Pivotal Politics, Presidential Capital, and Supreme Court Nominations

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Abstract

We analyze the Supreme Court nomination process in order to provide a general explanation of presidents' propensity to win confirmation battles even in the face of an ideologically hostile Senate. The analysis serves two purposes. First, we argue that employing the conventional measure of the Senate's power to constrain the president's choice of nominees—the median senator—provides an inaccurate picture of this process. In its stead we argue that the filibuster pivot (or the sixtieth most liberal or conservative senator) more accurately captures the Senate's power over the president (Krehbiel 1998). Second, we argue that even under this more stringent spatial constraint, presidents still have the ability to win most confirmation battles with the Senate. Indeed, our results indicate that presidents often overcome situations where the Senate should reject their nominees, or where it should force them to make a less desirable choice, by invoking political capital.

If they [Democrats] can get away with these filibusters, they're going to make it very difficult to replace any Supreme Court justice that retires.

—Senator Orrin Hatch (R-UT), May 10, 2003[1]

The fundamental tension between the president's power to nominate and the Senate's constitutionally prescribed advice and consent role has led to many nomination showdowns. Examples abound, including the Supreme Court nominations of Robert Bork and Clarence Thomas and, more recently, prolonged battles between the Senate and Presidents Clinton and George W. Bush over confirmation of nominees to the federal circuit courts of appeals. Despite the ideological and procedural minefield that judicial nominees face in the U.S. Senate, recent history teaches us that presidents usually succeed when they are given the opportunity to nominate someone to the Supreme Court (Baum 2001; Yalof 1999; Abraham 1999; Cameron, Cover, and Segal 1990). Indeed, since 1900 only five Supreme Court nominees out of 60 have failed to make it through the Senate's confirmation process (Baum 2001). This leads us to make two general observations—one obvious and one not so obvious—about the nomination and confirmation process. First, presidents win most confirmation battles in the Senate. Second, a significant number of victorious nominees win confirmation even though the spatial alignment of the key players suggests they should have been defeated or not nominated in the first place.

We are interested in explaining the latter proposition because of its counter-intuitive, and normatively important, nature. Indeed, while the alignment of preferences might appear to make it impossible for some presidents to gain approval for nominees who mirror their ideology (e.g., Reagan's nomination of Bork), presidents have traditionally been able to overcome this constraint by shrewdly playing the nomination game with the Senate. Specifically, we argue that presidents can use political capital (Light 1999) (or what Moraski and Shipan [1999] call bargaining advantages) to increase senators' costs of obstructing the confirmation process or of ultimately voting to reject the president's nominee.

To test this conjecture we analyze all Supreme Court nominations from 1949 to 1994. In so doing, we begin by demonstrating that the conventional measure of the Senate's power to constrain the president's choice of nominees—the median senator—leads to a theoretically inaccurate picture of this process. Thus, we employ the filibuster pivot (the senator who is, spatially, the critical vote on cloture) as we analyze the relationship between the president and the Senate (Krehbiel 1998). From there we test whether this more stringent constraint actually keeps presidents from winning confirmation battles. In stark contrast to Moraski and Shipan (1999), our findings demonstrate that presidents can overcome this constraint and ultimately win confirmation for their most important nominees. On a theoretical level this argument suggests that ideological spatial distances cannot fully explain this phenomenon. Rather, we must look to factors beyond the spatial model to understand the president's choice of Supreme Court nominees.

The paper proceeds as follows. First, we explain why the filibuster is the proper pivot to use when analyzing the Supreme Court confirmation process. Second, we provide explicit data to test this argument and compare the empirical and theoretical ramifications of using the filibuster rather than the median senator as the pivot point. After confirming that the nomination and confirmation process is better understood if we focus on the filibuster pivot we then explicitly examine why the Senate rejects so few Supreme Court nominees, by offering empirical evidence to demonstrate why presidents are so successful. We conclude with some general remarks about how these findings help us better understand this political process.

THE FILIBUSTER PIVOT VERSUS THE SENATE MEDIAN PIVOT

One of the most unique features of the U.S. Congress is the constitutional provision allowing the two chambers to develop their own parliamentary rules. This has lead to remarkable differences in the rules of debate between the House and the Senate. While the House has efficient means of ending debate by majority vote, the Senate constantly struggles to end discussion on many measures due to provisions of its rules allowing for extended debate. Indeed, unless a super-majority of the Senate (currently three-fifths) agrees to stop debate by invoking cloture, a senator can engage in extended debate (i.e., a filibuster) to effectively thwart the matter before the Senate (Binder and Smith 1997). For our purposes, if the president and the controlling party in the Senate seek ideologically extreme Supreme Court jus-

tices, a minority of senators may threaten, or actually carry out, a filibuster to force a nomination that is more acceptable to a supermajority in the Senate.

This comports with Krehbiel's (1998) theory of "pivotal politics," which holds that supermajoritarian institutions—such as the Senate filibuster and the presidential veto—have an important influence on the legislative process because policy makers often must obtain large supermajority coalitions to secure passage of legislation. As he argues:

> . . . [A]lthough the motion in question . . . nominally requires only a simple majority, the prospect of a filibuster and the corresponding parliamentary need for cloture makes the filibuster pivot, not the median voter, pivotal. If the filibuster pivot . . . is not accommodated—more precisely, if she prefers the status quo . . . to the bill . . . that is offered—she and all colleagues with more extreme preferences can mount a filibuster and vote no on cloture, thereby keeping the status quo intact. (1998, 94)

While Krehbiel does not explicitly discuss the filibuster pivot in the context of the Supreme Court confirmation and nomination process, his theory implies that a president seeking to nominate a justice to the Supreme Court must accumulate more than the simple majority of votes needed for confirmation. In the modern-day Senate this means that 41 determined senators can mount a filibuster in an attempt to circumvent presidential nominations.[2] This tactic has played an outwardly pivotal role in at least one Supreme Court nomination—President Johnson's failed attempt to promote Justice Abe Fortas to chief justice (Abraham 1999).[3] Yet, Krehbiel's theory suggests that we should rarely see the filibuster pivot play a visible role in this process, as presidents should anticipate the potential for extended debate when making nominations, and act accordingly.

Theoretically, then, presidents must ensure that they appease a supermajority, rather than a majority, of the Senate in order to avoid perilous confirmation battles.[4] As the spatial model in Figure 1 details, this creates difficulty for the president because the "win set" of acceptable nominees is necessarily smaller and farther from the president's ideal point if the sixtieth senator, rather than the median, is considered pivotal.

To test our theory about the filibuster pivot and whether, empirically, presidents can overcome this constraint, we reconsider a recent analysis of the Supreme Court nomination and confirmation process (Moraski and Shipan 1999). Moraski and Shipan consider the institutional preferences of the three key players in the nomination process (the Senate median, the president, and the Court median at the time of a vacancy) (1999, 1075-78).[5] Based on the ideological relationship between these actors they develop a spatial model that produces three regimes under which a Supreme Court nomination may occur. We recreate these regimes in Figure 2.[6] The president is unconstrained in his choice of a nominee in Regime 1 because both he and the Senate agree on the ideological direction in which the Court should move. More formally, because Senate (S) < President (P) < Court Median (J), the president is located between the status quo and the Senate's ideal point. As such, anything he proposes will be in the Senate's win set

FIGURE 1
The Pivotal Politics Model

Legend:

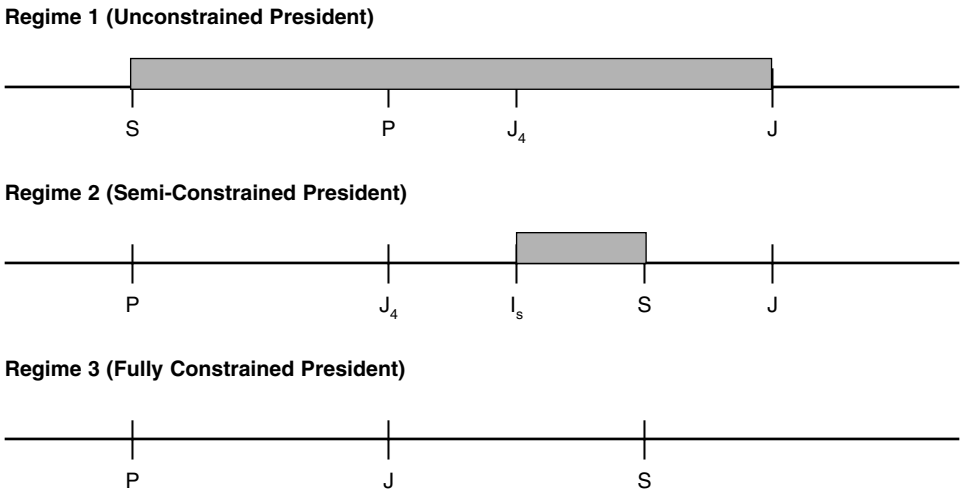
F = Senate Filibuster Pivot
P = President
M = Senate Median
SQ = Status Quo or Current Court Median
I_{sm} = Senate Indifference Point with median pivot
I_{sf} = Senate Indifference Point with filibuster pivot
= Winset with median pivot
= Winset with filibuster pivot

and will represent a Pareto improvement for both the Senate and the president.[7] This is the best-case scenario for a president, as he finds himself free to nominate someone exactly on his ideal point without fear of Senate objection.

In Regime 2 the president is semiconstrained; as Figure 2 reveals both he and the Senate agree on the direction the Court should move, but the Senate prefers a nominee more moderate than one the president would like. Formally, since President (P) < Senate (S) < Court Median (J), the president's ideal point is no longer in the Senate's win set. As a result, the president still has a range of choices but must choose from those nominees who lie between the Senate indifference point I_s (2S-J) and the Court Median. This is the best-case scenario for the Senate, as the president's best response will be to nominate someone at the Senate's indifference point (I_s). Finally, Moraski and Shipan posit that the president is fully constrained in Regime 3. In this scenario the Senate and the president are diametrically opposed about which direction to move the Court, and the president has little choice over the ideology of the nominee. Formally because President (P) < Court Median (J) < Senate (S), the Pareto set is empty and thus the Senate should reject any nominee who does not lie between its ideal point and the current Court median. In this situation, the president's best response is to choose a nominee at the current Court median.

Using this model we are able to evaluate the constraints facing presidents during the nomination process by identifying the regime within which each nominee falls. In Table 1 we present the regime classification results; the top half of the table displays the results using the median senator as the Senate's ideal point (Moraski and Shipan 1999), while the bottom half reports the results using the filibuster pivot as the Senate's ideal point. For the president's and the Senate filibuster pivot's ideology we use DW-NOMINATE scores (1st dimension) (Poole and Rosenthal 1997), and for the nominee's ideology we use Segal/Cover scores (1989).[8]

FIGURE 2[a]
Presidential Nominating Regimes



Legend:

S	=	Senate Filibuster Pivot
P	=	President
J	=	Court Median when a vacancy occurs $[(J_4 + J_5)/2]$
I_s	=	Senate Indifference Point
J_4	=	Location of the fourth justice when a vacancy occurs
▭	=	Regime Win Set

[a]Portions of this figure reprinted with permission of Blackwell Publishing, from *American Journal of Political Science*, Vol. 43 (1999): Figure 2, p. 1075, in Byron J. Moraski and Charles R. Shipan, "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices."

As Table 1 reveals, the choice of the Senate median or filibuster pivot has a dramatic impact on regime classifications. Only 8 of the 28 nominees (28%) remain in the same regime when the filibuster pivot, rather than the median pivot, is considered critical. Further, 12 of the nominees (43%) move two full regimes. Employing the Senate median means that, most of the time (64%), the president finds himself in Regime 1 and is therefore free to successfully appoint whomever he chooses. In contrast, if the filibuster pivot is critical the president is in Regime 1 only two times (7%) and fully constrained (Regime 3) for 75% of his nominations. These differences are striking and warrant further consideration.

The portrait of the president as unconstrained finds some support from the fact that few nominations are ever rejected. However, a closer inspection of Table 1 reveals why classifying nominations based on the filibuster pivot provides a better picture of the nomination process. First, consider President Nixon's failed nominations of Clement Haynsworth and Harrold Carswell.[9] If the Senate median

TABLE 1[a]
A Comparison of Regime Classifications Based on the Senate Median and Senate Filibuster

Regime 1: Unconstrained President	*Regime 2: Semi-Constrained President*	*Regime 3: Fully Constrained President*
Moraski and Shipan (1999) (Senate Median Pivotal)		
Warren	Stevens	Clark
Brennan	Bork	Minton
Whittaker	Kennedy	Harlan
Stewart		Fortas (associate justice)
White		Fortas (chief justice)
Goldberg		Souter
Marshall		Thomas
Burger		
Haynsworth		
Carswell		
Blackmun		
Powell		
Rehnquist (zssociate justice)		
O'Connor		
Rehnquist (chief justice)		
Scalia		
Ginsburg		
Breyer		
Reconfigured Regime Classifications (Senate Filibuster Pivotal)		
Goldberg	Brennan	Blackmun
White	Breyer	Bork
	Ginsburg	Burger
	Stewart	Carswell
	Whittaker	Clark
		Fortas (associate justice)
		Fortas (chief justice)
		Harlan
		Haynsworth
		Kennedy
		Marshall
		Minton
		O'Connor
		Powell
		Rehnquist (associate justice)
		Rehnquist (chief justice)
		Scalia
		Souter
		Stevens
		Thomas
		Warren

[a]Portions of this table reprinted with permission of Blackwell Publishing, Table 2, p. 1082, in Byron J. Moraski and Charles R. Shipan, "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices," *American Journal of Political Science*, Vol. 43 (1999).

is considered pivotal, both of these nominees are placed in Regime 1 where the president is supposedly unconstrained in his choice, and where rejection should therefore be least likely because any nominee acceptable to the president would be, by definition of Regime 1, in the Senate win set. The rejections of Haynsworth and Carswell are clear failures of the Senate median model. Second, the only rejection the Senate median model places in Regime 3 is the elevation of Abe Fortas to the chief justiceship. In contrast, by focusing on the filibuster pivot, we place all four rejected nominees from the modern era (Haynsworth, Carswell, Bork, and Fortas (II)) in Regime 3 where presidents face the greatest likelihood of rejection. This result is intuitive, as we should expect the most difficult confirmation battles to occur in Regime 3 rather than in a regime where the president is unconstrained, or where he can choose a nominee directly on the Senate's indifference point.

Classifying the regime structures based on the filibuster pivot also reveals a substantial weakness in the empirical and theoretical implications of considering the median senator pivotal. Doing so leads to the conclusion that, when fully constrained, presidents have almost no power to determine the ideology of a new justice due to the ideological constraint placed on them by the Senate. Yet, if we apply this logic to the regime classifications based on the filibuster pivot, we would be forced to conclude that in 21 of the last 28 Supreme Court nominations (or 75% of all nominations since 1949) the president played little or no role in choosing the ideological makeup of his nominees! Empirically, the Senate rejected only four of the 20 nominees in our Regime 3, which demonstrates that the president is still highly successful even when facing a hostile Senate.[10] These results lead us to conclude that, even when fully constrained, the president still has substantial control over the nomination process. [11]

WHY SO FEW REJECTIONS?

While our revised regime structure properly places all of the rejected nominees in Regime 3, it raises new and important questions concerning the lack of Senate rejections in this regime and the lack of a filibuster on the Clarence Thomas nomination.[12] Indeed, the spatial model predicts an additional 14 rejections when the president is fully constrained, which suggests that the spatial model alone cannot fully explain choices made by presidents or the Senate in this process.[13] To be sure, we believe the spatial model provides a good representation of the ideological constraints faced by the actors in this game, but we believe that the lack of rejections predicted by the spatial model is the product of two additional factors: the president's political capital (Light 1999) and what Groseclose and McCarty (2001) call the "politics of blame."[14] We explore these explanations in more detail below.

President's Political Capital

The literature on political capital suggests that conditions exist under which presidents should be able overcome the constraint of a possible filibuster and still win confirmation for their nominee—even in the face of a hostile Senate—if they

nominate someone who is politically costly to reject (Light 1999). For Light, presidents' strength includes their public approval ratings and their margin of victory in the most recent election (1999, 32). When these factors increase, presidents gain political capital and are therefore more likely to garner congressional support for their domestic agenda in Congress.

Light's analysis comports with other accounts of how presidents can use their political capital (which they largely accrue from their popularity) to win battles with Congress. For instance, many scholars argue that presidents can use their resources to set both the public agenda and the congressional agenda (Edwards and Wood 1999; Neustadt 1990). More important for our theoretical argument, several scholars demonstrate that popular presidents are able to win more often in Congress (Edwards and Wood 1999; Brace and Hinckley 1992).

While these existing accounts speak directly to the relationship between the president and Congress during the typical legislative process, a similar argument can be made about the relationship between the executive branch and the Senate during the Supreme Court confirmation process. Just as the president is more successful at fulfilling his domestic agenda when he has more political capital, he should be more successful at securing confirmation for a Supreme Court nominee when he invokes his political resources. In this case he can use his resources to increase the costs of rejection for those who threaten a filibuster (see below).

We can use Light's measures of political capital to determine a president's ability to overcome constraints imposed by a competing Senate coalition during the confirmation process. For instance, when the president enjoys high public approval ratings, and when he wins his most recent election by a large margin, he should feel freer to nominate someone to the Court who is closer to his own ideal point. In other words, when the public strongly supports the president, his nominees (no matter how ideologically distant they are from the pivotal senator) should face an easier confirmation process, because rejections are more costly for the Senate when the president is politically strong. Additionally, several scholars suggest that the executive branch is strongest during a president's honeymoon period (Bond and Fleisher 1990; Brace and Hinckley 1992). As such, Congress often defers to policies on the president's agenda and the Senate usually confirms initial cabinet nominees with little controversy (although there are exceptions).

In our own previous work we find that presidents are strategic in their use of political capital, as they are more likely to make public statements on behalf of nominees when a nominee is ideologically distant from the Senate (Johnson and Roberts 2004).[15] More generally, we find empirical support for the argument that presidents are able to change votes on confirmations by "going public" (Kernell 1997) on Supreme Court nominees. For our purposes here, a president who has more years remaining in office should be able choose nominees closer to his own ideology. Finally, even if the president does not have a great deal of capital, we argue that he can still secure confirmation by nominating a highly qualified candidate. This is consistent with scholarly accounts that suggest candidates with high American Bar Association qualification ratings have an easier time making it through the Senate (Yalof 1999; Baum 2001).

The Politics of Blame

While the Constitution gives the Senate a veto over presidential nominees, and while Senate rules allow a minority of senators to obstruct most legislation, including nominees, these tactics are not without cost. Groseclose and McCarty (2001) analyze a bargaining model in which the actor receiving an offer (in this case the Senate) may accept offers outside of its win set due to the fear of appearing "extreme" to the voting public. These scholars empirically demonstrate that vetoing legislation is costly for presidents—those who use such a tactic usually incur a decline in their public approval.

While the Groseclose/McCarty model explicitly deals with congressional offers to the president, we argue that it does an even better job of explaining confirmation battles when the president makes the offer to the Senate. We do not have systematic data on Senate approval, but Hibbing and Theiss-Morse (1995) observe that Congress is the least popular branch of the U.S. government, at least partly because the public is turned off by its (highly visible) process. Given that tenuous confirmation battles are often some of the Senate's most public moments (Yalof [1999, 15] notes that they have been televised since 1955), Hibbing and Theiss-Morse argue that these proceedings leave the public with an even dimmer view of the Senate. For instance, polls taken during the Robert Bork and Clarence Thomas hearings suggest that a large proportion of respondents were displeased with the way the Senate handled the confirmation process. Sixty percent of respondents reported that senators "looked ridiculous" during the Clarence Thomas hearings, 57% thought the Senate Judiciary Committee treated Robert Bork unfairly, and 50% disapproved of the way the Senate handled the Thomas nomination. Further, 17 percent of this final number responded that what transpired during the Thomas hearing made them less likely to vote for their incumbent senator (ABC News/*Washington Post* Polls 1987, 1991).

The Groseclose/McCarty model suggests that when the president makes a nomination to the Supreme Court the obstructionist route may be electorally costly for senators, and Binder and Smith (1997) note that there are myriad other costs associated with the use of the filibuster for individual senators and legislative parties. For instance, filibusters take up precious time for senators and their staff, and they require the expenditure of a great deal of political capital.[16] Filibustering can also affect a senator's relationship with other Senate colleagues.[17] Finally, the public often have a poor perception of senators who constantly hold up the Senate with filibusters. These reasons may explain the absence of filibusters on President George W. Bush's nomination of John Ashcroft as Attorney General. On the heels of a contested election, and with President Bush seeking to "change the tone" in Washington, it is unlikely that the Senate Democrats wanted to start off the legislative year with a highly publicized filibuster. Additionally, in the case of Clarence Thomas it is possible that, by nominating someone of a minority race, the president was able to make the issue multidimensional with race *and* ideology acting as deciding factors for certain senators.[18]

Given these costs of rejection for the Senate, combined with our argument about the president's use of political capital during the confirmation process, it is

intuitive that the Senate rejects so few Supreme Court nominees—even when the pivotal senator is ideologically opposed to the nominee. In the next section we provide data to explain this phenomenon. Explicitly, we demonstrate that presidents can successfully exploit these costs by spending political capital.

MULTIVARIATE ANALYSIS

The spatial model in Figure 2 predicts that the president's ideal point in Regime 1, the Senate indifference point in Regime 2, and the current Court median in Regime 3 should be the only significant predictors of a Supreme Court nominee's ideology. In Table 2 we begin by assessing whether these spatial attributes, based on the filibuster pivot, empirically capture what transpires during the nomination process. For each of the four models we regress the same dependent variable—the nominees' ideological scores—on the ideological scores for the president, the Senate filibuster pivot, and the current Supreme Court median.[19] The most basic model (model 1) supports the predictions of the spatial model for regimes 1 and 2. Indeed, the positive and significant coefficients for presidential ideology and the Senate indifference point indicate that they have the proper impact in their respective regimes. However, the location of the current Court median is not a significant predictor of nominee ideology in Regime 3.

The results in models 2 and 3 sharply diverge from what the spatial model predicts. Here, the coefficients for the three key variables are signed in the wrong direction and, except for the Senate's indifference point in Regime 2 of the second column, fail to achieve statistical significance. In other words, the president appears to have no influence in Regimes 2 and 3, the Senate appears to have no influence in Regimes 1 and 3, and the Court appears to have no influence in Regimes 1 and 2. Note, however, that if entered in bivariate equations, the variables for the Senate and president achieve statistical significance. While these results may indicate that employing the filibuster pivot does not empirically capture the dynamics of the confirmation process, we believe that it is the high level of multicollinearity in columns 2 and 3, rather than our measurement choice, which leads to these disappointing findings.[20] Finally, model 4 suggests the current Court median is not the best indicator of a nominees' ideology in Regime 3, despite the fact that the spatial model predicts that a nominee at the current Court median is the closest nominee to the president that the Senate will confirm. The coefficient on this variable is negative and statistically insignificant, neither of which is predicted by the model based on the Senate median.

Taken as whole, the results in Table 2 indicate that factors other than the ideological proximity of the key players may be at work in the confirmation process. As the Groseclose/McCarty model predicts, this is especially true when the president and Senate find themselves at loggerheads over the direction the Court should move (Regime 3). Like Cameron, Cover, and Segal, we argue that the nomination process is affected by both spatial distance and valence factors (see Enelow and Hinich 1982, 1984; Enelow, Hinich, and Mendell 1986). We are concerned with nonspatial attributes that the president brings to the table during the

TABLE 2
Predicting the Ideology of Supreme Court Nominees Using the Filibuster Pivot to Determine theSenate Indifference Point

Variable	*Model 1*	*Model 2*	*Model 3*	*Model 4*
President (Regime 1)	0.92*	–1.92	–2.50	0.00
	(0.60)	(1.24)	(1.69)	(0.38)
Senate Indifference (Regime 2)	1.26**	–2.58*	–1.83	
	(0.66)	(1.37)	(1.67)	
Court Median (Regime 3)	0.83	–0.63	–2.22	–0.34
	(0.68)	(0.68)	(1.65)	(0.31)
President (Regimes 2 and 3)		0.58		
		(0.78)		
Senate (Regimes 1 and 3)		–0.76		
		(0.69)		
Court Median (Regimes 1 and 2)		1.60		
		(1.70)		
President (all regimes)			0.58	
			(0.78)	
Senate (all regimes)			–0.76	
			(0.69)	
Court Median (all regimes)			1.60	
			(1.70)	
Constant	–0.026	0.96	0.95	0.57
	(0.34)	(0.94)	(.094)	(0.14)
Adjusted R^2	.08	.46	.45	.01
Maximum VIF	6.98	99.69	69.93	1.32
Mean VIF	5.34	35.79	36.59	1.32
F	1.80*	4.81***	4.81***	0.79

N = 28. Standard errors are in parentheses. The dependent variable is the Segal/Cover score of the nominee, transformed to a 0 (conservative) to 1 (liberal) scale. The mean VIF (Variance Inflation Factor) indicates the amount of multicollinearity in the model, and the maximum VIF calculates the degree of multicollinearity between the two most collinear variables. A maximum VIF of over 10 suggests a high degree of multicollinearity. Note that because we have clear expectations about the directionality of the relationship between the dependent and independent variables, we use one-tailed tests throughout the analysis. *< .10; **p < .05 ***p < .01.

nomination process, and hypothesize that he can overcome the Senate's ideological constraint, and nominate someone closer to his ideal point than the spatial model predicts, by invoking these attributes (see e.g., Light 1999; Cameron, Cover, and Segal 1990; Groseclose and McCarty 2001).

To test this hypothesis, we include measures of presidential political capital in our statistical models. These variables include presidential approval in the month prior to the nomination, the proportion of the president's term in office

remaining, and the president's popular margin in the previous election. Due to the nonlinear nature of our predictions regarding presidential capital—high approval should allow a conservative president to nominate a conservative, whereas high approval should allow a liberal president to nominate a liberal—we rescaled these variables to account for these conditional hypotheses.[21] The ideology of the nominee remains the dependent variable, and we expect positive signs on all of the variables tapping the president's political capital. Table 3 presents these results.

Models 1, 2, and 4 confirm that when the president possesses high approval ratings, enjoys large electoral wins, or faces a hostile Senate early in his term, he is more likely to appoint a nominee close to his own ideological predilections in Regime 3. This indicates that, although the Senate seems able to constrain the president's choice in this regime, the president can overcome this barrier by calling on his political strength. Ultimately, this means that the president can still successfully choose someone close to his ideology, which comports with our hypothesis. Additionally, the findings indicate no significant effect from the three key predictor variables, which is likely due to the high multicollinearity (see the VIF at the bottom of the table).[22] These findings directly contradict Moraski and Shipan's (1999) argument that, while the president has to act strategically when making nominations to the Court, he cannot successfully use his bargaining advantage (what we call political capital) to help secure confirmation for his nominees.[23]

Finally, model 3 reveals an additional strategy that the president can use to overcome the Senate's constraints in Regime 3; when a president nominates a highly qualified candidate he has the ability to overcome a politically divergent Senate. In other words, the president can raise the costs of Senate rejection or obstruction, and ultimately reach a better outcome, by nominating highly qualified candidates. A highly qualified nominee makes it easier for the president to portray obstructing senators as "extremists" thus making the Senate more likely to acquiesce (McCarty and Groseclose 2001). Generally, this confirms that while the president's choice of nominees includes consideration of the spatial distance between himself and the Senate, his extra policy resources play a key role in the choice of nominees (Enelow and Hinich 1982, 1984; Enelow, Hinich, and Mendell 1986).

DISCUSSION

Our analysis teaches three important lessons. First, it indicates that to properly understand the dynamic between the president and the Senate during the Supreme Court confirmation process, scholars should focus on the filibuster pivot and not on the median senator. Krehbiel (1998) makes a sound theoretical argument about why, in general, the filibuster pivot is the most powerful senator. We extend his argument and establish that the senator who occupies the filibuster pivot is important for understanding the Supreme Court nomination and confirmation process. This is evident in Table 1. Indeed, using the filibuster pivot provides a more theoretically and empirically accurate picture of the nomination process than does using the Senate median.

TABLE 3
Controlling for Presidential Capital in the Supreme Court Nomination Process Using the Filibuster Pivot to Determine the Senate Indifference Point

Variable	*Model 1*	*Model 2*	*Model 3*	*Model 4*
President DW-Nominate Score (Regime 1)	0.21 (0.50)	0.48 (0.48)	0.25 (0.52)	0.69 (0.57)
Senate Indifference Point (Regime 2)	0.36 (0.57)	0.70* (0.54)	0.43 (0.58)	0.59 (0.84)
Court Median (regime 3)	0.23 (0.55)	0.53 (0.53)	0.23 (0.57)	0.15 (0.70)
Presidential Approval (Regime 2)	–0.54 (0.89)			
Presidential Approval (Regime 3)	1.13*** (0.27)			
Years Remaining in Office (Regime 2)		–0.38 (0.70)		
Years Remaining in Office (Regime 3)		0.85*** (0.21)		
Nominee's Qualifications (Regime 2)			–0.27 (0.57)	
Nominee's Qualifications (Regime 3)			0.79*** (0.21)	
President's Margin of Victory (Regime 2)				0.02 (0.03)
President's Margin of Victory (Regime 3)				0.02** (0.01)
Constant	0.44 (0.29)	0.26 (0.27)	–0.03 (0.28)	0.12 (0.32)
Adjusted R^2	.44	.44	.40	.20
Maximum VIF	7.51	7.11	7.56	10.30
Mean VIF	4.13	3.82	4.12	6.01
F	5.70**	5.24**	4.57*	2.36*

N = 28. Standard errors in parentheses. The dependent variable is the Segal/Cover score of the nominee, transformed to a 0 (conservative) to 1 (liberal) scale. The mean VIF (Variance Inflation Factor) indicates the amount of multicollinearity in the model. Note that because we have clear expectations about the directionality of the relationship between the dependent and independent variables, we use one-tailed tests throughout the analysis. *< .10; **p < .05 ***p < .01.

Second, and more importantly, our findings demonstrate the limitations of spatial models when trying to predict political outcomes. Indeed, while we think the spatial model in Figure 2 accurately represents the ideological constraints faced by the key players in our game, it cannot fully capture they dynamics of the

game because it cannot account for valence factors such as a president's public approval ratings, or a nominee's qualifications. As such, if scholars are to fully understand how the nomination and confirmation process works, they must consider both spatial and nonspatial attributes.

Finally, our results suggest presidents have a great deal of power over the nomination process—even when they face ideological constraints in the Senate—and that they use this power to gain confirmation for their preferred choices. This finding does not surprise us, and it comports with Maltese's (1995, 11) argument that presidents have developed

> . . . their own strategic resources to help secure confirmation of their judicial nominees, resources used to "sell" their Supreme Court nominees. Presidents now have an unprecedented ability to communicate directly with the American people, to mobilize interest groups, and to lobby the Senate.

While Maltese writes about the president's role more generally, our results confirm the intuition that, when facing a hostile Senate, presidents use political capital to overcome opposition that may otherwise thwart their chosen nominee. Of course there are exceptions: Robert Bork's failed nomination in 1987, and the failures of the Nixon administration. But such outcomes are just that—exceptions.[24] Indeed, as noted above, only four of the nominees in Regime 3 suffered defeat at the hands of a Senate clearly opposed to the president's choice.

Thus, we demonstrate how presidents, even when faced with a hostile Senate, can successfully secure confirmation of their chosen nominee. Sometimes they do so by strategically choosing nominees who will be ideologically acceptable to the Senate or by tying the Senate's hands by nominating highly qualified candidates (e.g., Justice Scalia). We provide strong evidence, however, that presidents often rely on their wealth of political capital so that they can choose someone closer to their preferred choice than the Senate may actually like. In short, we confirm the hypothesis that presidents act strategically when nominating someone to the Supreme Court, but we make a significant advance over previous findings because we also demonstrate that the key to presidents' strategy is the invocation of extra policy resources when they may be forced by the Senate to choose a nominee far from their own ideal point.

Notes

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[1]Dlouhy (2003).

[2]Note that Rule XXII of the Senate has been altered over the years to reduce the number of votes needed for cloture. Prior to Justice Stevens's nomination in 1975, invoking cloture required two-thirds of the senators present and voting. Since that time, cloture has been set at three-fifths of the chamber membership (Binder and Smith 1997).

[3]Fortas withdrew his name from consideration after a cloture motion failed (Abraham 1999). Moraski and Shipan (1999) also argue that President Clinton considered the possibility of a filibuster when he nominated Justice Breyer.

[4]The filibuster pivot is not the only potential "constraint point" for a president. Binder and Maltzman (2002) suggest that divided government acts as an important constraint on the ability of presidents to fill judicial seats. However, only Johnson's nomination of Fortas for associate justice occurred at a time when the president had a filibuster-proof majority in his own party.

[5]Like other recent literature that focuses on the interaction between the executive and the Senate during the confirmation process, Moraski and Shipan consider the median senator critical, rather than the filibuster pivot (see e.g., Nokken and Sala 2000). Based on this assumption (among others) they argue that the ideological makeup of the Senate constrains the president's choice of nominees, and oftentimes fully constrains this choice. While Moraski and Shipan therefore conclude that presidents must act strategically when deciding whom to nominate to the Supreme Court, they "find little support" for the conclusion that the president's bargaining advantage (1090)—what we call extra policy resources—plays any role in his strategic calculations. Moraski and Shipan's bargaining advantage is comprised of a president's approval ratings, the number of years he has left in office, and whether he nominates a highly qualified candidate.

[6]The symbols for Figure 2 appear in its legend. Regime 1 occurs when $S < P < J$; Regime 2 occurs when $P < S < J$, $S > (J_4 + J)/2$, and $P < 2S - J$; and Regime 3 occurs when $P < J < S$. Of course, like Moraski and Shipan, the regimes also occur for the mirror images of these configurations. We also assume that the players have complete and perfect information regarding the sequence of the game and the preferences of the other players.

[7]Note that the spatial alignment of the players can be reversed without loss of generality.

[8]Both sets of scores have been converted to a scale ranging from zero (most conservative) to one (most liberal).The reader should note that our measures of ideal points (DW-NOMINATE scores and Segal/Cover scores) might not be based on an identical policy space. That is, while both sets of scores have face validity, we cannot be sure that a specific Segal/Cover score maps directly onto the DW-NOMINATE space. Bailey and Chang (2001; 2003) seek to address this problem by creating, and utilizing, ideological measures that are directly comparable across the three branches of government. They do not include rejected nominees or President Truman's nominees in their data set because they argue that failed nominations contaminate the theory and because of the lack of available data on the Truman nominees. Thus, while their measurement strategy is certainly a good one, in our view their case selection approach creates many more problems for our analysis than their measurement innovations solve.

[9]Clement Haynsworth's confirmation had been "guaranteed" by Senator Eastland (D-MS), (the Judiciary Committee chair), as well as by Senators Everett Dirksen (R-IL) and Ernest Hollings (D-SC). Yet, in the end, the Senate failed to confirm Haynsworth.

[10]We also suspect that the president did not fully capitulate to the wishes of the Senate in the other 16 cases. To see this, one need only consider President Bush's nomination of Justice Thomas and President Reagan's nomination of Justice Scalia.

[11]It is also important to consider the iterative nature of the nomination game. We argue that the players recognize that the game potentially has many rounds. In other words, if the Senate rejects a nominee, the president submits another nominee, and both face costs by moving to a second round of the game. Indeed, the president must deal with a loss of political capital as well as the public embarrassment of having a nominee rejected, while the Senate faces the public relations costs noted by Hibbing and Theiss-Morse (1995). Thus, rather than the iterative nature of the nomination process making the game intractable, we think this helps to explain why presidents are typically able to win confirmation for nominees closer to their own ideology in Regime 3 than the spatial model predicts. Given that the preferences of the key players do not change during the course of the game and that playing the game is costly, confirmation in the first round is consistent with a subgame perfect equilibrium for this game.

[12]Thomas's 52-48 margin of victory was far from filibuster-proof.

[13]In fact, the spatial model in Figure 2 only predicts confirmation for Eisenhower's nominations of Harlan and Warren.

[14]We also believe that the politics of anticipation (Cameron 2000) plays a role in this process, whereby the president often avoids nominations that are sure to meet stiff resistance in the Senate.

[15]In fact, we find that presidents invoke their capital throughout the process—from the day they nominate until the day the Senate finally takes action on the nomination.

[16]Note that the Senate has mitigated many of the costs of obstruction on federal court nominees by employing "tracking"—a process whereby the Senate considers other legislative matters while the filibuster is essentially occurring in the background. Some senators refer to this as a "filibuster light" (see Binder, Lawrence, and Smith 2002 for a thorough account of the history and development of tracking).

[17]See Dlouhy (2003) for a discussion of the recent confirmation battles.

[18]Senate Republicans have repeatedly invoked this point on the circuit court nominations of Miguel Estrada (a Hispanic American) and Priscilla Owen (a woman), apparently seeking to embarrass Democrats for obstructing the nomination of women and minorities.

[19]Specifically, we replicated Moraski and Shipan's Table 3 (1999, 1083). That is, we used switching regression models to determine the ideology of the Supreme Court nominee. The only differences are that we use DW-NOMINATE scores for the president's and Senate's ideology and, more importantly, we use the filibuster rather than the median senator as the appropriate pivot. We think DW-NOMINATE scores are more appropriate for this type of analysis for a number of reasons. DW-NOMINATE scores are constructed using an overwhelming majority of the roll call record (only unanimous and near-unanimous votes are excluded), whereas the ADA selects only 20 "key votes" for each calendar year. While the two sets of scores are highly correlated (r>.9 for most Congresses), DW-NOMINATE scores are less sensitive to missed votes and strategic manipulation. By design, the ADA chooses votes that will separate perceived "liberals" from "conservatives," which as Arnold (1990, 82) notes can lead to cases where legislators intentionally vote against the ADA position to insure that they do not receive a "perfect" ADA score which might attract potential challengers. The DW-NOMINATE procedure clearly precludes this type of behavior from severely contaminating the analysis.

[20]Neter, Kutner, Nachtsheim, and Wasserman (1996: 385) present five informal "symptoms" of multicollinearity; columns 2 and 3 show signs of at least three. They note that "Nonsignificant results in individual tests on the regression coefficients for important predictor variables" indicate the existence of multicollinearity. In columns 2 and 3 all but one of the key predictor variables fails to reach standard levels of significance. Second, "Estimated regression coefficients with an algebraic sign that is the opposite of that expected from theoretical considerations or prior experience," also suggest multicollinearity between variables. Clearly, in columns 2 and 3, none of the three main variables are signed properly. Finally, "Wide confidence intervals for the regression coefficients representing important predictor variables," suggest the presence of multicollinearity. This is evident for all variables in columns 2 and 3.

Neter, Kutner, Nachtsheim, and Wasserman also use the Variance Inflation Factor (VIF) as a formal test for multicollinearity. These scholars argue that a combination of maximum VIFs larger than 10 and mean VIFs considerably larger than one, are indicative of severe multicollinearity. In column 2 the maximum VIF reaches 99.79 and its mean VIF is 35.79. Column 3 is not much better; the maximum VIF is over 69, and the mean VIF is almost 36. Taken together, this confirms that columns 2 and 3 suffer from severe multicollinearity. As such, we must interpret their results with a great deal of caution. This was not just a problem with our models. Indeed, when we reran Moraski and Shipan's models, using the Senate median, we also found unacceptable levels of multicollinearity. In column 2 the maximum VIF is 11.39 and the mean VIF is 5.21. These levels are 9.6 and 5.28 in column 3. This indicates the existence of severe multicollinearity in both models.

Multicollinearity is an especially serious problem when a researcher is seeking to demonstrate null effects, as Moraski and Shipan are in regards to the influence of the president in Regimes 2 and 3, the Senate in Regimes 1 and 3, and the Court median in Regimes 1 and 2. Multicollinearity has the effect of inflating the standard errors of parameter estimates, which increases the likelihood of a null finding. In other words, with the presence of multicollinearity there is an increased risk of failing to reject a null hypothesis (thereby making a Type I error) or wrongly accepting a null hypothesis (making a de facto Type II error). This suggests that Moraski and Shipan's results, as well as ours presented in Table 2, should be heeded with great caution.

[21]In constructing these variables we followed the lead of Moraski and Shipan (1999, 1089) by multiplying the interaction terms by the distance between the president and the Court median for Regime 3, and the president and the Senate for Regime 2.

[22]The reader should also note that we cannot reject the null hypothesis that the three spatial variables are jointly different than zero. Also note that these models, like those in Table 2, suffer from multicollinearity. However, we seek to determine whether the president can invoke his political capital to win confirmation when facing a hostile Senate. Given that multicollinearity usually results in high standard errors and low levels of significance (Greene 2000, 256), our analysis is hindered, rather than helped, by this problem. As a result, we are more confident about our findings because we find strong effects even in the face of a high level of collinearity.

[23]As they note, "The results…demonstrate little systematic support for these factors. . . . [H]owever, even in this regime (regime 3) the results are not strong. . . ." (1090)

[24]One could even argue that Bork was not an exception, as by 1987 the Reagan presidency had reached its weakest point (Kernell 1997), and Bork was ideologically distant from the Senate filibuster pivot.

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