate both more Congresses and more administrations. If, what seems to be an interesting finding here, can be broadened across those dimensions it will obviously increase the generalizability and either further call into question or bolster the two presidencies thesis. Ultimately, what needs to be done is to pool the McCarty and Razaghian data and merge it with data concerning foreign

⁴ Since the alternative models did not yield any significantly different results, they are not shown here. The author would be more than willing to provide them upon request.

policy-related nominations. Only those types of comparisons can reveal whether the two presidencies thesis is applicable in a nominations context and further whether it was simply the result of the conditions of the past. In the interim though, including domestic nominations during the 107th Senate is a quick way to merge both types of data and draw, on some level, concrete solutions.

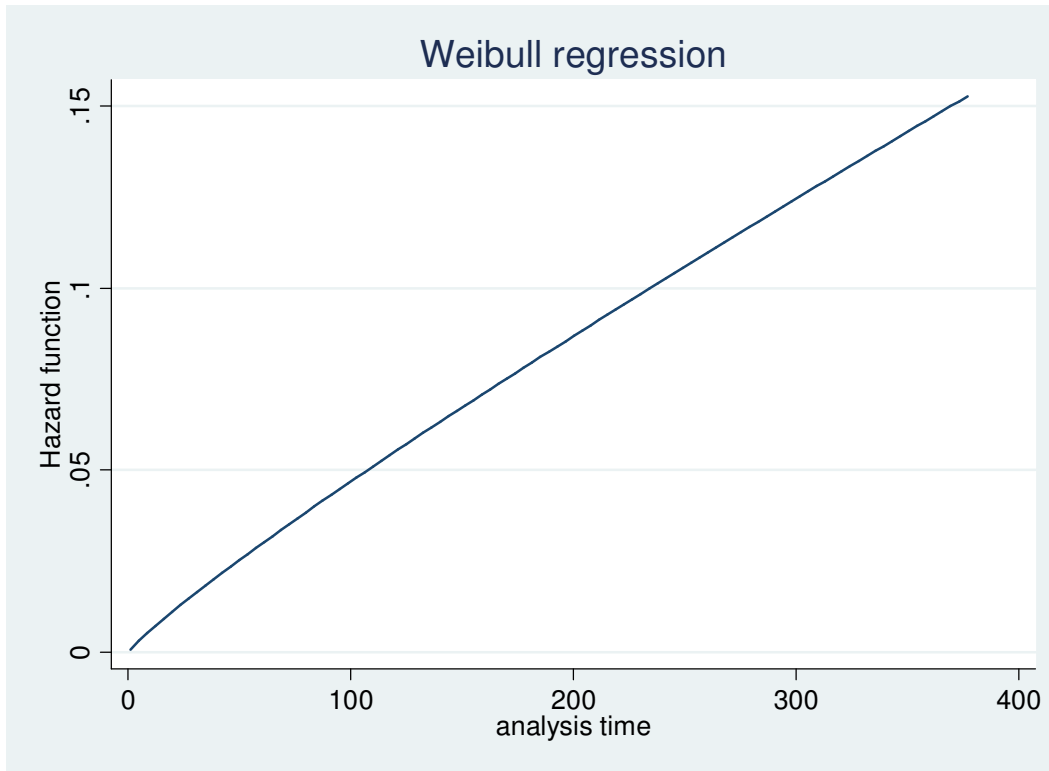
Table 1: Weibull Regression -- Log Relative-Hazard Form

Independent Variable	
Divided Government	0.2623* [0.1257]
Sept. 11	-2.0666** [0.1241]
Foreign	0.808** [0.0529]
Presidential Term (Days)	0.0074** [0.0006]
District Court	-0.0582 [0.1185]
Circuit Court	-2.6796** [0.2468]
Secretary	4.1727** [0.389]
2nd Tier Sec.	-0.3831** [0.0788]
Re-nomination	0.0563 [0.0929]
Session	-2.147** [0.1507]
Senate Work Load	-0.0001 [0.0002]
First 100 Days	0.9911** [0.1141]
Presidential Approval	-0.0067* [0.0021]
Constant	-6.0692** [0.1932]
Log Likelihood	-2771.72
LR (13) χ^2	2018.7
Number of Subjects	3206
Number of Failures	2895
Times at Risk (Days)	187054

Figures in parentheses are standard errors.

** Indicates that the coefficient is significant at better than 0.01;

* Coefficient is significant at better than 0.05

Figure 1: Estimated Hazard Function

Appendix—Operationalizations

- 1) Divided Government—1 = divided government (anything after May 24, 2001 – the end of the second session), 0 = unified government (January 20, 2001 – May 24 when Jeffords made the announcement of his switch).
- 2) 9-11—1 = any nomination that was made or under review after the attacks on New York and Washington, 0 = every nomination confirmed prior to the event.
- 3) Foreign—1 = the nomination was for a foreign position (sent to Foreign Relations Committee or in some cases Armed Services), 0 = other.
- 4) Circuit Court—1 = nominee to the Circuit Court of Appeals, 0 = other.
- 5) District Court—1 = nominee to the District Courts, 0 = other.
- 6) Secretary—1 = nominee for a Cabinet level position or EPA administrator, 0 = other.
- 7) 2nd Tier Secretary—1 = nominee for under, deputy, assistant or associate secretary in an executive agency, 0 = other.
- 8) Presidential Approval— the average approval rating in the month before a nomination.
- 9) First One Hundred Days—1 = January 20, 2001 – April 29, 2001, 0 = other.
- 10) Number of Days since Inauguration—1 (January 20, 2001) – 634 (October 16, 2002).
- 11) Senate Session Counter—1 = session 1, 2 = session 2.
- 12) Workload—the number of nominations before the Senate at the time of each nomination.
- 13) Re-nomination—1 = a nominee has been confirmed in some capacity before the Senate in the four years prior to the current nomination, 0 = other.
- 14) Dependent Variable (Duration)—0—283 (the number of days between the president's nomination and confirmation.).

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