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Judicial Nominations to the Courts of Appeals and the Strategic Decision to Elevate

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ABSTRACT

Although presidents regularly elevate district court judges to fill appellate court vacancies, research to date suggests that presidents elevate judges who are further from their preferences than nominees outside the federal judiciary. Current research also does not offer a satisfactory answer of when and why presidents decide to elevate. I argue that presidents are likely to decide to elevate when they perceive political conditions that they think will lead to a nominee facing a difficult confirmation battle in the Senate. Once they decide to elevate, they then elevate judges further from their preferences, knowing they will have the conciliatory prize of being able to fill a newly opened district court seat. This argument is bolstered by recent work that theorizes that judicial nominations and confirmations are dynamic, and not one-shot activities that gridlock models of advice and consent would suggest. The results of this analysis bear out my hypotheses. Presidents typically elevate when the ideological balance of an appellate court is at stake and, when they do, they often elevate district judges who are further from their preferences than they otherwise would. In fact, the district judges they elevate frequently resemble ideologically the appellate judges they are replacing.

KEYWORDS

Elevations; judicial nominations; appellate courts

Introduction

The purpose of this paper is to deepen our understanding of when and why presidents choose to elevate federal district court judges to the federal appellate courts. Most research on judicial elevations focuses on who the president chooses to elevate to the appellate bench, and hypothesizes that presidents will elevate district court judges whose ideological preferences are similar to their own preferences. Surprisingly, this line of research finds only a weak alignment between the president's preferences and the preferences of the elevated district court judge nominated to the appellate courts (Savchak et al. 2006; Swanson 2006). Instead, presidents typically rely on blunt partisan cues rather than ideological proximity when they elevate district court judges. As Savchak et al. note after examining the congruence of district court judges' records with a nominating president's preferences, "A Republican appointee with a highly liberal decision record is less likely to be elevated by a Democratic president than a Democratic appointee with a highly conservative record as a district court judge" (Savchak et al. 2006, 399).

Why is this the case? In this paper I draw on recent theoretical literature that conceptualizes judicial nominations as a multi-stage process to generate hypotheses predicting when presidents will choose to elevate district court judges to the federal appellate bench, as well as what type of judge a president is likely to elevate. The results suggest that presidents use elevations as a form

of tradeoff. Presidents are likely to elevate district court judges when an appellate court is balanced ideologically. Republican presidents are also likely to elevate district court judges when the judge who is being replaced is ideologically distant from the president. When these conditions are present, the president is likely to elevate a district court judge and, more importantly, he is likely to elevate a district judge who is further from his preferences than he might otherwise nominate. Indeed, the district judge he nominates is likely to resemble ideologically the appellate judge he or she is replacing.

I argue that presidents engage in this behavior to make the best of a difficult situation. One-shot gridlock models of advice and consent predict that presidents should not be able to get their nominee confirmed if an appellate court's status quo position lies between the president's preferences and the preferences of a pivotal senator unless he nominates someone who exactly maintains the appellate court's status quo.¹ Here I argue, however, that presidents may be willing to take a short-term hit to their utility when elevating a district court judge to the appellate courts knowing that if their elevated nominee is confirmed, they will have the conciliatory prize of being able to nominate someone to the newly created district court vacancy.

The elevation of William Traxler to the Fourth Circuit Court of Appeals serves as a good illustration of this behavior. President Clinton elevated Judge Traxler from the District Court for the District of South Carolina to the Fourth Circuit in 1998. The Fourth Circuit was ideologically balanced between Democratic and Republican nominees at the time. Clinton also faced divided government, and an increasingly polarized Senate. Battles over nominations to the Fourth Circuit were particularly contentious at the time.² The judge Traxler was chosen to replace – Donald Stuart Russell – was a Nixon appointee. Traxler was a good friend of Strom Thurmond, who was the senior Republican member of the Senate Judiciary Committee at the time, and was nominated to his district court position by President H.W. Bush in 1991. President Clinton chose Traxler to fill the Fourth Circuit vacancy despite his conservative background. His nomination sailed through the Senate and he was confirmed eighty-one days after his nomination. President Clinton then used the newly created district court vacancy on the District Court for the District of South Carolina as an opportunity to fulfill his objective of diversifying the federal bench. He nominated Margaret Seymour – an African-American female – to take Traxler's place. Senator Thurmond fully supported the nomination, stating, "She is ... a person of character and integrity. I am very pleased to support her, and am confident she will be a very able addition to the District Court" (Thurmond 1998, 27645). She was confirmed only forty-three days after her nomination. I believe this illustration exemplifies when and why presidents choose to use elevations to fill vacant appellate court judgeships.

Nominations, delayed confirmations, and gridlock

Although there are two parts to the advice and consent process – nominations and confirmations – most research in this field focuses on the confirmation process. The bulk of this research focuses on delay tactics in the Senate, and why the Senate may delay confirming some nominees rather than others given different arrays of political and institutional conditions. For example, there is a large body of literature finding that the Senate is very likely to delay confirming a president's nominee when divided government is president, and especially when there is greater polarization between the two parties (Asmussen 2011; Bell 2002; Basigner and Mack 2010; Binder and

¹I use the term "status quo" throughout this paper to keep my terminology consistent with Jo, Primo, and Sekiya (2017) theoretical model, which I refer to throughout the paper.

²President Clinton's struggles to get nominees confirmed to the Fourth Circuit during his tenure are well documented. The most notorious case involves Clinton's feud with Jesse Helms (R-N.C.) over Clinton's unwillingness to elevate Terrence Boyle to the Fourth Circuit. Helms' recalcitrance resulted in North Carolina – the most populous state in the Fourth Circuit – having no appellate judges from the state appointed to the Fourth Circuit by 2003.

Maltzman 2002; Bond, Fleisher, and Kurtz 2009; Hartley and Holmes 2002; Jo, Primo, and Sekiya 2017; Shipan and Shannon 2003).³ Not surprisingly, the Senate is more likely to delay their vote on a judicial nominee if the nominee is thought to be too ideologically extreme (Basigner and Mack 2010; Epstein and Segal 2005; Segal, Cameron, and Cover 1992), although well qualified nominees are more likely to be confirmed more quickly (Basigner and Mack 2010; Epstein et al. 2006; Martinek, Kemper, and Van Winkle 2002; Shipan and Shannon 2003). Finally, this body of research concludes that senatorial delay – and not an outright rejection of a nominee via an up-or-down vote – is becoming the new norm for killing judicial nominations in the Senate (Binder and Maltzman 2002; Bell 2002; Bond, Fleisher, and Kurtz 2009; Martinek, Kemper, and Van Winkle 2002; Nixon and Goss 2001). Whereas judicial nominees in the past were presumed to be successfully confirmed, they are now subjected to what Bond, Fleisher, and Kurtz (2009) refer to as malign neglect, whereby individual senators seek to restrict the scope of conflict around individual nominees so they can block the nominees' confirmation through the use of Senate rules and parliamentary maneuvers. Among the maneuvers used are holds placed on nominees by individual senators, failures to hold hearings for certain nominees, negative blue slips returned by home-state senators, failure on the part of the majority leader to schedule a floor vote for a nominee, and the use of the filibuster to kill a confirmation vote (Binder and Maltzman 2002; Crockett 2007; Jacobi 2005; Martinek, Kemper, and Van Winkle 2002; Sollenberger 2004).⁴

This certainly places the president in a precarious position. On the one hand, presidents want to choose nominees who reflect their policy preferences (Goldman 1997; Sheldon and Maule 1998). However, the president must also choose nominees who are not so objectionable to the Senate they will not be confirmed (Hollibaugh 2015; Massie, Hansford, and Songer 2004). All of this is done in an atmosphere of increasing political polarization. It is not surprising, then, that it takes presidents longer to choose nominees to fill vacant federal judgeships than it takes for the Senate to confirm those nominees (Massie, Hansford, and Songer 2004). It is apparent there are many factors that presidents have to consider when they select nominees for federal judgeships. Surprisingly, there is little research examining the causes and consequences of presidential delay in nominating federal judges (but see Hollibaugh 2015; Sheldon and Maule 1998; Jo, Primo, and Sekiya 2017).

Instead, more recent literature on the topic attempts to take a more unified approach by explaining who presidents are capable of nominating and getting confirmed, given senatorial constraints. These are the one-shot gridlock models examining bargaining processes between the president and the Senate in a one-dimensional policy space, usually defined by ideology (Asmussen 2011; Cameron, Segal, and Cover 1990; Johnson and Roberts 2005; Krehbiel 2007; Moraski and Shipan 1999; Primo, Binder, and Maltzman 2008; Rhode and Shepsle 2007; Segal,

³It is very important to understand from this point forward that divided government and polarization are two distinct concepts, and should not be conflated (Primo, Binder, and Maltzman 2008).

⁴Questions were raised during different drafts of this paper about the role of senatorial courtesy in this paper's theory and modeling. Senatorial courtesy and the institutionalization of the blue slip process are important components of the advice and consent process. However, there are theoretical and empirical explanations for how senatorial courtesy is used in this paper. First there is important scholarship showing that, while senatorial courtesy is important, its influence on the president's decision calculus fades in the face of greater influence from more institutionally empowered senators (Binder and Maltzman 2004, 2009; Steigerwalt 2010). As Binder and Maltzman note, "[S]enatorial courtesy works its will quite efficiently in the weeks just following a vacancy. But after those easy nomination choices are made, the dynamics of the selection process take on a new character, as presidents face structural incentives to consult more widely beyond their partisans in choosing their nominees (Binder and Maltzman 2004, 18)." It should also be noted that their research covers a timeframe where senatorial courtesy would be assumed to be stronger than it is today (1947 to 1998). Second, although senatorial courtesy is important when choosing appellate court judges, its influence is recognized to be much stronger when the president chooses district court judges (Goldman 1997; Songer 1982; Steigerwalt 2010). Finally, the filibuster pivot is used formally in this paper because Primo, Binder, and Maltzman (2008) find the filibuster pivot to be the best "pivotal" senator to use in spatial advice and consent models. Having said this, I do account for the effect of senatorial courtesy in both stages of the Heckman probit models presented here, which is acceptable as long as there is at least one variable in the selection equation that is not in the outcome equation (Wooldridge 2006). This means that the model accounts for the effect of senatorial courtesy in both the decision whether or not to elevate, and also in the decision of who to elevate once the decision to elevate has been made.

Cameron, and Cover 1992). These models typically predict that presidents will try to move a court's status quo ideological position as close as they can to their preferred ideological position, given institutional constraints. A president's nominee in these models will be confirmed as long as the most distant pivotal senator is at least indifferent to the court's new status quo position once the nominee is confirmed, relative to the court's ideological position after the previous judge leaves the bench. Otherwise, the nominee will be rejected (Primo, Binder, and Maltzman 2008).

The likelihood of these models predicting rejection are contingent on the size of the gridlock interval, i.e. the ideological distance between the president and the most distant pivotal senator in the model. Typically, those models conclude that the likelihood of a nominee being confirmed decreases as the size of the gridlock interval increases – particularly under divided government (Asmussen 2011; Whittington 2006). This conclusion on its own is quite relevant, given the fact there is increasing polarization between the parties in the Senate and the presidency, divided government has been the rule rather than the exception for nearly fifty years, and more judicial nominees have failed to be confirmed over that time.

However, a weakness of these models is that they do not account for the dynamic, multi-stage nature of the advice and consent process. Recent research recognizes that the advice and consent process is in fact dynamic. Judicial nominations do not occur in a vacuum. They occur in political time (Hollibaugh 2015; Jo, Primo, and Sekiya 2017). As Stiglitz states, "... appointment politics often involve more than one period: indeed, the next presidential election is always just around the corner" (Stiglitz 2014, 47). These models reflect the fact that policymakers condition current choices on future interactions and environmental conditions, and at times may be willing to accept nominees who are further from their preferences than they would otherwise accept (Jo, Primo, and Sekiya 2017).

Judicial elevations in the context of one-shot and multi-stage selection models

Savchak et al. (2006) analysis of judicial elevations is the foremost analysis of who presidents choose to elevate to the federal appellate courts. The most important conclusion they reach in their paper is that presidents rely on blunt cues like who nominated the district court judge to his or her position, or a president's compatibility with a judge's record, to decide on who to elevate to the appellate courts. They also find several institutional factors like the size of the pool of co-partisans in the district courts, or whether the appellate seat is "owned" by a particular state, play a role in who gets elevated. While these conclusions are undoubtedly useful in determining who gets elevated, they do not address the question of when a president chooses to elevate and why.

Barrow, Zuk, and Gryski (1996) explanation of why presidents choose to elevate district court judges also provides an interesting but incomplete answer for why presidents may choose to elevate: elevating district court judges to the appellate courts maximizes the number of judicial nominations a president can make. Presidents can elevate co-partisans to the appellate courts and then fill newly created district court vacancies with co-partisans. This is an enticing insight into why presidents may elevate, but it does not coincide with modern political realities. Presidents elevated district court judges to vacant appellate court positions 37.5 percent of the time from 1969 to 2014. As Figure 1 illustrates, there is variation among presidents in how frequently they use elevations to fill vacant appellate court seats. There is also a great deal of variation between Republican and Democratic presidents as to the use of elevations. Republican presidents appear to use elevations more extensively than Democratic presidents.⁵ It is also worth noting here that elevations as a proportion of all appellate court nominees appears to be getting smaller over time.

⁵A difference of proportions test between Republican and Democratic presidents supports this observation ($\pi = -4.75$, $p \leq .001$).

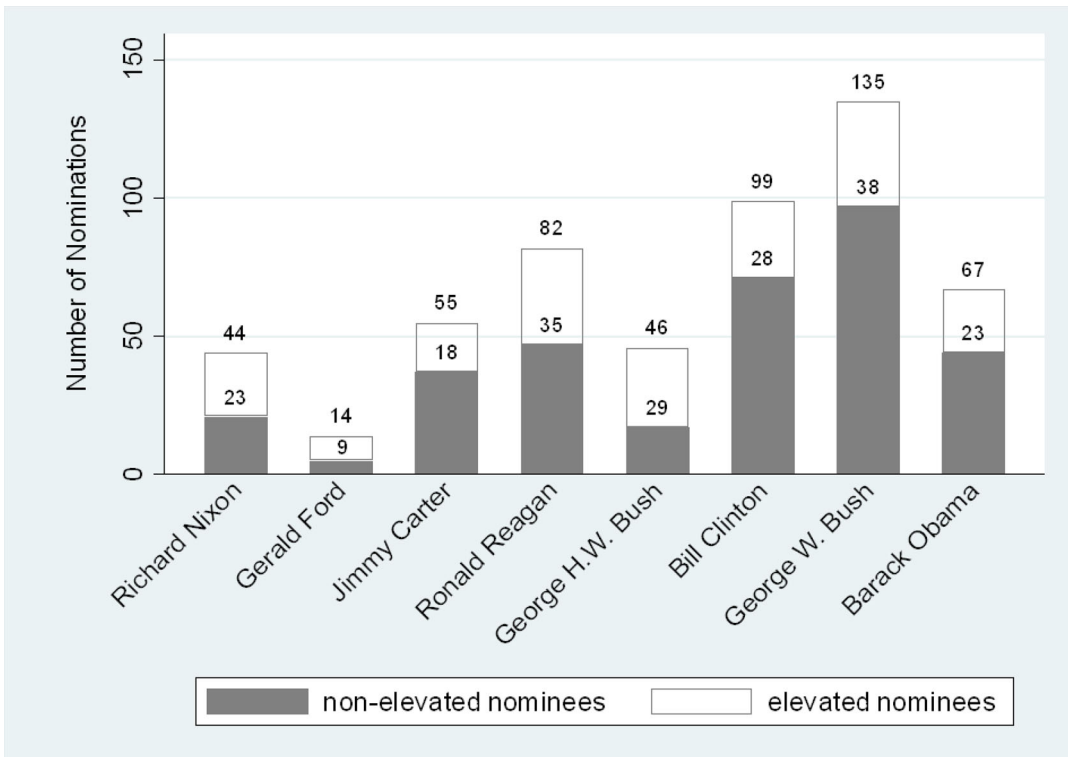


Figure 1. Number of elevated appellate court nominees by president, 1969–2014.
Source: Federal judicial center biographical database.

Why is this the case? Recent theoretical work by Jo, Primo, and Sekiya (2017) may shed some light on this question. They model judicial nominations and confirmations as a dynamic, multi-stage process where presidents and the Senate may make short-term sacrifices to their utility in order to be better off over the long run. The most important conclusion of their models is that a court's status quo can in fact be moved if it is located in the gridlock interval between the president and a pivotal senator in a one-dimensional policy space. Elevations are a two-step process akin to Jo, Primo, and Sekiya's theoretical framework. They are also conceptualized as such in Barrow, Zuk, and Gryski's analysis (1996). Presidents elevate district court judges when it is likely a judicial nominee will face greater difficulty getting confirmed by the Senate.⁶ After presidents make the initial decision to elevate, it is likely they will choose to elevate a district judge who is more moderate than they might otherwise accept because they will receive the conciliatory prize of being able to nominate someone closer to their preferences to the newly created district court vacancy.⁷

Elevations in a one-shot gridlock model

The purpose of this section is to demonstrate that prototypical gridlock models may not offer the best theoretical explanation of judicial elevations. To demonstrate, assume ideological preferences to be in a one-dimensional policy space, and assume that the preferences of the president (p),

⁶A difference of proportions test shows supports the hypothesis that more elevations are made during divided government than during unified government ($\pi = -11.04, p \leq .001$).

⁷A t-test shows that district court judges who are elevated are more ideologically moderate than district judge who are not ($t = 2.34, p \leq .01$).

and a pivotal senator (f) are arrayed in that policy space. Let q represent the status quo ideological position of the appellate court after a random appellate judge vacates his or her seat, and let y represent the new status quo position of the court if the president's nominee to the court is confirmed. Assume the actors in the model have single-peaked preferences. Let us also assume that presidents desire to maximize the number of appointments they make to the federal courts. This would mean that under certain conditions the president may be willing to nominate someone to the federal courts who is further from his ideal point simply so he can fill another federal court vacancy with one of his own nominees rather than leave that vacancy to be filled by another president.

The president in this model can receive one of three specific payoffs: $-|p - y| + b$, where b represents the benefit of having the chance to nominate someone to the newly created district court opening if his elevated nominee is confirmed, $-|p - y|$ if a non-elevated judicial nominee is confirmed, and $-|p - q|$ if either his elevated or non-elevated nominee is rejected. The game begins when the president makes a nomination to fill the vacant appellate court seat. Next, the pivotal senator (conceptualized from this point forward as the filibuster pivot in the Senate) receives a utility of $-|f - y|$ if the nominee is confirmed and a utility of $-|f - q|$ if the nominee is not confirmed.

The game is solved using backward induction. One can see that it is always in the president's interest to elevate regardless of where the president's ideological location is in relation to the pivotal senator, and also regardless of where the appellate status quo is located. Per the conclusions of other gridlock models, a pivotal senator will block a nomination if y is further from his or her preferences than q . The appellate court's status quo position (q) is located within the gridlock interval when it is located between p and f 's preference points. No nominee will be confirmed that changes the status quo because any change to the status quo that moves y closer to p decreases the pivotal senator's utility.

The key to this game is the b term in the president's utility function. Based on the course of the game, it is never in the president's interest to *not* elevate. When q is on the opposite side of both p and f , or when p is in between q and f , the president can move the appellate court median to y and also receive the benefit b when he elevates. When q is located in the gridlock interval, the president's choice is only q . However, if he elevates a district judge who maintains q he gets the benefit of filling the newly created district court vacancy. This choice implies a two-step process whereby the president may sacrifice utility when nominating someone to the appellate courts in return for being able to nominate someone more closely aligned with his preferences to the district courts.

Two-period selection models

The ultimate conclusion of the one-shot judicial selection model is that the president should always elevate no matter what the status quo position of the appellate court is. He will always be better off by giving himself the chance to fill two vacancies rather than one. But we know that presidents do not pursue this strategy with regularity. It is therefore important to understand why presidents do not elevate district court judges to the federal appellate courts at all times. One important reason why is that the benefit received from being able to fill a newly created district court vacancy is not as great as the payoff from being able to nominate an ideological ally to the appellate courts.⁸ Therefore, we should observe an inverse relationship between the ideological

⁸It is well understood that appellate courts are more capable of shaping policy than district courts are. District court judges are rarely able to shape policy on their own. However, this does not preclude the possibility that presidents nominate certain individuals to the district courts with the hope that they or some future president will elevate them to the federal courts of appeals at a later date.

proximity of a possible nominee to the president and the likelihood of elevation. When a president is able to nominate someone who perfectly approximates his preferences, it should not matter to the president whether the nominee is elevated or not because the payoff of having an ideologically proximate nominee confirmed to the appellate bench is greater than the payoff of getting the opportunity to fill a newly vacated district court position.⁹ However, it is probable that a president will look for other types of payoffs when choosing who to nominate to the appellate bench as the likelihood of getting an ideologically proximate nominee confirmed by the Senate decreases.

This raises the question of when this condition will be found. One area where this condition can be found is in the status quo position of the appellate court. Presidents should be less likely to elevate a district court judge to an appellate court with an ideologically extreme status quo position. When we assume the medians of those courts are outside the gridlock interval, the president has every incentive to nominate someone who shares his preferences exactly, and the pivotal senator has no incentive to block the nomination because the court's new status quo will either be unchanged or will move closer to the pivotal senator's ideal point. Under these conditions the president is likely to rank the payoff of ideological proximity more highly than the payoff of an additional district court nomination, and the predictions of the one-shot gridlock model will hold.

The opposite is true for appellate courts with status quo positions in the gridlock interval, and especially when those courts are more ideologically balanced between liberal and conservative judges.¹⁰ When this condition is present the president should not be able to have any nominee confirmed that alters the status quo; however, in this case he can benefit from elevating a district court judge who can be confirmed only to be able to fill that district court vacancy at a future point in time. This leads to the following hypothesis:

Hypothesis 1: Presidents are more likely to elevate district court judges to federal appellate courts that are ideologically balanced.

Next, it is important to consider who the president is replacing on a federal appellate court. Changes in an appellate court's status quo will vary based on the preferences of the appellate judge who is leaving the bench. A court's status quo will move toward the president's ideological position if the president and the judge vacating the appellate court seat are on opposite sides of the court's status quo. Conversely, the status quo will move away from the president if the vacating judge and the president are on the same side of the status quo. Presidents may be more likely to encounter challenges from the pivotal senator in the first scenario because the new status quo will be closer to the president's preferred position than the original status quo, and it is in this situation where the president may benefit from elevating a district court judge whose ideological position is further from the president's position than the president might otherwise find acceptable. Under these conditions, the president may be willing to take a short-term hit to his utility in order to have the opportunity to nominate someone to the district court position that would be created if the elevated judge is confirmed. Conversely, pivotal senators may be more willing to accept a nominee closer to the president's preferences in the second scenario because the original status quo will be maintained. This leads me to a second hypothesis:

⁹President Trump's nomination strategy to date reflects this reality. Despite criticism that President Trump is rubber-stamping members of the Federalist Society to federal judgeships, he is not maximizing the number of nominations he could be making. Indeed, at the time of this writing only six of his twenty-nine confirmed appellate court nominees were elevated from the district courts (more on this later).

¹⁰A t-test does show that presidents are much more likely to elevate when appellate courts are ideologically balanced as opposed to when they are more ideologically extreme ($t = 15.32, p \leq .001$).

Hypothesis 2: The probability of a president elevating a district court judge to an appellate court vacancy will increase as the ideological distance between the president and the appellate judge vacating the bench decreases.

There is a caveat to this argument, however. A t-test of the ideological difference between president and vacating appellate judge for vacancies filled via elevation and those not filled via elevation is correctly signed, but not statistically significant ($t = -1.06, p = .14$). However, there is a much greater difference in ideological distance when we look at the differences between Republican and Democratic presidents. The ideological distance between president and vacating appellate judge is much greater for Republican presidents than for Democratic presidents ($t = -6.98, p \leq .001$). Furthermore, t-tests show there to be a significant difference between decisions to elevate and decisions to not elevate for Republican presidents only ($t = -1.65, p \leq .05$ for Republicans; $t = 1.57, p \leq .06$ for Democrats). Indeed, a t-test shows that Democratic presidents are more likely to elevate when the distance between president and appellate judge is larger rather than smaller. These hypothesis tests lead me to a second hypotheses regarding the ideological distance between presidents and vacating appellate court judges:

Hypothesis 2a: There is a greater probability that Republican presidents will elevate a district court judge to an appellate court vacancy as the ideological distance between the president and the appellate judge vacating the bench increases.

The previous two hypotheses delineate conditions when presidents will elevate district court judges to fill vacant appellate court positions, but none of the hypotheses above address *who* the president will elevate to a vacant appellate court seat. As mentioned earlier, Savchak et al. (2006) find that presidents rely on blunt partisan cues and geographical or institutional norms to decide who they can elevate to the appellate courts. However, more than partisanship is considered when presidents elevate district court judges. In fact, approximately 17% of district court judges elevated to the federal appellate courts between 1969 and 2014 were nominated to the appellate courts by a president from the opposite party of the president who nominated the federal judge to his or her position.¹¹

At this point it is important to keep in mind the two-stage process of elevations. Remember that in two-state nomination games presidents are willing to take a short-term hit to their utility in order to receive a greater payoff at a later date (Jo, Primo, and Sekiya 2017). Regarding elevations, presidents are willing to elevate someone further from their preferences in order to fill a newly created district court vacancy later. Even though presidents are more likely to nominate a district court judge who was nominated to his or her position by a fellow partisan president, that does not guarantee that the district court judge a president decides to elevate shares his preferences (Swanson 2006). Indeed, based on the discussion above, we should anticipate the preferences of those the president chooses to elevate to be further from the president's preferences than he would find acceptable in other circumstances. However, there are limits to the distance between president's preferences and the preferences of the district judge he nominates. At a certain point there should be a preferential threshold beyond which the president will not be willing to cross in order to elevate any particular district court judge. Thus we should observe a curvilinear relationship between the ideological distance between the president and the district judge he chooses to elevate. This leads to two hypotheses about this curvilinear relationship:

¹¹The purpose of this article is not to supplant Savchak et al.'s proposition that presidents rely on blunt cues when determining who to elevate. Partisanship is fully expected to be an important and influential predictor of who gets elevated once a president decides to elevate. However, I also expect president to elevate district court judges who, while they share the president's party, may not completely share the president's preferences. This is in line with Swanson's (2006) conclusions, and directly aligns with Savchak et al.'s quote used at the beginning of this paper.

Hypothesis 3a: The probability of a president elevating any particular district court judge to an appellate court vacancy will increase as the ideological distance between the president and the district court judge increases.

Hypothesis 3b: At a certain point, the probability of the president elevating that district court judge to a vacant appellate court seat will decrease as the ideological distance between the president and the district court judge increases.

One final theoretical observation should also be noted. Since presidents are likely to elevate when an ideologically distant judge vacates his or her appellate seat, and since a president is likely to elevate a district court judge who is more ideologically distant than might otherwise be acceptable, it is probable that the ideological position of the elevated district court judge will be similar to the judge he or she is replacing on the appellate court. Evidence of this type of behavior already exists in the judicial selection literature. Zigerell (2010) demonstrates that there is a degree of reference dependence among senators in the Senate. Senators use departing judges as temporal reference points when they assess the acceptability of nominee to replace that departing judge. When they assess a nominee, they compare the ideological distance between themselves, the vacating judge, and the nominee, and hypothesizes that "... liberal senators should be happier with a moderate nominee replacing a conservative justice than with a moderate replacing a liberal" (Zigerell 2010, 395), and vice versa.

Note that what Zigerell is saying is quite similar to the Savchak et al. (2006) statement at the beginning of this paper, and also similar to what I hypothesize in this paper. This observation is important because it demonstrates how presidents can maintain the status quo of an appellate court even though they are nominating someone new to sit on that court. It is also important because it implies that elevating district court judges to the appellate courts may not be the best way for an ideological president of either political party to shift the ideological balance of any particular appellate court closer to his preferences (Swanson 2006).¹² This leads me to a final hypothesis:

Hypothesis 4: Presidents will be more likely to elevate district court judges to the federal appellate courts who are ideologically proximate to the appellate judge he or she is replacing.

Data and method

I test the previously stated hypotheses by analyzing all judicial nominations made to fill vacant appellate court seats from 1969 to 2014. I chose 1969 as the first year of analysis for two reasons. The first is that this year coincides with the increased presence of divided government between the Senate and the presidency.¹³ It also coincides with the election of Richard Nixon as president and the beginning of the partisan nomination of federal judges in earnest. I choose 2014 as the final year of analysis because of data collection limitations and also because this was the last full year Democrats held the Senate and the presidency after Senate Democrats enacted the "nuclear option," which eliminated the 60-vote rule for ending filibusters of lower federal court nominees. The nuclear option all but eliminated the filibuster as a senatorial delay tactic for federal judicial confirmations. My dataset includes a total of 542 nominations where I have complete data.

My analysis of when presidents choose to elevate district court judges to vacant appellate court position occurs in two stages. The first stage is designed to test hypotheses 1 and 2, while the

¹²A t-test does show that those who are elevated to fill vacant appellate court seats are closer ideologically to the appellate judges they are replacing than those who are not elevated ($t = 3.35, p \leq .001$).

¹³There have only been eleven years of unified government in the years under consideration, although Ronald Reagan did enjoy six years of unified partisan control of the presidency and the Senate, while Barack Obama enjoyed four years of the same type of partisan control.

second stage is designed to test hypotheses 3 and 4. The goal of the analysis performed here is to show that presidents assess the context in which they are making nominations in order to ascertain whether an elevation is appropriate, and the predict the type of nominee presidents are likely to elevate once they have decided to elevate.

Dependent variables

The first dependent variable in this analysis is a dichotomous variable that is coded 1 if the president chooses to elevate a district court judge to an appellate court vacancy and 0 otherwise. 201 nominations during this time period were elevations – approximately 40 percent of the nominations made during the time period. 339 appellate court nominees were chosen from outside the federal judiciary. In the second analysis, I analyze who is chosen from among the pool of district court judges associated with a particular appellate court seat to fill an appellate court vacancy, given conditions that make it more or less likely that a president will elevate a district court judge to a vacant appellate court seat.¹⁴ The unit of analysis is the district judge/vacancy dyad. 9,579 district judge/vacancy dyads were at risk of being elevated in the dataset. The 201 dyads that were elevated represent approximately 2 percent of the data. Although the probability of a president choosing to elevate rather than nominate someone from outside the federal judiciary to a vacant appellate court seat is rather high, the probability that any individual district court judge will be elevated to the federal courts of appeals is quite small.

Independent variables - the decision to elevate

The first theoretical variable of interest in ascertaining when a president will elevate a district court judge to the federal appellate courts is the ideological distance between the nominating president and the appellate judge leaving the bench. I measure *president-departing judge distance* by taking the absolute value of the difference between the president's ideology score and the departing judge's ideology score. Presidential ideology is measured using NOMINATE scores (Poole 1998), and the departing judge's ideology is measured using Epstein et al. (2007) Judicial Common Space scores (see also Giles, Hettinger, and Peppers 2001; Epstein et al. 2007. I will refer to these scores as JCS scores throughout the rest of the paper).¹⁵ The second theoretical variable of interest for determining when a president will elevated a district court judge to the federal appellate courts is an *appellate court median* variable that is measured by taking the absolute value of the JCS score of the median justice on each appellate court after the departing appellate judge has left the bench (see Epstein et al. 2007).¹⁶

Other control variables are accounted for in this analysis. *Divided government* is a dichotomous variable that is coded as 1 if the Senate and presidency are controlled by different parties and 0 if they are not. I measure the size of the *gridlock interval* by using the absolute value of the

¹⁴I limit the data as to who can be elevated to the appellate courts to the district court judges from the state that "owns" a particular appellate seat. Although no state technically "owns" an appellate seat, there are strong norms of association between states and particular appellate seats (Savchak et al. 2006). It is incredibly rare when a president does not nominate someone to those seats who is not from the state that "owns" the seat, and there is often blowback from home-state senators when a president attempts to do so. This is also an important reason why there is no variable measuring whether a state "owns" an appellate seat in the model that follows.

¹⁵These measures are comparable (see Epstein et al. 2007).

¹⁶There was some concern among reviewers about using Giles, Hettinger, and Peppers' (2001) common space measures to measure ideological distance between the different political actors in this model. There were some questions as to whether this paper's analysis would be robust to alternative ideology specifications. The appendix addresses this issue. Specifically, I reran the model in this paper on a subset of nominations using the original data and data from Bonica's Database on Ideology, Money in Politics and Elections (DIME) (see Bonica 2014). In summary, the results are similar in the selection equation, with some differences in the outcome equation – particularly related to the distance between current district court judges and departing appellate judges.

distance between the president and the filibuster pivot in the Senate using each's NOMINATE score (see Primo, Binder, and Maltzman 2008). I also account for *senatorial courtesy* by using the absolute value of the distance between the president and the average of the two home-state senators associated with a vacant appellate court seat using each's NOMINATE score (see Binder and Maltzman 2009).¹⁷ *Candidate pool* is measured by taking the proportion of district court judges chosen by a president's co-partisans who occupy district court judgeships in the state associated with a particular appellate court vacancy. I account for whether an appellate court seat is a *new seat* created by Congress by using a dichotomous variable coded as 1 if the seat is a new seat, and 0 if it is not. Information for both variables was gathered from the Federal Judicial Center's biographical directory. I measure *presidential approval* by using the nominating president's Gallup approval rating for the week the nomination was made. *Republican president* is a dichotomous variable coded as 1 if the nominating president was Republican and 0 if not. Finally, the *election* variable is a dichotomous variable that is coded as 1 if the nomination was made during a presidential election year and 0 if it was not.

Independent variables – who gets elevated

The first theoretical variable of interest in this part of the analysis is *president- district court judge distance*. This variable is measured by taking the absolute distance between the nominating president's NOMINATE score and the district court judge's JCS score as calculated by Boyd (see Boyd 2015; Epstein et al. 2007; Giles, Hettinger, and Peppers 2001).¹⁸ I also include the squared term of this variable to account for the hypothesized curvilinear relationship between this variable and the probability that a particular district judge will be elevated to the vacant appellate court seat.

I also measure *district judge-departing judge distance* by measuring the absolute value of the difference of the appellate judge and district court judge JCS scores. I measure whether those who are elevated to the district courts are more moderate than others who could be elevated to a vacant appellate court seat by including a *district judge moderation variable*, which is measured as the absolute value of the district court judge's JCS score. Following Savchak et al. (2006), I include a dichotomous variable measuring whether a district court judge is from the *same party* as the nominating president. This variable is coded as 1 if the district judge is nominated by a co-partisan president, and 0 otherwise. I also include a dichotomous variable measuring whether or not the district court judge was nominated to the district court by the *same president* making the appellate court nomination. This variable is coded as 1 if the same president who nominated the district court judge is also making the nomination to fill the appellate court vacancy, and 0 otherwise. This information was gathered from the Federal Judicial Center biographical directory. The *senatorial courtesy* variable used in the selection model is also used in this analysis, as it is highly likely the president will have to work directly with the senators whose state "owns" an appellate court seat at this stage of the advice and consent process (Binder and Maltzman 2004, 2009; Jacobi 2005; Savchak et al. 2006).¹⁹

¹⁷I also ran the model using a measure of senatorial courtesy ranging from 0 to 2, where 0 represented a state where no senators were in the president's party, 1 represented a state where 1 senator was in the president's party, and 2 represented a state where both senators were in the president's party. This variable approached significance in the outcome equation ($p = .17$) but did not approach significance in the selection equation. The Bayesian Information Criterion (BIC) for this model was larger than it was for the models presented in this paper. All other estimates in the model were nearly the same as the estimate presented in this paper.

¹⁸As discussed in the appendix, there was concern that using JCS scores to measure ideological distance would result in a high number of values for this variable to equal zero, as those nominated when the president and home-state senators are in opposite parties would assume the value of the nominating president. This proved not to be the case in the data.

¹⁹It should be noted that Savchak et al. (2006) follow the same modeling strategy in the selection model presented in the appendix to their paper.

Table 1. Descriptive statistics.

Dependent Variables	Mean	St. Dev.	Min	Max	Expected Sign
Decision to Elevate	.409	.492	0	1	
Who Gets Elevated	.021	.143	0	1	
Outcome Equation Variables					
President-District Judge Distance	.582	.343	.002	1.231	+
District Judge-Appellate Judge Distance	.320	.270	0	1.129	-
District Judge Moderation	.299	.144	0	.814	-
Same Party	.458	.498	0	1	+
Same President	.206	.404	0	1	+
Senatorial Courtesy	.562	.312	.0065	1.13	+
Race	.157	.363	0	1	+
Gender	.171	.376	0	1	+
ABA Rating	1.53	.511	0	2	+
Age	58.19	7.74	34	90	+
Seniority	9.06	6.30	0	48	+
Duration	6.53	5.78	1	52	-
Selection Equation Variables					
President-Departing Judge Distance	.559	.310	.005	1.279	+
Appellate Court Median	.198	.110	0	.514	-
Divided Government	.509	.500	0	1	+
Gridlock Interval	.722	.160	.301	.932	+
Senatorial Courtesy	.562	.312	.0065	1.13	+
Candidate Pool	.453	.177	0	1	+
New Seat	.174	.379	0	1	-
Presidential Approval	.519	.124	.26	.87	-
Election Year	.145	.352	0	1	+
Republican President	.561	.496	0	1	+

I include several variables that measure demographic factors and other objective criteria. I include dichotomous variables measuring *race* and *gender*. I include a measure for *age* and *age-squared* that measures the effect of age at the time of the appellate court nomination. I measure district judge quality by including the district court judge's *ABA rating* when he or she was nominated to his or her district court position.²⁰ I also include two variables, *seniority* and *seniority-squared*, that measure the number of years a judge has served on a district court at the time the president nominates someone to the vacant appellate court position. The descriptive statistics for all of the variables used in this analysis are presented in Table 1, along with predictions as to the expected direction of influence each variable may have on whether a president decides to elevate, and who the president may elevate if he chooses to do so.

Model estimation

This analysis is designed to predict who the president will elevate from the district courts to the federal appellate courts once he has decided to elevate. This model must account for two different factors. First, the model implies a selection effect because the president will not elevate someone from the district courts unless he has decided to elevate in the first place. Failing to account for this first stage (the decision to elevate) when estimating who the president will nominate in the second state can introduce selection bias into the results. I account for this two-stage process by using a Heckman two-stage probit model.²¹ I use robust standard errors that are clustered by president.²²

²⁰There have been changes to the ABA scores analyzed in this paper. All ABA scores have been standardized so they can be measured on the current 3-point ABA rating scale, where 0 = unqualified, 1 = qualified, and 2 = well-qualified.

²¹Logit models were performed for each stage of the model as well. The results were similar.

²²Several other cluster specifications were made, but this analysis produced the lowest Bayesian Information Criterion (BIC) of any of the models. This model specification was therefore used, since the rule of thumb is that the model with the lowest BIC value is the best-fitted model (Primo, Binder, and Maltzman 2008).

Table 2. Heckman probit results - when and who to elevate to federal appellate courts.

	Estimate	(Std. Error)	Estimate	(Std. Error)	% Δ	Δ
Outcome Equation						
President-District Judge Distance	1.17***	(.348)	1.09***	(.353)	50.69	
President-District Judge Distance Squared	-1.65***	(.188)	-1.55***	(.189)	-32.64	
District Judge-Appellate Judge Distance	-.368***	(.141)	-.357**	(.144)	-19.05	
District Judge Moderation	.634**	(.314)	.576*	(.297)	19.44	
Same Party	.534**	(.282)	.543**	(.278)	267.37	
Same President	.212	(.202)	.210	(.207)	53.72	
Senatorial Courtesy	.099	(.150)	.115	(.140)	12.27	
Race	.173	(.141)	.172	(.140)	42.66	
Gender	-.020	(.075)	-.019	(.076)	-4.07	
ABA Rating	.016	(.088)	.017	(.086)	2.23	
Age	.035	(.023)	.035	(.022)	81.99	
Age Squared	-.001***	(.000)	-.001***	(.000)	-31.95	
Seniority	.171***	(.034)	.171***	(.034)	1377.77	
Seniority Squared	-.005***	(.001)	-.005***	(.001)	38.17	
Duration	-.086***	(.017)	-.085***	(.015)	68.94	
Constant	-2.43***	(.645)	-2.49**	(.593)		
Selection Equation						
President-Departing Judge Distance	-.158	(.217)	-.741***	(.220)		-.177
Appellate Court Median	-1.59***	(.429)	-1.43***	(.455)		-.062
Divided Government	.484***	(.130)	-1.29	(.995)		-.147
Gridlock Interval	-1.87***	(.283)	-1.49***	(.539)		-.022
Senatorial Courtesy	.306	(.299)	.225	(.314)		.028
Candidate Pool	.686	(.508)	.648	(.597)		.046
New Seat	-.348*	(.185)	-.329*	(.182)		-.129
Presidential Approval	-.624	(.495)	-.345	(.595)		-.017
Election Year	.137	(.121)	.169	(.114)		.067
Republican President	.344	(.217)	.492	(.715)		.091
President-Departing Judge Distance*						
Republican President			1.05***	(.386)		.087
Gridlock*Divided Government			2.31*	(1.19)		.23
Gridlock*Republican President			-1.18	(1.05)		.18
Constant			.905*	(.503)		
N	9,579		9,579			
Rho (ρ)	.180	(.202)	.288**	(.119)		
Likelihood ratio test of ρ	.79		5.86**			
BIC	13,569.04		13,390.67			

*** $p < .01$.

** $p < .05$.

* $p < .10$.

Coefficients are clustered by president.

Second, there are multiple observations for several of the district court judges in the dataset. This creates the possibility that there may be correlation between the error terms of the same judge at different points in the dataset. There is also the issue of censoring to deal with in this model, as well as the fact that different judges leave their district court positions for reasons other than elevation (death, assumption of senior status, resignation, or impeachment, for example). I account for these problems by treating the data as competing-risks, discrete time-duration data, which allows me to account for any duration dependence in the model on the right-hand side of the equation (Beck, Katz, and Tucker 1998; Box-Steffensmeier and Jones 1997). I follow Savchak et al.’s lead by including a linear variable – *duration* – on the right hand side of the model equation that account for the number of times a district court judge has been passed over for elevation at the time of a new nomination to the federal appellate courts.

Results

Table 2 presents the coefficients and standard errors of the Heckman probit analysis. The first two columns show the coefficients and standard errors for the model without the interaction

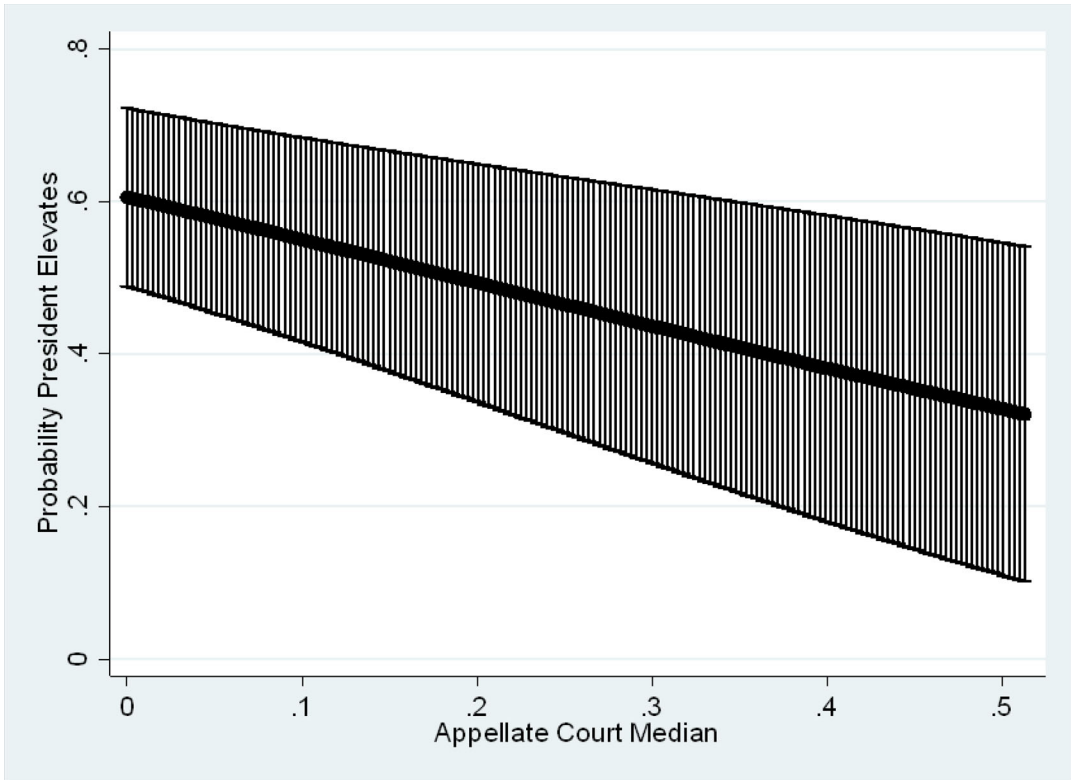


Figure 2. Predicted probability the president elevates based on appellate court median.

term for *Republican president*. The second two columns show the coefficients and standard errors for the model with the interaction term. The far right-hand column presents the changes in probability for each variable in the selection model by increasing the variable of interest one standard deviation, or by changing a dichotomous variable from 0 to 1, while holding all of the variables at their means or modes. Since the probability of any one district court judge being elevated to fill an appellate court vacancy is marginal even after a president decides to elevate, the second column from the right presents the percent change in probability a district court judge will be elevated by holding variables at their means or modes and increasing the variable of interest one standard deviation, or by changing dichotomous variables from 0 to 1.

The first coefficient of note is the value and significance of the rho statistic (ρ). This statistic in a Heckman model is important because it measures the dependence between the selection equation and the outcome equation – in this case, the decision to elevate and choice of who to elevate once the decision to elevate has been made. A significant rho statistic allows us to reject the null hypothesis that the decision of who to elevate is independent of the decision whether or not to elevate. The rho statistic in the first model is not significant. The rho statistic in the full model, however, is almost significant at the .01 level ($p = .015$). We can reject the hypothesis that the decision to elevate and the decision of who the president chooses to elevate are not related. This result is an important one, as my theoretical explanation of elevations is based on the premise that presidents decide whether or not to elevate before they decide who they are going to elevate.

The results of the selection equation provide support for my first two hypotheses. The probability of a president elevating a district court judge to fill an appellate court vacancy falls as the appellate court ideological median increases. Specifically, when holding other variables in the

selection equation at their means and modes, there is a .062 decrease in probability that a president will use an elevation to fill the appellate court vacancy when the value of the ideological median is increased by one standard deviation. Figure 2 demonstrates this change graphically, and its results are telling. The probability of a president choosing to elevate is .61 [.49, .72] when an appellate court is ideologically balanced. The probability drops to .32 [.10, .54] when the ideological median reaches its highest value in this dataset.

There is evidence for the hypothesis that presidents will choose to elevate when the appellate judge vacating the bench is further away from the president's preferences, but the evidence is mixed. The coefficient for this variable in the first model is incorrectly signed and statistically insignificant. In the second model it is incorrectly signed and significant. However, there is a noticeable change in this variable when it is interacted with whether the president is a Republican president. It appears that Republican presidents are much more likely to choose to elevate when they are replacing an ideologically distant appellate judge than are Democratic presidents. Figure 3 graphically presents these results. The probability of a Republican president choosing to elevate is .27 [.05, .50] when the president and vacating appellate judge share the same preferences. The probability of a Republican president choosing to elevate increases to .77 [.60, .93] when the ideological difference between a Republican president and a vacating appellate judge reaches the highest value. The opposite holds true for Democratic presidents. The probability of a Democratic president choosing to elevate is .57 [.44, .69] when the Democratic president and vacating appellate judge share the same preferences. The probability of a Democratic president choosing to elevate drops to .22 [.08, .37] when the ideological difference between a Democratic president and a vacating appellate judge reaches its highest value.

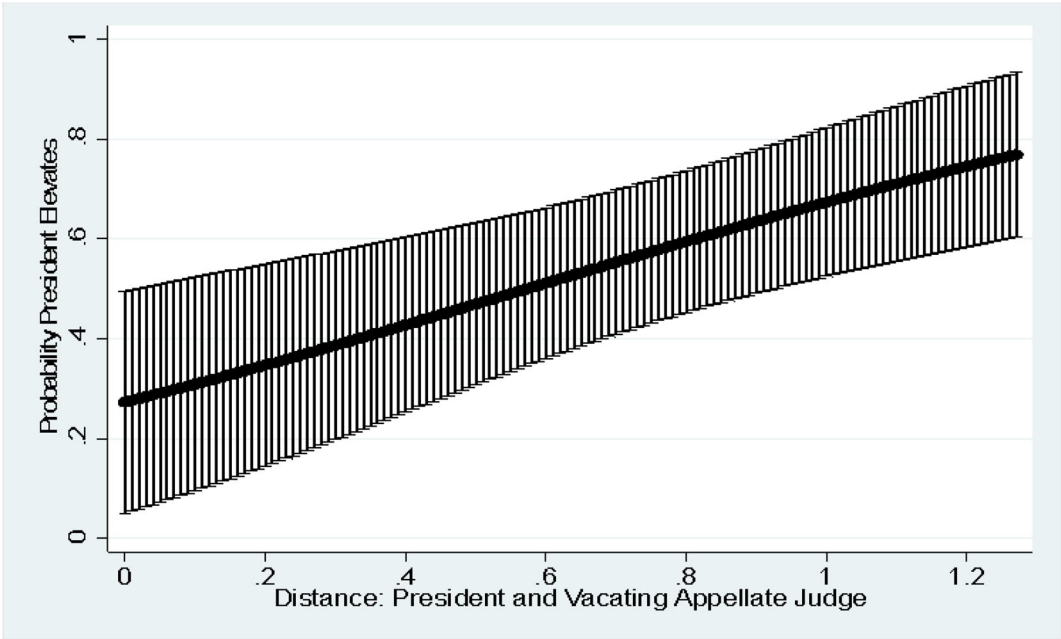
These probabilities are interesting. On the one hand, the results for Republican presidents are in line with theoretical expectations. Although the probabilities for Democratic presidents are not, the results do align with Jo, Primo, and Sekiya's (2017) theoretical predictions as to who has bargaining advantages in two-stage nomination games. Their models predict that presidents will have a greater bargaining advantage when appellate judges furthest from their preferences vacate the bench. The results for Democratic presidents bear this out. Future research may want to reconcile the results and competing theoretical expectations proffered here.

Turning to the outcome equation, we find support for the third and fourth hypotheses. Presidents do in fact elevate district court judges who are further from their preferences, and there is a curvilinear relationship between the distance a president is from a district court judge and the probability a president will elevate that district judge to the appellate courts. This is graphically demonstrated in Figure 4. The curvilinear relationship is clear. The likelihood a president chooses a district court judge who shares his preferences is .015 [.006, .023]. The probability a president chooses a particular district judge increases as the ideological distance between the two increases until the distance between the president and the district judge is approximately .357.²³ At this point, the probability of the district judge being elevated is .022 [.012, .033] – a 50.7 percent increase in probability.²⁴ At this point the probability a district judge is chosen to be elevated declines. A one-standard deviation increase in distance from the tipping point produces a 32.64 percent decrease in the probability that a president will elevate that particular district court judge to the appellate courts.

²³This change in probability is significant at $p \leq .01$. For points of comparison, Democratic presidents in this model would be willing to elevate a district court judge whose ideology score was as low as -.034. Republican presidents would be willing to elevate a district judge whose ideology score was as low as .318. While this analysis shows that presidents from both parties are willing to make concessions when they elevate, Republicans are less likely than Democrats to compromise on the overall ideological moderation of their elevated nominees.

²⁴This change in probability is significant at $p = .12$.

Republican President



Democratic President

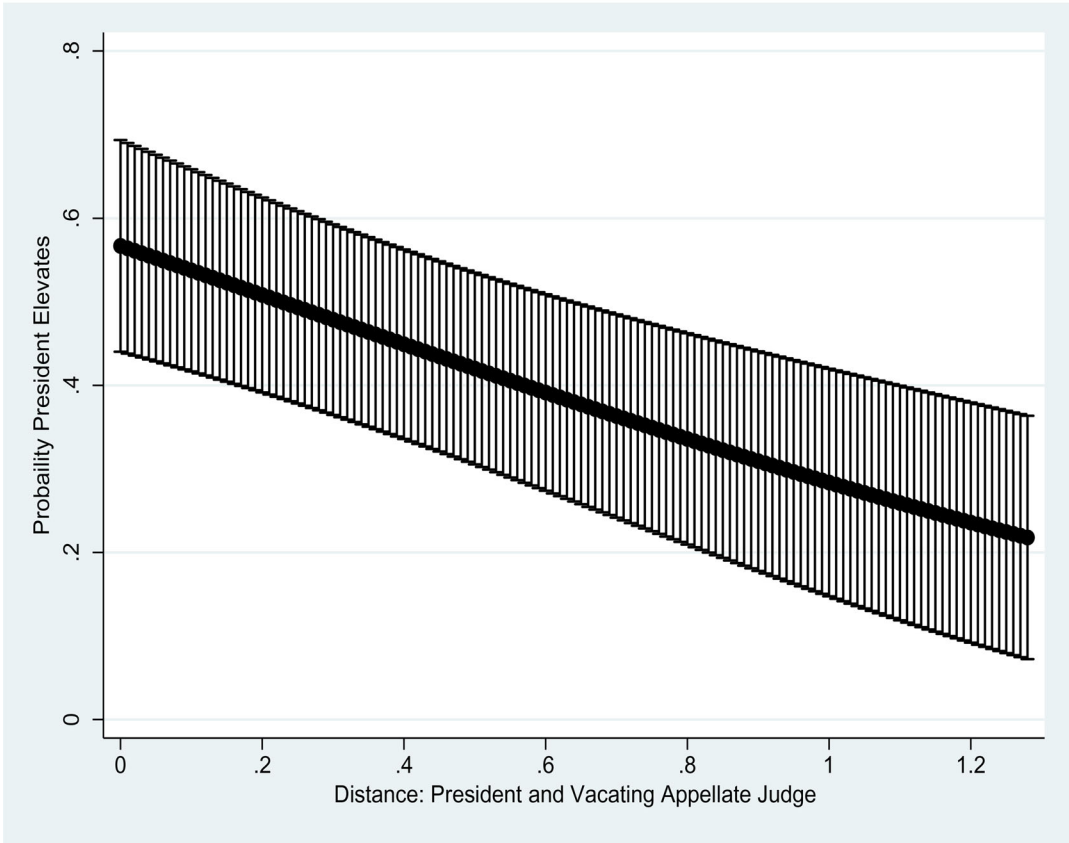


Figure 3. Predicted probability the president elevates based on distance between president and vacating appellate judge.

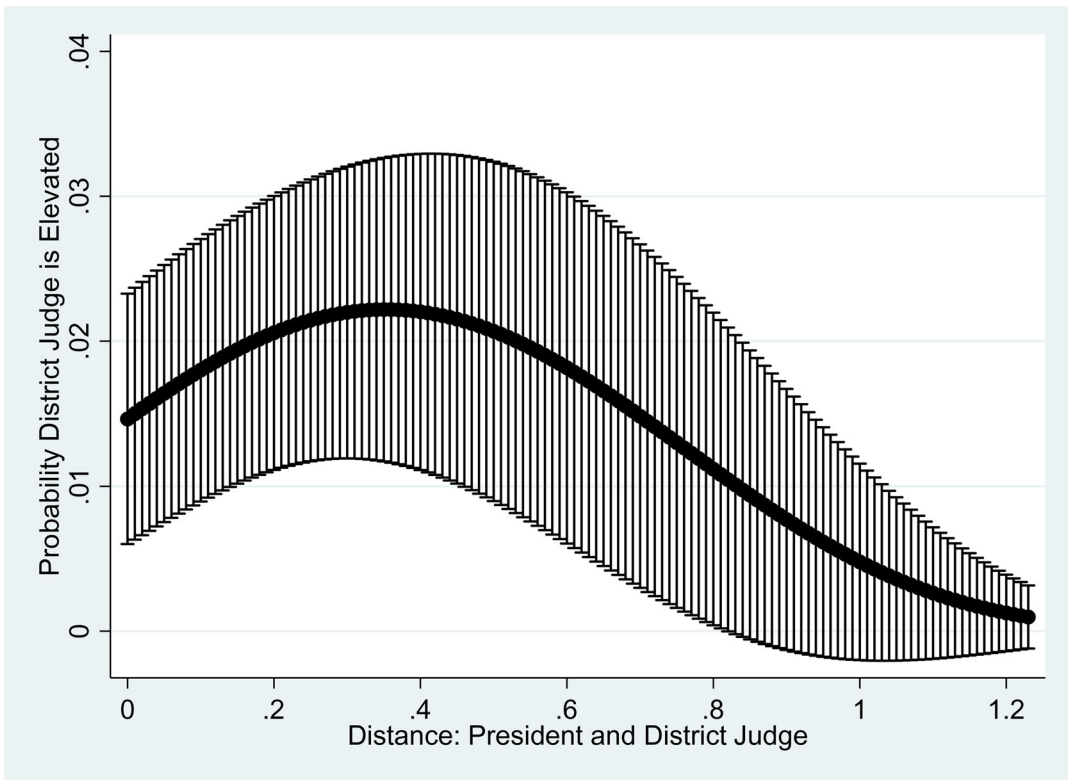


Figure 4. Probability district judge is elevated, given decision to elevate, based on distance between president and district judge.

Finally, the results of the outcome equation show the probability a president elevates a particular district court judge increases as the ideological distance between a vacating appellate judge and that particular district court judge decreases.²⁵ In short, when presidents decide to elevate, it is probable they will choose district judges who resemble ideologically the appellate judge who is leaving the bench. This relationship is displayed graphically in Figure 5. A one-standard deviation increase in the ideological distance between a district court judge and the vacating appellate judge decreases the probability a president will elevate that particular district judge from .018 [.007, .031] to .015 [.006, .024] – 19.05 percent decrease in probability. The probability a president elevates a particular district judge is .024 [.006, .041] when that district judge shares the same preferences as the vacating appellate judge. That probability drops to .010 [.003, .016] when the ideological distance between the district judge and the vacating appellate judge reaches its highest value in the dataset – a 58.33 percent decrease in probability.²⁶

Conclusion and discussion

This analysis makes a theoretical and empirical contribution to our understanding of federal judicial selection. Theoretically, the analysis performed here provides strong evidence that models of judicial selection are more nuanced than one-shot gridlock models of judicial selection would

²⁵The coefficient for district judge moderation proved to be quite sensitive to model specification. This variable is improperly signed (based on theoretical expectations) and is significant. However, model post-estimation did not show the variable to be collinear with other variables in the model. I reran the model excluding the variable, and the results were almost unchanged.

²⁶This change in probability is significant at $p \leq .01$.

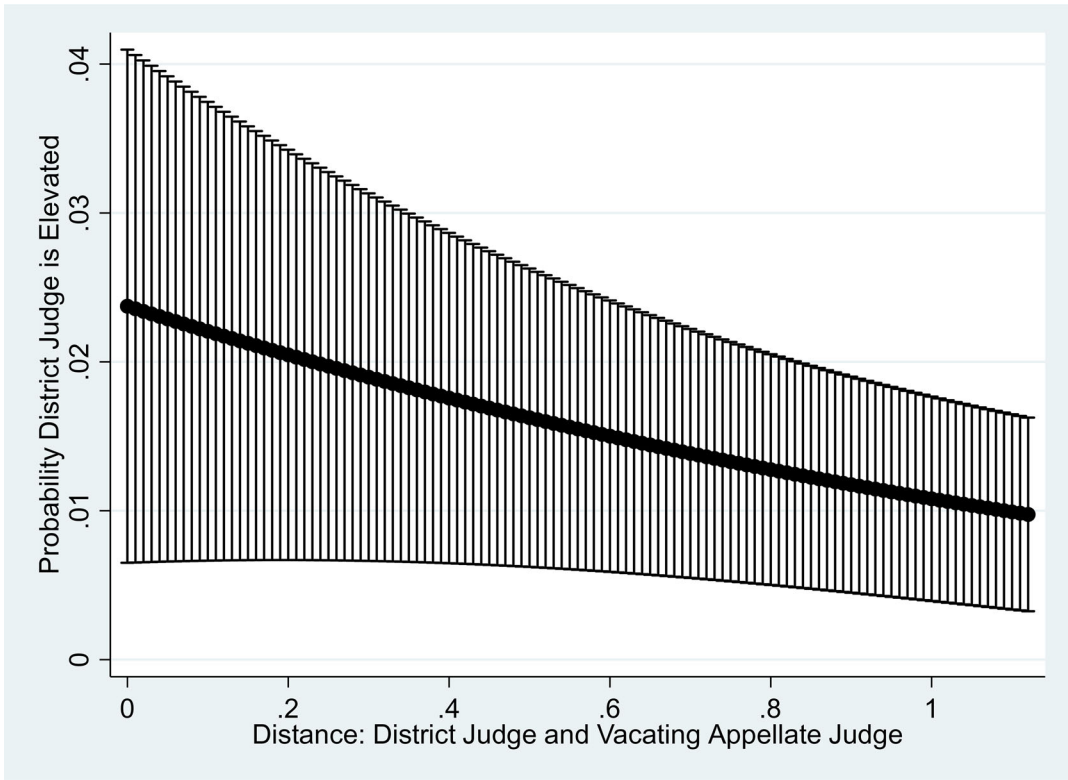


Figure 5. Probability district judge is elevated, given decision to elevate, based on distance between district judge and vacating appellate judge.

suggest. This is not to say that one-shot models are not useful. They are. However, the theoretical framework of this analysis shows that presidents have options as to who they can choose to fill federal appellate vacancies, whereas gridlock models would suggest they do not. Indeed, the results of this analysis suggest, in accordance with Jo, Primo, and Sekiya (2017) theoretical claim, that under certain conditions a president may be willing to take a short-term hit to his utility in order to possibly secure a payoff at a later date. The model in this paper shows that when a president decides to elevate a district judge to fill an appellate court vacancy, he is likely to select a district court judge that does not too closely match his preferences. In fact, it is quite probable that he will elevate a district court judge whose preferences are more similar to the appellate judge he or she is replacing.

Empirically, the results of this analysis provide evidence as to when the president will choose to elevate, and who the president chooses to elevate. Specifically, the results suggest that presidents are likely to elevate district court judges to vacant appellate court seats when the appellate court where the vacancy occurs is ideologically balanced. This makes sense. We would expect that senators concerned about the ideological direction of an appellate court would fight to maintain a court's status quo as long as it was in their interests to do so. Second, the results demonstrate that Republican presidents may take into account possible future conflicts with the Senate when they are tasked with making a nomination to the federal appellate courts. It is surprising that Democratic presidents do not take some of the theoretical variables assessed in this analysis into account as much as their Republican counterparts. Future research may want to examine differences in the types of confirmation battles presidents of different parties face in the Senate, and whether these battles result in presidents of different parties vetting potential judicial nominees in different ways in order to get their nominees confirmed in the Senate.

The empirical results of this paper extend our understanding of who presidents choose to elevate as well. Specifically, the results of this paper show that presidents rely upon more than just the blunt informational cues Savchak et al. find to affect who presidents choose to elevate. The results of this analysis show that, while presidents are quite likely to elevate district court judges who were nominated to their judgeships by a president of the same party, the judges they do elevate are not necessarily the district court judges who are closest to the president's ideological preferences. This result aligns with Swanson's (2006) assessment of the ideological differences between President Reagan and his elevated nominees. And again, the results show that district judges nominated to fill vacant appellate court seats tend to resemble the ideological dispositions of the appellate judges they are replacing. This again provides evidence of how presidents can still achieve an outcome that increases their utility without necessarily changing a court's status quo, assuming they can fill the new district court vacancy with an ideological ally. After all, it should be clear that presidents are in fact trying to maintain an appellate court's status quo if they choose to nominate someone (whether they are elevated from the district courts or not) who is ideologically similar to the appellate judge who is being replaced.

The results of this paper suggest several directions for future research. First, this paper only addresses the decision of when a president elevates, and who he elevates to the appellate courts. It does not examine who presidents may choose to fill newly created district court vacancies and if elevated district court judges are confirmed to the federal appellate courts. Further research should examine to what degree presidents are able to derive benefits from these nominations. For example, it could be the case that presidents maximize their utility at this stage by nominating someone to the district courts who is closer to their ideological preferences. As the example of Judges Traxler and Seymour suggest, it is also possible that Democratic presidents may use elevations as a way to diversify the district courts.

Second, the paper focuses on nominations and does not account for the actual confirmation of those whom presidents choose to elevate. Hollibaugh's (2015) vetting theory may be useful here. District court judges nominated to serve on the appellate courts have already been vetted once by the Senate before they are vetted again as nominees to the federal appellate courts. They also have a judicial record that can be scoured with minimal costs. Future research may want to examine the role that vetting has on whether presidents choose to elevate. It may also be useful in future research to determine what effects, if any, elevations have on the duration of the Senate confirmation process, and on the likelihood elevated district court judges are confirmed more so than other appellate court nominees. The results of this paper imply that presidents and the Senate may be willing to bargain in a two-stage process: the elevation of the district court judge to the appellate courts, and the subsequent nomination of someone to fill the newly created district court position. It would be interesting to see if theories of bargaining and judicial confirmation duration discussed by Jo, Primo, and Sekiya (2017) and Console-Battilana and Shepsle (2009) would be useful for furthering our understanding of how presidents use elevations to fill appellate court vacancies.

A final potential for future research deals with changes in Senate rules, and particularly the elimination of the use of the filibuster to delay the confirmation of federal judicial nominees. The data in this paper end where this new era in Senate confirmation politics begins. Note that in this analysis, the use of elevations decreases as the size of the gridlock interval increases during unified government. The filibuster pivot is widely used as a relevant policy actor in both one-shot and two-shot models of judicial nominations and confirmations (Primo, Binder, and Maltzman 2008). The size of gridlock intervals will now be smaller than they were in the past despite the fact that polarization in the Senate is increasing. This has important implications for our understanding of judicial nominations, and judicial elevations in particular. Stiglitz (2014) has already hypothesized that the elimination of the filibuster in the judicial confirmation process may lead to presidents nominating more ideologically extreme individuals to the federal courts. The results

of this paper also appear to bear out this hypothesis. If presidents know they will not have to take short-term hits to their utility in order to maximize utility at a later point in time, then there is no reason for them to not choose someone from outside the federal judiciary that more closely approximates a president's ideal preferences. If this is the case, the results of this paper suggest that presidents will be less likely to use elevations to fill appellate court vacancies in the future and that if they do, the nominees they select will be more extreme than they have been in the past. Current political conditions, coupled with unified government between the presidency and the Senate, should provide a good starting point for gathering data and evidence to see if this is in fact the case.

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