

Supreme Court Vacancies and Discretionary Opinion Writing in Federal Circuit Courts

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Abstract

We study the behavior of Circuit Court judges during Supreme Court vacancies; judges who were candidates of nomination write fewer discretionary opinions when the Senate is controlled by the opposing political party.

1 Introduction

This paper analyzes one institutional factor that likely influences political polarization in the courts: promotion incentives. We focus on the nomination process for U.S. Supreme Court judges, where circuit court judges can be promoted by to the highest court by the president and senate. If judges are rewarded for being divisive, then judges might dissent against their colleagues more while angling for a nomination. If judges are punished for being divisive, then they might dissent less against their colleagues during nomination phases.

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We examine judicial behavior during U.S. Supreme Court nomination vacancies. Black and Owens (2016) [2] find that judges who are on the presidents' personal "short list" are more likely to dissent in court and express opinions that are consistent with that of the presidents. Our analysis seeks to replicate that analysis with a much larger sample of judges and years. We find the opposite: contender judges actually tend to write fewer dissents during the vacancy. They also tend to write fewer concurring opinions during the vacancy. One reason for these effects is fear that their discretionary opinions could be used against them in their nomination hearing .

This analysis is an extension of Black and Owens (2016) [2], who compared the behavior of judges between vacancy and non-vacancy periods. Using a relatively small number of cases from 1946 to 2011, they found that contenders are more likely to write dissents and vote in favor of the government, while less likely to write concurring opinions. With a richer dataset in hand (that includes all opinions), we reexamine these conclusions.

Note that the selection of Supreme Court justice is a complicated process involving multiple parties of interest and different stages of the game. We do not attempt to analyze the whole process in detail, like Nemacheck (2007) [3]. We only provide evidence about how career promotion might provide incentives for circuit court judges to change their behavior.

The rest of the paper is organized in the following sections. Section 2 describes the data sources. Section 5 analyzes responses of discretionary opinion writing during nomination vacancies. Section 6 concludes.

2 Data

The main source of data is the complete collection of 387,898 United States Courts of Appeals opinions from 1891 to 2013, published in three volumes of Federal Reporter. After using scripts to parse raw text into Python, we use the Python module `nltk` to tokenize sentences and count stemmed phrases.¹ We select opin-

¹Note that our scope of analysis is limited to the n-grams (n-word phrases) extracted from raw text, as most articles do. We do not use syntactic structure in this paper. We also use part-of-speech tags, but this work is still ongoing and is not included in this paper.

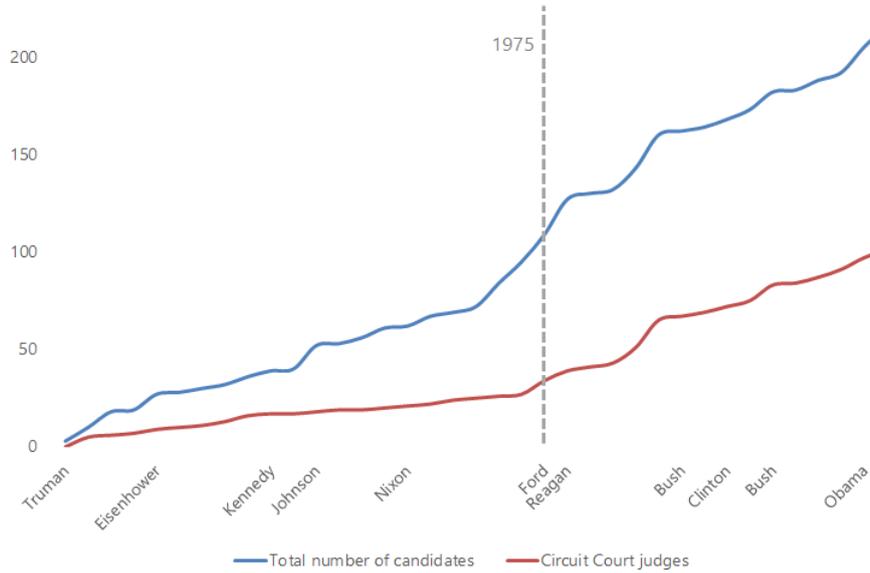
ions that are written by a specific author (excluding opinions labeled *per curiam*, which are decided by the whole panel). We sum these phrase counts to judge-year level, and use these observations to construct sparse matrices for estimation. For judge characteristics, we link the data of phrase counts to the dataset of Berdejo and Chen (2017) [1], and use variables like circuit, year, gender and majority party for estimation. For the clustering analysis, we used the “vote” of each judge on the three-judge panel (whether they dissented or not).

The list of Supreme Court nominees from 1946 to 2006 comes from the appendix of Nemacheck (2007) [3]. This book provides an extensive analysis of the strategic selection process of Supreme Court nominees, and the author looked through archives of presidents for relevant information about shortlist candidates. For two nominations made by Obama, we use the shortlist provided by Black and Owens (2016). We use this list to define contenders and non-contenders. For vacancy, we define the start of a vacancy as the day a Supreme Court justice publicly announced his retirement or resignation, and the end as the day of the Senate confirmation vote.

3 Identification strategy

We use cases decided after 1974 as our sample for analysis. One reason for leaving older cases out is that vacancies often overlapped before 1975. As Supreme Court vacancies are recurring events, this would make identification difficult as it is hard to distinguish the effect from overlapping vacancies. Another reason is that before 1975 few slots were given to circuit court judges. Few slots means the competitions, if there were, were more likely to happen between circuit court judges and candidates from public sector or academia, rather than competitions within the courts. As Nemacheck (2007, [3]) notes, since President Eisenhower, presidents gradually tend to favor individuals from federal courts as their potential candidates. One possible explanation is that federal judges have a more traceable ideology, compared to candidates from other backgrounds. Since President Ford nominated Justice John G. Roberts, about 73% of candidates are circuit court judges (as we can see in Figure 3).

Figure 1: Cumulative number of all candidates and Circuit Court candidates



We assume a linear model

$$Y_{it} = \alpha + \beta \text{Vacancy}_t + \gamma \text{Contender}_i + \delta \text{Vacancy}_t \times \text{Contender}_i + \boldsymbol{\zeta}' \mathbf{X}_{it} + \boldsymbol{\eta}' \mathbf{Z}_{it} + \varepsilon_{it} \quad (1)$$

where Y_{it} is the outcome (e.g. dissent rate), \mathbf{X}_{it} are dummies for divided government and divided panel, and \mathbf{Z}_{it} are groups of circuit, year and legal-issue fixed effects. We estimate (8) using OLS with robust standard errors clustered by circuit.

The coefficient of interest is δ ; this will give the average difference in the outcome variable, conditional on fixed effects, for contenders during vacancies. We examine whether judges write more/less dissent opinions, whether judges write more/less concurring opinions, and whether judges vote in favor of U.S. government agencies (when a U.S. government actor is party to the case). In additional specifications, we look for heterogeneous treatment effects by whether the judge is in a divided panel, and whether there is currently divided government (Senate and presidency controlled by different parties).

4 Results

Table 1 shows our results for behavior of writing dissents. Column 2 shows that under divided government, vacancies cause contenders to reduce their dissent rate. This is different from the result in Black and Owens (2016)[2], who showed an increase in dissent rate due to vacancies. They used ideology scores to select cases they consider similar for analysis, which may account for the different result.

In Column 3, we see that when a contender judge sits in a panel with members from both parties, he or she is less likely to dissent as well. The existence of divided panel encourages all judges to dissent more, which is consistent with what Berjeró and Chen (2017) [1] find when they are looking at how electoral cycles affect dissent rate.

Since all nominations must be affirmed by senate, candidates would prefer not to write more dissents during the vacancy, for the more dissents they write, the more ammunition the senators would have during the hearings of nomination. In the recent nomination of Neil Gorsuch, for example, critic Guerino J. Calamine (of the Communications Workers of America) testified: “*Just seven months ago, Judge Gorsuch issued a seven-paragraph dissent in a workplace safety and health case that amounts to a flashing red light for the Senate. ... This dissent alone disqualifies Judge Gorsuch for the position to which he has been nominated.*” Table 2 provides the results for writing concurring opinions. Similar to Black and Owens (2016)[2], we find that contender judges tend to write less concurring opinions during vacancies. But whether contenders write concurring opinions has no significant relationship with divided government or divided panel. It seems that judges simply choose to keep a low profile during the vacancy.

Table 3 reports the results on supporting federal government actors. We find little evidence of contenders supporting for pro-U.S. decisions. The coefficient for contenders at vacancy is positive yet insignificant, and there is no interaction effect of divided panel or divided government.

Table 1: Effect of Vacancy on Contender Dissent Rate

	(1)	(2)	(3)	(4)
Vacancy	-0.00102 (0.00146)	-0.00102 (0.00146)	-0.000961 (0.00145)	-0.000958 (0.00145)
Contenders	0.00269 (0.00204)	0.00267 (0.00205)	0.00255 (0.00209)	0.00253 (0.00210)
Contenders at vacancy	-0.00513 (0.00383)	0.000817 (0.00460)	0.00460 (0.00693)	0.0111 (0.00733)
Divided government		0.000177 (0.000975)		-0.000420 (0.00147)
Contenders at vacancy × Divided government		-0.0153** (0.00600)		-0.0155** (0.00604)
Divided panel			0.00662** (0.00125)	0.00618*** (0.00159)
Contenders at vacancy × Divided panel			-0.0141** (0.00697)	-0.0147** (0.00699)
Divided panel × Divided government				0.000853 (0.00171)
Year FE	Yes	Yes	Yes	Yes
Circuit FE	Yes	Yes	Yes	Yes
Legal issue FE	Yes	Yes	Yes	Yes
<i>N</i>	191768	191768	191768	191768
<i>R</i> ²	0.004	0.004	0.005	0.005

Standard errors in parentheses, * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Table 2: Effect of Vacancy on Contender Concurrence Rate

	(1)	(2)	(3)	(4)
Vacancy	0.001862 (0.001599)	0.001895 (0.001601)	0.001913 (0.001596)	0.001943 (0.001597)
Contenders	0.005735** (0.002319)	0.005818** (0.002316)	0.005606** (0.002343)	0.005684** (0.002338)
Contenders at vacancy	-0.01108** (0.005148)	-0.01503*** (0.005625)	-0.01562*** (0.005434)	-0.02003*** (0.006998)
Divided government		-0.001184 (0.001016)		-0.0006904 (0.001560)
Contenders at vacancy × Divided government		0.009426 (0.007907)		0.01011 (0.007605)
Divided panel			0.006050*** (0.001202)	0.006377*** (0.001607)
Contenders at vacancy × Divided panel			0.006399 (0.008115)	0.006737 (0.008228)
Divided panel × Divided government				-0.0006485 (0.001889)
Year FE	Yes	Yes	Yes	Yes
Circuit FE	Yes	Yes	Yes	Yes
Legal issue FE	Yes	Yes	Yes	Yes
<i>N</i>	191768	191768	191768	191768
<i>R</i> ²	0.005	0.005	0.005	0.005

Standard errors in parentheses, * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Table 3: Effect of Vacancy on Contender Support for Government Party

	(1)	(2)	(3)	(4)
Vacancy	-0.005308 (0.005620)	-0.005100 (0.005608)	-0.005256 (0.005619)	-0.005012 (0.005605)
Contenders	0.004884 (0.005320)	0.005188 (0.005330)	0.004704 (0.005291)	0.005022 (0.005293)
Contenders at vacancy	-0.0001486 (0.01518)	0.01063 (0.01872)	0.01520 (0.02990)	0.02677 (0.03343)
Divided government		-0.004511 (0.003158)		-0.01082* (0.005635)
Contenders at vacancy × Divided government		-0.03310 (0.02195)		-0.03389 (0.02210)
Divided panel			0.008055** (0.003134)	0.003276 (0.004480)
Contenders at vacancy × Divided panel			-0.02206 (0.03354)	-0.02310 (0.03424)
Divided panel × Divided government				0.008985 (0.006117)
Year FE	Yes	Yes	Yes	Yes
Circuit FE	Yes	Yes	Yes	Yes
Legal issue FE	Yes	Yes	Yes	Yes
<i>N</i>	71571	71571	71571	71571
<i>R</i> ²	0.089	0.089	0.089	0.089

Standard errors in parentheses, * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

5 Conclusion

In this paper, we show that the existence of vacancy affects judges who are potential nominees. We are planning to continue our research by extending our analysis in the following ways. We will see if there is any event that could be used as a natural experiment so that we can exploit the causal effect of vacancy and shortlist candidacy on behavior of Circuit Court judges. The current method is akin to a difference-in-difference approach, and we should check whether the parallel trends assumption holds.

References

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