

The Power to Appoint: Presidential Nominations and Change on the Supreme Court

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Can presidents use their appointment power to pull the Supreme Court closer to their own ideological preferences? Using new and novel tests of existing theories of appointments, we provide the first systematic evidence that the president is able to draw the Court median closer to his ideal point when specific theoretically identified conditions are met. Our findings hold even when we account for alternative explanations, including peer effects and the influence of public opinion, and when we leverage the uncertainty found in our data. At the same time, although the president's power to appoint new members of the Court is constrained by Senate approval, we find that such constraints are less restrictive than existing theories predict and that presidents achieve ideological gains above and beyond what the Senate should allow.

One of the most significant abilities the Constitution gives presidents is the power of appointment. In part, this power allows presidents to staff government agencies with people who will help them achieve their administrative and policy goals. It also allows presidents to nominate judges—including Supreme Court justices—who share their views. Given the Court's prominence in policy making, along with the likelihood that any nominee who is approved will serve on the Court long after the president has left office, nominations provide presidents with the opportunity to appoint someone who will advocate for their preferred policies for years, or even decades, to come.

A question that arises is whether this power extends beyond the ability to place a single justice on the Court whenever the opportunity arises. More specifically, can presidents use their power of appointment to influence the Court more generally? That is the central question we address in this article.

Our analysis of this question provides several notable contributions. First, at the broadest and most substantive level, we investigate whether presidents have been able to use their appointment power to influence the overall ideological loca-

tion of the Supreme Court—and more specifically, whether appointments of new justices have allowed presidents to pull the Court closer to their ideal points. Second, we interrogate a set of formal models of presidential appointments (Johnson and Roberts 2005; Krehbiel 2007; Moraski and Shipan 1999; Rohde and Shepsle 2008), drawing out the commonalities across these models to identify the specific theoretical conditions under which presidential influence should occur. Doing so allows us to examine not just the general idea that presidents can be influential but also the more specific idea that such influence should occur when certain conditions are met. Third, we present the first systematic tests of these theoretical predictions about presidential influence over the location of the Court.¹ Given that the driving force and foundational idea in these models is that the president wants to pull the Court closer, it is especially surprising—and a gap in our knowledge about presidential power—that this relationship has never been tested.

Our findings show that presidents can use appointments to influence the location of the Court, shifting it closer to their ideal points when the theoretically identified conditions—

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1. One partial exception to this claim is Krehbiel (2007), which we address below.

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which derive from potential Senate- and Court-imposed constraints—are met. Presidents, our data show, are able to move the Court in the direction and the distance that theory predicts. In addition to finding that presidents can pull the Court closer to their ideal points under specified conditions, we show that this effect is maintained when we control for two other prominent potential sources of change on the Court—peer effects and public opinion. We also find continued support for these existing theories when we conduct alternative tests that leverage the uncertainty that is inherent in ideal point estimates. Finally, we observe that not all of the evidence from our tests is consistent with the predictions from these models. In particular, we find that presidents are more powerful, or alternatively that the Senate is less powerful, than these theories predict.

THE PRESIDENT'S ABILITY TO MOVE THE COURT: A THEORETICAL PERSPECTIVE

To investigate whether and when presidents can use their appointment power to influence the location of the Supreme Court, we turn to a set of spatial models that have explored the appointment process in depth (e.g., Johnson and Roberts 2005; Krehbiel 2007; Moraski and Shipan 1999; Rohde and Shepsle 2008). Although there are some differences across these models, the overlap is substantial. Most importantly, the starting point for each is that the president's overriding goal in selecting a nominee is "to move the median of the Court as close as possible to his own ideal point" (Moraski and Shipan 1999, 1073).²

Building from this central motivation, these median-based models all follow the same three-stage sequence. First, a sitting justice departs, whether due to retirement, resignation, impeachment, or death. Second, the president selects a nominee, with the goal of choosing someone whose appointment would bring the Court closer to the president's preferences. As we discuss below, though, and as these theories spell out, presidents are limited in their ability to shift the location of the Court. Third, as a final step, the Senate votes. Overall, then, these models are fundamentally about, first, the ability of presidents to strategically use their power to nominate potential justices who will shift the Court median closer to their ideal points, and second, the constraints that other institutions place on this ability.³

2. Numerous theoretical, empirical, and anecdotal studies have established the importance of the median justice (e.g., Bonneau et al. 2007; Toobin 2007).

3. All of these models follow this sequence, all have the same players (with linear and symmetric utility functions), and all rely on the equilibrium concept of subgame perfection. There are, of course, differences across these models. For example, Krehbiel (2007) locates the reversion point at the median of the previous Court prior to the departure of a justice, whereas Moraski

In these models, two conditions determine whether the president can use an appointment to cause a change in the median. First, the president and the pivotal player in the Senate must agree on the direction of change—for example, when both are to the left of the Court median and consequently want the Court to shift in a liberal direction.⁴ The logic here is straightforward: when the Senate is on the opposite side of the Court median from the president, it will not look favorably on any attempt by the president to use an appointment to pull the median toward his ideal point.

Second, appointments can lead to a change in the Court median only when the president has the opportunity to replace either the median justice or a justice on the opposite side of the median justice. If the departing justice has preferences similar to the president's, and the president can choose a replacement justice who also has similar preferences (i.e., because the Senate agrees to this), then the new Court would have essentially the same distribution of preferences, and the new median would be the same as the old one. If, however, the departing justice is from the opposite side of the median, then the president will have the chance to use a nomination to produce a new median.⁵

Crucially, the models predict that the president will be able to shift the median only when *both* of these conditions hold. When both hold—that is, when the president and Senate are on one side of the median while the departing justice is at or on the other side of the median—the president can appoint a justice whose presence on the bench will pull the median toward his ideal point.⁶ Notably, these models do not simply say that presidents either can or cannot influence the Court's location. Rather, they take the more important and interest-

and Shipan (1999) locate it at the midpoint of the Court after a justice has departed. Johnson and Roberts (2005) depart from these two models by incorporating the filibuster pivot, rather than the Senate median, an approach that Rohde and Shepsle (2008) then explore in greater detail. Although these differences exist, the models are very similar in their approach to predicting whether appointments can produce a shift in the median.

4. Moraski and Shipan (1999) characterize this alignment as one where the president is either "unconstrained" or "semi-constrained." Krehbiel (2007) applies the label "proximal confirmer" to describe this alignment. Consistent with prior studies (e.g., Cameron and Kastellec 2017; Moraski and Shipan 1999), we utilize the Senate median in our tests.

5. Consider, for example, a five-justice Court, aligned $J_1 < J_2 < J_3 < J_4 < J_5$, with the president and Senate located to the left of J_1 . If J_1 departs and the president replaces her with a justice who shares J_1 's ideology, then J_3 will continue to be the median. But if instead J_5 departs and the president replaces him with a justice whose ideology is similar to that of J_1 , then J_2 will become the new median.

6. There is an additional check on the president's power, which we explore below. Even if the president and the Senate prefer large changes to the location of the Court median, they are limited in that they can shift the median only as far as the next justice.

ing step of spelling out the conditions under which presidents can do so, conditions that then provide guidance about how to properly test for such influence.

Figure 1 illustrates these necessary conditions, along with two situations in which the conditions for a president to select a median-moving nomination are *not* met. When the president’s ideal point (*P*) and the Senate median (*S*) are located on one side of the Court median (*C*), while the departing justice (*D*) is located on the other side, then both of the necessary conditions are met. This is what we see in the configuration shown in figure 1a. The president and Senate will both agree on a nominee who is located to the left of *C*, and since this appointee will be replacing a justice who had been to the right of *C*, the president will have the opportunity to shift the median to the left.

Figures 1b and 1c, however, depict situations in which nominations would *not* be expected to produce a change in the median. In figure 1b, the president and Senate agree on the direction that they would like to see the Court move, but they are thwarted by the location of the departing justice on the same side of the Court. Since any replacement would be to the left of the median, the departure has no effect on the identity of the median justice. In figure 1c, the departing justice is on the opposite side of the Court median from the president, but the president and Senate disagree on the preferred direction of change. In this constellation of preferences, the Senate will oppose any nominee who would move the Court to the left, leading the median to remain in the same location.⁷ Thus, only when the president and Senate agree on the direction of change *and* the departing justice is on the other side of the Court median, as in figure 1a, will presidents be able to use appointments to pull the median of the Court closer.

MEASURING OUR DEPENDENT VARIABLE

In order to test the theoretical predictions about the president’s ability to influence the location of the Court, we rely on ideology scores that Michael Bailey developed (e.g., Bailey 2013; Bailey and Maltzman 2011). To create these scores, Bailey and his coauthors utilize a variety of data, including congressional roll call votes, presidential vetoes, and Supreme Court justices’ votes. Rather than just calculating scores within each branch, however, this estimation technique also identifies situations where individuals from different branches and cohorts take positions on the same policy questions and issues

7. In other words, in fig. 1b only the first condition is met, while in fig. 1c only the second condition is met. Of course, the president also will not be able to use an appointment to shift the median if neither condition is met (e.g., if $P < D < C < S$).

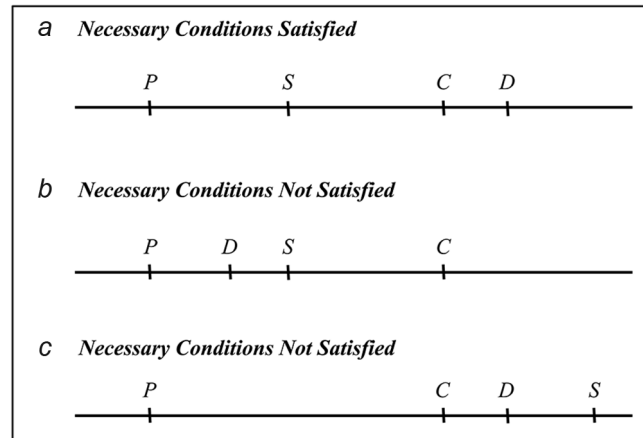


Figure 1. Necessary conditions for a policy-changing nomination

and then uses this information to construct “bridges” across institutions and over time. An example of such bridges across branches would be when a president or a member of Congress signals agreement or disagreement with a Court decision, whether via a vote cast, a position taken, a bill sponsored, and so on. Positions over time similarly can be bridged using instances in which a justice declares a position regarding a previous Court case.⁸ When a justice reveals her opinion about a previous Court case, she can then be compared directly to those justices who originally decided the case. Bailey’s cross-branch and across-time bridges can then be used to calculate scores that are comparable over time and across institutions.

Because “Bailey scores” place members of each branch on the same ideological scale and are comparable across time, they are ideal for our analysis.⁹ We use these scores to analyze all presidential nominations to the Court during the period they cover, starting with Earl Warren’s replacement of Fred Vinson in 1953 and ending with Elena Kagan’s replacement of John Paul Stevens in 2010. Because we are interested in how the potential causal effects we have identified might produce changes in the location of the median justice, our primary dependent variable is *Median Change*, which we calculate as the Bailey score for the median justice in year *t* minus the score for the median justice in year *t* – 1. Higher values

8. See Bailey and Maltzman (2011) for a discussion of types of bridging information.

9. The Common Space version of Martin-Quinn scores (Martin and Quinn 2002) also allows for interbranch (and intertemporal) comparisons. But because the method for linking the branches derives from median-based appointment models—in particular, Moraski and Shipan’s model (see Epstein et al. 2007, 307)—they are not appropriate for testing these same models. On this point see Cameron and Kastellec (2017). Bailey’s scores also have the added advantage of not relying on an assumption that the Court’s agenda remains constant over time. See Bailey (2013) for an elaboration of this point.

of these scores indicate a conservative ideology, while lower values indicate a liberal ideology; thus, an increase in the score from one year to the next (i.e., a positive value for Median Change) denotes movement in a conservative direction.

TESTING THE THEORETICAL PREDICTIONS OF MEDIAN-BASED MODELS

Median-based models make a variety of predictions about the appointment process, some of which have been the subject of empirical tests. Moraski and Shipan (1999), for example, test predictions about nominees' ideologies and produce evidence consistent with the implications of these models. More recently, Cameron and Kastellec (2017) found less support for the models' predictions about nominees' ideologies and also found that senators' votes do not correspond with additional predictions.

So far, however, there have been no systematic or suitable tests of the models' predictions about the president's ability to influence the location of the Court—which is especially surprising given that the effect of a nomination on the Court's median is, as we noted earlier, the president's (and the Senate's) main consideration in these models. The one partial exception can be found in an insightful article by Krehbiel (2007). This article, which is primarily a theoretical exploration of the appointment process, deserves credit both for highlighting the implications of median-based models for the movement of the Court and for being the first to subject this central aspect of the models to statistical analysis. However, Krehbiel bases his analysis on only one implication derived from median-based models: whether presidents can pull the Court closer when vacancies are from the opposite side of the Court median (i.e., when vacancies are “distal,” to use his term), as opposed to the same side. He finds that presidents are indeed able to do so.

Here we begin by adopting Krehbiel's general approach but with a crucial difference. Krehbiel examined only whether the nature of the vacancy—that is, whether it was distal or not—led to the Court moving toward the president. As we have argued, however, the location of the vacancy is just one of two necessary conditions that must be met in order for the president to be able to use an appointment to shift the Court median; the location of the Senate is the other. In fact, as we have shown, models beginning with Moraski and Shipan (1999) predict that a distal vacancy on its own should *not* allow a president to pull the Court closer. Instead, presidents can have such an effect only when the vacancy is on the opposite side of the Court median and the Senate is on the same side. Consequently, a primary implication of these models is that *both* conditions need to be met in order for presidents to have influence. A test that includes only the location of the vacancy,

but not that of the Senate, is missing a critical piece of the theoretical story.

We begin by conducting a test similar to Krehbiel's, but one that recognizes that both conditions must be met. We modify Median Change, as Krehbiel did, by converting the actual change to a positive value when it moves closer to the president's ideal point and a negative value when it moves farther away, producing *Change in Median toward the President*. Next, we create two measures that correspond to the necessary theoretical conditions. First, *President-Senate Agreement* is set equal to one when the president and the median member of the Senate are located on the same side of the Court median and is zero otherwise. Second, *Distal Vacancy* is set equal to one when the president and the departing justice are on opposite sides of the Court median and zero otherwise. Recall that the president will be able to pull the Court closer only when the president is on the opposite side of the Court median from the departing justice and the same side as the Senate. *Conditions Met for Change* is thus equal to one if and only if both President-Senate Agreement and Distal Vacancy equal one.

Model 1 of table 1 presents the results from regressing Change in Median toward the President on Conditions Met for Change.¹⁰ The positive and significant coefficient indicates that when both conditions are met, presidents can pull the median closer to their ideal point. Thus, our findings here provide better evidence in support of median-based models than did Krehbiel's analysis, since our tests recognize that both conditions need to be met.

Another pertinent prediction emerges from the models: when there is only a distal vacancy *or* agreement between the president and the Senate, but not both, we should *not* observe change (see figs. 1b and 1c). The key implication of this logic is that neither Distal Vacancy nor President-Senate Agreement should be significant on its own. However, when we include these two variables in model 2, along with Conditions Met for Change, we find that Distal Vacancy is significant, just as it was in Krehbiel's basic test. Because this result should be interpreted as the effect of Distal Vacancy when President-Senate Agreement equals zero (i.e., the president and Senate do not agree), this finding is inconsistent with the theoretical predictions.

The results in table 1 thus provide some overall support for theoretical predictions about the president's power to use appointments to change the median. Conditions Met for Change is positive and significant in model 1 and remains

10. Because the dependent variable is continuous, we use ordinary least squares. Our results remain essentially unchanged if we include only years in which appointments were made (see table A5).

Table 1. Predicting Change in Median toward the President

	(1)	(2)
Conditions met for change	.242*** (.073)	.131 (.080)
Distal vacancy		.133*** (.040)
President-Senate agreement		.008 (.032)
Constant	.038** (.016)	.009 (.022)
R ²	.152	.299

Note. Standard errors in parentheses. $N = 64$.

* $p < .10$.

** $p < .05$.

*** $p < .01$.

positive in model 2.¹¹ In addition, President-Senate Agreement is insignificant, as expected. However, Distal Vacancy, which should be indistinguishable from zero, is positive and significant. Because Conditions Met for Change is the interaction of the two variables capturing the necessary conditions, the coefficient on Distal Vacancy should be interpreted as the effect of a distal vacancy when President-Senate Agreement is equal to zero (i.e., if the president and Senate do not agree). The positive and significant coefficient on Distal Vacancy indicates that the president can pull the median toward his ideal point even if the Senate in principle opposes such movement, suggesting that the president may be more powerful, or the Senate less powerful, than the theories predict. Thus, although both Krehbiel's analysis and ours found a positive and significant effect for Distal Vacancy, an important point of distinction is that he interpreted it as evidence in favor of the theory, while we have shown that it actually runs counter to theoretical predictions.

These findings—both those that are consistent with the predictions of the theory and those that are not—provide a starting point in terms of evaluating theories of presidential appointment power. They also motivate us to consider further, and in more depth, whether presidents can influence the location of the Court and whether they can do so in the way theory predicts. We begin by addressing two issues that are fundamental to testing whether presidential appointments have

11. In model 2 this variable falls just short of statistical significance at $p < .05$ (one-tailed test). Given that it is created from the other two variables included in the equation, collinearity almost certainly inflates the standard error for this variable. Furthermore, in robustness checks that we discuss below, we find that Conditions Met for Change does achieve significance when we include fixed effects for presidents or chief justices (see tables A1, A3).

the power that theories ascribe to them: point predictions about the exact nature of the Court's movement toward the president, and controls for alternative explanations of change in the Court median.

Directional predictions and controlling for alternative explanations

We start by further interrogating the theoretical models in order to highlight an important and subtle implication of these models for presidential influence, one that previously had gone entirely unrecognized. More specifically, we note that in addition to making predictions about the *direction* of movement (e.g., as we explored in table 1), these models also make arguably more important point predictions about the *amount* of movement we should observe. As Moraski and Shipan (1999) argue, the president can move the median only as far as the justice adjacent to the median, a distance that is sometimes small and other times large.¹² Thus, while table 1 provides us with a useful comparison to an earlier test, a refined and more appropriate test should account for the potential distance that a presidential appointment can shift the median.

In table 2 we begin to examine this prediction by regressing our dependent variable, Median Change, which, as discussed earlier, is the actual amount of change in the median, on *Predicted Median Change*, which is the distance the median should move if predictions about presidential power from median-based models are correct.¹³ Because both the independent variable and the dependent variable can take on either positive or negative values, and because a positive (negative) value for Predicted Median Change should produce a positive (negative) value for Median Change, we expect this coefficient to be positive and significant. And that is what we find in model 1. As the predicted size of the amount of change increases (decreases), so does the actual amount of change.¹⁴

Of course, other factors also might affect the change in the location of the Court median. Our primary goal in this article

12. Referring back to the example in n. 5, a presidential appointment could potentially move the median from J_3 to J_2 , but no farther.

13. For example, Byron White was the median (0.38) when he departed in 1993. The justice immediately to White's left was Sandra Day O'Connor (0.28). Because the president (-0.75) and Senate (-0.37) were to the left of White and O'Connor, they both preferred to pull the median to the left. Since the median could move only as far as O'Connor, theory predicts that a utility-maximizing president should make an appointment that would cause O'Connor to be the new median. Thus, Predicted Median Change takes on a value of -0.1 (i.e., $0.28 - 0.38$) for this observation.

14. More specifically, the result means that an increase in Predicted Median Change of 0.1—that is, a change that theory predicts will be of that size (e.g., from, say, -0.4 in one year to -0.3 in the next)—leads to an actual change in the median of 0.1215. This is approximately the distance between Ruth Bader Ginsburg and Stephen Breyer in 2010.

Table 2. Predicting the Amount of Median Change

	(1)	(2)	(3)	(4)
Predicted median change	1.215*** (.277)	.778*** (.257)	1.186*** (.196)	1.054*** (.218)
Peer effects		.118*** (.024)		.037 (.025)
Change in public mood		.002 (.007)		.001 (.006)
Predicted median change (non-constraining Senate)			.678*** (.086)	.582*** (.109)
Constant	-.014 (.018)	-.019 (.016)	.0005 (.013)	-.003 (.013)
N	64	63	64	63
R ²	.237	.457	.623	.636

Note. Standard errors in parentheses.

* $p < .10$.

** $p < .05$.

*** $p < .01$.

is to empirically assess whether presidents can use appointments to alter the location of the Court median. To do this, however, and to have confidence that our results are not spurious, we should account for alternative factors that scholars have identified as potentially influencing the ideological position of the median justice. We focus on two such factors: peer effects and public opinion.¹⁵

We begin by considering peer effects, which occur when justices are influenced by the actions of their peers on the Court. Some recent evidence of the influence that judges can have on each other comes from the world of appellate courts. Sunstein et al. (2006), making use of the random assignment of federal appellate court judges to three-member panels, investigate the effects that the presence of other judges with either similar or different preferences has on how a judge votes. They find that due to a combination of exposure to potentially persuasive arguments, social comparison, and the role of corroboration, judges' votes change depending on the partisan affiliation of other judges on the panel. Other scholars (e.g., Cross and Tiller 1998; Kastellec 2011) reach similar conclusions, with Revesz (1997, 1764) going so far as to assert that "the ideology of one's colleagues is a better predictor of one's vote than one's own ideology."

15. We also acknowledge that other factors that we do not model, such as the influence of law clerks (e.g., Black and Boyd 2012) and acclimation effects (e.g., Shipan 2000), might affect this ideological location.

Peer effects for voting might be stronger for appellate courts than for the Supreme Court, since appellate judges sit on rotating panels where they are exposed to arguments from different colleagues, and since they usually make decisions as part of small, three-judge panels, where peer influence is more likely. Still, the mechanisms that provide for peer influence on voting—bargaining, deliberation, and logrolling—are likely to be in place for the Court, even if they might be weaker than in lower courts. Furthermore, there is substantial evidence that other actions of Supreme Court justices are influenced by their colleagues (Maltzman, Spriggs, and Wahlbeck 2000).

Based on these studies, we control for the possibility that the replacement of one justice with another can influence the behavior of other justices.¹⁶ More specifically, we want to examine whether a new justice, one with different policy preferences from a departing justice, influences the actions of continuing justices.¹⁷ To create *Peer Effects* we subtract the ideology of the departing justice in year $t - 1$ from the ideology of the new justice in year t (i.e., his or her first year on the Court), again using Bailey's scores.¹⁸

Next, we consider public opinion. Although the Supreme Court is designed to be insulated from public pressure, it would be surprising if it were completely immune to shifts in opinion. Indeed, several studies have found that the Court acts in ways consistent with public opinion (e.g., Marshall 1988; McGuire and Stimson 2004)—even if the effects are sometimes weak (e.g., Giles, Blackstone, and Vining 2008).¹⁹ As with peer effects, we remain agnostic about why the Court responds to public opinion and allow that it might be through a variety of mechanisms. Justices might prefer their actions to be consistent with public preferences, perhaps because popular decisions tend to last longer (Marshall 2009) or because doing so increases the legitimacy of courts (Vanberg 2005). Or they might get signals from Congress that serve as indicators of public disapproval (Clark 2011).²⁰

16. Our goal here is not to distinguish between the mechanisms that might cause such an effect. In addition, we emphasize that we include these not as part of our theoretically derived tests but rather to account for potential factors that other scholars have empirically identified as affecting the behavior of judges and to increase our confidence in the results we obtain from our core tests of presidential power.

17. In an innovative paper, Zigerell (2010) shows that senators' confirmation votes take into account the distance between outgoing justices and new nominees.

18. As an example, Elena Kagan (-0.5) replacing John Paul Stevens (-0.9) results in the variable taking a value of 0.4, predicting a shift to the right for returning justices.

19. Such an effect could help explain the changes to the median in nonappointment years.

20. Our analysis controls for what other studies have identified as a potential confound in examining the effect of public opinion on the Court: that public opinion indirectly influences the Court by affecting its composition

Our approach to measuring public opinion is straightforward: we utilize Stimson's (1999) measure of aggregate changes in public opinion over time. We create a variable called *Change in Public Mood*, which subtracts the previous year's value of Stimson's measure from the current year's value. Because higher values of these scores correspond to a more liberal public mood, higher values of our variable indicate movement in a liberal direction.

In model 2 we control for these two prominent alternative explanations. Once again we find that Predicted Median Change is positive and significant. Regarding the alternative explanations, we do not find a significant effect for Change in Public Mood. We do, however, find that Peer Effects is significant and, as expected, positive. This positive coefficient indicates that when a departing justice is replaced by a more conservative appointee, the ideological distribution of the Court shifts rightward, which in turn has an effect on the median member. Although the coefficient for this variable is small, the distance between a departing justice and his or her replacement can be large, producing sizable shifts in the median. For example, the replacement of a moderately conservative justice with a Bailey score of 0.5 by a moderately liberal justice with a score of -0.5 would cause the median to move 0.118 to the left, a fairly substantial change.²¹

Models 1 and 2 of table 2 thus provide crucial support for the idea that presidents can, under certain conditions, foster change in the Court median. These results demonstrate the value of using a subtler and more refined test that draws more fully on the predictions of median-based models, in particular the specific point predictions that the theories generate. Furthermore, these results are robust to the inclusion of factors that other scholars have found to influence judges' votes—namely, public opinion (which is not significant) and peer effects (which does significantly affect the change in the Court median).²² Presidents, the results show, can use appointments to shift the Court median.

(Kastellec, Lax, and Phillips 2010). We do this, of course, by virtue of accounting for the conditions under which appointments can in and of themselves determine which justice is the median.

21. Our test assumes that the influence of peer effects is additive, occurring in tandem with appointments but with an influence that is not conditional on public opinion or other characteristics of the nominee. Although little theoretical guidance exists to suggest that the effects of new membership on the Court might be moderated by the preferences of the other branches or public opinion, we did investigate this possibility. Tests with the peer effects variable interacted with the other hypothesized causes of median change revealed no statistically significant or substantively interesting differences in the results. Finally, we note that to the extent peer effects are significant, they present an alternative (and indirect) way that presidents can use appointments to influence the Court's location.

22. As we discuss below, they are robust to the inclusion of a wide range of other factors.

Exploring greater presidential power

We now return to the unexpected finding that emerged from our initial exploration of the data in table 1. Although the results in that table provide support for some of the key predictions of median-based models regarding the president's ability to pull the Court closer, they also suggest that the president appears to be stronger, or the Senate weaker, than median-based models predict. To investigate this further we create a new variable, *Predicted Median Change (Nonconstraining Senate)*, that captures the change in the location of the median that would be expected to occur if the Senate did not constrain the president when median-based models imply that it should. More specifically, the value of this variable is equal to the distance a median would move, given a distal vacancy, when the president and Senate disagree about the direction of change but the Senate ends up providing no constraint.²³ Assessing the effect of this variable will allow us to determine whether presidents influence the Court median even when median-based models explicitly predict that they should not be able to do so. If the Senate does not constrain the president in the way that median-based models predict—and if the president is more powerful than these theories predict—then this variable should be positive and statistically significant.²⁴

The results again show that the president is able to influence the location of the median in ways the models predict but also can use appointments to draw the median toward his ideal point even when the Senate should oppose such an action. In both models 3 and 4 of table 2, we find that Predicted Median Change (Nonconstraining Senate) is positive and significant, indicating that the president is able to favorably shift the Court median even if the Senate disagrees with the president. Notably, though, we continue to see strong support for the effect of Predicted Median Change, confirming that the

23. Figure 1c provides a hypothetical example of when Predicted Median Change (Nonconstraining Senate) would take on a nonzero value. A real-world example occurred in 1987. When Lewis Powell retired as the median justice on the Supreme Court, Ronald Reagan faced an opposing Democratic Senate. Given that Reagan would be replacing the median justice with this appointment, he had the opportunity to establish a new median at least as far right as Byron White, who was the nearest conservative justice to the right of Powell. Under traditional median-based models, we would assume that the Senate would not consent to any appointment that shifted the median to the right of Powell. However, in including a variable for a nonconstraining Senate, we address a situation in which Reagan would appoint a justice to the right of Byron White, effectively changing the median from Powell's ideal point of 0.27 to White's 0.44. Hence, for this appointment, the Predicted Median Change (Nonconstraining Senate) is $0.44 - 0.27 = 0.17$.

24. In order to keep Predicted Median Change (Nonconstraining Senate) independent of Predicted Median Change, this variable is allowed to be nonzero only if Predicted Median Change equals zero and must be zero when Predicted Median Change is nonzero.

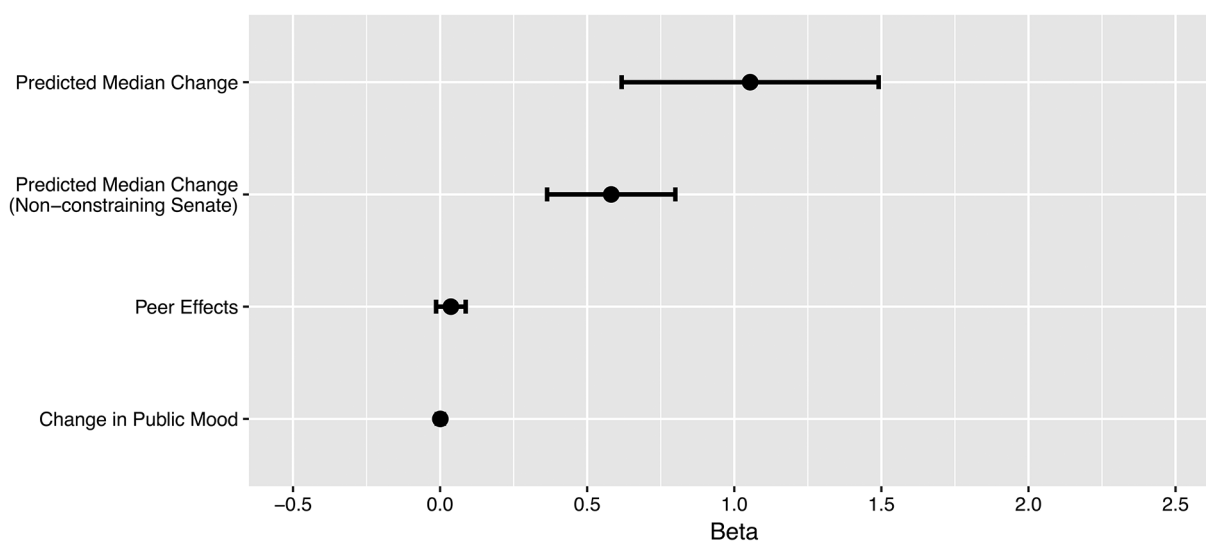


Figure 2. Predicting median change

president has the ability to influence the median in the way that models predict. In addition, in model 4 we find support for neither Peer Effects (in contrast to model 2) nor Change in Public Mood.²⁵

One additional and critical test allows us to further evaluate the results in models 3 and 4. If the predictions of median-based models are correct, then not only should we find that Predicted Median Change is positive and significantly different from zero, we also should find that it is statistically indistinguishable from one. This is a strong test, but the models predict that if the president can use an appointment to produce a change in the median of, say, 0.25, then we should observe an actual change in the median of 0.25. This in turn should produce a coefficient of one for Predicted Median Change.

Figure 2 plots the coefficients and confidence intervals from model 4. On the one hand, this figure clearly shows that Predicted Median Change both *is* significantly different from zero and *is not* significantly different from one, thereby again providing strong support for median-based theories of Supreme Court appointments. On the other hand, although Predicted Median Change (Nonconstraining Senate) is significantly different from zero, its coefficient *does* differ significantly from one, indicating that the president is not fully unconstrained in those

circumstances.²⁶ In other words, while presidents are able to use appointments to pull the median toward their ideal points even when models predict they should not be able to do so, they are not always able to move it as far as they would like.²⁷

The finding that presidents are more powerful than median-based models predict merits additional exploration. In part, as a strong and robust finding, it draws attention to potential limitations of the theories we test, a point we return to in the conclusion. But we can also explore this issue empirically by considering a range of factors that might affect the costs to the Senate of engaging in obstruction or, viewed conversely, that might increase the president's ability to induce deference. These variables fall into three categories, corresponding to the nominee, the president, and the Senate.

For reasons of space, we present results examining these factors in the appendix, but they are easily described and summarized here. Regarding the nominee, one might expect that it would be harder for the Senate to obstruct a highly qualified nominee, so we coded each nominee's Segal-Cover qualifications scores, whether the nominee had served as a federal judge, and if so, for how long. We also coded the age of the nominee, on the grounds that the Senate might be more likely to constrain the president in the case of younger nominees.

25. The lack of significance for Peer Effects suggests that new justices do not directly influence their colleagues or indirectly exert influence by, for example, changing the mix of cases that are heard. We also note that our findings in table 2 (as well as those in table 1) are robust to the inclusion of fixed effects for presidents or chief justices and if we limit the analysis to just years in which appointments were made. We present these results in tables A1–A4. In addition, they are robust to the inclusion of a large number of other potential causal factors, as we discuss shortly.

26. The coefficient for this variable also differs significantly from one for model 4. The coefficient for Predicted Median Change, however, is statistically indistinguishable from one for all four models in table 2.

27. The R^2 values provide additional information. In particular, because they tell us the proportion of the total variation in Median Change that is explained by the models, they allow us to see how much explanatory power is added by including the nonconstraining Senate measure. Comparing models 2 and 4, we see that adding this variable increases the R^2 from 0.457 to 0.636, an increase of 39%.

For the president we similarly identified a set of factors that might induce the Senate to defer. We coded whether the appointment occurred during the president's first year; if there is a war, which increases presidential power; presidential approval; and if it is the president's first appointment. We also identified factors that might strengthen the Senate's hand, including whether the nomination took place in the post-Bork or post-Fortas eras (which might have strengthened the Senate's hand), whether parties are highly unified, and whether control over government is divided.

We began by simply including these variables as additional factors in our regressions. As we show in tables A7, A9, and A11 (tables A1–A13 are available online), however, none of these variables are significant, and their inclusion has almost no effect on the key variables we present in table 2.²⁸ Another, and perhaps more appropriate, way to assess whether these factors affect the cost of Senate opposition is to interact them with Predicted Median Change (Nonconstraining Senate), which allows us to test whether there are certain conditions under which the Senate is more effective or less effective at constraining the president.

Here we find some suggestive evidence. First, as we show in table A8 and figure A1 (figs. A1–A4 are available online), the interaction with nominee quality is significant and positive, indicating that presidents are more able to realize gains, even when the Senate should constrain them from doing so, by selecting a highly qualified nominee. Second, we also find (see table A8 and fig. A2) that the interaction with nominee age is significant and positive, indicating that the Senate is more likely to act as a constraint when the nominee is younger and less likely to do so when the nominee is older. These two variables provide some evidence that the president's ability to avoid Senate obstruction is at least partially modified by characteristics of the nominee. Finally, we find (see table A12 and fig. A3) that when Senate parties are more unified, they are more able to constrain the president. None of the other variables designed to capture aspects of the president or Senate, however, are significant in the expected direction. Overall, then, the results provide some evidence suggesting that presidents can increase their power, relative to what models predict,

28. Although none of the nominee-specific variables were significant, we note that their inclusion reduced the size of the coefficient on Predicted Median Change (Nonconstraining Senate) from 0.582 (table 2, model 4) to values ranging from 0.469 to 0.507. This implies that when we account for other variables that might increase costs to the Senate, the president—while able to bring the Court closer—is less successful at doing so (e.g., the reduction in presidential power ranges from 13% $([0.582 - 0.507]/0.582)$ when *Nominee Quality* is included, to 19% when the number of years as a federal judge is included).

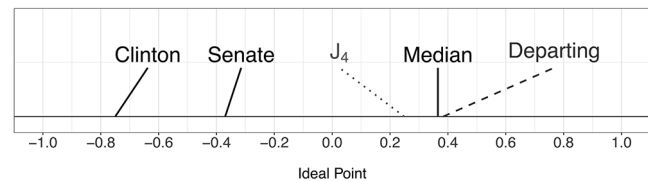


Figure 3. Ginsburg nomination, without uncertainty

when they choose nominees with certain characteristics and that the Senate is more powerful during times of party unity.

MAKING USE OF UNCERTAINTY

Our estimates in tables 1 and 2 rely on the assumption that we have been able to capture the exact ideological location of each justice on the Court. Although the scores we use are excellent estimates of judicial ideology, we recognize that we cannot be certain about the precise location of each justice. More specifically, although we have been using the ideology scores as single point estimates, these scores are actually the means of an estimated distribution of potential ideal points. Hence, our predictions for the location and change of the median justice should not be treated as exact. Rather we must account for the uncertainty inherent in our measurements and, as a result, our tests.

Consider Justice Kennedy. His 2010 ideal point is 0.28, but this value is actually the average of 500 potential ideal points—ranging from -0.05 to 0.60 —that have been sampled from a density function estimated by Bailey's model. By reducing this distribution of ideal points to a single point prediction we ignore relevant information regarding the uncertainty of the estimates.

For example, as displayed in figure 3, in Clinton's nomination of Ginsburg to replace White, the point estimates of the president, Senate, and pivotal members of the Court are arrayed such that we would predict the Court median to shift from the current median to the fourth justice (i.e., J_4). With the president and Senate in agreement about the direction of change and the departing justice (i.e., White) on the opposite side of the median, the conditions for presidential appointment power are met.

Figure 4, however, shows that when judicial ideal points are treated as a distribution rather than a point prediction, it is less certain whether these conditions remain satisfied.²⁹

29. We omit uncertainty for the president and Senate here for two reasons: first, because these actors are located far enough from the relevant justices' ideal points that any uncertainty in their estimates would not matter (which is true in the majority of cases over time); and second, because for the Senate there are enough senators clustered around the median that it ends up making little difference which specific person is actually the median.

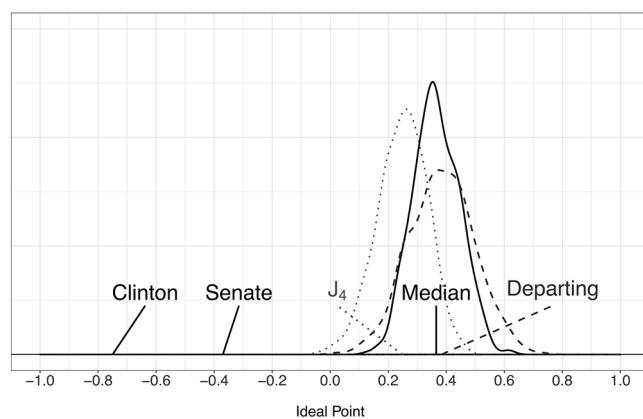


Figure 4. Ginsburg nomination, with uncertainty

For example, it is possible that the median is actually to the *left* of J_4 or to the *right* of the departing justice, in which cases we would not expect the appointment to produce any change in the location of the median. It is also possible that when J_4 is to the left of the median, the distance between these two justices is much greater than we would expect if we ignored uncertainty. Indeed, as figure A4 shows, once we incorporate uncertainty, we find a range of potential predictions for the magnitude of change that could result from this nomination, ranging from zero (i.e., no change at all, for the reasons just discussed) to the slim but real possibility of -0.45 .

Incorporating uncertainty also allows us to identify more nominees for whom there is at least some positive probability that their appointment will shift the median. When we treat the location of the justices as point estimates, we find that only 12% of the appointments in our data set meet the strict conditions for predicting change. When we take into account the uncertainty in the estimates, however, we find that there are many more appointments—44% of our nominations—for which there is a positive probability that the president could potentially pull the median toward his ideal point.³⁰

In figure 5 we reanalyze the data using the posterior distribution. To run our test, we recalculate the dependent and independent variables according to each of the unique versions of the Court determined by drawing 500 samples from the posterior distribution. This essentially produces 500 new data sets, one for each sample, and we run our regression model on each of these data sets, with each regression estimating the mean and variance-covariance of the coefficients. To summarize the results, we take a single sample from these estimated beta distributions by randomly drawing from a multivariate normal distribution with the beta coefficients and

30. This positive probability occurs in the appointments of Alito, Blackmun, Brennan, Burger, Fortas, Ginsburg, Goldberg, Harlan, O'Connor, Warren, and White. Using Bailey scores as perfect estimates, it occurs in the appointments of Alito, Burger, and Ginsburg.

variance-covariance matrix as the parameters. This procedure yields a new set of coefficients for each version of the Court. Following Melton, Meserve, and Pemstein (2014) and Tanner (1993), we then plot the mean and middle 95% of the sampled coefficients in figure 5. Plotting the values in this way gives us the equivalent of a 95% confidence interval.

Once again, the results support the idea, formalized in median-based models, that presidents can use appointments to shift the Court median. Consistent with our earlier results, and indicating strong support for median-based models of appointments, Predicted Median Change differs significantly from zero but not from one. The president can, as theory predicts, influence the Court median by strategically selecting a nominee when the conditions are right. And once again, we see that the president is able to pull the median toward his ideal point even when theory predicts the Senate should prevent him from doing so, although to a lesser degree. Most importantly, we obtain these results after incorporating the uncertainty produced in the estimation of ideal points. Thus, tests that use the full amount of information available in the estimates of justices' ideal points, including uncertainty about these estimates, corroborate and strengthen our earlier results and conclusions.

CONCLUSION

Nominations offer presidents a powerful means by which they can ensure that their preferences will continue to influence policy long after they leave office. In this article we contribute to our understanding of presidential appointments and, more generally, of presidential power in a separation of powers setting. Most broadly, we examine whether presidents can use appointments to influence the ideological location of the Court. But we make use of theory to narrow this from a general question to one that specifically identifies and examines the conditions under which such influence should occur. Thus, we have examined the degree to which presidents are able to take advantage of vacancies on the Court and the degree to which the Senate acts as a constraint on the president's choices. Across a set of empirical tests we consistently find evidence that presidents capitalize on these opportunities. When the Senate is in ideological agreement with the president and the departing justice is from the other side of the ideological spectrum—that is, under conditions formally specified by models of the appointment process—then presidents are able to use the appointment process to pull the median toward their own ideal points.

It is important to note, however, that our results demonstrate not only that presidents are able to move the median, and in the ways and amounts predicted by theory, but also that presidents have some (if more limited) ability to influence the Court even when theory implies that they should not be

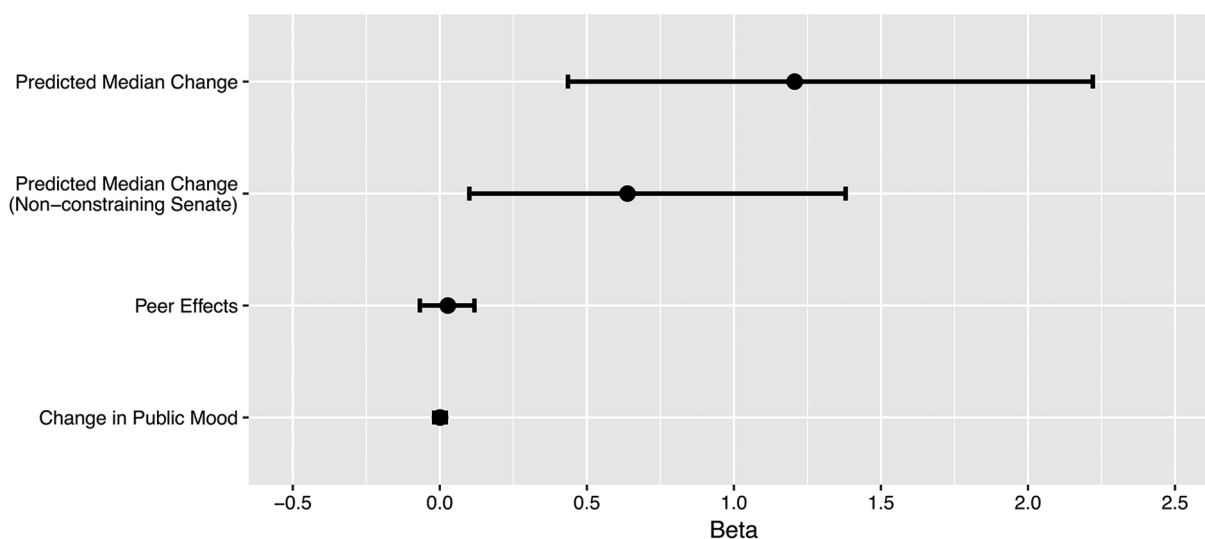


Figure 5. Predicting median change (incorporating uncertainty)

able to do so.³¹ It would be inaccurate to claim that the president's appointment power in these cases is unconstrained by the Senate—indeed, an alternative and appropriate interpretation of our results is that they show that presidents are less able to move the median under conditions when the Senate should act as a constraint.³² But it is equally inaccurate to say that the Senate leverages its bargaining power to extract ideological concessions to the full degree that theories predict. In this our results dovetail with those of Johnson and Roberts (2005) and Cameron and Kastellec (2017), who also suggest that the Senate is less powerful, or the president more powerful, than the theoretical models suggest.

An important implication of our statistical analysis derives directly from this finding—namely, the need for expanding theories of appointments. Our findings suggest two obvious directions for theoretical innovation.³³ First, they point to the need for a more dynamic model of appointments, one that incorporates the possibility of future nominations, since this might alter the incentives and actions of the players. Here we can point to an example of a recent article that has taken such

31. Furthermore, we find that they are especially able to do so when they choose older nominees and nominees of higher quality, and that they are less able to do so when facing a more unified Senate.

32. More specifically, our results can be interpreted as providing an empirical, quantitative, scalar, and interpretable measure of the effectiveness of Senate constraints.

33. The recent Senate obstruction of Merrick Garland suggests a third direction theory can take: including parties in spatial models of appointments. In that instance, a completely cohesive Republican Party simply chose not to take action when it was their turn in the game. While unprecedented at the level of the Supreme Court (and while not inconsistent with the predictions of players' actions in median-based models), this has become more common for lower courts appointments and thus would be a promising extension of existing theories.

a step: Jo, Primo, and Sekiya (2017) provide an elegant theoretical analysis that identifies how the shadow of the future in a multiperiod appointment game can induce players to settle for what appear to be suboptimal outcomes. Such an insight would be consistent with a setting in which the Senate might be willing to accept a nominee who will move the median partly toward the president—which is what we found.

Second, in addition to expectations about the future, models also could consider the systematic effects of uncertainty in a theory of appointments. Our analysis acknowledges the uncertainty that is contained in the ideal point estimates that we use and, more importantly, incorporates this uncertainty into our statistical tests. The tests that we conduct using these estimates of ideology not only provide additional support for the idea that presidents can use the power of appointment to influence the Court, they again show that this power appears to extend beyond what median-based models predict. This is noteworthy on its own, as it allows for the most nuanced test yet of the predicted outcomes from appointment models and gives us a fuller picture of the president's ability to change the Court's median. But it also provides a template for how the uncertainty surrounding ideal point estimates can be utilized beyond tests of the nomination game and for tests of other separation-of-powers models.³⁴

Yet although these tests form an important part of our empirical contributions, they also highlight the need for incorporating uncertainty *theoretically* and not just *empirically*. One promising development along these lines can be found in new research by Bailey and Spitzer (2018) that shows how uncertainty can lead to situations in which the Senate appears to be abdicating its power but in reality is acting in ways to

34. On these points, see also Cameron and Kastellec (2017).

produce the best outcomes it can get. Thus a clear future direction for theoretical work is to further examine the uncertainty players in this game face and how this uncertainty affects their actions.

Both theoretical and empirical work can address additional questions. We explored some factors that might allow presidents to be more successful in using appointments to influence the Court than models would predict, but future work should further explore the conditions under which this happens. The president may have certain advantages in bargaining with the Senate, like the use of the bully pulpit to exert added pressure on confirmation. There might be a norm of deference to presidential nominations. Or the president's success might be the natural consequence of having to confirm justices with uncertain ideological preferences. In addition, further exploration of alternatives to median-based accounts of change—beyond peer effects and public opinion—can be considered, especially those related to internal dynamics on the Court. For now, though, our results provide clear support for the view that presidents can use appointments to influence the Court and shift its median, while also suggesting that they might be more powerful than existing models predict.

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