Should I Stay or Should I Go?

The Clash of Views on Supreme Court Retirements

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Abstract

Hagle (1993) constructed a model to test whether Supreme Court justices engage in strategic behavior in their retirements. The model included several political variables that proved highly significant and supported the hypothesis. Since Hagle's study, research works by Atkinson (1999), Brenner (1999), and Ward (2003) have examined the departures of Supreme Court justices in detail and have called into question whether political motivations influence the justices' retirement decisions. Using Hagle's model as a starting point, this study examines recent research, updates the data, and tests two new variables. The model is again estimated using Poisson regression. The model and the political variables, continue to be highly significant with the new data and one of the two new variables adds to the model's explanatory power.

Although the passing of any United States Supreme Court justice is a historic event, the death of Chief Justice Rehnquist on September 3, 2005, was particularly important for those who study personnel changes on the Court. In addition to bringing an end to the Rehnquist Court, the Chief Justice's death was the first by a sitting justice since the death of Justice Jackson in 1954. In addition, given the retirement announcement of Justice O'Connor on July 1, 2005, Rehnquist's death created a rare double vacancy, something that had not occurred since 1971 when Justices Powell and Rehnquist were confirmed within days of each other to replace Justices Black and Harlan.

Chief Justice Rehnquist's death also came at a time when there was great speculation whether he would retire once a nominee was confirmed to replace Justice O'Connor. Speculation whether Rehnquist or another justice might be the next to retire actually began to intensify immediately after the 2002 elections. Several factors contributed to the belief that a retirement was imminent. From a practical standpoint, there had not been a change in personnel on the Court since 1994 when Justice Blackmun retired and was replaced by Justice Breyer. Aside from the remaining justices being nine years older, several had experienced a variety of medical problems over the years. Chief Justice Rehnquist, for example, had suffered a severe knee injury in late-2002 that kept him from hearing December's oral arguments (Associated Press, 2002). From a political standpoint, Justice O'Connor's reported remark on election night of 2000 when news outlets initially called Florida for Al Gore suggested that she

would be eager to retire when Republicans controlled both the White House and the Senate (Thomas and Isikoff, 2000).[1] Republicans had regained a slim majority in the Senate in the 2002 elections, and as 2003 was not an election year, many believed the time was ripe for one or more of the justices to retire (see, e.g., Eastland, 2002; Gearan, 2003; Helm, 2002; Lewis, 2002; Toner and Lewis, 2003).

Speculation continued through the second half of the 2002 Term, but none of the justices gave any indication of retiring as the term drew to a close. The summer of 2003 passed and the Court began the 2003 Term as usual. Unlike the previous term, there was little retirement speculation as the Court approached the term's midpoint, or even as the term drew to a close in mid-2004 (see, e.g., Associated Press, 2004).

Conventional wisdom suggested that the summer of 2003 would have been an opportune time for a retirement, but can a more rigorous analysis shed light on why one did not occur? Moreover, given that no retirement occurred in 2003, was the lack of speculation regarding the retirement of one of the justices during the spring and summer of 2004 reasonable under the circumstances?[2] To begin an examination of these questions, I will do four things in this paper. First, I will briefly summarize three prior studies that addressed the question of strategic retirements. Second, I will discuss three more recent works that, to varying degrees, contest the notion that politics enters into the retirement decision. Third, I will update the data for a prior model of strategic retirements to determine whether the model continues to explain Supreme Court retirements from a political perspective. Fourth, I will test two new variables using the prior model as a starting point.

<u>Early Research and Prior Model</u>

Although the Political Science literature prior to the mid-1980s contained occasional comments on Supreme Court retirements, most of these comments were either tangential to the matter under investigation or appeared in much longer works with a more general focus (e.g., Murphy 1964, Spaeth 1979). The area finally came under closer scrutiny in three articles by King (1987), Squire (1988), and Hagle (1993).

Hagle's focus was specifically on developing a political model for retirements from the Supreme Court. As such, he developed a foundation based on the attitudinal model, which views the justices as rational actors who pursue their ideological goals as best they can within the context of their decision making powers (see Segal and Spaeth 2002). Although much of the literature on the attitudinal model focuses on the policy output of the justices, Hagle (1993, 44) argued that the decision to retire can also be motivated by the pursuit of ideological goals. Hagle then turned to an examination of the works by King and Squire.

In brief, Hagle found that the methodology used by King (exponential Poisson regression) was appropriate, but that King's model was poorly specified (1993, 28). In contrast, Squire approached the question from an individual-level and used probit to estimate his model. Hagle found that Squire's variables were well-specified, but that the structure of the data and the estimation procedure were problematic (1993, 27). Having determined the strengths and weaknesses of the King and Squire models, Hagle structured an institutional-level model with a combination of explicitly political

variables and demographic factors. As presented in his Table 1 (1993, 37), Hagle's

model contained variables measuring the following: whether the president was in a

second term, the year of that second term, if the majority party in the Senate had its

numbers reduced in the last election, the percentage of justices with political experience,

a variable measuring the institutional stability of the Court, the mean age of the justices,

and the proportion of the justices over 80 years old. (The first five being the political

variables, the latter two the demographic variables.) All but one of Hagle's variables

(Political Experience) reached traditional levels of statistical significance ($p < .05$ or

smaller). The model as a whole proved significant, as did the political variables as a

group. Hagle then used the results to examine how the likelihood of another retirement

would differ in succeeding years based on different scenarios.

Recent Research

Interest in retirements of the justices has remained high. This is particularly so

given that the announcement of O'Connor's retirement ended the longest period

without a personnel change on the Court since the early 1800s.[3] On average, a vacancy

on the Court occurs approximately once every two years and scholars continue in their

efforts to explain the reasons and timing of these Court vacancies.

Three particularly important works have appeared since the publication of

Hagle's strategic retirement model: books by Atkinson (1999) and Ward (2003), and an

article by Brenner (1999). Each of these works contributes to the discussion of Supreme

Court retirements and is worth brief examination here.[4]

Atkinson's primary focus is on the circumstances surrounding the retirement or death of each justice. Atkinson's point is to put in context the physical and mental difficulties that faced each justice when confronted with the decision to retire. Atkinson's first chapter frames the discussion of the justices by noting eight basic reasons why justices leave office: 1) the threat of impeachment, 2) an attractive pension, 3) ambition, 4) dissatisfaction or weariness, 5) poor health or declining physical energy, 6) mental decline or disability, 7) family pressure, 8) a voluntary choice even though they remain capable of doing the work (1999, 1). Conversely, Atkinson also lists eight reasons why justices choose not to leave voluntarily: 1) financial considerations, 2) party or ideology, 3) a determination to stay, 4) a sense of indispensability, 5) loss of status, 6) a belief they can still do the work, 7) not knowing what else to do, 8) family pressure to stay in office (1999, 7-8).

These various reasons to stay or go do not operate in isolation, and are often very specific to particular justices. Family pressure, for example, appears in both lists. As a reason to retire it may be due to the family's concern for the justice's health. As a reason to stay it may be due to financial or status concerns. The threat of impeachment is an example of how these reasons may be specific to a particular justice as it may have been a reason to go only for Justice Fortas given that Justice Chase, the only justice impeached (though not removed), did not resign.

Notice that Atkinson only mentions political party or ideology as a reason to stay. One can easily argue that party or ideology should also be included as a reason to leave, at least as far as timing is concerned, but its inclusion in the list of reasons to stay makes

an important point. Although we might ordinarily think of a strategic retirement in

terms of the actual decision to leave, the influence will more often be to delay

departure.[5] Atkinson points to several examples of justices who delayed leaving for

political reasons. Sometimes this occurred when the president and justice were of

different parties as when Justice Clifford, a Democrat, stayed on the Court because he

did not want to give President Hayes, a Republican, the opportunity to appoint his

successor (1999, 60). Sometimes the conflict occurred even when the president and

justice were of the same party, as when Chief Justice Taft did not want to leave during

President Hoover's administration because he thought Hoover too progressive (1999,

96).

Although Atkinson notes several particular instances where ideology and politics

influenced the decision to retire, politics was not the focus of his book. As Ward points

out, "[w]hile rich in the details of justices' illnesses . . . what Atkinson's research fails to

address is how institutional arrangements have led to pervasive partisanship in the

current departure system. . . ." (2003, 7). Although Ward also recognizes the

importance of age and infirmity, he also seeks to examine the political and strategic

aspects of each retirement (2003, 7-8).

Like Atkinson, Ward discusses the specifics of each justice's decision whether to

retire. In framing his discussion, however, Ward concentrates on institutional

considerations. Foremost among these are the various expansions of retirement benefits

for the justices. The importance Ward places on retirement benefits is noted almost

immediately when he says the departure process "is pervaded with partisanship" (2003,

2). He follows this with a more specific comment on the role of expanded benefits when he notes that a "byproduct of the increased provisions, however, has been a dramatic rise in the number of justices engaging in succession politics by trying to time their departures to coincide with a compatible president" (2003, 9).

Once they begin the examination of the individual justices, both Atkinson and Ward use their chapters to present particular periods of the Court. The divisions chosen by the two authors are quite similar. The only differences of note are that Ward treats the 1937 to 1970 period in two chapters whereas Atkinson treats the period in one chapter (1937 to 1968). Ward's emphasis on expanding retirement benefits explains this difference using the Retirement Act of 1954 as the dividing point. Ward also includes a chapter on 2000 to the present.

The focus of Ward's final period is the disputed presidential election of 2000. It should come as no surprise that the departure decisions of Chief Justice Rehnquist and Justices O'Connor and Stevens may have been influenced by the outcome. The events surrounding the 2000 election have helped to refocus attention on the disputed election of 1876. Ward notes that the parallels between the two disputed elections are "startling," and concludes that the partisanship on the Court as a result of the 1876 election may have influenced the departure decisions of as many as four justices (2003, 82).

As to the 2000 election, Ward agrees with most observers and suggests that both Rehnquist and O'Connor are likely to "depart during the Bush Administration," but that Stevens and Ginsburg are likely to hold out until after the 2004 or 2008 elections

(2003, 213). Of course, neither Rehnquist nor O'Connor left the Court prior to the 2004 elections. Reasons for this are discussed below.

The third piece of research is Brenner's (1999) vigorous challenge to the notion that justices act strategically when retiring.[6] He concludes that "strategic behavior is uncommon," even for "justices who retired at an ideologically favorable time" (1999, 438).[7]

Unlike the other research in this area—Ward (2003) and Atkinson (1999), or even Hagle (1993), Squire (1988), and King (1987)—Brenner limits his dataset to only those justices who departed the Court in the post-1937 era (Van Devanter to Blackmun). Brenner begins his analysis with the retirement of Van Devanter for three basic reasons: 1) the improved retirement benefits available to the justices under the 1937 Retirement Act, 2) the availability of "modern medicine," and 3) the difficulty of determining the ideology of justices from the 18th and 19th centuries (1999, 433-434).[8] Though one might argue whether these justifications are reasonable, Brenner's limitation of his observations is of no particular consequence for the present discussion.

Brenner notes, "[w]e are interested in not only what is rational for the justices to do, but also in how the justices actually behave" (1999, 432). After examining justices who left the Court in the period examined he concludes, "possibly two of the 33 justices who left the Court in the post-1937 era might have strategically retired" (1999, 436). There are, however, two major weaknesses in the analysis. The first is an undue reliance on secondary sources of information. The second is an overly narrow view of what constitutes strategic behavior.

In his Table 1 (1999, 435), Brenner indicates that the listed reason each of the 33 justices left the Court is based on two tables in Epstein, Segal, Spaeth, and Walker (1996). The several sources Epstein et al. (1996) list for their information tend to be short biographical or encyclopedic works.[9] As Ward notes, however, the justices tend to be reluctant about discussing retirement with anyone but close friends and family (2003, xi; see also Greenhouse, 2004). This reluctance will be as true before the decision is made as it is after, particularly concerning public pronouncements as might appear in general works such as those cited by Epstein et al. (1996).

For example, Brenner indicates that Justice Van Devanter retired because of advanced age, the enactment of the 1937 Retirement Act, and a realization that further opposition to the New Deal would be futile (1999, 435). Although the third reason hints at a political basis, Brenner classifies Van Devanter's retirement as non-strategic (1999, 436). Both Atkinson (1999, 105-106) and Ward (2003, 138), however, note the political overtones of Van Devanter's decision based on their examination of primary sources.[10]

The more important limitation of Brenner's analysis is his extremely narrow definition as to what constitutes strategic behavior. For Brenner, a justice strategically retires only if the timing of the retirement meets one of two criteria. A justice of advanced age (i.e., over 70) must either (1) retire early when his or her health is good and an ideologically compatible president is in office, or (2) postpone retirement when his or her health is poor until an ideologically compatible president comes to office (1999, 433). Using these criteria Brenner concludes that only Burger and Powell strategically retired (1999, 435).

Brenner classifies five justices who retired at "an ideologically appropriate time" as having nevertheless left the Court for health reasons because they failed to leave the Court at their first opportunity to do so. For example, Brenner concludes that Justice Blackmun retired in 1994 due to declining health rather than the fact that the ideologically compatible President Clinton took office in 1993 (1999, 436). Both Atkinson (1999, 161) and Ward (2003, 208), however, report that Blackmun was in relatively good health at the start of the 1993 Term. Ward also reports that Blackmun was clearly thinking of retirement before the 1992 elections. (2003, 207). That Blackmun waited a year after Clinton took office to retire may have had more to do with a desire to not have two retirements in the same year (Justice White retired in 1993) than a lack of a strategic motive (see Atkinson 1999, 161; Ward 2003, 208).

Conversely, Brenner notes that justices such as Marshall and Douglas did not leave the court under an "ideologically congruent" president and thus did not act strategically. It is true, of course, that Marshall and Douglas did not leave under ideologically compatible presidents (George H. W. Bush and Ford, respectively), but one would be hard pressed not to recognize their efforts to retire strategically, even though those efforts were ultimately unsuccessful. For example, after his stroke Douglas reportedly said "I won't resign while there's a breath in my body, until we get a Democratic president" (Ward 2003, 186).[11] Justices generally wish to stay on the Court as long as possible to provide the best representation for their ideological positions. Sometimes, however, they miss the opportunity to retire at the "best" time.

To summarize the recent research, Brenner is the most critical of the notion of strategic retirements, but his criteria are extremely narrow. Atkinson's focus is on the context of how each justice left the Court, which tends to downplay the political aspects of the process. Ward is the most supportive of the notion of strategic retirements, although even he suggests that the precise timing of a retirement decision is often forced by outside circumstances, such as ill health. Although none of the criticisms from this research undermines the theoretical or methodological foundations of Hagle's political model, it is nevertheless appropriate to determine whether the model retains its explanatory power in light of an additional 17 years of data.

Updating the Data

Hagle (1993) provides extended descriptions and justifications for his five political and two demographic variables, so I include only brief descriptions here. The five political variables were Year of Second Term (coded 0 if a president was in his first term and 1, 2, 3, or 4 based on the year of a second term), Second Term (a dichotomous variable indicating whether the sitting president was in his second term), Reduced Majority (a dichotomous variable indicating when the majority of the justices and the majority of the senators were of the same party, and when the majority in the Senate was reduced following the previous elections), Political Experience (the proportion of the justices who held elective or high appointive offices), and Stability (a dichotomous variable relating to the institutional stability of the Court before and after 1803). The

two demographic variables were Mean Age (the mean age of the sitting justices) and

Over 80 (the proportion of the justices 80 or more years old).

The period covered by the original data began with the Court's first Term, 1790,

and ended with the 1991 Term. For this paper I followed Hagle's (1993) coding and

extended the dataset another 17 years, through 2008. Table 1 contains the results of the

prior model with both the original data and the updated data.[12]

TABLE 1 ABOUT HERE

The results with the original data (the first two columns) are taken directly from

Hagle's (1993, 37) Table 1. The first column contains the estimated coefficient for each

variable along with the standard error. The second column shows the probability that

the estimated coefficient is actually equal to zero (i.e., the statistical significance of the

estimate). The third column contains the estimated coefficients and standard errors for

the model using the updated data. The fourth column contains the significance levels

for the new estimated coefficients.

The model proves quite stable given that the additional 17 years of data produced

very little change in the estimates. The largest change occurred for Political Experience

which was reduced (in absolute value) by 0.91. Political Experience was the only

variable that failed to reach a traditional level of significance with the original data ($p <$

.08) and this level was changed to $p <$ .18 with the additional data. The second largest

change was for the estimate of Over 80 which increased by 0.22. Unlike Political

Experience, however, its significance level increased slightly and remained at $p <$ .02.

Overall, the model remained highly significant ($p <$ .001; χ^2 test with seven degrees of

freedom). Similarly, as a group the five political variables also remained significant ($p <$

.001; χ^2 test with five degrees of freedom).

Two New Variables

The work of Atkinson (1999) and especially Ward (2003) suggest two additional

factors that affected the justices' retirement decisions. Operationalizing these factors

and including them in the model may improve the model's performance.

The first factor concerns the elections of 1876 and 2000. In both of these elections

the candidate who won the Electoral College lost the popular vote. Both of these

elections also involved contested ballots, disputed electoral votes, and an ultimate

resolution involving justices of the Supreme Court (Ward 2003, 81-82; see also

Rehnquist 2004).

The 1876 election was between Democratic New York Governor Samuel Tilden

and Republican Ohio Governor Rutherford B. Hayes. Tilden won a slim majority of the

popular vote and appeared to have won the Electoral College. The results of three

Southern states (South Carolina, Louisiana, and Florida) and the qualifications of a

single Oregon elector were disputed, so Congress formed an Electoral Commission to

settle the matter. The commission consisted of five members from the Senate, five

members from the House, and five members from the Supreme Court.[13]

The Congressional members were evenly split with five Republicans and five

Democrats each. The first four justices appointed to the commission were chosen with

an eye to geographic representation, but were also evenly split along party lines:

Republicans William Strong of Pennsylvania and Samuel Miller of Iowa, and Democrats Nathan Clifford of Maine (the presiding officer) and Stephen Field of California. Many expected Justice David Davis to be the fifteenth member. Davis had been a strong Republican, but had drifted away from the party and was now seen as an independent. Hoping to secure Davis's vote for Tilden, the Illinois legislature elected him to the US Senate. Davis accepted the Senate seat, but surprised everyone by resigning his commission. Republican Justice Joseph Bradley was then appointed the fifteenth member. In a series of 8-7 party-line votes, the commission awarded the disputed states (and the disputed Oregon elector) to Hayes, who then won the Electoral College. Ward reports that the partisanship on the Court between the Hayes and Tilden supporters likely affected the departure decisions of Davis, Clifford, Swayne, and possibly Strong (2003, 82).

It is easy to see certain parallels between the 1876 election difficulties and those surrounding the 2000 election. Most important for present purposes was the involvement of the Supreme Court, which ultimately decided the conflict for Bush on a 5-4 vote. Although seven justices found there to be constitutional problems with the recount ordered by the Florida Supreme Court (Bush v. Gore at 111), it was the five most conservative justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) who decided the specific remedy (Segal and Spaeth 2002, 172).

Regardless of whether, as Segal and Spaeth suggest (2002, 171), the Court's decision in Bush v. Gore was its most blatantly partisan, it would be difficult to believe that the justices were not affected by the political aspects of the decision. Following the

1876 election Justices Clifford and Hunt refused to step down while Hayes was

president (Atkinson 1999, 61).[14] Conversely, Swayne and Strong apparently retired to

be sure Hayes appointed their successors (Ward 2003, 85-86).[15] It is safe to assume that

the liberal justices of the current Court (e.g., Stevens and Ginsburg, as the two liberal

justices most often mentioned as likely to retire) would have resisted leaving during the

administration of any Republican president, but the controversy of the 2000 election

likely steeled their determination to stay on through the 2004 election in the hope that

President Bush would be defeated.[16] On the other hand, we might expect that

conservative justices considering retirement (e.g., Rehnquist and O'Connor) might

have been more resolved to leave while President Bush could appoint their successors.[17]

The second variable suggested by recent research involves pension benefits for the

Despite the clear political influences of these disputed elections on the retirement

decisions of several justices, a variable taking the years following these two disputed

elections into account failed to improve the performance of the model. On reflection,

the reasons for this are understandable from a practical standpoint. Very simply, an

event such as a disputed election is not likely to influence retirements in just one

direction. As noted above, some justices were more likely to retire and some less so. To

measure the elections' influence one would need to conduct an individual-level analysis

that would allow the disputed election to be either a positive or a negative influence

depending on the political perspective of a particular justice. Given the institutional-

level model used here, the influence of the disputed elections washes out.[18]

The second variable suggested by recent research involves pension benefits for the

justices. Both Atkinson (1999) and Ward (2003) indicate how some seriously ill justices

refused to depart because of a lack of retirement provisions (or that they did not qualify for them). Special legislation was sometimes passed to provide benefits to these justices with the expectation that they would then retire (e.g., Hunt (Ward 2003, 87)). Rather than passing legislation specific to a particular justice, Congress occasionally passed more general retirement provisions with an eye to inducing some of the justices to leave. Ward reports that the infirmities of Justices Grier and Nelson were well known and that the 1869 Retirement Act was passed in part to encourage them to step down, which both did (2003, 76). The 1937 Retirement Act was passed in part to forestall Roosevelt's court-packing plan, but also to encourage some of the justices to retire (Ward 2003, 136-137). Justices Van Devanter and Sutherland, both elderly opponents of Roosevelt's administration, left the Court just months after the act was passed (Atkinson 1999, 104; Ward 2003, 137).[19]

Although Congress had a political motive in passing such legislation, the justices who initially took advantage of new or expanded benefits may have been more concerned with how they were personally affected (e.g., continued salary or status). Nevertheless, such new or expanded retirement benefits soon became part of the institutional structure within which later justices were able to make their retirement decisions. Moreover, having removed (or reduced) concerns about salary and status from the justices, an unintended effect of such legislation was to allow the justices a greater ability to engage in succession politics (Ward 2003, 130).

The availability or expansion of retirement benefits was clearly important to the retirements of several justices. On the other hand, the general effect was limited as later

justices became accustomed to the presence of the benefits. As such, I coded the variable Pension as a dichotomous variable equal to 1 for the year each of the three major retirement acts was passed (1869, 1937, and 1954), and for the following four years. Thus, for example, Pension takes on the value 0 through 1868, is equal to 1 for the 1869-1873 period, then is equal to 0 again through 1936, and so on.

There are two reasons to designate the effect of each act at five years. First, five years is approximately the average time that justices stayed on the Court after becoming eligible for retirement in the 1869-1936 period (Ward 2003, 74, Table 4.2). This average includes all 23 justices who left the Court during this period, whether by death (12) or retirement (11). Of those who retired, the range is from a low of two months (Grier) to a high of slightly over 20 years (Holmes). Of those who died, the range is from just under one year (Peckham) to a little under nine (Bradley). Second, a five year period ensures that there will be at least one presidential election following the passage of the act. This will allow any justices waiting for a more ideologically compatible president at least one opportunity for a change to occur.

TABLE 2 ABOUT HERE

The results from adding Pension to the model are contained in Table 2. The estimated coefficient for Pension proves to be in the expected direction (positive) and highly significant ($p < .01$). The changes to the estimated coefficients of the other variables were quite small. The biggest reduction in magnitude was for Second Term, though it still remained significant ($p < .03$). The variables Year of Second Term, Reduced Majority, and Mean Age were also reduced slightly in magnitude. On the

other hand, the largest gain was made by Political Experience. Although Political Experience still did not reach a traditional level of significance, it did improve to near the level in the original study. The variable Over 80 almost gained as much in magnitude as Political Experience. The remaining variable, Stability, also gained in magnitude. As a whole, the model remained highly significant ($p < .001$, χ^2, 8 d.f.), as did the five political variables as a group ($p < .001$, χ^2, 5 d.f.).

Discussion

Hagle (1993) demonstrated the appropriateness of a political model of retirements from the Supreme Court. The model remains statistically strong with 17 years of new data and increases its explanatory power with the inclusion of an additional demographic variable. Even so, a primary reason for examining retirements at an institutional level is to provide a president with a means of estimating the retirements that might occur in a given period. A simple graph may be the easiest way to show how the model's estimated retirements change from year to year.

FIGURE 1 ABOUT HERE

The solid line in Figure 1 plots the retirements estimated ("estimates") by the model from 1954 through 2008.[20] The diamonds in Figure 1 represent the actual retirements that occurred in a given year. The number of actual retirements ranged from zero to two during this period. The estimates, of course, are not constrained to whole numbers, so the *y*-axis is subdivided to give a better idea of the estimate values.

There have been 54 retirements in 219 years for the period covered by the entire dataset. This results in a yearly average of approximately 0.25, or about one retirement every four years. Note that the plotted estimates are of retirements for a given year, not probabilities. Note also that the estimates are not cumulative. In other words, if no retirements occur in a given year, certain factors (e.g., Mean Age) will operate to increase the estimated retirements for the next year, but other factors may work to decrease it (e.g., Year of Second Term).

We should generally expect a decrease in the estimated retirements for the year following a retirement. This is primarily because of the change in Mean Age due to the replacement. In fact, of the 17 years in which retirements occurred during the graphed period (three years had two retirements) the estimate for the following year was reduced 16 times. The exception was when Justice Ginsburg replaced Justice White in 1993. Their ages, 60 and 75 respectively, were not as far apart as is usually the case, so the change in Mean Age was minimal. In addition, the change from White to Ginsburg resulted in a reduction in the proportion of the justices coded as having political experience (White having been Deputy U.S. Attorney General, but Ginsburg not having held elective or high appointive office). Thus, there was a slight increase in the estimate for 1994. Of course, Justice Blackmun retired in 1994 and we can see that the estimate for 1995 was sharply reduced.

Conversely, we can generally expect that the estimates will increase from one year to the next if no retirements occur. Again, this is mainly based on an increase in Mean Age. We can see, for example, that following the retirement of Justice Douglas in 1975,

19

the estimate for 1976 was reduced to the lowest level for the plotted period. Over the next several years the estimates steadily increased until the retirement of Justice Stewart in 1981. The estimate dipped slightly for the following year, but again steadily increased for the next several years until the retirement of Justice Burger in 1986. It is possible, however, for the estimate to decrease despite a lack of retirements. An example can be seen in the estimates for 1997 to 1999. Having reached a small peak in 1997, the only two factors that changed in the following two years were Mean Age and Year of Second Term. Although the value of these variables each increased by 1 in 1998 and 1999, the magnitude of the estimated coefficient for Year of Second Term is larger and negative, so the net effect is a reduction in the estimates for those years.

Despite these various possibilities, we can see that retirements tend to occur at times when the estimates peak. There are five instances when the estimates rise above 0.40. The first occurs in the mid-1950s and Justices Minton, Reed, and Burton retired during this period. The second is a twin peak occurring between 1969 and 1971, at which time Justices Warren, Fortas, Black, and Harlan retired. The third peak does not come until 1986 when Burger retired, followed the next year by Powell. The fourth peak occurs just a few years later in 1990 and we saw the retirements of Justices Brennan and Marshall. The fifth peak reached a high in 2005 and we saw the retirement of Justice O'Connor. Because there was no retirement in 2004, the estimate for 2005 rose dramatically and reached the highest level in the period graphed. This was due largely to the value for Second Term equaling 1 and the increasing age of the justices.

In addition to examining the peaks in the graphed estimates, notice that in the 20 years prior to Justice O'Connor's departure the retirements have come in pairs in successive years: 1986-1987, 1990-1991, and 1993-1994. These pairs of retirements follow the two rules Justice White used to determine when he would retire (Hutchinson 1998, 408-409; see also Ward 2003, 20, Table 1.6). First, White did not want to retire in a presidential election year because he did not want to create a political issue during the campaign. Second, he did not want to retire if it would create a second vacancy in the same year for fear that the Court's efficiency would be hampered while the Court adjusted to two new justices simultaneously. Regardless of whether Chief Justice Rehnquist was attempting to follow White's rules, his death created a second vacancy that made it less likely that another justice would retire in the next year.

Returning to the question of why no retirement occurred in 2003, conventional wisdom suggested that the summer of 2003 would have been an opportune time for a retirement given that it was not an election year and the Republicans had recaptured majority control of the Senate following the 2002 elections. In Figure 1 we see that the model confirms the conventional wisdom as the graph shows that the estimates rose for the years 2001-2003. Although the estimate for 2003 rose above 0.40, it did not form a peak because the estimates for 2004 and 2005 continued to increase. Although the latest upswing was one of the five peaks discussed earlier, the retirements during those peak periods did not necessarily occur once the estimate rose above a particular level. For example, the estimate for 1985 is quite high, and substantially higher than the estimate for 2003, but a retirement did not occur until the next year when the estimate was even

higher. Similarly, 1989 has the third highest estimate for the period graphed, but it rose again for 1990, which is when a retirement occurred.[21]

Although the model and its estimates shed some light on the lack of a retirement in 2003, a more practical explanation may come from the political environment not captured by the model. Despite losing their majority status following the 2002 elections, Senate Democrats conducted filibusters against several nominees to the federal courts of appeal. Under Senate rules it takes 60 Senators to vote for cloture to end debate and then-Senate Minority leader Tom Daschle (D-SD) was able to maintain a coalition of at least 41 Democrats who voted against bringing the various nominations to a vote. These filibusters were directed at selected court of appeals nominees, but it was not difficult to see they were also a signal that a similar tactic could be used for any nominees to the Supreme Court. In particular, Senator Schumer (D-NY), who sits on the Senate Judiciary Committee, opposed several of President Bush's nominees to the courts of appeal because he felt they were "out of the mainstream," and he was quite clear that he would similarly oppose any Supreme Court nominees (Turner 2004). As much as comments such as these were a signal to President Bush, similar comments in 2002 and 2003 also warned any Supreme Court justices contemplating retirement that there would be a heated political fight over their successors (e.g., Lewis 2003). The prospect of a prolonged confirmation battle over a successor may very well have been a factor in the decision of justices such as Rehnquist and O'Connor to stay on the Court a little longer.

A final point to raise involves whether to take into consideration the medical condition of the justices. Atkinson (1999) and Ward (2003) both deal at length with the infirmities of many justices prior to their deaths or retirements. Brenner (1999), in particular, rejects a political reason behind several retirements because of the poor health of the retiree. Nevertheless, Hagle (1993, 35) points out two major problems with using the justices' health to model retirements. First, the justices are not particularly forthcoming about their health. We saw this most recently in the lack of information about the seriousness of Chief Justice Rehnquist's thyroid cancer (Greenhouse and Seelye 2004). Second, even at an individual level it would be difficult to code a variable indicating "poor health" that could be applied across justices. To again use Rehnquist as an example, being diagnosed with cancer might have provided an explanation if he had retired at the end of the 2004 Term, but it would not have been useful in explaining why the other three justices who have battled cancer (Stevens, O'Connor, and Ginsburg) did not retire. More generally, taking into consideration specific medical circumstances may be useful as a means of explaining an individual justice's retirement decision (i.e., determining <u>why</u> a specific justice retired at that time), but will be less so for an institutional-level model with an eye toward forecasting retirements.

<u>What Lies Ahead?</u>

Using the new model we can forecast the estimated retirements during the next four years of the Obama administration. As noted previously, we can usually expect an increase in the estimated retirements in the first year following an eight-year

administration. This will be true for the first year of the Obama administration as the estimated retirements for 2009 will rise above the 0.40 level to 0.46. Should no vacancies (retirements or deaths) occur, the estimates will continue to rise for the next three years, reaching 0.59 in 2012. If the lack of vacancies persists, the estimates continue to increase in a second Obama term, reaching a high of 1.25 for 2014 and decreasing slightly for the remaining two years (when the effect of Year of Second Term is strongest).

Following eight years of a Republican administration it is no surprise that speculation as to who will retire during an Obama administration focuses primarily on the Court's most liberal justices, Stevens and Ginsburg.[22] Coincidentally, these are also the two oldest justices on the Court. Although one might expect Stevens to be the first to retire given that he is approaching 90 years of age and is well over a decade older than Ginsburg, three factors may cause Stevens to delay retirement for a few more years. First, although it is reasonable for Stevens to believe that Obama will pick an ideologically compatible successor, Stevens is still the best person to represent his (Stevens') positions. Barring his own health problems or outside events that diminish the probability of an ideologically similar successor, Stevens may feel there is no rush to retire. Second, if Stevens has an eye on history, he may wish to remain on the Court through the 2010 Term at which point he will become the eldest justice to serve, surpassing Oliver Wendell Holmes, Jr., who was just shy of 91 years old when he retired. Third, and possibly more important, if Stevens stays on the Court through July of 2012 he will surpass Douglas as the longest serving justice—a particularly poignant milestone given that Stevens was Douglas's successor.[23]

If either Stevens or Ginsburg decides to retire in 2009, the estimates for additional retirements during the remainder of Obama's first term drop substantially. That said, all four of the Court's most liberal justices (Stevens, Ginsburg, Souter, and Breyer) will be over 70 before the end of Obama's first term. If for whatever reason the prospects of Obama's reelection seem dim in 2011 we may see as many as four retirements before 2013, which may include either multiple retirements or an election year retirement.

Conclusion

By combining important aspects of prior research Hagle (1993) constructed a model that demonstrated the influence of several political factors on the justices' decision to retire. The work of Atkinson (1999) and Ward (2003) provided details and context to the departures (deaths and retirements) of the justices. Atkinson was less concerned about the political aspects of the retirements. Ward dealt with them more explicitly, but both were primarily concerned with the individual decision rather than institutional trends. Brenner offered the most direct challenge to the idea of strategic retirements, but his results were weakened by overly restrictive criteria.

The results from reestimating the model with an additional 17 years of data proved highly consistent with the original results. Two new variables were tested, one of which added to the explanatory power of the model. An examination of the estimates in relation to actual retirements highlighted patterns occurring between the two.

The value of the institutional-level model presented here lies in its ability to predict the retirements one might expect at a particular time and under specified conditions. There will always be keen interest in retirements from the Supreme Court. Most speculation—the conventional wisdom—will tend to focus on specific justices. A general model of strategic retirements supplemented by specific details concerning the individual justices can only serve to enhance our understanding of the justices' retirement decisions.

Values (High, Low, and Mean) and Standard Deviations of the Variables

Variable	High	Low	Mean	σ
Retirements	3	0	0.24	0.51
Year of Second Term	4	0	0.82	1.34
Second Term	2	0	0.35	0.51
Reduced Majority	1	0	0.25	0.43
Political Experience	1.00	0.33	0.69	0.17
Stability	1	0	0.94	0.25
Mean Age	71.6	48.1	61.93	4.95
Over 80	0.33	0	0.03	0.06
Pension	1	0	0.07	0.25

1. Thomas and Isikoff (2000) report that when Florida was initially called for Gore on election night of 2000, Justice O'Connor said, "This is terrible." Justice O'Connor's husband explained that they wanted to retire to Arizona and they believed the initial call for Gore meant he would win the election. That would delay their retirement as Justice O'Connor did not want a Democrat to appoint her successor.

2. The question of judicial nominations was not totally ignored during the 2004 campaign. President Bush regularly said in his stump speeches, "I stand for the appointment of federal judges who faithfully interpret the law instead of legislating from the bench" (Candisky and Eckert, 2004). Such comments, however, seemed more related to the filibuster of several of his nominees to the lower federal courts rather than a reference to potential Supreme Court nominees. Syndicated columnist Ellen Goodman (2004) wrote a column at the start of the Court's 2004 Term that noted the connection between the presidential election and Supreme Court nominations, but it was not until the revelation of Chief Justice Rehnquist's illness in late October that speculation again focused on his retirement (see, e.g., Greenhouse and Seeley, 2004; Holland, 2004).

3. The only longer period occurred between the Senate confirmation of Justices Duvall and Story on November 18, 1811, and the death of Justice Livingston on March 18, 1823.

4. Ward also wrote a paper (2004a), which became a very short article (2004b), that related to Supreme Court retirements. The essence of the piece was the need to

consult primary sources in doing research. The example he used was an error

several researchers, including himself, had made interpreting a law relating to the

retirement of justices. Because these two works focus on the need to consult

primary sources rather than an examination of retirements per se, I do not include

them in the discussion here. In addition, following Hagle (1993, 25, note 1), I do

not distinguish between retirement, resignation, resignation with pay, etc. Thus, I

use the terms "retire" and "resign" broadly to indicate voluntarily leaving the

Court.

5.   Put another way, the decision to leave is made only once, whereas the decision to

remain can be made several times.

6.   Although Ward argues that "partisan departures have been the exception rather

than the rule" (2003, 7), he nevertheless presents ample evidence that politics

played a role in the process for many justices, particularly in relation to

"succession politics" (2003, 9).

7.   As a point of information, Brenner's article seems to have appeared prior to

Atkinson's book. Atkinson notes that prior versions of his chapters appeared in

several other sources (1999, xi-xii), and Brenner cites to one such law review article

(Atkinson 1976).

8.   The first two reasons are explicitly stated. The third is suggested in passing.

9.   Following Table 5-9, Epstein et al. (1996, 375) provide the following information:

"Sources: Elder Witt, Guide to the U.S. Supreme Court, 2d ed. (Washington, D.C.:

Congressional Quarterly, 1990); Leon Friedman and Fred L. Israel, eds., The

Justices of the United States Supreme Court: Their Lives and Major Opinions (New York: R.R. Bowker, 1969-1978); Harold W. Chase et al., Biographical Dictionary of the American Judiciary (Detroit: Gale research, 1976); Judges of the United States, 2d ed. (Washington, D.C.: Judicial Conference of the United States, 1983); The National Cyclopaeda of American Biography (New York: James T. White, various years); and Dictionary of American Biography (New York: Charles Scribner's Sons, various editions). Updated by the authors."

10. Although Epstein et al. (1996) is certainly a reliable and respected work, care must be taken when relying on such information for examinations of complex personal motivations. (Recall Atkinson's previously mentioned lists of the reasons justices decide to stay or leave (1999, 1 and 7-8)). On a related point, Ward (2004a, 2004b) also takes Brenner to task for not consulting primary sources. His criticism, however, centers on Brenner's interpretation of the Retirement Act of 1937.

11. Ward cites <u>Time</u>, November 24, 1975 for this quote. Woodward and Armstrong note that Douglas had discussed retiring at the start of the Nixon administration, but was loath to give Nixon a seat to fill (1979, 20). On the other hand, Woodward and Armstrong also note that Douglas said, "That is not a factor in any of my calculations," in response to a question as to whether he was staying on the Court after his stroke to wait for a Democratic president to replace Gerald Ford (1979, 361)

12. As with Hagle (1993), I use exponential Poisson regression to estimate the model. Details on the method can be found in Maddala (1983), King (1987), and Hagle

(1993). Briefly, the method uses the Poisson distribution to estimate the expected

number of retirements in a given year. More specifically, $\ln \lambda_t = \beta_0 + \sum_{i=1}^{n} \beta_i X_i$,

where β_0 is the estimated coefficient of the constant term, the β_i are the estimated

coefficients of the independent variables, and λ_t is the expected number of

retirements in year t.

13. The details of the 1876 election controversy are contained in an overview posted

on the HarpWeek website, which contains text and cartoons from Harper's

Weekly (1857-1912). The specific web address for the section is listed in

References.

14. Justice Hunt was a Republican, but his political mentor, Senator Conkling of New

York, had quarreled with President Hayes over reform policies, which alienated

Hunt (Atkinson 1999, 61).

15. Ward suggests that there is no direct evidence Strong left to ensure Hayes

appointed his successor (2003, 85). Even so, and as Ward notes, as a member of

the Electoral Commission Strong voted to seat Hayes. In addition, Strong retired

in good health and just a few months before the lame-duck Hayes left office (2003,

85).

16. Goldman (2006) quotes Joseph Thai, a former Stevens law clerk (2000-2001), who

believed Stevens, as a result of Bush v. Gore, would do everything he could to

avoid having Bush appoint his successor.

17. Of course, no justices retired during Bush's first term. Explanations for the lack of retirements are discussed below.

18. On the other hand, the influence of these elections is captured indirectly in the model as the justices' inclinations to retire are heightened or diminished depending on their ideological congruence with the incumbent president.

19. Although Van Devanter and Sutherland were taking advantage of new retirement provisions, the decisions nevertheless had political overtones. Abraham (1999, 159) notes that the court packing bill was still being considered by the Senate at the time Van Devanter announced his decision to retire. Moreover, the Court had just announced three decisions supporting New Deal legislation—the "switch in time that saved nine." Having lost their majority, and with the Court under attack, Van Devanter and Sutherland likely decided it was time to leave.

20. I limit the graph to the most recent 55 years for three reasons. First, prior to Chief Justice Rehnquist no justices had died in office since 1954, so we get a more direct comparison between the estimates and the actual retirements. Second, 1954 was the date of the last major legislative revision of the justices' retirement benefits. Third, as a practical matter, the graph is more readable by only including the last 55 years of data.

21. Both 1985 and 1989 were years following a presidential election, so a retirement the following year (1986 and 1990, respectively) would not have come in a presidential election year. The increased estimate for 2003, however, was followed by the presidential election year of 2004, so it should have been no surprise that

none of the justices retired or that there was little speculation about it. Although not captured in the model, the lack of speculation regarding a retirement in 2004 may have been based on White's rule of avoiding retirements in presidential election years. One might surmise that White formed this rule in part because of what he saw happen when Chief Justice Warren announced his retirement in 1968 and Justice Fortas was nominated to replace him (Ward 2003, 171-174).

22. Baum (2009, 123, Table 4-2) shows Stevens to have the most liberal voting record for the 1994 through 2004 Terms (67.1%) followed by Ginsburg (61.9%), Souter (61.7), and Breyer (57.9).

23. If Stevens prefers to not pass great justices such as Holmes and Douglas in their respective categories, he will pass Stephen J. Field as the second longest serving justice in mid-September of 2010. Resigning then would make him both the second oldest justice and the justice with the second longest term of service.

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Table 1: Poisson Regression Estimation of Retirements from the Supreme Court

Using Updated Data

	Original Data[a]		Updated Data	
Variable	Estimated Coefficient (Standard Error)	Pr ($\beta = 0$)	Estimated Coefficient (Standard Error)	Pr ($\beta = 0$)
Constant	-4.91 (3.15)	0.0594	-5.20 (3.03)	0.0436
Year of Second Term	-0.54 (0.21)	0.0045*	-0.46 (0.19)	0.0085*
Second Term	1.36 (0.41)	0.0005*	1.17 (.39)	0.0016*
Reduced Majority	0.51 (0.30)	0.0455*	0.61 (0.30)	0.0204*
Political Experience	-2.10 (1.46)	0.0764*	-1.19 (1.26)	0.1728*
Stability	-2.37 (0.69)	0.0003*	-2.16 (0.67)	0.0007*
Mean Age	0.11 (0.05)	0.0136	0.10 (0.05)	0.0207
Over 80	4.04 (1.89)	0.0162	4.26 (1.96)	0.0155
N	202		219	
χ^2, 7 d.f.	32.03**		37.76**	

Dependent Variable: Number of retirements in a given year.

[a]Results in these columns are from Hagle's Table 1 (1993, 37).
*The probability that the estimated coefficients of the five political variables could have come from a population in which they are all really equal to zero (Pr ($\beta = 0$)) is less than 0.001.
**The probability that all seven of the variable coefficients are really equal to zero (Pr ($\beta = 0$)) is less than 0.001.

Table 2: Poisson Regression Estimation of Retirements from the Supreme Court

Using Updated Data and New Model

Dependent Variable: Number of retirements in a given year.		
	New Model	
Variable	Estimated Coefficient (Standard Error)	Pr (β = 0)
Constant	-4.15 (3.04)	0.0871
Year of Second Term	-0.36 (0.19)	0.0288*
Second Term	0.79 (0.41)	0.0282*
Reduced Majority	0.59 (0.30)	0.0251*
Political Experience	-1.62 (1.32)	0.1098*
Stability	-2.25 (0.68)	0.0006*
Mean Age	0.08 (0.05)	0.0403
Over 80	4.66 (2.02)	0.0110
Pension	1.09 (0.41)	0.0041
N	219	
χ^2 , 8 d.f.	41.69**	

*The probability that the estimated coefficients of the five political variables could have come from a population in which they are all really equal to zero (Pr (β = 0)) is less than 0.001.
**The probability that all eight of the variable coefficients are really equal to zero (Pr (β = 0)) is less than 0.001.

Figure 1: Actual and Estimated Retirements, 1954-2008