

Party Politics and Nominee Age: Why Some Presidents Fail to Get Judges on the Federal Bench and Others Succeed

Jeffery Condry
Political Science
The University of North Carolina Asheville
One University Heights
Asheville, North Carolina 28804 USA

Faculty Advisor: Dr. Ashley Moraguez

Abstract

Judicial confirmations have become divisive political battle between the Senate and the president. Much of the literature on presidential success for judicial confirmations focuses on the party alignment of the Senate and the presidency. Little attention is given to the importance of nominee age to predict the success of the president. I advance a theory of strategic nomination of judges by the president; it posits that both the president and Senate care about the age of nominees to the courts, while building off the extant party literature. I should be more likely to see presidential success in appointing younger judges under same party control (i.e. the presidency and the Senate are ideologically the same) than when there is split party control. I evaluate this hypothesis with data on all U.S. Courts of Appeals and Supreme Court nominations during the George W. Bush and Bill Clinton administrations and find substantive support in favor of it.

1. Introduction

One of the major issues in the 2016 presidential election was Supreme Court nominations. The passing of Associate Justice Antonin Scalia, just nine months before the general elections, came as a surprise for the country. Judge Merrick Garland, a 64-year-old judge sitting on the DC Circuit Court of Appeals, was nominated by President Obama to replace Justice Scalia. Judge Garland was considered a moderate judge but had some social views more aligned to President Obama and was rated “well-qualified” by the American Bar Association. However, the Republican Senate refused to hold confirmation hearings or give him consideration on the Senate floor. President Trump then won the 2016 election. About a month after he was sworn into office, he nominated then Judge Neil Gorsuch to replace Justice Scalia. Justice Gorsuch, when nominated, served on the United States Court of Appeals for the Tenth Circuit and was 49 years old. Senate Democrats sought to stall Judge Gorsuch’s nomination by filibustering if needed and not voting to invoke cloture. After a tough confirmation hearing, Senate Republicans invoked the “nuclear option,” which essentially ended the filibuster on Supreme Court nominees, and Judge Gorsuch was confirmed as the next Associate Justice of the Supreme Court of the United States. Between Justice Scalia’s passing and the then Judge Gorsuch’s nomination, there was a vacancy on the Supreme Court for 422 days. Two presidents nominated two different judges to fill the vacancy but only one was confirmed. These fights against the president’s judicial nominees have become the norm in the United States Senate. This raises the question: what determines presidential success in appointing judges to the federal judiciary?

Under Article II, Section 2 of the United States Constitution, the President of the United States has the constitutional duty to nominate judges to the federal court. However, the Senate must provide “advice and consent.” This means the United States Senate has the constitutional duty of confirming (or rejecting) nominees to the federal courts. This shared power of placing judges on the federal courts has become a partisan battleground in recent years. Federal judges, I contend, have a lot of control over public policy. Judicial interpretations of law and legal opinions take on the force of law in terms of how each law is read and applied. Additionally, all federal judges constitutionally have lifetime

tenure. This means judges when serving under good behavior serve on a court until they choose to retire, or their seat is vacated by the death of the judge. With lifetime tenure, judges can sit on the federal bench and affect policy for decades. For such reason, the president and the Senate, who are political actors, want to control the judicial confirmation process as much as possible to get judges confirmed who most align with their political agenda.

I argue that under unified party control of the Senate and presidency, judicial confirmations will be easier, and the age of the nominees will be younger. Younger nominees are more likely to remain on the federal court decades after a president has left office and will continue to affect policy long after that president has left office. Easier confirmations will result as the president and the Senate will be ideologically alike. However, when the Senate and the president disagree ideologically, we are more likely to see longer confirmations, less frequent success, and older nominees. Older nominees, I argue, are the result of a compromise between the branches, as older nominees are less likely to stay on the court for many decades and continue to affect policy change. The duration and success of confirmations will stall as a result of disagreement between the president and the Senate. I test these expectations using data on judicial nominations during the Bill Clinton and George W. Bush presidencies.

In what follows, I will begin with a discussion of the literature pertaining to presidential success in judicial confirmation hearings. However, I will briefly address the concern that there is a void in the literature regarding the importance of age to the success of judicial confirmations. I will then lay out my theoretical argument regarding the interactive effect between party control of the presidency and Senate and the age of judicial nominees. Next, I will discuss my research design and data, which will be followed by an explication of my results. I will conclude with a discussion of the implications of my finding and thoughts for further research.

2. Literature Review

Recent scholarship has explored the question regarding whom the president may seek to nominate.¹ It establishes that the president will be strategic in choosing who to nominate to the federal judiciary. Presidents will attempt to place individuals with their ideology on the bench, since they have lifetime tenure. However, a “yea” or “nay” vote is required for confirmation by the Senate. Thus, the president, when nominating an individual for the federal judiciary, will also need to consider the ideology of the Senate and the timing of such nominations.² This paper seeks to further explore the importance of the Senate’s ideology on presidential decision making.

Though the Constitution does not explicitly state any qualifications for an individual nominated to the federal judiciary, recent scholarship examines senators’ perceptions of nominee quality.³ The perceived quality can be measured in different ways. For example, there is evidence that senators rely on ratings of nominees by the American Bar Association.⁴ Further, recent literature suggests that interest groups play a viable role in the success of judicial confirmation hearings, given that interest groups can actively persuade senators. In addition, another strain of recent scholarship focuses on how the president can pressure the Senate to act favorably on their nomination through the president’s ability to “go public” with their judicial nominations.⁵ If a president has a high approval rating, it is expected that the president can use their popularity to pressure the U.S. Senate to act. Senators, like the president, are accountable to their constituents. If a popular president nominates an individual to a federal court, the president can use their leverage to go to the public and call for the citizens to persuade their elected senators to vote yes on the nominee.

Building from the literature, I argue that the political environment will affect presidential success. However, I also argue that nominee age, a currently understudied factor, also plays a major role in the process. Given the lifetime tenure of judges and how important the judiciary is for making policy and political decisions, I think that nominee age is something strategic political actors will consider.

3. Theoretical Foundation

The judiciary in American politics has emerged to play a significant role in our system of government. Federal judges are given lifetime tenure based on good behavior, which makes the politics behind the selection of judges a contentious political battle. For a president, lifetime tenure means that judges can continue making decisions consistent with his preferences and impact his legacy for years, if not decades, after that president has left office. However, for this reason, the Senate also has strong preferences over who sits on the bench.

I assume that the president will have to take into consideration the Senate when selecting federal judicial nominees since the success of the president is determined by an up-or-down vote in the Senate. Indeed, there is evidence that the president considers members in the United States Senate when appointing federal judicial nominees). I further

assume that the president and senators are driven by policy preferences when deciding whom to nominate and whether to reject or confirm that individual, respectively. This means that they seek to nominate/confirm like-minded judges on the federal bench as a means of influencing policy.

Additionally, the president and members of the Senate belong to political parties. The partisanship of the Senate and the president are important considerations when predicting presidential success. It is likely that a president whose party controls the Senate will have an easier time getting a federal nominee through. A president whose party does not control the Senate is expected to see a delay in the confirmation process or even a rejection of that nomination. Arguably, senators will not elect to confirm a nominee to a lifetime appointment on the federal bench if the senator and nominee are not in agreement ideologically. Of course, judicial nominees rarely state their ideological preferences. Therefore, the ideological preference of the nominee is assumed from the ideology of the president. It is assumed that the president would nominate an individual whose ideology is like his own. That is, I assume that a president wants to nominate a judge whose interpretations of the law are friendly to the president's own goals and policy ambitions. If a judge and president are not ideologically similar, then rulings from such judge could contradict the president's goals and policy ambitions. As such, the president would not nominate such a person.

Thus, when a majority of the Senate is of the same party as the president, I expect to see a more effortless confirmation and more success, as the Senate is more likely to agree with the president on policy grounds. When the Senate majority opposes the president, the process will be more difficult. Therefore, I hypothesize:

H1: The president will have more success in judicial confirmations when facing a Senate whose majority is in the president's party.

Further, because of lifetime tenure, I argue that the president will want younger judges on the federal bench to serve a longer term to reflect the ideology of the president long after he is gone. Younger nominations to the federal court could serve up or four to five decades after the initial confirmation vote.

The Senate will also care about the age of nominees. When the Senate agrees with the president ideologically, they too will favor younger nominees and will want to appoint them to the courts to decide cases favorably over a long period. When the Senate disagrees with the president, they will be less likely to confirm young nominees. In this situation, the nominee will be a compromise between the parties, with neither getting the perfect ideological candidate. As such, they will compromise on older nominees who will not influence policy from the federal bench for as long. As such, I hypothesize the following:

H2: When the president and Senate majorities are of the same party, the president will have more success in getting younger judges confirmed by the Senate than he does when he disagrees with the Senate majority.

4. Empirical Analysis

I take a statistical approach to analyzing presidential success in judicial nominations. The unit of analysis is the individual judicial nomination. I focus on all appointees to the U.S. Courts of Appeals and the U.S. Supreme Court during the presidential administrations of Bill Clinton and George W. Bush. These two levels of the judicial hierarchy are important for this study as they are the two highest levels of the federal judiciary and the judges make high profile and pressing decisions. This is where I would expect battles between the president and Senate. The number of observations contained in the dataset is 267 nominations between the years 1993 and 2008.

The dependent variable of the study is presidential success in the judicial confirmation process. I measure presidential success in two ways. First, I use a dummy variable for whether a nominee was confirmed or not. An observation is coded as a 1 if the nomination was confirmed to the federal court and 0 otherwise. Of the 267 nominations during the Clinton and Bush administrations, 130 were successful confirmations or 49 percent. Therefore, 137 or 51% are failed confirmations. The list of nominations from the Clinton and Bush Administrations was collected by the Federation of American Scientists (FAS), and they provided information on whether the judges were confirmed.

The second measure of presidential success is the duration of presidential nominations. This data was collected by using the same compiled list of nominations by the FAS. Their list contained the date of the nomination and the date when action was taken on the nomination. This allowed for the use of an "age calculator" to determine the duration from the beginning of the nomination to the end of the nomination. Duration can be seen as a metric of presidential success, as I assume that successful presidents have faster and easier processes than unsuccessful ones. The average duration for judicial nominations during the Clinton and Bush administrations was approximately 220 days. The minimum nomination duration was that for Judge Jeffrey R. Howard whose first nomination attempt to the U.S. First

Circuit Court of Appeals lasted one day during the Bush administration. The maximum nomination duration was for Judge Richard A. Griffin whose second nomination attempt to the U.S. Sixth Circuit Court of Appeals lasted 707 days.

There are two independent variables of interest in this analysis. The first is whether the party of the president and the majority party in the Senate align. Concerning the Clinton administration, President Clinton was the President during the 103rd to the 107th Congresses. President Bush was the President during the remainder of the 107th Congress to the first month of the 111th Congress. I created a dummy variable to account for the party dynamic. The dummy variable is coded 1 if the party of the President and the party control of the U.S. Senate were the same. If the party of the U.S. Senate and the President were different, then it is coded as 0. In the dataset, there were 101 1s and 166 0s, meaning that the Senate was usually controlled by the president's opposition party. The second independent variable is the age of each nominee at the time of their nomination. The age of each nominee was collected using an age calculator that accounted for the date of the nomination and the date of the nominee's birth. The average age at the time of nomination was approximately 50 years old. The youngest nominee in the dataset was Judge Kimberly A. Moore who, was 37 years old at the time of nomination to U.S. Federal Circuit Court of Appeals. The oldest nominee was Judge Carlos T. Bea, who was 68 years old at the time of nomination to the U.S. Ninth Circuit Court of Appeals.

I also include three control variables that may also affect presidential success. First, I control for whether a nominee had prior service on a federal court. The expectation is that any judge elevated to a higher court with prior federal judicial service will impact the decision of each United State Senator positively and help the nominee through their confirmation process. Out of a total of 267 nominees during the Clinton and Bush administrations, 63 were chosen to be elevated. Second, I accounted for impact of the American Bar Association's (ABA) ratings on a senator's decision to confirm or reject a nominee. The ABA rates all federal judicial nominees on qualification and submits their report to the Senate Judiciary Committee and the United States Attorney General's office. The ABA does not look at partisanship of nominees when considering qualification. The American Bar Association defines professional qualifications as professional competence, judicial temperament, and integrity. This control variable was coded as a 1 for any nominee who was rated as "well qualified" by the ABA. If a nominee received any rating less than "well qualified," then a 0 was coded for that nominee. Of 267 nominations during the 103rd and 110th congresses, 170 nominees were rated well qualified by the ABA and 97 were rated as anything less than well qualified.

The last control variable is the polarization of the U.S. Senate when that nomination went before the Senate. This control variable is important because it captures the level of disagreement between the two parties in the Senate. When the Senate is more polarized, it will be harder for them to come to an agreement on any nominees. This variable is calculated using the DW NOMINATE scores of senators, which scales each from +1 (the most conservative) to -1 (the most liberal). Polarization is measured as the absolute distance between the mean of the Democrats and the mean of the Republicans for each meeting of Congress. This gives us an idea of how distinct the two parties are from one another for each meeting of Congress. For example, the least polarized session of the Senate was during the 103rd Congress with a polarization score of 0.6335. The most polarized session of the Senate was during the 110th Congress with a polarization score of 0.6874. Ideally, what these numbers can tell us is that it is more likely to be difficult for a nominee to get through the judicial confirmation process in the 110th Congress rather than in the 103rd Congress. For this reason, I conclude the control variable of polarization in the U.S. Senate is important.

5. Results and Analysis

To test my hypothesis of interest, I estimate two linear regression models. The first uses the dichotomous confirmation variable as the dependent variable. It includes all independent variables of interest and controls. Further, it includes an interaction term between the party control variable and the age of the nominee, to get at the conditional nature of Hypothesis 2. The results are shown in Table 1.

Table 1: Regression Results for the Confirmation Dependent Variable

Variable	Coefficient	Standard Error	P-value
y-intercept	1.52	1.24	0.22
Party control	0.52	0.49	0.3
Age	0.01	0.007	0.13
Interaction	-0.008	0.01	0.4
Elevated	-0.01	0.08	0.9
Polarization	-2.57	1.8	0.16
ABA Rating	0.19	0.06	0.003

Table 1: This table shows the results of a linear probability model with the confirmation dummy as the dependent variable. Consistent with Hypothesis 1, party control has a positive and substantively significant effect. The negative coefficient on the interaction term shows support for Hypothesis 2; it suggests that younger nominees stand a better chance of being confirmed under same party control than they do under split party control. Neither result of interest is statistically significant. However, the ABA rating control does have a statistically significant effect.

Hypothesis 1 stated that the president should have more success in confirmations when the Senate is controlled by his party. The positive coefficient on party control suggests this to be the case. When the president's party is in charge, I expect a 51.7% increase in success, all else equal. This is a very large substantive effect. The result, however, is not statistically distinguishable from zero. It does provide some support for my claims, however. The coefficient on age is also positive, which means that older candidates have better luck getting confirmed. For each additional year in age, I expect a 1% increase in the probability of confirmation, all else equal (this assumes split party control). The effect is not statistically significant.

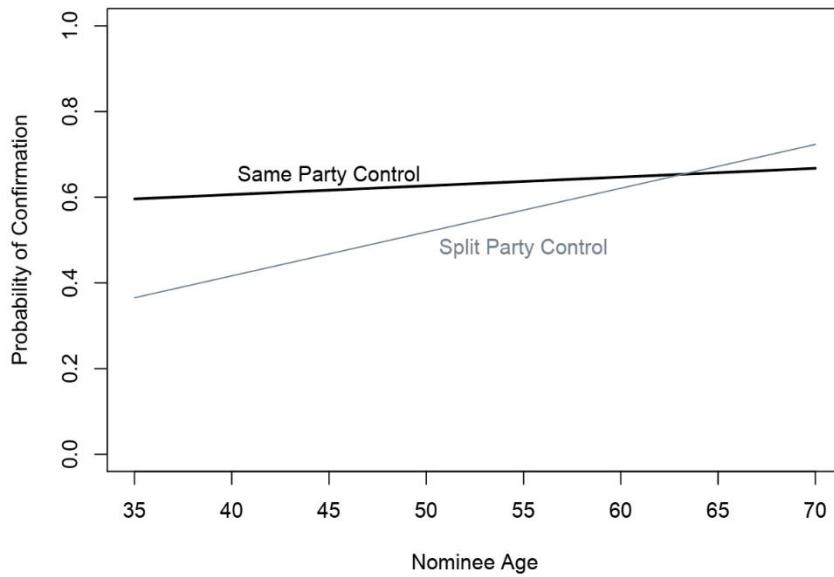


Figure 1.1 Presidential Success: Age and Confirmation.

Figure 1.1: This graph shows nominee age on the x-axis and the probability of confirmation on the y-axis. The bold line displaying same party control, has a slightly positive slope that indicates younger nominees have a roughly equal chance of being confirmed as do older nominees. The line for split party control shows a gradual upward slope that indicates that the older a nominee is, the more likely they are to be confirmed. This is consistent with my expectations.

However, in Hypothesis 2, I argue that the effect of age would vary based on party control; specifically, I expect younger nominees to have more success when the president's party and the Senate majority are aligned. The coefficient on the interaction term can speak to this. The coefficient, as seen in Table 1, is negative, which is consistent with my expectations. The coefficient tells us that when there is unified party control of the presidency and Senate, I expect the effect (or slope) of age to be 0.8% less than when there is split party control. This means the age of the nominees matters more when the Senate and president are split. Figure 1.1 shows these results. This plot assumes all control variables are held at their means or modes.

As you can see, the slope on age under the same party control is basically flat. This means that young nominees are almost as likely to be confirmed as older nominees when the president and the Senate majority agree. When they disagree, however, age has a much stronger effect – older nominees are much more likely to be confirmed. While the interaction term is not statistically significant, the results support my claims, substantively speaking.

The regression also included all the controls, as seen in Table 1. The first control variable was whether a nominee was elevated to a higher court. I expected if a nominee was being elevated to a higher court, that nominee would have an easier time being confirmed.

However, according to Table 1, this is not the case. The coefficient on elevation indicates for a one-unit change of whether a nominee was being elevated to a higher court results in a decrease of 1% in the likelihood of the confirmation succeeding. This coefficient is not statistically distinguishable from zero, and a 1% decrease in the likelihood of a confirmation succeeding is not large and arguably not substantively significant either. The second control variable was polarization of the United States Senate, as this can affect the success of a nominee making it through to a confirmation vote. Table 1 displayed substantively what I would expect. The coefficient indicates a 257% decrease in the success of confirmation for a one-unit change in polarization, which would be a drastic change. While this is a large substantive effect, it is not a statistically significant effect. Lastly, I include the control for the ratings given to nominees by the American Bar Association (ABA). This control is important in the success of nominations as it is expected well-qualified nominees have a better chance of success during the Senate confirmation process. According to Table 1, this variable was the only variable that was statistically distinguishable from zero. When a nominee moves from the baseline to well-qualified, I should see a 19.5% increase in the likelihood of a successful confirmation.

My second regression uses duration in days as my metric of presidential success and similarly includes all independent and control variables, including the interaction between age and party control. The results are shown in Table 2.

Table 2: Regression Results for the Duration Dependent Variable

Variable	Coefficient	Standard Error	P-value
y-intercept	684.98	463.78	0.14
Party control	-234.14	185.21	0.2
Age	-4.03	2.51	0.11
Interaction	3.82	3.65	0.3
Elevated	-22.45	28.26	0.43
Polarization	-372.008	673.64	0.58
ABA Rating	9.04	23.97	0.71

Table 2: This table shows regression results with duration of the nomination as the dependent variable. The negative coefficient on party control shows support for Hypothesis 1, while the positive coefficient on the interaction shows support for Hypothesis 2. Neither the results of interest nor the controls had statistically significant effects but, substantively, they are important predictors of duration.

Using duration as a measure of success, I would expect a successful nomination to have a shorter duration of confirmation time. As displayed in Table 2, when looking at party control, there is a 234-day change in the time of confirmation when party control in the Senate is changed. Per the results, this negative coefficient would indicate that as the control in the Senate shifts from the party not of the president to the party of the president, there is a 234-day decrease in the duration of confirmations. While this estimate is not statistically distinguishable from zero, I would contend that it is substantively meaningful. Two hundred and thirty-four days is a long time in the United States Senate. Furthermore, when interpreting the coefficient on the age variable in Table 2, it can be determined that for each year increase in the age of a nominee, there is a 4 day decrease in the duration of confirmation under split party control. This result is not statistically distinguishable from zero, but it is a substantively meaningful effect. The

coefficient on the interaction term speaks to Hypothesis 2. When there is uniform part control, I expect the effect of age to increase the duration of confirmation by 3.8 days relative to the effect on split party control. The substantive effect of the interaction variable on the duration of confirmations can be seen in Figure 1.2. As you can see, the slope on age under the same party control is basically flat (the slope is 0.2). This means that the duration of confirmations for young nominees and old nominees are almost indistinguishable when the president and the Senate majority agree. This makes sense considering the Senate will likely accept whomever the president nominates. When they disagree, however, age carries a much stronger effect. Older nominees are more likely to have shorter lengths of confirmations in the Senate than are younger nominees. This can be expected as when the president and the Senate majority are at ideological odds with each other, older nominees are likely to be compromised. The three control variables were also included in the analysis. First, the elevation of a nominee. According to Table 2, if a nominee was being elevated, there is an expected 22 days decrease in the length of their confirmation, which is in the expected direction.

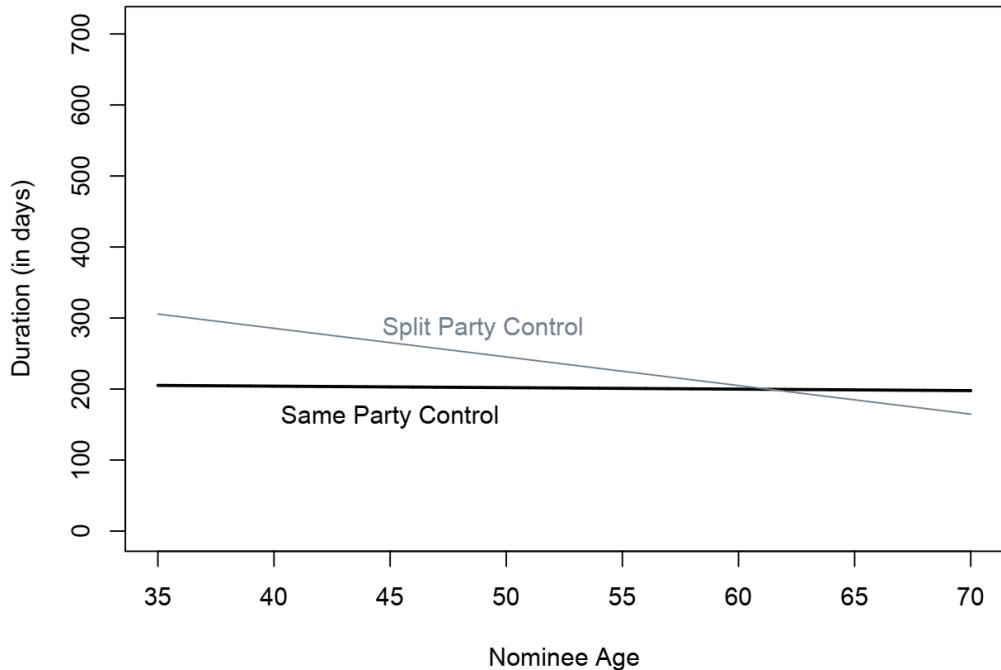


Figure 1.2 Presidential Success: Age and Length of Confirmation.

Figure 1.2: This graph displays nominee age on the x-axis and duration of the confirmation process on the y-axis. The line displaying same party control, has a slightly upward slope that indicates younger nominees have slightly quicker confirmations than under split party control. The line for split party control shows a steeper downward slope that indicates the older a nominee becomes, the more the duration of their confirmation will decrease.

However, this is not considered statistically significant. Second is the control variable for the polarization of the Senate. If the Senate is polarized too much, I would expect to see a longer duration of judicial confirmation as the body is divided along ideological purposes. Oddly, the results show that a one-unit increase in polarization is associated with a 372 day decrease in the length of the process. This is not consistent with expectations, but the result is not statistically significant. Third, I include a control for the rating of the American Bar Association (ABA). I expect the ABA to influence how senators are going to vote and if that nominee might be considered “controversial.” If a nominee is considered “controversial,” this can prolong the duration of the judicial confirmation. Per Table 2, the difference of a nominee going from any rating other than well-qualified to well-qualified is an addition of 9 days in the duration of the confirmation process. This variable is not what I would expect to see. The result, however, is not statistically distinguishable from zero.

Taken together, I find some support for my claims. While these results were not statistically significant in either model, there was substantive support for both hypotheses. When there is unified party control of the presidency and the Senate, I find that the likelihood of confirmation increases, and the process is shorter and more efficient. Further, I find that the age of nominees matters more under split party control of the branches. Older nominees are much more attractive when the president and Senate disagree. When they agree, younger nominees stand a much better chance.

6. Conclusion

I argue under same party control of the presidency and Senate that presidents will encounter an easier time getting through younger judicial nominees quicker. Though none of my results were statistically distinguishable from zero, each were substantively significant. As seen in Figure 1.1, younger nominees have better confirmation success under same party control than under split party control. In Figure 1.2, the duration of younger nominee's confirmations is less compared to older nominees. Though approximately 100 days separated the youngest nominee to the oldest according to the graph. I argue 100 days is a long time in the United States Senate.

I argue that my findings are substantively important. The recent literature on judicial nominations lacks the information on the importance of age when determining success. Though not statistically significant, these results give a compelling conclusion that age does play a factor in determining the success of the president under same party or split party control in the Senate.

Further research on this topic could use my data and expand it to include future presidencies such as the Obama and eventually Trump presidencies. With the use of the nuclear option on federal lower court nominees in the Obama presidency and the use of the nuclear option in the Trump presidency for Justice Neil Gorsuch, precedents have been set that the filibuster is no longer an option in the judicial confirmation process. I contend that the inability to use the nuclear option can have a larger implication on the judicial confirmation process than my research could focus on. Lastly, I would add that future research could add United States District Court nominees to the dataset for a greater expansion of data. Additionally, while the federal district courts are trial courts, I argue they too affect policy, and some are elevated to federal appeals courts. They also make way more decisions than do appellate judges.

7. Reference

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