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

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Abstract: Can presidents use their appointment power to pull the Supreme Court closer to their own ideological preferences? Using new and novel tests of existing models of appointments (e.g., Krehbiel 2007, Moraski and Shipan 1999), we find consistent evidence that under the right conditions the president is able to draw the Court’s pivotal voter closer to his ideal point. 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 regularly achieve ideological gains above and beyond what the Senate should allow. These 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.
Judicial appointments provide presidents with significant opportunities to shape policy and establish their legacies. Legislative accomplishments can be noteworthy, of course; but all laws passed during a president’s term – even landmark laws – are subject to being revoked or substantially altered in the future. Judicial nominees, on the other hand, serve for life, potentially affecting major policy issues and establishing legal precedent well beyond a president’s term. Given this large and long-term effect of judicial appointments, it is no surprise that presidents recognize the importance of their appointment power and carefully select nominees who will help establish their legacies.

The Constitution, however, does not give presidents unlimited appointment power. Although the president is entrusted with the power to nominate judges, the Senate can reject these nominees if it so chooses. Given this serious constraint on their power to appoint judges, presidents must anticipate the policy preferences of senators in order to ensure that their nominees make it to the bench. When presidents do this successfully, they have the chance to influence both the roster of judges sitting on courts and the outcomes these courts produce.

In this paper we investigate a specific aspect of appointment power: the ability of presidents to effect change on the Supreme Court by appointing new justices. Our main goal is to empirically assess whether presidents have been able to use their appointment power to pull the Court median toward their own ideological preferences. Our starting point is the theoretical finding, produced by several related models, that presidents can, under certain circumstances, use appointments to produce a favorable shift in the Court median, despite the presence of constraints that other institutions impose. Using data that were explicitly designed to facilitate inter-institutional comparisons and drawing on the
full power and variety of implications found in models of appointments, we conduct a series of new and subtle tests of the predictions of these models.

Our contributions, however, extend well beyond using more appropriate data and conducting more refined tests. First, we examine not only whether presidents are able to achieve ideological gains under specific theoretically-identified circumstances, but also, crucially, whether those gains have the magnitude that theory predicts. Second, in investigating the effects of appointments we control for other factors, such as peer effects and public opinion, that also might lead to change. Third, we examine whether presidents have had success in using appointments to pull the Court in their direction even when theory predicts they should not be able to, due to Senate opposition.

Finally, we then re-examine our core tests regarding president appointment power by taking greater advantage of the nature of our data. We do so by drawing upon and leveraging the uncertainty inherent in the estimates of political actors’ ideal points, incorporating this uncertainty into our statistical tests. Using the data in this way not only provides additional evidence of the power of appointments, it also demonstrates more generally how other tests of separation-of-powers models can utilize the uncertainty inherent in estimates of political actors’ ideal points.¹

¹ See also Cameron and Kastellec 2017. Although their paper, like ours, offers more precise tests of these models of appointments, the substantive focuses of the two papers are quite different: our paper examines the ability of the president to use appointments to change the ideological location of the Court (i.e., aggregate change), while theirs focuses on the predictions these models make regarding the actions of individual players in the game (i.e., the voting choices of senators and the selection of nominees by presidents).
Presidential Power, Nominations, and the Supreme Court Median

In order to examine whether presidents can use appointment power to cause the Supreme Court to change over time, we need a way to measure that change. To do so, we focus on the ideology of the median justice on the Court for a variety of reasons. To begin with, theoretical work on voting has produced the well-known result that under reasonable assumptions (e.g., a one-dimensional policy space) the median member of a voting body will be pivotal on any given decision and thus will be a part of any winning coalition. This result is regularly used in models that include Congress (e.g., Ferejohn and Shipan 1990), and some studies have shown that the Court similarly operates along a single dimension (e.g., Grofman and Brazill 2002).

Theoretically, if justices have strict preference orderings along a single dimension and they vote based on these preferences, the median justice will play a pivotal role in deciding cases, since this justice must be included in any winning coalition. Indeed, popular accounts of the Court frequently have painted such a portrait of the median justice’s role on the Court.² Consistent with this view, research has shown that the median justice is very likely to be part of majority coalitions (Epstein and Jacobi 2008).

In terms of voting, then, there is strong evidence – theoretical, observational, and

² Toobin (2007), for example, emphasizes the power that accrued to Justice O’Connor as a result of her position as the median justice on the Rehnquist Court (e.g., “[t]he way to win a majority in the Rehnquist Court was to earn O’Connor’s support, so her colleagues invariably came to her as supplicants” (48)). Of Justice Kennedy, who became the median justice when O’Connor retired, Toobin observed, “Even more than O’Connor had over the previous decade, Kennedy now controlled the outcome of case after case” (327).
statistical – that the median justice plays a powerful role on the Court. Furthermore, this justice’s influence extends beyond the direction of the vote. Median justices, for example, are more likely to be asked to write opinions, particularly if they are what Epstein and Jacobi characterize as "super medians." In addition, when medians are in the majority, they are extremely likely to join in the majority opinion, rather than writing or joining special concurrences, suggesting that this opinion reflects their views. Research also shows that an opinion is more likely to be treated as a precedent when it is backed by a majority (e.g., Epstein and Knight 1998, Maltzman, Spriggs, and Wahlbeck 2000).

Overall, then, median justices can, by virtue of their position, determine which side wins; they can influence who joins the majority coalition and the prevalence of concurrences; and they can alter the location of a decision, making it more conservative or liberal than either the opinion author or the coalition median would prefer if they were acting in an unconstrained manner (Bonneau et al. 2007). Given these powers, which are broad and deep, if not completely unlimited, it is reasonable to use the median justice as a proxy for the Court’s overall ideology in our analysis of the president’s ability to influence the location of the Court.

**The President’s Ability to Move the Court: A Theoretical Perspective**

We return now to our central question: whether presidents can use their

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3 On this last point, one potential objection is that the median justice might not play a key role in shaping the content of opinions. Although many models suggest that other justices will play the main role, almost all of them indicate that the median justice plays a significant role in influencing content (see Cameron, Park, and Beim 2009).
appointment power to influence the location of the Court median. Figure 1 provides some preliminary evidence on this issue, using appointments from 1953 through 2010, with the right panel showing the distribution of the change in the Court’s median in years following appointments and the left panel showing the distribution of change when no appointment has been made.\textsuperscript{4} If appointments are a primary source of change, then we should see more change in the median in years following presidential appointments than in years without appointments – which is what the figure shows. In particular, there is clearly more change after presidents make appointments, with the distribution more dispersed in the right panel than the left.

**Figure 1: Distribution of Median Change**

![Distribution of Median Change](image)

Of course, although the president can try to shift the median by selecting a preferred nominee, the Senate must approve that nominee. Presidents do not want to have

\textsuperscript{4} We discuss the data we use in this figure (and in our tests) in detail below.
their nominees rejected, as this would require them to use political capital to nominate and shepherd a second nominee through the Senate, taking time and political resources away from other activities (Binder and Maltzman 2009). Furthermore, reputational costs matter: presidents suffer drops in approval when their nominations run into trouble (Shipan and Shannon 2003). Therefore, anticipating the Senate’s response, presidents will strategically select nominees whom the Senate will confirm and whose appointments will pull the Court as close as possible to their ideal points.

This basic framework has been explored in depth by a set of spatial models of the appointment process (e.g., Moraski and Shipan 1999, Johnson and Roberts 2005, Krehbiel 2007, Rohde and Shepsle 2008), all of which examine the president’s ability to shift the median of the Court. Although there are some differences across these median-based models, the overlap is substantial, with all following the same three-stage sequence. First, a sitting justice departs, whether due to retirement, resignation, impeachment, or death. Second, the president selects a nominee, taking the Senate’s preferences into account. As Moraski and Shipan note, the president’s overriding goal in making this selection is “to move the median of the Court as close as possible to his own ideal point” (1999, 1073). As we discuss below, though, and as these theories spell out, presidents are limited in their ability to do this. 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.⁵

⁵ There are, of course, differences across these models. For example, Krehbiel locates the reversion point at the median of the previous Court prior to the departure of a justice,
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 want the Court to shift in a liberal direction. 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 use an appointment to pull the median toward his ideal point.

Second, the Court median can change only when the president is given 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 those of the president, and the president can choose a replacement justice who also has similar preferences (i.e., whereas Moraski and Shipan locate it at the midpoint of the Court after a justice has departed. Johnson and Roberts depart from these two models by incorporating the filibuster pivot, rather than the Senate median; and Rohde and Shepsle explore this approach in greater detail. Notably, although these differences across models exist, the models are very similar in their approach to predicting whether appointments can cause a shift in the median.

Moraski and Shipan characterize this alignment as one where the president is either unconstrained or semi-constrained. Krehbiel 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.

Krehbiel (2007) provides evidence that presidents are able to move the Court median closer to their ideal points when this condition is met.
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, on
the other hand, the departing justice is from the opposite side of the median, then the
president will have the opportunity to use a nomination to create a new median.\(^8\)

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
shift the median toward his ideal point.\(^9\)

Figure 2 illustrates these necessary conditions, as well as 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

\(^8\) 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.

\(^9\) There is one additional check on the president’s power. Even if the president and the
Senate might wish to induce large changes to the location of the Court median, they are
limited in that the median can shift only as far as the next justice. We incorporate this
factor into our analysis starting with Table 2.
Figure 2a. 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.

**Figure 2: Necessary Conditions for a Policy-Changing Nomination**

2a. *Necessary Conditions Satisfied*

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   P     S     C     D
```

2b. *Necessary Conditions Not Satisfied*

```
   P     D     S     C
```

2c. *Necessary Conditions Not Satisfied*

```
   P     C     D     S
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Figures 2b and 2c, on the other hand, depict situations in which nominations would *not* be expected to produce a change in the median. In Figure 2b, the president and Senate agree on the direction that they would like to see the Court move, but they are thwarted by the fact that the departing justice is on the same side of the court as the president and Senate. Because any replacement would be to the left of the median, the departure has no effect on the identity of the median member of the Court. In Figure 2c, the departing justice is on the opposite side of the court median from the president, but the president and Senate disagree on their preferred direction of movement on the court. In this constellation of preferences, the Senate will oppose any nominee who would move
the median to the left, leading the median to remain in the same location.\textsuperscript{10} Thus, only when the president and Senate agree on the direction of change and the departing justice is from the other side of the Court median, as in Figure 2a, will presidents be able to use appointments to pull the median of the Court toward their preferred ideology.

Measures

Given the nature of our interbranch, across-time analysis, reliably placing justices, senators, representatives, and presidents in a common policy space is crucial. Thus, we use scores developed and updated by Michael Bailey in a series of publications (Bailey and Chang 2001; Bailey and Maltzman 2008; Bailey 2013). These “Bailey scores” are useful for our analysis precisely because they place members of each branch on the same ideological dimension and are comparable across time and across institutions.\textsuperscript{11}

To create these scores, Bailey and his co-authors begin by using roll call votes cast by members of Congress and positions taken by Supreme Court justices to establish the

\textsuperscript{10} In other words, in Figure 2b only the first condition is met, while in Figure 2c 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., where P<D<C<S).

\textsuperscript{11} Martin-Quinn scores (Martin and Quinn 2002) allow for comparisons across justices, and the Common Space versions of these scores allow for interbranch comparisons. But because the method for calculating Common Space scores derives from median-based models of appointments – in particular, Moraski and Shipan’s model (see Epstein et al. 2007, p. 5) – they are not appropriate for testing these same models. On this point see also Cameron and Kastellec (2017).
ideal point of an individual relative to other members within each branch, independently by year. They then bridge these ideal points across branches and over time, identifying situations where individuals from different branches and cohorts take positions on the same policy questions and issues. When bridging across branches, for example, they identify when the president or a member of Congress takes a position on certain Court cases, using a variety of measures to signal agreement or disagreement with the Court’s position. To bridge positions over time they identify, for example, instances in judicial opinions where a justice declares a position regarding a previous Court case. When a justice reveals her opinion about a previous Court case, she then can be compared directly to those justices who originally decided the case. Using these different bridges, they calculate scores that are comparable over time and across institutions.

We analyze all presidential nominations to the Court during the period covered by the Bailey scores, 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 (following Krehbiel 2007) 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 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.

In addition to using the Bailey scores to create our dependent variable, we also use them to create the measures needed to test whether presidents can induce change on
the Court in the manner that median-based models predict. In order to facilitate an initial and basic test of our model, we first create a dummy variable that captures when both of the necessary conditions identified earlier are met – that is, when the ideal points of the president and the Senate median are on one side of the median justice and the ideal point of the departing justice is on the other side. This variable, *Conditions Met For Change*, is set equal to 1 when the conditions are met and is 0 otherwise.\(^\text{12}\)

Bill Clinton’s two nominations – Ruth Bader Ginsburg and Stephen Breyer – usefully illustrate when this variable is set to 1. In both cases, Clinton and the Democratic-controlled Senate preferred a Court that was farther to the left, but only Ginsburg’s nomination was able to cause such a shift. When Harry Blackmun, who had been one of the most reliably liberal justices on the Court, stepped down, there was no appointment Clinton could make that would shift the Court median to the left, since the replacement of one liberal justice with another would have no effect on the median. Thus, the confirmation of Breyer to replace Blackmun did not cause the Court to shift. Ginsburg, on the other hand, replaced the moderately conservative Byron White. Since White had been the median justice, his departure meant that Clinton, by appointing a more liberal justice, was able to shift the median to Justice O’Connor, who previously had been the fourth-most liberal justice.

We create two additional variables for our initial assessment of presidential appointment power, corresponding to the two main theoretical conditions. First, *President-Senate Agreement* is set equal to 1 when the president and the median member

\(^{12}\) Later we introduce a related independent variable, *Predicted Median Change*, a continuous measure that we also create using these scores.
of the Senate are located on the same side of the Court median, and is 0 otherwise.

Second, adopting Krehbiel’s terminology, we create *Distal Vacancy*, which is set equal to 1 when the president and the departing justice are on opposite sides of the Court median and 0 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. This means that if both *President-Senate Agreement* and *Distal Vacancy* equal 1, so too will *Conditions Met For Change*. If only one condition is present, we expect no change, but including the component parts of *Conditions Met For Change* allows us to test the prediction of no change rather than assuming it.

**Initial Tests**

We begin our empirical analysis with two initial tests of the prediction that presidents can, under conditions identified by median-based models, influence the location of the Court median.\(^{13}\) In Model 1 of Table 1, we regress a modified version of our dependent variable on *Conditions Met For Change* for the years 1952-2010. For this first test (and for our second test in Model 2), we modify our dependent variable by converting the actual change to a positive value when it is in the direction of the

\(^{13}\) We hasten to add that although these initial tests allow us to assess some implications of median-based models, we do not view them as full or complete tests of these models. Rather, they provide a useful baseline for our additional analyses and especially allow for comparison with previous analyses, e.g., Krehbiel 2007. In following sections we will build on these first tests and derive how to more accurately test these models.
president’s ideal point and a negative value when it is in the opposite direction, producing Change in Median Toward the President. Given this adjustment, then if the predictions about presidential power are accurate, the coefficient for Conditions Met For Change should be positive and significant – which is indeed what we find. Model 1 shows that shifts in the Court median toward the president will be greater in those years when the conditions for change are satisfied.

<table>
<thead>
<tr>
<th>Table 1: Predicting Change in Median Toward the President</th>
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<tbody>
<tr>
<td>(1)</td>
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<tr>
<td>Conditions Met For Change</td>
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<tr>
<td>Distal Vacancy</td>
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<tr>
<td>President-Senate Agreement</td>
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<td>N</td>
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<tr>
<td>AIC</td>
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<td>R²</td>
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Standard errors in parentheses
* p < 0.10, ** p < 0.05, *** p < 0.01

Although Model 1 provides initial evidence that the president can use appointments to influence the median in the way that theories predict, Model 2 complicates the picture. Again, when there is only a distal vacancy or agreement between the president and the Senate, but not both, we should not observe change. The key implication that follows from this logic is that neither Distal Vacancy nor President-

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14 See Krehbiel 2007. Because this dependent variable is continuous, we use OLS. We note that the results in this and later tables remain essentially unchanged if we include only years in which appointments were made.
Senate Agreement should be significant on its own. However, when we include these two variables, as in Model 2, we find that Distal Vacancy is significant, whereas Conditions Met For Change, although positive, falls short of significance.

Table 1 thus provides initial, albeit mixed 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 positive in Model 2. In addition, President-Senate Agreement is insignificant, as expected. However, Conditions Met For Change does not reach standard levels of significance in Model 2. More importantly, Distal Vacancy, which should be indistinguishable from zero, is positive and significant. Because Conditions Met For Change is actually 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 0 (i.e., when the president and Senate do not agree). Thus, 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.

Core Tests and Alternative Causes

Before tackling the issue of whether presidents have more power to use appointments to influence the Court than models predict, we first address two issues that are more fundamental. First, median-based models do predict the direction of movement; but more importantly, they also make a point prediction about the amount of movement we should observe. As Moraski and Shipan (1999; see also Krehbiel 2007) pointed out,
the president can move the median only as far as the justice adjacent to the median, a distance that sometimes is small and other times is large.\textsuperscript{15} Thus, while Table 1 provides us with useful baseline findings and raises an intriguing puzzle about the president’s ability to pull the median toward his ideal point even when the Senate should prevent such a change, a subtler and arguably more appropriate test should account for the potential distance that a presidential appointment can shift the median.

Second, our primary goal in this paper 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, identified by other scholars, that could influence the ideological position of the median justice. We focus on two of these factors: peer effects and public opinion.\textsuperscript{16}

We begin by considering peer effects, which occur when justices are influenced by the actions of their peers on the Court. Much evidence, across a range of activities, shows that justices can sway the behavior of other justices. Maltzman, Spriggs, and Wahlbeck (2000), for example, use internal memos to establish that justices are influenced by the arguments of their colleagues, often changing the content of written opinions to account for these other views. Epstein and Knight (1998) similarly draw on private papers to

\textsuperscript{15} Referring back to the example in footnote 8, a presidential appointment could potentially move the median from $J_3$ to $J_2$, but no farther.

\textsuperscript{16} We emphasize that we include these not as part of our theoretically-derived tests, but rather to account for potential effects that other scholars have empirically identified as affecting the behavior of judges. We also acknowledge that change might occur for a variety of other reasons, including ideological drift, acclimation effects, and so on.
show that justices’ decisions on actions such as which cases to hear or how to vote are influenced by the views of, and anticipation of the actions of, their colleagues.

In terms of the effects of peers on voting, much recent evidence of the influence that other 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 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.”

Of course, 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.\textsuperscript{17} 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. Thus, to capture the influence of 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.\textsuperscript{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. Some of these studies are qualitative and historical (Friedman 2009); others are quantitative, based on public opinion polls (Marshall 1988); and others utilize a variety of methods (Clark 2011). But many find support for the notion that when public opinion shifts, so does the Court (McGuire and Stimson 2004) – even if the effects are sometimes weak (e.g., Giles, Blackstone, and Vining 2008).\textsuperscript{19}

\textsuperscript{17} Our goal here is not to distinguish between the mechanisms that might cause such an effect. Rather, it is just to control for the potential existence of such an effect, given that many other scholars have identified it as a potential source of change; and in so doing to increase our confidence the results we obtain from our core tests of presidential power.

\textsuperscript{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.

\textsuperscript{19} Such an effect could explain the changes in non-appointment years shown in Figure 1.
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).  

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 Stimson’s scores correspond to a more liberal public mood, higher values of our variable indicate movement in a liberal direction.

**Results**

In Table 2 we incorporate these considerations into our analysis of presidential appointment power, starting with the point prediction and then turning to the additional explanatory factors. In Model 1 of Table 2 we begin by regressing our dependent variable, *Median Change*, which, as discussed earlier, is the actual amount of change in the median,  

20 Our analysis also controls for what other studies have identified as the largest potential confound in examining the effect of public opinion on the Court, which is that public opinion indirectly influences the Court by affecting its composition (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.
on *Predicted Median Change*, which is the distance the median should move if predictions about presidential power from median-based spatial models are correct.\(^\text{21}\)

Because both the independent variable and the dependent variable can take on either positive or negative values, and because we expect a positive (negative) value for *Predicted Median Change* to 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.

### Table 2: Predicting the Amount of Median Change

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<td>.005</td>
<td>-0.003</td>
</tr>
<tr>
<td></td>
<td>(.018)</td>
<td>(.016)</td>
<td>(.013)</td>
<td>(.013)</td>
</tr>
<tr>
<td>N</td>
<td>64</td>
<td>63</td>
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<td>63</td>
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<tr>
<td>AIC</td>
<td>-64.72</td>
<td>-80.04</td>
<td>-107.77</td>
<td>-103.26</td>
</tr>
<tr>
<td>(R^2)</td>
<td>.237</td>
<td>.457</td>
<td>.623</td>
<td>.636</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
* * * \( p < 0.10, ** * * * p < 0.05, *** p < 0.01\)

\(^\text{21}\) For example, Byron White was the median (.38) when he departed in 1993. The justice immediately to White’s left was Sandra Day O’Connor (.28). Because the president (-.75) and Senate (-.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 -.1 (i.e., .28-.38) for this observation.
In Model 2 we control for the two alternative explanations identified earlier. 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 on this variable is fairly 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 who has a Bailey score of 0.5 with a moderately liberal justice who has a score of -0.5 would cause the median to move .118 to the left, a fairly substantial change.22

Models 1 and 2 of Table 2 thus provide additional 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 test that draws more fully on the predictions of the models, in particular the specific point predictions that the theories generate.

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22 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 should 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.
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 and which is also a function of presidential appointments).

*Exploring Greater Presidential Power*

We now return to a surprising finding from Table 1. Although the results in that table provide some support for the key prediction 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 (see also Johnson and Roberts 2005, Cameron and Kastellec 2017). To investigate this further we create a new variable, *Predicted Median Change (Non-constraining Senate)*, for which we assume that an opposing-side Senate – which should act to constrain the president when a vacancy is distal – does not provide such a constraint. Thus, unlike *Predicted Median Change*, it takes on non-zero values when the vacancy is distal and the president and Senate disagree on the direction the Court should move.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 –

23 More specifically, the value of this variable is equal to the distance a median could move toward the president, due to a distal vacancy, when the president and Senate disagree about the direction of change but the Senate provides no constraint.
and if the president is more powerful than the theories predict – then this variable should be positive and statistically significant.

The results again show that the president is able to move 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 Model 3 and Model 4 of Table 2, we find that Predicted Median Change (Non-constraining 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 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.

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 0; we also should find that it is statistically indistinguishable from 1. That is, if the models predict the president can use an appointment to produce a change in the median of, say, .25, then we should observe an actual change in the median of .25. This in turn should produce a coefficient of 1 for Predicted Median Change.

Figure 3 plots the coefficients and confidence intervals from Model 4. This figure clearly shows that Predicted Median Change both is significantly different from 0 and is not significantly different from 1, thereby again providing strong support for median-based theories of Supreme Court appointments. On the other hand, although Predicted
*Median Change (Non-constraining Senate)* is significantly different from 0, its coefficient *does* differ significantly from 1, indicating that the president is not fully unconstrained in those circumstances.\(^{24}\) Overall, then, these results demonstrate that although the president is able to use appointments to pull the median toward his ideal point even when models predict he should not be able to do so, he is not able to move it as far as he would like.\(^{25}\)

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\(^{24}\) The coefficient for this variable also differs significantly from 1 for Model 4. The coefficient for *Predict Median Change*, on the other hand, is statistically indistinguishable from 1 for all four models in Table 2. In addition, *Predicted Median Change* and *Predicted Median Change (Non-constraining Senate)* are statistically distinguishable from each other.

\(^{25}\) A thorough investigation of why, or when, presidents can do this is a topic ripe for future study but beyond the scope of this study. Preliminary tests of a variety of plausible mediating effects, such as whether the president’s party controls the Senate, whether the president is in his first year of office, and whether it is a president’s first nomination, showed no significant effects. Only the nominee’s qualifications produced the expected effects, and those effects were tenuous. More promisingly, Jo, Primo, and Sekiya (forthcoming) provide an elegant new theoretical analysis that identifies how the shadow of the future in a multi-period appointment game can induce players to settle for what appear to be suboptimal outcomes. In addition, Bailey and Spitzer (2016) show how uncertainty can lead to situations in which the Senate appears to be abdicating its power, but in reality is acting in ways that produce the best outcomes it can get.
Making Use of Uncertainty

Although we have been using ideology scores as single point estimates, these scores are actually the means of an estimated distribution of potential ideal points. For example, Justice Kennedy’s 2010 ideal point may be .28, but this value is actually the average of 500 potential ideal points – ranging from -.05 to .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 4, 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 5, 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. 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 1A in the online appendix 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 0 (i.e., no change at all, due to the possibility just discussed) to the slim but real possibility of -0.45.

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26 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 most 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 person is actually the median.
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 twelve percent of the appointments in our dataset 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 vacancies – 44% of our nominations – for which there is a positive probability that the president could potentially pull the median toward his ideal point.\footnote{These justices are Alito, Blackmun, Brennan, Burger, Fortas, Ginsburg, Goldberg, Harlan, O’Connor, Warren, and White. The justices meeting the strict conditions, using Bailey scores as perfect estimates, are Ginsburg, Burger, and Alito.}

In Figure 6 we re-analyze the data using the posterior distributions. 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 datasets, one for each sample; and we run
our regression model on each of these datasets, 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 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 6. Plotting the values in this way gives us the equivalent of a 95% confidence interval, which we can use to assess the results of our test.

**Figure 6: Predicting Median Change (Incorporating Uncertainty)**

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 0 but not from 1. 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. 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. When given an opportunity to select a nominee whose ideology will inform how the Court interprets the Commerce Clause, the extent of Executive Branch power, or the expansion of civil rights, presidents seek to take full advantage. The Senate, in turn, has equally strong incentives to carefully consider nominees and reject those whose preferences conflict with its own.

In this paper 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. More specifically, 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 specified by a set of theoretical 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 although our results demonstrate that presidents have this power, they also show that presidents are able to shift the Court median toward their ideal point even when median-based models of appointments predict that they should *not* be able to do so. It would be inaccurate to claim that the president’s appointment power is unconstrained by the Senate, 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 thus dovetail with those of Johnson and Roberts (2005) and Cameron and Kastellec (2017), who also suggest (in different contexts) that the Senate is less powerful, or the president more powerful, than the theoretical models suggest.

Our tests also show that these aforementioned results hold even when we control for two other factors that could influence the location of the Court median: changes in public opinion and peer effects. We find no evidence that changes in public opinion affect the ideological location of the median. Evidence for peer effects is more mixed, with some of our tests (i.e., those using the ideal point estimates without uncertainty) indicating that peer effects do pull the median in the direction of the new appointee, while other tests (i.e., those incorporating uncertainty) do not. It is also worth noting that the finding that peer effects might influence the location of the median provides another measure of support for the idea that presidents can use their power of appointment to influence the location of the median.

Finally, our analysis acknowledges the uncertainty that is contained in the ideal point estimates that we use and, more importantly, incorporates this uncertainty into our 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 significant on its own, as it allows for the most nuanced test yet of the predicted outcomes in appointment models and gives us a fuller picture of the president’s ability to change the Court’s median. But it is also significant because it provides an example of 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.28

As always, questions remain. For starters, are there factors that allow presidents to be more successful in using appointments to influence the Court than models would predict? 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, as recent research has suggested, the president’s success might be the natural consequence of having to confirm justices with uncertain ideological preferences (Bailey and Spitzer 2016). There are a number of potential explanations for the president’s success in the nomination process that have yet to be explored. In addition, although we have identified two alternatives to median-based accounts – peer effects and public opinion – there may also be additional sources of conversion, based on internal Court dynamics, that future studies could take into account. 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.

28 On these points, see also Cameron and Kastellec 2017.
References


