Strategic Timing in the Appointments Process:
Position Taking on Supreme Court Nominees

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Abstract

This paper examines how senators behave strategically when announcing positions on executive appointments. The appointment process is dynamic and involves opportunities for strategic action well beyond the senator’s final confirmation vote. In order to explore this phenomenon we examine nominations to the U.S. Supreme Court. We theorize that position taking on judicial nominations is a function of signals transmitted to senators as well as the characteristics of the senator and nominee. We hypothesize that senators take positions earlier when they receive clear signals and delay their position taking when these signals are in conflict or unclear. We utilize duration models to explain position taking on potential justices from 2006 to 2010. Our results indicate that position taking behavior in response to Supreme Court nominees is a product of senator status, nominee ideology and interest group pressures.
On May 10, 2010, President Barack Obama nominated Solicitor General Elena Kagan to serve on the Supreme Court of the United States. Kagan was chosen to replace Associate Justice John Paul Stevens, who was taking senior status after nearly 35 years as a justice. Fifteen senators announced their explicit support or opposition to Kagan within 24 hours of her nomination. Among these senators were fourteen Democrats in favor, including the party’s leaders in the Senate and the chairman of the Senate Judiciary Committee, and one Republican against. On the other hand, fourteen senators failed to express their support or opposition until the confirmation vote 87 days later. What explains the divergent timing of these statements? We argue that it is the result of rational decision-making by senators who perceive high-profile nominations as opportunities to advance their policy goals and take positions pleasing to their constituents.

Timing is an important aspect of politics. Potential candidates for office consider when to enter electoral contests (Ashworth and Bueno de Mesquita 2008; Carson, Engstrom, and Roberts 2006), parties time elections so as to retain majority party status (Alt and King 1994; Warwick 1992), and legislative leaders schedule votes based on strategic considerations (Yackee 2003). Members of Congress face numerous instances where the timing of their actions may benefit from strategic calculations. These include voting, agenda-setting, proposing legislation and amendments, offering trades, threatening obstruction, and communicating with the press and public (Calvert and Fenno 1994). Legislators also engage in position taking activities that advertise their efforts to constituents; they may do so strategically when these activities are most advantageous (Fenno 1978; Mayhew 1974). A small number of studies examine strategic position taking on legislation (Box-Steffensmeier, Arnold and Zorn 1997) and executive impeachment (Caldeira and Zorn 2004) by applying Krehbeil’s (1991) legislative signaling
theory. However, it is unknown whether this theoretical framework explains position taking on presidential appointments. Because Article II, Section 2, of the U.S. Constitution requires the Senate to provide “Advice and Consent” to the president’s nominees for “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and…other Officers of the United States,” this aspect of the separation of powers requires further examination.

We examine senator position taking in response to the nominations of Samuel A. Alito, Jr., Sonia M. Sotomayor, and Elena Kagan to better understand senators’ behavior during the appointment and confirmation process. We employ a duration model to analyze the timing of senatorial position taking. We develop this model using prior research on both the position taking activities of legislators and Supreme Court confirmation votes. Our findings indicate that position taking behavior is a function of senator status, nominee ideology, and connectedness to interest groups.

**Position Taking in Congress**

Members of Congress are concerned with pleasing their reelection constituencies and thereby retaining their seats (Arnold 1990; Mayhew 1974). Mayhew identifies position taking as a key activity employed by members of Congress seeking reelection. He argues that voters respond positively when legislators “make pleasing judgmental statements” (1974, 62). Legislators believe that the positions they take affect their electoral success (Arnold 1990; Fiorina 1974; Kingdon 1989; Mayhew 1974) and there is substantial support for this assumption (Box-Steffensmeier et al. 2003; Rocca and Gordon 2010; Schiller 2000; Wright and Berkman 1986). Position taking can take the form of roll call votes, bill and resolution sponsorships and cosponsorships, and statements concerning policy positions (Box-Steffensmeier et al. 2003; Harward and Moffett 2010; Kessler and Krehbiel 1996; Oleszek 2007). Most studies of position
taking examine roll call votes (e.g., Ansolabehere, Snyder and Stewart 2002; Bovitz and Carson 2006; Erikson and Wright 2008; Fiorina 1974; Jones 2003). However, legislators are concerned with both how to vote and when to announce their positions to best achieve their personal or political goals.

Taking a stand prior to the recorded vote is voluntary but not unusual (Highton and Rocca 2005, 304). Several scholars acknowledge the role of timing in congressional decision-making, including position taking activities beyond roll call votes (Box-Steffensmeier, Arnold and Zorn 1997; Caldeira and Zorn 2004; Glazer et al. 1995; Highton and Rocca 2005). This literature recognizes the distinction between the process prior to roll call votes and the votes themselves, providing a more nuanced view of congressional behavior.

The determination of when to announce a position is many times as important as the position selected because strategic timing can facilitate the achievement of electoral and policy goals (Box-Steffensmeier, Arnold and Zorn 1997, 325). Krehbiel (1991) asserts that legislators take positions early in the consideration of a legislative issue if they receive clear, consistent, and compatible signals about the preferences of their constituents, interest groups, and policy or party leaders. According to Krehbiel, by recognizing and responding to such signals a legislator acknowledges their importance; staking a public position early in the process can thus help legislators mobilize constituents and increase electoral support. Early announcements also allow members to play the role of policy entrepreneur as well as act as position influencers.

Similarly, Lipinski (2001) explains that “[m]embers strongly desire to communicate their positions successfully when they determine it is in their political interest for constituents to know their stances” (81). Members may publicize their positions because either they believe they will be viewed favorably or they feel obligated to explain a position without strong support from their
constituents. The choice to publicize a vote can also have a significant impact on constituent knowledge of senators’ positions (Lipinski 2001), as voters in Senate elections are “calculating and somewhat sophisticated” (Wright and Berkman 1986, 584) and pay attention to incumbent policy positions (Abramowitz 1988).

Conversely, legislators may delay taking a position if the preferences of crucial actors are mixed or unclear. For example, constituent heterogeneity makes the decision to delay position taking sensible (Highton and Rocca 2005). Senators also face cross-pressures from their constituents, party leaders, or other external forces that influence their willingness to take a position (Bovitz and Carson 2006, 300). There are risks to taking a position early in such situations: legislators may misread the preferences of constituents or elites and be forced to alter their positions (Box-Steffensmeier, Arnold and Zorn 1997). Furthermore, miscalculating “can harm a [member’s] reputation, influence and ultimately the chance to be reelected” (Schiller 1995, 198). A legislator’s response to these signals may be heightened if he or she is facing reelection, and especially a primary challenger, in the near future (Caldeira and Zorn 2004). Uncertainty therefore can result in the collection of additional information and the consideration of the costs and benefits of taking a particular position.

Waiting to take a position can also be beneficial. Delay allows legislators to consider the electoral ramifications of their decisions and appear to be thoughtful public servants. For example, delay can “demonstrate to constituents that a representative is seriously weighing conflicting viewpoints” (Caldeira and Zorn 2004, 518). Additionally, Members may decline to take a position early in the process because they wish to remain part of the policy development process (Fenno 1990). For those legislators who emphasize the goal of good public policy, staying publicly silent may be one way to ensure inclusion in the deliberation process. However,
waiting too long to take a position may alienate some constituents or interest groups, bring unwanted attention to the member, or decrease the member’s credibility on the relevant issue (Box-Steffensmeier, Arnold, and Zorn 1997).

The risks of position taking lead some legislators to avoid it and thereby escape the scrutiny of their constituents. Jones (2003) finds that delay is more likely among senators who are pursuing higher office (i.e., the presidency), retiring, or won by larger electoral margins in previous elections and is less likely among party leaders. Similarly, Glazer et al. (1995) find that House members delay casting roll call votes when they plan to vote against their party and especially when the vote itself is likely to be close.

The extant literature on position taking focuses very little on legislators’ responses to presidential appointments. Given the important tasks fulfilled by these appointees, as well as the constitutional role delineated to senators, understanding when and why senators publicly take positions on presidential appointments is necessary to comprehend both position taking behavior and confirmation politics. Furthermore, vacant positions must be filled to ensure the judicial and executive branches function effectively. Few legislative initiatives demand such urgent attention. We therefore examine nominations to the U.S. Supreme Court in order to explore this phenomenon. Supreme Court nominations offer a particularly good test of position taking behavior with respect to appointments because they are (a) high salience appointments that (b) receive substantial public and elite attention and (c) are important to presidents and senators in terms of both constituent wishes and long-term policymaking goals.

**Position Taking on Supreme Court Nominees**

The Senate’s consideration of Supreme Court nominees is among its most important responsibilities. Justices retain their offices “during Good Behaviour,” usually interpreted as
providing life tenure, so the appointment process is the primary mechanism by which the Court is tethered to public opinion (Dahl 1957; Giles, Blackstone, and Vining 2008). Presidents attempt to appoint justices whose ideological preferences are similar to their own, and they are usually successful (Segal, Timpone, and Howard 2000; Szmer and Songer 2005). Outside interest groups also recognize the importance of judicial appointments and are routine participants in the federal judicial confirmation process. Interest groups mobilize their constituents and directly lobby senators in order to influence senators’ votes on these nominations (Caldeira, Hojnacki and Wright 2000; Caldeira and Wright 1998; Scherer, Bartels and Steigerwalt 2008; Steigerwalt 2010; Vining 2011). Although a rich literature examines roll call votes on Supreme Court nominees (Epstein, et al. 2006; Segal 1987), we do not know why senators decide to either announce positions or “wait and see” during the confirmation process.

However, when senators announce their preferences may be as important as their votes (Box-Steffensmeier, Arnold, and Zorn 1997). Qualitative studies and media accounts illuminate the importance of senatorial behavior prior to the confirmation vote (Maltese 1995; Silverstein 1994; Watson and Stookey 1995). Senators do not necessarily make voting decisions about judicial nominees based on conditions at the time of the vote; instead, they may take a position any time after the president’s announcement of the nomination. It is often possible to forecast the outcome well in advance of the vote due to senators’ public commitments (Poole and Rosenthal 1991). Furthermore, given the high salience of Court nominations with the public and interest groups alike, the signals sent to senators are likely to be strong (Kingdon 1989) and senators’ responses closely monitored (Gimpel and Wolpert 1995).

The judicial confirmation process it is lengthy and dynamic (Shipan and Shannon 2003), and both interest groups (Vining 2011) and the public (Gimpel and Wolpert 1995) respond to the
fluid nature of the confirmation process. Senators have opportunities to take positions throughout this process, and their incentives to do so vary as they learn new information. First, the number and identity of undecided senators can have a substantial impact on confirmation politics. If sufficient support exists to invoke cloture and confirm a nominee, there are fewer incentives for senators or pressure groups to prolong a confirmation battle. Groups preserve resources when opposition does not materialize (Scherer, Bartels and Steigerwalt 2008; Steigerwalt 2010). The president is also unlikely to expend political capital on nominees when they are not closely contested (Cameron and Park 2011; Johnson and Roberts 2004); “going public” and utilizing the bully pulpit are unnecessary without opposition (Holmes 2007; Kernell 1997). Conversely, a smaller coalition favoring confirmation justifies a prolonged debate and encourages the president to exert time and energy on behalf of his nominees. Thus, if senators’ actions are informed by their desires for reelection and political goals (Arnold 1990; Fenno 1978; Mayhew 1974), they may (or may not) perceive an advantage associated with taking a position (or not) before the roll call vote in response to a Supreme Court nominee.

**Explaining Position Taking in the Appointments Process**

We analyze the timing of senatorial position taking during the presidential appointments process by examining Supreme Court nominations. We propose a signaling theory adapted from the framework developed by Krehbiel (1991). Krehbiel proposes that legislators respond to signals sent by constituents, interest groups, and policy and party leaders when determining when to take a position on an issue. Our model includes signals sent from these actors. We argue that senator status, constituent effects, interest group effects, and nominee characteristics determine when senators take positions and how they vote on potential justices. Our theory and
hypotheses are presented below along with the measurement strategies for our dependent and independent variables.

**Individual senator factors**

We expect that several factors related to senators’ status affect the timing of position taking activities, specifically their position in the Senate and electoral status. Legislators’ status within their chamber influences both behavior and outcomes (Hibbing 1991; Krutz 2000; Lazarus and Steigerwalt 2009). In particular, party leaders act differently than rank-and-file members. They are tasked with making important decisions regarding chamber agendas and committee composition as well as explicating the party’s positions on issues. Senate leaders persuade their copartisans using a variety of tactics (Patterson 1989). One way a leader influences her caucus is to take a public position on an issue as a signal to the rank-and-file about the party’s formal position. We thus posit that Senate party leaders are more likely to take positions early in the confirmation process as a signal to their copartisans than rank-and-file members. We code as 1 all *Party Leaders* in the four main Senate leadership positions: Majority Leader, Minority Leader, Majority Whip and Minority Whip. All other members are coded as 0.

We anticipate that position taking on Supreme Court nominees is also associated with Senate Judiciary Committee membership. Members of the Judiciary Committee evaluate nominees prior to consideration by the full Senate. Most important, the Committee holds a public confirmation hearing during which nominees are questioned as to their views and background (Wermiel 1993). Members of the Judiciary Committee are likely to participate in the public debate about a nominee but, contrary to expectations for legislation (Box-Steffensmeier, Arnold, and Zorn 1997), we expect that they will not take explicit positions early in the confirmation process. Rather, Judiciary Committee members define their task as ensuring that a nominee has
the proper intellectual capacity, professional competence, and judicial temperament to serve as a justice (Wermiel 1993, 122). The need to evaluate objectively the nominee’s fitness implies a rejection of position taking prior to a nominee’s confirmation hearings. Members who announce their positions before public hearings may be perceived as shirking their duties.¹ We therefore expect that Judiciary Committee members refrain from position taking in order to maintain the appearance of a fair hearing. We code as 1 all senators serving on the *Judiciary Committee* at the time of each nomination, and all others are coded 0.

Because position taking is a reelection-oriented legislative strategy, it is likely also influenced by the senator’s reelection status. We posit two facets of reelection affect when a senator will announce her position. First, senators who are up for reelection are more likely to delay announcing a position. Electoral pressures influence members of the Senate differently than members of the House. In particular, senators’ six-year terms allow them to forestall a single-minded focus on reelection until the final two years of their terms (Lazarus and Steigerwalt 2009; Schiller 2000, 2005). Therefore, senators possess more latitude to vote sincerely, as opposed to following constituent preferences, in the first four years in office. However, as reelection approaches, senators must devote more time to reelection activities and to pleasing important constituent groups. Announcing positions on appointments likely follows a similar pattern. As discussed above, senators may fear constituent backlash with respect to their decision; however, this fear is more likely to surface once a senator enters the reelection phase of her term. We therefore theorize that senators in the last two years of their terms are more likely

¹ Caldeira and Zorn (2004) provide a similar hypothesis regarding the behavior of House Judiciary Committee members during the impeachment process of President Bill Clinton.
to delay announcing a position on a Court nomination as compared to their non-electorally oriented colleagues. We code *Senators Facing Reelection* as 1, and all other senators 0.

Second, retiring senators are free of electoral concerns and constituency pressures. By announcing their retirements, senators allow themselves to vote their personal preferences. Thomas (1985) finds that retiring senators, like those imminently facing reelection, change their voting habits. However, they do so by increasing their ideological voting patterns. We therefore expect that senators who have announced their retirement will be more likely to ignore signals transmitted by others and announce their positions later than other senators. We code *Retiring Senators* as 1, and all others 0.

We also recognize and test for the important influence of senator ideology on position taking behavior. We discuss this factor below, however, as we utilize a measure of senator ideology relative to the ideology of the specific nominee.

**Interest group effects**

Signaling theory posits that position taking is further influenced by interest group activity. With respect to judicial nominations, interest group lobbying exerts a strong influence on senators’ votes (Caldeira and Wright 1998; Scherer, Bartels and Steigerwalt 2008; Steigerwalt 2010). Interest groups particularly monitor Supreme Court nominations and tend to support nominees selected by likeminded presidents (Vining 2011). We posit that interest group activity also influences senators’ position taking strategies. Since we are less interested in what position a senator takes than when they express it, the question is how interest group support or opposition will influence senators’ strategic calculations. We posit that senators who are closely connected to pressure groups will express a position earlier in the process. Senators who are allied tightly with conservative or liberal interest groups and rely on their backing will express support for the
groups’ preferred positions; alternatively, senators who are less reliant on pressure groups will experience less pressure to take a position early. In both cases, senators act strategically to try and either maximize or minimize the groups’ contribution to the debate over the nomination (and simultaneously boost the influence of groups aligned with their own preferences). In order to capture the extent to which senators are connected to special interest groups we examine \textit{PAC Dependence} to determine the extent to which senators relied on PAC contributions relative to their total fundraising in their most recent previous elections. Because senators vary in their dependence on interest group contributions, and given the differential costs of Senate races in large versus small states, we measure this variable as the proportion of a senator’s total campaign funds donated by interest groups. If a member was appointed to the Senate and did not intend to run for a full term, we code has as independent of PAC donations (i.e., \textit{PAC Dependence} = 0).

We also anticipate that the bonds between interest groups and senators are loosened when the latter is no longer dependent on interest group support. Accordingly, our model includes the product of \textit{PAC Dependence} and \textit{Retiring}.

\textbf{Constituent effects}

Signaling theory posits that the timing of position-taking depends on cues from constituents. There are strong linkages between a legislator’s constituency and her tendency to take positions on policy issues (Highton and Rocca 2005). This is not surprising given that senators’ ideologies are generally congruent with those of their reelection constituencies (Uslaner 1997, 244). We expect that senators will consider the ideological composition of their constituencies, particularly with regard to support for the president who selected the nominee. Studies find a link between constituent support for the sitting president and favorable senatorial votes for his nominees (Cameron, Cover and Segal 1990). With regard to position taking
behavior, we predict that senators whose states more strongly supported the sitting president in his last election will announce their positions earlier than senators from states whose citizens were more likely to vote for the president’s opponent. *Presidential Vote* thus reflects the president’s share of the two-party vote in the last presidential election.

**Nominee characteristics**

Our key addition to Krehbiel’s (1991) signaling theory is the consideration of nominee characteristics. One key determinant of roll call votes on Supreme Court nominees is the ideology of a potential justice, and we expect this factor influences the timing of position announcements as well. Ideology is a central determinant of Senate votes (Uslaner 1997). Ideology also influences confirmation votes, and senators are less likely to support ideologically distant nominees (Cameron, Cover and Segal 1990; Epstein et al. 2006).

In general, ideologically close senators should announce support sooner than ideologically distant senators. On one hand, those who are ideologically concordant with the nominee are likely to announce a position early to help mobilize support for the president’s nominee. On the other hand, those who are ideologically distant are likely to wait before making a public statement. This expectation stems from one of the distinct features of the judicial confirmation process: the default position of senators is to support the nominee regardless of the party of the appointing president (Gerhardt 2003; Scherer, Bartels and Steigerwalt 2008). This default position makes opposition risky, so potential opponents may delay announcing their positions to see if their concerns can be assuaged or additional opposition mobilized.

Ideologically compatible senators will announce their position early – a position almost certain to be in support – to aid the president in establishing a strong base of support for the nominee. By announcing early, these senators tap into the default expectation of support and
make it more difficult for opposition to arise. Alternatively, when a senator is ideologically distant, the senator will take longer to announce a position to allow time for potential outside opposition to develop. Senators who are predisposed to block the nominee on ideological grounds will likely decide to wait and see how other actors respond before publicly taking a position.

To capture the *Ideological Distance between Each Senator and the Nominee*, we measure the absolute distance between the senator’s Poole-Rosenthal Common Space score and the nominee’s Judicial Common Space score (Epstein et al. 2007). A potential alternative measure is to capture whether the senator is a member of the president’s party. However, there are two concerns with this operationalization: first, opposition party membership does not necessarily denote opposition to a president’s nominees; rather, the default position is to support the president’s nominees to judicial posts (Gerhardt 2003). Senators are increasingly willing to vote against Supreme Court nominees in recent years, but out of 151 total nominations to the Court, only twelve have been rejected outright. Eight of those 12 rejections occurred prior to 1900. Second, partisan identification may be too blunt a measure to identify which senators are more or less likely to announce their positions quickly, as opposed to determining whether a senator is likely to support a particular nominee. Not surprisingly, the correlation between a simple party measure and the more nuanced ideological distance measure is quite high ($r = .94, p < .0001$). We use the ideological measure given the stronger theoretical justification for its use, especially in terms of strategic timing.²

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² We also considered including a measurement of nominee qualifications given the secondary role of nominees’ qualifications identified in studies of role call votes (Segal and Spaeth 2002, Epstein, et al. 2006). However, the three nominees in our data lacked sufficient variation to conduct meaning analyses using either Jeffrey Segal’s perceived qualification scores or relevant
Finally, we utilize three additional interactions related to **Senator-Nominee Ideological Distance**. The first two capture the multiplicative influence of ideological distance with **Judiciary Committee Member** and **Party Leader**. The third captures the interactive effect of ideological distance and **PAC Dependence**.

Given the high correlation between party and ideological distance, the first two interactions essentially capture the effect of political concordance with the president on senator status within the chamber. We theorize the president’s allies are ideologically proximate to the nominee and generally support the chief executive and his nominees; as a result, these senators are likely to announce their positions earlier than opposition party senators in order to bolster support for the nomination. Thus, while we generally expect members of the Judiciary Committee to wait to express any position until the Committee vote is imminent (and thus well into the confirmation process), we expect that members of the Committee allied with the president will announce a position earlier than other members. Similarly, while we expect party leaders to announce a position earlier than the rest of their caucus in order to proactively signal caucus members and influence their decisions, we posit that leaders from the president’s party will announce a position sooner than opposition party leaders, in part because the latter need more time to determine whether voicing opposition is worth the potential risks. We hypothesize that **PAC Dependence** is especially salient for members who are ideologically compatible with a Supreme Court nominee. Members who are highly dependent on PAC support and ideologically similar to the nominee have incentives to take positions early. By doing so they can satisfy their interest group allies and shore up support for the pending Supreme Court nomination.

data related to their professional experience (clerkships, judicial experience, years as government attorney). We hope to examine the impact of nominees’ qualifications on the timing of senators’ position taking more fully in future research.
Table 1 lists summary statistics as well as the expected effects for each of our independent variables. In the next section we describe our data and model specifications.

**Data and Methods**

Our data include all members of the Senate during the confirmation processes of Samuel Alito, Sonia Sotomayor, and Elena Kagan. There were 129 different senators who served during this period, yielding 299 observations.\(^3\) We are interested in when each senator took a position on each nomination. Members who did not proclaim support or opposition prior to the floor vote for each nominee are treated as taking a position on the day of the vote.\(^4\) We identify the date when each senator took a position through three sources: the Congressional Record, senators’ press releases, and news reports located using LexisNexis searches for the last names of the senator and nominee (e.g., “Leahy AND Alito”) from the date of the nominee’s public introduction until the day of the confirmation vote.

\[\text{[Insert Figure 1 and Figure 2 about here.]}\]

**Position-Taking on Supreme Court Nominees**

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\(^3\) We restrict our data set to these nominations because the quality of available data declines precipitously prior to the Alito nomination due to incomplete archives of websites and press releases. We decline to focus on floor speeches or press releases alone because they do not capture the full range of public statements made by senators. One possible observation is excluded because the relevant senator, Ted Kennedy (D-MA), was hospitalized with terminal brain cancer during the confirmation process for Sonia Sotomayor and failed to take a position or vote for confirmation. We consider these circumstances to be sufficiently idiosyncratic to justify exclusion from the data set.

\(^4\) A possible alternative treatment of these senators would be to consider their position taking behavior as censored because it did not precede the confirmation vote. However, we argue this is inappropriate because it senators can abstain from the final vote if they prefer not to take a position.
Figure 1 shows when senators announced their support or opposition to the confirmations of Alito, Sotomayor, and Kagan. A similar pattern is observed in response to each nominee. First, a subset of senators takes a position in the opening days. There is then a lull during which few members announce positions. Finally, the remaining senators gradually take positions in the final weeks of the confirmation process. The percent of senators taking a position at each stage of the confirmation process is shown in Figure 2. Notably, 59.86 percent of announcements for or against confirmation took place before the Judiciary Committee sent its recommendation to the full Senate. Only 11 percent of senators in our data delayed taking a position until the final vote on confirmation. This indicates that studies of confirmation votes overlook a substantial amount of important information. Observing these trends does not, however, reveal why particular senators take positions at a certain moment in the confirmation process.

[Insert Figure 3 about here.]

If we explore simple bivariate relationships, we find stark differences in position taking behavior based on the ideological distance between the senator and nominee. The number of days before taking a position increases from 40.44 to 67.86 when the ideological distance changes from one standard deviation below the mean to one above it. We display the relationship between ideological discordance and time until position taking in Figure 3. This is consistent with interparty differences—the mean is 45.82 days for members of the president’s party and 67.59 days for other senators. This partisan relationship is especially pronounced for members of the Judiciary Committee. Those from the president’s party take a position in 35.69 days, on average, but those from the opposition party take an average of 67.05 days to announce their position. We observe similar trends among party leadership, with members of the president’s party taking positions in 24.57 days versus 66.33 days for leaders of the opposition party.
Bivariate relationships also indicate that senators respond to constituent preferences captured by the presidential vote. When electoral support for the president is one standard deviation above the mean, 60.62 percent, senators take a position in 40.20 days. When the president’s vote is a standard deviation below the mean, 42.27 percent, senators take positions in 63.02 days—more than three weeks later. Interest group effects are also apparent. Senators more dependent on PAC contributions to fill their campaign coffers, with a proportion of their total contributions one standard deviation above the mean, took an average of 65.18 days to declare support or opposition. Those less dependent on PAC contributions took an average of 54.13 days to announce a position. This is contrary to our expectations but we decline to accept or reject this aspect of legislative signaling theory based on preliminary analyses. Retiring members take positions 28 days slower than their colleagues (81 days versus 53.06 days). However, a t-test reveals no significant difference ($p = 0.79$) between members facing reelection (mean = 54.68 days) and other senators (mean = 53.56 days).

Although descriptive statistics provide insight into senators’ position taking behavior in the appointment process, multivariate models are needed to understand the variety of forces that simultaneously influence the strategic calculations surrounding position taking. In the next section we report the results for the estimation of our models for position taking.

**Models of Position-Taking on Supreme Court Nominees**

In this section we test the hypotheses derived from our signaling theory. In order to do so we construct an event history model. Our dependent variable is the duration of time (in days) from the date of the formal nomination until each senator announces support or opposition to nomination (mean = 54.90, s.d. = 33.72). For senators not announcing a position prior to the final
confirmation vote, we use the date of the final vote. Because the dependent variable is the duration of time, we employ survival analysis.

We estimate the results using a stratified Cox proportional hazards model. This survival model variant is semi-parametric and does not assume a particular form of the distribution over time. As a result, it is more flexible than its common alternatives and more suited for our analysis of the timing of position taking. We stratify by nominee to allow the form of the underlying hazard function to vary for each nomination. This is necessary given the different maximum duration until a position taking event for each nominee.

Whether the proportional hazards assumption—i.e., that the covariates are multiplicatively related to the hazard—holds is the primary concern when fitting a Cox model (Box-Steffensmeier and Jones 2004, 131). We test this assumption by generating Schoenfeld residuals; we then estimate the rho, chi-square, and $p$ value for each covariate. Five variables ($Judiciary Committee Member$, $PAC Dependence$, $Senator-Nominee Ideological Distance$, and the interaction terms $Judiciary Committee Member*Ideological Distance$ and $PAC Dependence*Ideological Distance$) violate the proportional hazards assumption ($p < .05$). As a result, we generate interaction terms comprised of each offending variable and the duration term (Box-Steffensmeier and Jones 2004, 134-137); the time-dependent covariates are presented under the “fixed” coefficient results.

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5 The primary alternatives to the Cox model, the Weibull and Gompertz models, assume a monotonically increasing, decreasing, or flat hazard rate throughout the duration of interest. The Cox model makes no assumption about the distribution of the data and thereby avoids misspecification of the shape parameter (Box-Steffensmier and Jones 2004, 47–48).

6 The duration of each confirmation process, from introduction by the president until confirmation vote, was 94 days for Alito, 73 days for Sotomayor, and 88 days for Kagan.
Coefficients estimated by the Cox model are difficult to interpret directly so we display hazard ratios for each independent variable. Each hazard ratio is interpretable as the relative risk of position taking corresponding to a unit increase in the explanatory variable with all others held constant. A hazard ratio of 1 indicates no change in the hazard of taking a position. Hazard ratios greater than 1 indicate a greater relative “risk” of position taking, or, in our case, a decrease in the length of time between nomination and position announcement. The exact substantive effect is calculated by subtracting 1 from the hazard ratio and then multiplying by 100 to calculate the likely increase in the probability of the senator announcing a position. Hazard ratios less than 1 indicate a lower relative risk, or an increase in the length of time between nomination and position announcement. The substantive effect is then calculated by subtracting the reported hazard ratio from 1 and then multiplying by 100. For example, a hazard ratio of 1.30 indicates a 30 percent increase in the hazard of position taking, or a shorter duration between nomination and position announcement, relative to when the treatment is absent. Alternatively, a hazard ratio of 0.70 indicates a 30 percent lower risk, or a longer duration between nomination and position announcement, when the treatment is applied, all else equal.

[Insert Table 2 about here.]

The results appear in Table 2. The parameter estimates support our signaling theory, though the significant effects of several variables are time-dependent rather than unconditional. Senators’ decisions about when to take positions are influenced by their institutional roles, electoral status, dependence on PAC support, and their ideological concordance with the president’s nominee.

[Insert Figure 4 about here.]
As signaling theory predicts, Senate leaders take positions at more than double the rate of other members (h.r. = 2.47). We display the Kaplan-Meier survival estimates for Senate leaders and other members in Figure 4. Party leaders have a higher probability of position taking until the final days of the confirmation process. Interestingly, the interaction term for leadership and ideological distance fails to achieve statistical significance when controlling for other factors. Leaders take positions more quickly than rank-and-file members regardless of their ideological concordance with the nominee. We also find support for our expectations regarding Judiciary Committee members. Although our untreated Judiciary Committee factor is not statistically significant, its interaction with the duration is significant at $p < .01$ (two-tailed test). Judiciary Committee members are, therefore, more likely to take positions as the duration of the confirmation process increases. This result is consistent with our expectations given the institutional norm that Judiciary Committee members not enter the confirmation hearings with their views predetermined.

[Insert Figure 5 about here.]

Consistent with the bivariate results, our hypotheses for retirees are supported ($p = .04$), but our expectations for members facing reelection are not ($p = .64$). As shown in Figure 5, retiring members refrain from position taking until about eight weeks into the confirmation process. Retirees are considerably slower than continuing members who must appeal to interest groups and the electorate. Furthermore, retiring members are nearly 60 percent less likely to take a position, all else equal, than other members. This is consistent with the behavior of retiring members with regard to legislation (Jones 2003). We do not find any differences in position taking behavior associated with reelection status. Senators defending their seats thus do not treat nominees in the same way as legislation, most likely stemming from the inherent differences
between appointments and legislation that we discuss above—Supreme Court nominations have high stakes, are uniformly salient, do not allow negotiation, and must be filled in relatively short order.\textsuperscript{7}

With regard to constituent and interest group effects, our results are mixed. Senators take positions more quickly over time when they are more closely connected to interest groups, indicating that they are sensitive to their dependence on activist donors. We do not identify any unique behavior with regard to PAC dependence for members related to either their ideological congruence with the nominee or decisions to retire. We also find no evidence that the level of electoral support for the president in the previous general election influences senators’ behavior. We speculate that this is due to the close association between the presidential vote in a state and the ideological predispositions of the senators it elects.

Finally, our hypotheses regarding ideological distance are supported by our model results. As shown in Figure 3 above, greater ideological distance from the nominee results in a longer duration of time before taking a position. Senators who are ideologically distant from the nominee are more likely to wait and see than those who share her political leanings, but this effect is not stable through the confirmation process. Instead, the likelihood of position-taking increases in tandem with ideological distance as the confirmation process lengthens. Ideologically distant senators are highly likely ($p < .0001$) to take a position as the duration increases rather than earlier in the confirmation process.

**Discussion & Conclusions**

\textsuperscript{7} Congress may also eliminate the vacant Supreme Court seat rather than fill it. However, the size of the Court has been consistent at nine justices since 1869.
Despite the wealth of knowledge accumulated about the Supreme Court confirmation process, our understanding of it is incomplete. In this paper we analyze senators’ behavior beyond roll call votes to uncover behavioral heterogeneity previously masked by the literature’s concentration on confirmation votes. Our analysis reveals that signaling theory explains aspects of position taking in response to Supreme Court nominees, though not always in a manner consistent with studies of legislation. Most important, we find senators behave strategically not only when deciding what position to take on an executive nominee but also when determining when to publicly announce that position. Senators respond to cues sent to them by party leaders and interest groups, and individual senators must weigh these factors, along with their own ideological inclinations, when deciding both how to vote as well as when to declare their position on a nominee. The behavior of senators prior to the floor vote can therefore have important consequences vis-à-vis confirmation outcomes, necessitating its study. Furthermore, our findings also illuminate important differences between the treatment of appointments as opposed to legislation by members of Congress.

First, Judiciary Committee members recognize their institutional roles and delay position taking as a result. This finding is consistent with behavior among members of this committee during the Clinton impeachment (Caldeira and Zorn 2004) and suggests that institutional norms are important for senators in certain circumstances. Furthermore, delay by Committee members shows how appointments are very different from legislation. Whereas members of committees generally provide guidance to their colleagues on whether to support bills and even sections of bills of interest, our findings suggest Judiciary Committee members recognize the need for restraint and deliberation when evaluating executive nominees. Second, we find that constituent effects on position taking are muted because senators respond instead to interest groups, party
leaders, and their own predispositions. This result is a significant deviation from studies of confirmation votes (Kastellec, Lax, and Phillips 2010). We argue that this finding highlights the importance of examining both confirmation votes but also the timing of position announcements. While constituent preferences influence senators’ positions themselves, our findings suggest that the timing of position announcements is more a function of strategic calculations. Thus, party leaders take positions earlier to guide the rank-and-file, and some senators respond to interest groups by announcing their positions to help bolster either support or opposition.

Third, we find substantial support for the influence of a predictor specific to the appointments process—the ideological distance between nominees and the senators who provide advice and consent to the president. We find that the influence of greater ideological distance is time-dependent, increasing the rate of position taking behavior only after the initial stages of the confirmation process. We believe this relative scarcity of reactionary behavior among ideologically distant senators is both interesting and important. Despite frequent discussions in scholarship and the popular press about agenda-setting by the opponents of nominees (Segal and Spaeth 2002, 195), we find this behavior is rare. Among the 76 senators more than one standard deviation away from a nominee, only eight (10.53 percent) spoke out less than 23 days after the introduction of the nominee. All of them did so almost immediately (mean = 1.25 days). Such early dissenting behavior is newsworthy but not common. Rather, senators generally wait before taking a stand against nominees who do not share their ideological preferences. We speculate that senators predisposed to oppose the nominee recognize that contrarian statements rarely

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8 The most famous example is Senator Ted Kennedy’s (D-MA) condemnation of Robert Bork shortly after his Supreme Court nomination in 1987 (Reston 1987; Segal and Spaeth 2002, 195). 9 Seven of these 8 senators were Democrats staking out opposition to the confirmation of Samuel Alito. The remaining event was Senator James Inhofe (R-OK) immediately opposing the confirmation of Elena Kagan.
counter strategic announcements in favor of ideologically close nominees and instead wait to receive signals from party leaders, interest groups and constituents. By doing so, they avoid taking unpopular positions with potentially harmful electoral consequences. Rather, early statements tend to come from nominees’ ideological allies (and likely supporters) and contribute to the construction of a sort of firewall for judicial nominees. Such early announcements then act to (a) reinforce the presumption of confirmation as well as (b) create the perception of a critical mass of senators in support of the nominee. These findings thus reinforce how the presumption of confirmation—a reality that does not exist in the legislative arena—tangibly influences senators’ strategic calculations and resultant behaviors.

We acknowledge the limitations inherent in the study of a single type of appointments, Supreme Court nominations, but argue that this analysis is important due to their salience and high stakes. Senators’ decisions to support or oppose Supreme Court nominees represent their verdicts on the direction of American law and can have substantial effects for decades after the conclusion of the confirmation process. Furthermore, the confirmation process for executive appointees is increasingly combative, and our results help to explain why. Party leaders and interest groups prompt senators to take positions prior to confirmation, and members ideologically concordant with nominees are likely to mobilize support for potential justices well before the floor vote. Given the inherent presumption in favor of confirmation, such early efforts can render opposition fairly meaningless. It is therefore little wonder that opponents of confirmation believe it necessary to wage caustic campaigns against nominees as a counterweight to earlier, positive statements.

Our findings highlight the importance of recognizing that the appointment process is dynamic and involves opportunities for strategic action well beyond the confirmation vote. We
demonstrate that external forces and ideological predispositions shape the process during which senators announce support or opposition for executive nominees. We believe that this study opens new avenues for studies of the appointment process and encourages additional research on coalition building and strategic choice in response to political appointees. It also points to future opportunities for research into position taking and other arenas of legislator behavior outside of the legislative process.
References


Came


Patterson, Samuel C. 1989. “Party Leadership in the U.S. Senate.” *Legislative Studies Quarterly* 14: 393-413.


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Note: N = 299
Table 2. Stratified Cox Regression Results

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Note: N = 299; Time at risk = 16,415; Log-pseudolikelihood = -1117.06
Figure 1. Histogram of days from nomination to position taken on Supreme Court nominee.
Figure 2. Percent of senators taking position during each stage of confirmation process, 2006 to 2010.
Figure 3. Relationship between senator-nominee ideological distance and days until position taking event.

Days from Nomination to Position Taking Event

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Figure 4. Kaplan-Meier survival estimates for Senate leaders and rank-and-file members.
Figure 5. Kaplan-Meier survival estimates for retiring and non-retiring senators.