PRESIDENTIAL STRATEGY FOR THE APPOINTMENT OF SUPREME COURT JUSTICES

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The purpose of this paper is to develop a method for predicting the effect of membership change on the policy output of the Supreme Court. With such a method, it is then possible to advise a President as to the type of Justice to appoint, in order to achieve specific policy goals. (Emphasis is on the type of Justice, not his or her identity.)

It has long been recognized that Presidents seek to influence Supreme Court policy by the appointment of ideologically "correct" Justices. Implicit here is the assumption that the Court response (if any) will be in the direction of the new appointee. The specific task of this paper is to challenge that assumption by showing what results, in group policy, can be expected from various kinds of changes in group membership.

Before turning to this demonstration, however, some background must be set out. Toward this end, a model of Supreme Court decision making will be constructed.

I. Decision Making

Since the Justice is the focus of this study, construction of the model begins with the specification of individual utility . Utility is a measure which "indicates

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the level of enjoyment or preference attached" (Mansfield, p. 30) by an individual, to a particular alternative (or state of the world). Thus great satisfaction is reflected by high utility, and dissatisfaction by dis-utility (or negative utility).

The Justices can be seen as having before them a set of policy options representing the rulings on cases before them. Each Justice has preferences over this "policy space." The utility function associates a value (utility) with each option in the policy space. The function can be thought of as saying that a Justice likes (e.g.) point A the most, point B more than C, is indifferent between D and E but prefers both to point F, and so on. Point A is the Justice's ideal point. As the function proceeds away from the ideal, the Justice receives less and less satisfaction from the options. At some point he gets no satisfaction at all, and his utility drops to zero. Beyond that, the Justice receives dissatisfaction from the alternatives (negative utility). The utility function is simply a shorthand for expressing the Justice's preferences over many ideological positions.

So far only the Justices' policy preferences have been described. The members of the Court also have a preference for winning. It is assumed that a Justice most prefers to be in the winning opinion coalition (the group that writes the opinion of the Court). A Justice has various options open to him: he can be in the winning decisional coalition and in the winning opinion coalition; he can be in the winning decisional coalition and not join the opinion of the Court; he can be in the losing decisional coalition and join the group's dissenting opinion, or he can dissent alone. (There is also the possibility that a Justice might "reserve opinion" but this happens so rarely that it can be ignored here.[1])

As before, it is assumed that a Justice gets utility from each of these options also. In this case the utility function will be discontinuous, assigning 'x' utiles to winning, 'y' utiles (x greater than y) for concurring separately, etc. The precise values of 'x' and 'y' need not be specified beyond asserting that a Justice most prefers to be in the winning opinion coalition.

A Justice does not desire to be in the winning coalition simply for the sake of winning. Rather, and this is the motivating assumption used throughout, the Justice wants to have his ideological position adopted as the policy of the Court (Rohde, p. 210). The only way he can accomplish this is by being in the opinion-writing coalition. Thus, by combining the Justice's policy preferences, and his utility for winning, the resulting function will express the Justice's utility for winning with the Court espousing a particular policy.

The Justice's utility is at a maximum when the opinion of the Court expresses his most preferred policy. His satisfaction diminishes as the opinion diverges from his ideal point, until he is indifferent between being in the winning coalition and some other option. This is the point of indifference. Below the point of indifference the Justice has two options—he can write a separate opinion (concurring or dissenting) or he can join another opinion (again either concurring or dissenting). Whether he goes his separate way or joins another depends solely on

[1]See Mr. Justice Frankfurter in Kinsella *v* Kruegar, 351 U.S. 470 (1955).

how close, ideologically, the other Justice is to him. There are reasons for preferring to join in another opinion, but they do not seem compelling enough to induce the Justice to diverge very far from his ideal.

The Justice's default option, the one he can exercise no matter what any of his colleagues do, is to write a separate opinion. Therefore, the utility of writing alone is the Justice's security level.[2] This means that a Justice cannot be made to join a coalition that does not give him at least the utility furnished by his security level.

The preceding comments establish two utility functions—one embedded in the other. The larger one (see Figure 1) is the Justice's utility for winning, with the Court expressing a particular policy position. It is identified as u(W). The smaller function shows his utility for joining an opinion which is not the opinion of the Court (either a concurrence or dissent). It is labeled u(LC).

In behavioral terms, it is expected that whenever the policy of the opinion of the Court gives a Justice utility greater than his point of indifference, he will join that opinion. Whenever the utility of that opinion is less than his security level, he will not join. Between these two points is an area of ambiguity—the Justice has a choice between the opinion of the Court and some other option.

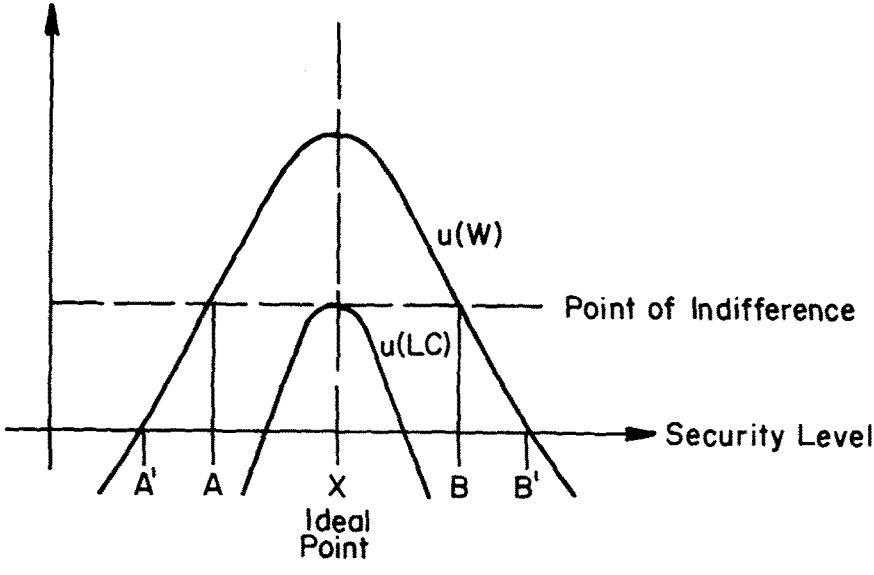


Figure 1

Complete Utility Function

[2]The lone dissenter "is the gladiator making a last stand against the lions . . . Deep conviction and warm feeling are saying their last say, with knowledge that the cause is lost." (Cardozo, p. 36). See also Danelski (p. 247).

The Justice finds himself in this zone of ambiguity when the Court's opinion is between points A and A′ and B and B′—it is reasonably far from his ideal point, but not so far as to be patently unacceptable (Figure 1). Were he to join an opinion between A and A′ he would receive less utility than he could get by joining a separate opinion at his ideal point (X) but more than he could get from writing alone (his security level).

It should be expected that vote switching and opinion changes and the like are most common when Justices are presented with options in this zone of ambiguity.[3] Unfortunately, due to the myraid personal factors involved, there is no way of rigorously specifying this area. Hence, all references to a Justice's utility function below will refer to his utility for winning.

II. Coalition Formation

The decision making process of the Supreme Court can be seen as a three step procedure. The first step consists of building a decisional majority– will the lower court's decision be affirmed or reversed? The second stage is the building of an opinion coalition. Finally, the majority opinion coalition must agree on an opinion. The concern here is the second step.

The President's desire is to shape the opinion of the Court so that it expresses his policy choices. A particular decision is, of course, of great importance to the litigants involved, and it does "serve as an invitation to potential litigants to initiate legal action" but what is of paramount importance is the reason for the decision (Murphy, p. 21). The Supreme Court is important because it makes policy, and that policy is expressed in the opinions. For that reason, the President wants to be sure that the Court has, at least, a five-man majority to formulate opinions that he approves of. (If less than a majority joins the opinion, it is not considered "the opinion of the Court" and is in no sense binding.)

The specific opinion in any case is the result of, essentially, a pure bargaining game among the majority coalition members. Because of the staggering number of factors that can be determinative in such a process, the ideology of that final opinion cannot be predicted.[4] However, the coalition that writes that opinion can

[3]Consider, in this context, the Justices' own remarks: William Douglas writing in International Association of Machinists *v* S. B. Street, et. al. (367 U.S. 740, 1961): ". . . there is the practical problem of mustering five Justices for a judgment in this case . . So I have concluded dubitante to agree to the one suggested by Mr. Justice Brennan ((who wrote for the Court))." (@778)

Or, see Justice Blackmun in Gertz *v* Robert Welch, Inc. (418 U.S. 323, 1974): "If my vote were not needed to create a majority, I would adhere to my prior vote. A definitive ruling, however, is paramount." (@354)

This relectant joining in the opinion of the Court accurately expresses the meaning of the zone of ambiguity.

[4]The process of hammering out an opinion, especially in the most important cases, is a long and tedious one. A draft opinion is written, circulated to the other Justices, comments

be predicted, and hence the range of ideological positions that could be announced in the opinion can be predicted.

In order to build an opinion coalition, the Justices can be seen as putting forth broad proposals at their weekly conferences. A "proposal" includes several specific "alternatives"—an alternative being a case and its disposition (opinion). The alternatives are points in the ideological space (not necessarily a one dimensional space), and because of the great flexibility the Justices have in fashioning their opinions, this set of points can be considered to be everywhere dense. There is virtually an infinite number of distinct alternatives. When at least five Justices agree with a proposal, one of their number is assigned to formulate an acceptable opinion.

For ease of exposition, distinguish between Potential Coalitions (PC), Potentially Winning Coalitions (PWC) and Winning Coalitions (WC). A Potential Coalition will be Potentially Winning whenever its proposal yields positive utility to at least five Justices. There may be many Potentially Winning Coalitions, but there will be only one Winning Coalition.

Coalitions are represented by proposals, hence there are Proposals (proferred by PCs), Potentially Winning Proposals (from PWCs), and Winning Proposals (containing the opinion of the Court). Potentially Winning Proposals can be identified by examination of the utility functions of the Justices; the Potentially Winning Coalition includes those Justices whose utility functions intersect in the positive zone. (See Figure 2)

Figure 2 shows clearly that the size and location of the PWPs is dependent not only on the locations of the ideal points, but also on the shapes of the utility functions. A steep, narrow form indicates a dogmatic Justice who will only accept alternatives quite close to his ideal point. A slowly descending, wide function corresponds to a tolerant (or wishy-washy) Justice; he will accept a wide range of alternatives. Clearly, the more tolerant the jurist, the more chance he will join a WC (*ceteris paribus*).

Having settled on the Winning Proposal, the opinion of the Court must come from that set of alternatives. These are the Pareto Optimal points: no option not in that set will give the members of the WC more utility without disadvantaging some other members of that group. The bargaining over the final opinion takes place within these boundaries—the opinion writer must formulate a policy statement that will be acceptable to all members of the majority.

III. Presidential Strategy

The task of the President in appointing a new Justice is to pick one so that the set of points acceptable to the Court will be as close as possible to the President's ideal point, and with the smallest possible spread around that point. The

added, a new draft (possibly preceded by more negotiations) is written and circulated and more comments returned, and finally (hopefully) an opinion joined by the original members of the coalition is released. (See, e.g., Bickel).

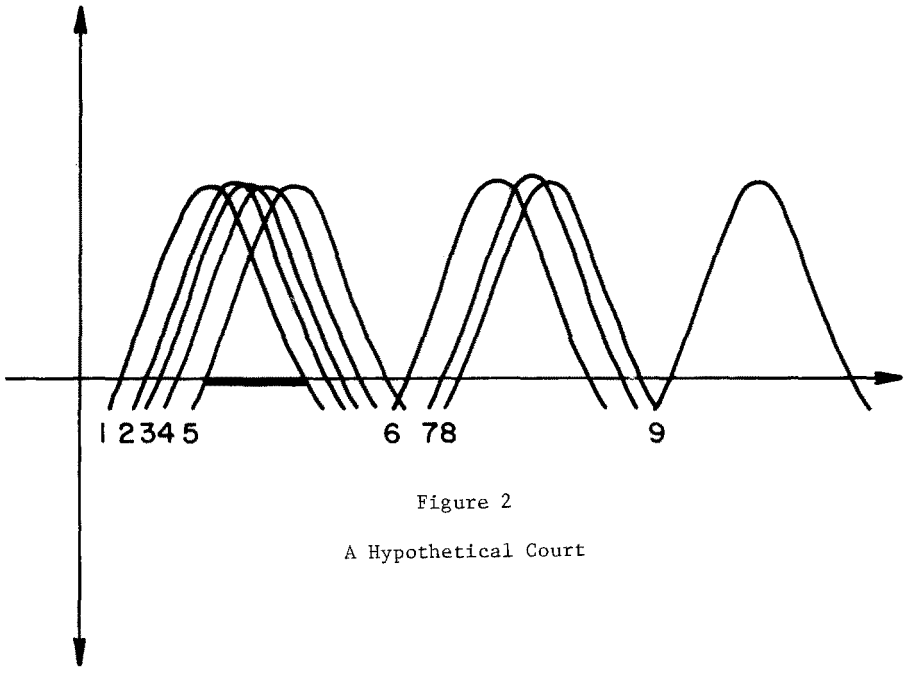


Figure 2

A Hypothetical Court

President must consider both the new Justice's ideal point and the shape of his utility function. Moreover, while he must pick a Justice who will be able to join Potentially Winning Coalitions, he will also have to insure that his Justice will be in *the* Winning Coalition.

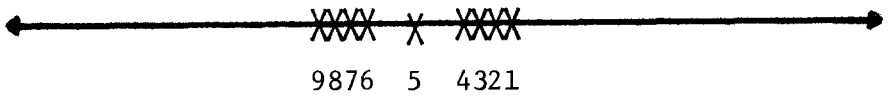
In order to demonstrate the problem confronting the President in selecting the right appointee, a hypothetical Court will be constructed. As was pointed out above, the Justices' utility functions may take various shapes; for ease of exposition a simple form will be chosen. Let each Justice have a symmetric concave utility function (roughly the shape of a "normal" curve). This means that utility is at a maximum at the ideal point and decreases as the distance from ideal point to policy increases. Here, utility is solely a function of distance and the curve is symmetric. All the Justices' curves need not have the same steepness, but for simplicity's sake, they will all have the same basic shape.

As before, it is assumed that a Justice picks the coalition he will join so as to maximize expected utility. He will always choose the option that gives him more satisfaction (rather than one that gives him less). Ultimately, this means that he endeavors to have the opinion of the Court reflect his ideal position.

Rather than draw out each curve, with the visual confusion that will cause (cf. Figure 2), the policy area within each Justice's zone of positive utility can be represented by a line. This line can be thought of as the linear distance between the two 'legs' of the utility function at the intersection of the function and the policy

space. Each line is marked at the midpoint, corresponding to the Justice's ideal point (this holds because the curves are symmetric).

Continuing with the example, let the Justices' attitudes toward search and seizure be arranged as shown in Figure 3. (For simplicity only, the discussion here will be limited to one dimension). The left side of the continuum will represent a permissive attitude toward police searches—non-warranted searches will not be penalized by use of the exclusionary rule. The right side of the line stands for strenuous enforcement of the Fourth (and Fourteenth) Amendments. The left side is the conservative position; the right, liberal.



Distribution of Ideal Points

Figure 3

With the nine Justices depicted in Figure 3, the Winning Coalition was the conservative group, Justices 9, 8, 7, 6, and 5. But with the resignation of Justice 9, that Winning Coalition is broken up. The new President is a firm law and order man, and wants to give the police a free hand. What kind of Justice should he appoint? (Recall: a five man majority is needed for the Court to make autoritative policy.)

Figure 4 displays the sitting Court; lines 1 through 8 represent the Justices' zones of positive utility in accord with the construction explained above. The President's ideal point is represented by the midpoint of the line labeled "P".

The President's first choice for the Supreme Court is represented by the line marked "P"—the prospective nominee is an old ally of the Chief Executive and is in firm agreement with him on the search and seizure question. His position is decidedly pre-Wolf.[5] He would hold that the Fourteenth Amendment does not even bind the states to the warrant provisions of the Fourth Amendment.

It is quite apparent to the President's advisors that Justice P would be a mistake. Justices 6, 7 and 8 are, in slightly different degrees of leniency, followers of the due-process-as-fair-play rule. If they find situations where police behavior is shocking, they hold that evidence so gained is inadmissible.[6] A glance at Figure 4 shows that these are the only Justices whose utility functions intersect P's in the positive zone. They could be persuaded to join him in a Winning Coalition,

[5]Wolf *v* Colorado, 338 U.S. 25 (1949).

[6]E.g., Rochin *v* California, 342 U.S. 165 (1952); or Breithaupt *v* Abram, 352 U.S. 432, (1957).

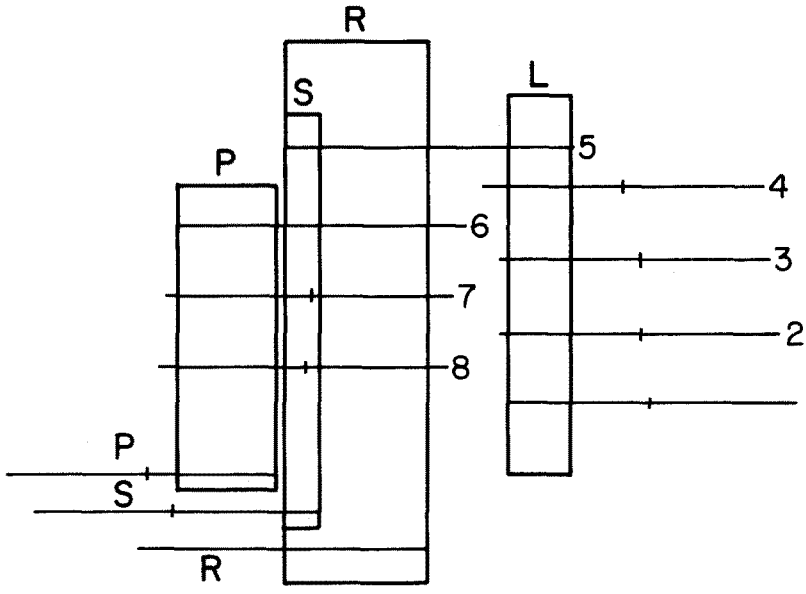


Figure 4

Example

but Justice 5 refuses to join them. Coalition P will never win.

Here Justice 5 is the pivot. He would hold evidence to be admissible so long as the non-warranted (or improperly warranted) searches were the result of good faith error by the police.[7] If the police misconduct were deliberate, he would invoke the exclusionary rule. The rest of the Justices endorse the Mapp holding,[8] with the most liberal willing to go beyond the initial formulation of the exclusionary rule, and restrict police rights in areas such as "hot pursuit" and searches incidental to lawful arrests.

If the President appoints P, Justice 5 will join with the liberals in coalition L. (Of course Justices 6, 7, and 8 cannot be excluded from L, but the bargaining over the opinion need not consider their claims, since the minimum winning coalition exists without them.) Even if 5 prefers to be with the conservatives in a Winning Coalition (which he does) that option is not available because of P's dogmatic stand.

Persuaded of the error in P's appointment, the President attempts to find a jurist who can join the other conservatives in a Winning Coalition. Mr. S. is

[7]See, Stone *v* Powell and Wolff *v* Rice, 96 S. Ct. 3037 (decided July 6, 1976), particularly Chief Justice Burger's concurring opinion at 3034-3035 and Justice White's dissent at 3072-3073.

[8]Mapp *v* Ohio, 367 U.S. 643 (1961).

convinced of the rightness of the Wolf holding, but refuses to go further. He would not invoke the exclusionary rule, but, instead, urges citizen suits against the offending officers.

The addition of Justice S will allow the Conservatives, including Justice 5, to form a Potentially Winning Coalition. But, as can be seen clearly in Figure 5, that coalition cannot offer 5 enough to lure him away from the liberals. The pivot has more in common with the liberals than with Justice S (though he is more sympathetic to 6, 7 and 8 than to 1, 2, 3, and 4). Thus even the President's better judgment is counterproductive.

Finally, the President gets new advisors who counsel the appointment of Ms. Right (symbolized by the line labeled 'R'). She is much more liberal than the President, accepting both the Wolf position and the fair play approach to search and seizure. She does, however, share the President's desire to give the police a free hand and requires quite shocking behavior before invoking the exclusionary rule. Because she is willing to compromise to achieve a less unsatisfactory result, rather than a more unsatisfactory one, she can join Justice 5 and the Conservatives in a Winning Coalition.

The obvious implication of this, somewhat fanciful, tale is that the President can more nearly achieve his goals by appointing a Justice who diverges from his ideal. More impressively, the appointment of the ideal Justice actually does the President more harm than good.[9]

IV. An Example

In order to better complete the development of the model, and to show its application to real data, an example can be presented. By using a multidimensional unfolding procedure (Kruskal 1964a, 1964b and Kruskal and Carmone) it is possible to create an ideological space, containing both Justices and cases. In addition, each Justice's zone of positive utility can also be shown in the space. The zone represents the intersection of the utility function with the ideological space, the point where utility is equal to zero (the security level). If the ideological space is two dimensional, the zone of positive utility is indicated by a circle, representing the intersection of the cone-like utility function and the space.

Description of the entire procedure is not possible in an article, but the particulars of arranging the data must be spelled out. Only divided cases were used as input to the scaling program; a case was counted as divided whenever at least one Justice refused to join the opinion of the Court. Thus, even though all the Justices

[9]While the method used to determine the Winning Coalition here may appear to be ad hoc, it is actually quite similar to a new, and rigorous, solution concept for N-person Game Theory: "the Competitive Solution." See: McKelvey, Ordeshook and Winer; and McKelvey.

The Competitive Solution was developed at about the same time that the original work for this article was going on. The two approaches come from quite different directions and were developed more independently than not, though I did have the benefit of consultation with Professors McKelvey and Ordeshook, and did see an early draft of their paper with Winer.

might agree on the disposition of the case, if the opinion was not delivered unanimously, the case was counted as divided. As noted above, primary importance must be given to the opinion of the Court, thus the focus here is on opinion behavior, and not voting behavior.

In order to capture as much information as possible, the traditional dichotomous code cannot be used. A new coding scheme is offered here, resting on two assumptions. First, a Justice who agrees with the disposition of a case, but not the opinion of the Court, is closer to the majority than one who agrees with neither the opinion nor the decision. Second, a Justice who disagrees silently (without writing or joining another opinion) has less intense differences with the majority than one who authors (or joins) another opinion. One can certainly imagine situations where both of these assumptions will fail, but as general statements they seem quite satisfactory.

Based on the above premises, a seven point ordinal scale was developed. A Justice joining the majority opinion was coded with a "0"; he had virtually no disagreements with the opinion of the Court. A Justice who concurred with the decision, but not with the Court's opinion, and did not join a separate opinion, was designated with a "1". Membership in a concurring opinion was coded with a "2". One who concurred in part and dissented in part, without opinion, received a "3"; if he joined an opinion it was a "4". A Justice who dissented without opinion was scored with a "5"; finally, membership in a dissenting opinion was noted by a "6". In short, the higher a Justice's score, the greater is his disagreement with the opinion of the Court.

The Justice's scores on each case provided the raw input to the unfolding procedure. The fundamental assumption of unfolding is that if an individual prefers point B to point C, then B must be closer to the individual's ideal point than C (Coombs). As applied here, a Justice who authors a dissenting opinion must be further from the opinion of the Court than one who concurs silently.

In order to demonstrate, empirically, the effect of membership change it is necessary to look at two consecutive natural Courts. The first might be seen as the control, providing a basis for the evaluation of the second, reconstituted Court. The two natural courts chosen for examination here cover the years 1914 to 1920.

The first Court, sitting for the 1914 and 1915 terms, consists of Chief Justice Edward White, and Associate Justices Joseph McKenna, Oliver Wendell Holmes, William Day, Charles Evans Hughes, Willis Van Devanter, Joseph Lamar, Mahlon Pitney, and James Clark McReynolds. The start of the 1916 terms saw Lamar replaced by Louis Brandeis, and Hughes replaced by John Clarke. This Court remained intact until the death of the Chief Justice during the 1920 term.

Rather than attempt to analyze all the cases decided by the Court in this period (1527 written opinions), the focus here will be on one of the most salient issues of the first third of this Century: Substantive Due Process.[10] The first court

[10]It must be emphasized that the choice of one substantive area for analysis here does not imply that it was Wilson's only area of concern nor does it imply that the model is only able to deal with one area. The choice of due process litigation was based on convenience and

(the 1914 and 1915 terms) decided 66 cases in this category, of which only nine featured non-unanimous opinion coalitions. This subsample was scaled using the multidimensional unfolding technique. The final configuration is shown below (Figure 5). (Only seven points show up: cases 3 and 4 are at point 3; cases 8 and 9 are at point 8.)

An examination of the configuration reveals two clusters of cases, although the clusters are somewhat spread out. The northern-most group of cases, 2, 3, 4, 5 and 6 all represent decisions in favor of big business interests. All but case 6 declare state statutes to be in violation of the due process clause of the Fourteenth Amendment. Case 6 is a property dispute decided in favor of a large railroad company (to the disadvantage of a local property owner). The southern cluster of cases, 7, 8, 9, and 1, all uphold government regulations against due process attack.

By examining the positioning of the points, the content of the cases, and the voting records of the Justices, the orientation of the axes is clear. The northeast quadrant represents the conservative pro-business section; the so-called lassez-faire position. The opposite quadrant, the southwest, is the liberal, pro-government-regulation region. The off-diagonal area, the northwest and southeast, contain the Justices offering mixed votes. McReynolds, in the far northeast, regularly champions the lassez-faire position.

A Strategy for President Wilson

The death of Justice Lamar in 1916 gave Woodrow Wilson his second opportunity to nominate a Justice of the Supreme Court. His first appointee, James Clark McReynolds, had disappointed Wilson in many respects. The President was determined to get the right man for the job this time. Supposing that, by some science-fiction type time machine (or legal-fiction generator) the President had sought advice on what kind of Justice to appoint based on the model espoused here. What help could have been supplied?

In order to counsel the President, three factors must be considered. First, it is necessary to know what kind of policy he wanted the Court to propound. Wilson was a noted progressive; his "new freedom" prescribed, among other things, improved economic and social conditions for the working man, and firm control of big business. He favored more "government interference" with the economy (Braeman, esp. pp. 50 and 111). It is clear that Wilson wanted due process decisions in the southwestern quadrant of the configuration.

Wilson should have next considered the prospects of future appointments: could he use this nomination as one step in a rebuilding process, in anticipation of more vacancies, or was the outlook for the future membership of the Court more stable? As it turns out, the sitting Court was relatively youthful and prospects for the future were far from certain. Given that Wilson was facing re-election shortly,

interest.

For a short discussion of some of the issues involved in this field, see McCloskey.

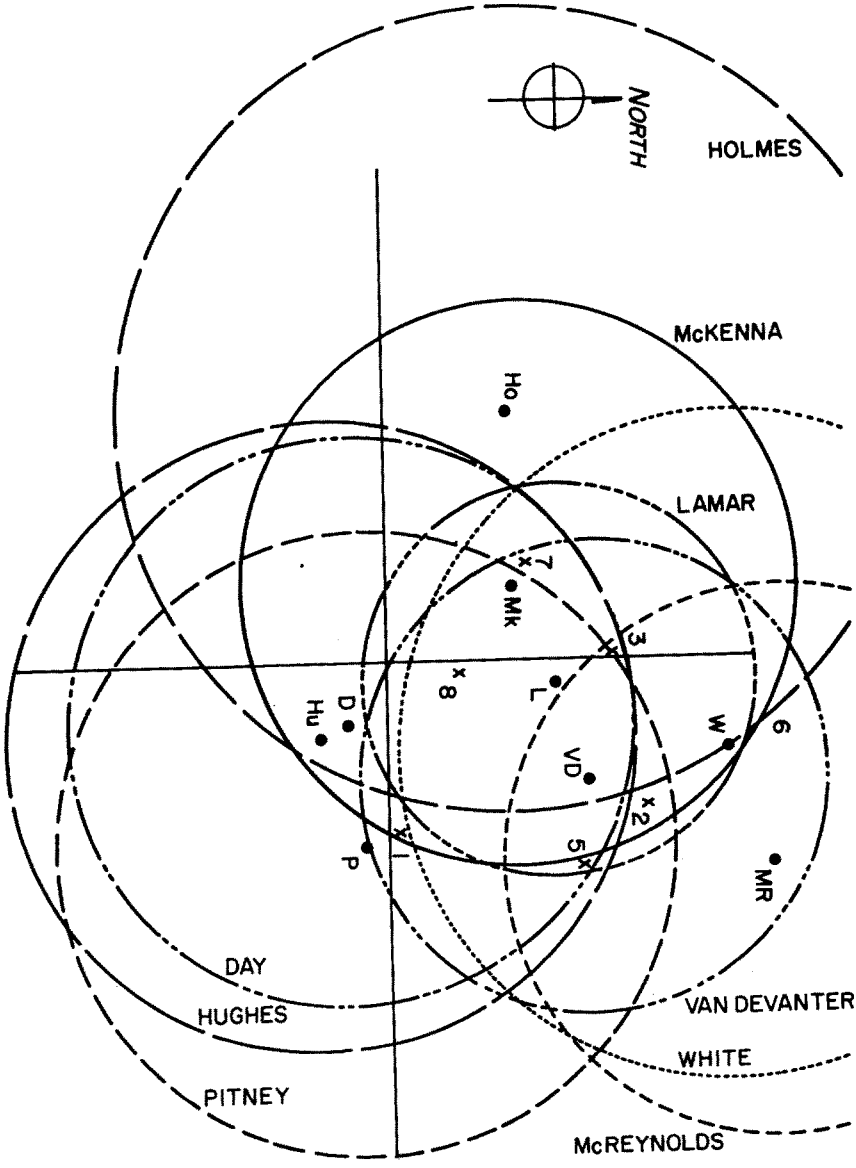


Figure 5

Due Process Cases--Configuration for Court 1
(List of cases available, upon request, from the author)

Key to Figure 5

W=White	D=Day	L=Lamer
Mk=McKenna	Hu=Hughes	P=Pitney
Ho=Holmes	VD=Van Devanter	MR=McReynolds

he had to do the best that he could with this one appointment, and any other opportunities would be unexpected gifts.

The President's third consideration should have been where to locate his appointee. It is obviously easy to pick a Justice who can join Winning Coalitions, but in order to move Court output toward Wilson's ideal point more information about the existing Court is needed.

There were seven different Winning Coalitions that actually formed, but this should not obscure the main import of the data presented; the Court reported over 86 percent of its cases unanimously. The divided cases almost all fall right around the center of the graph as well. Thus it is obvious that this was a consensual Court. But given the variety of personalities on the Bench, it is somewhat surprising to find such a high rate of agreement. The explanation for this phenomenon lies in the patterns of agreement and disagreement.

Consider the Justices sitting down at the bargaining table. Knowing the relative postions of each of their colleagues, the Justices would set forth three Coalitions, each with a reasonable chance of winning. The Coalitions are sketched in on the configuration reproduced below (Figure 6). Coalition R is offered by White and McReynolds; C by McKenna and Lamar; and L, by Hughes and Day.

Coalition L could easily pick just the right option to win the support of Pitney and Holmes. The Proposal would be located just about on the vertical axis and is marked with a small "x". (Recall the Justices' zones of positive utility are of different sizes and therefore distance is relative to those zones.) Coalition R, however, would have to move its Proposal south to get Van Devanter, and by continuing a little further south, could get Lamar. McKenna is left unaligned.

Both Potentially Winning Coalitions need McKenna if they are to win, so the jockeying for position must continue. As L moves north to entice the pivot man, their Proposal moves away from Pitney (Holmes is pretty much indifferent). At the same time, R is moving toward McKenna; the closer they get, the more L is forced to move, and the less happy is Pitney. Ultimately Pitney is in a position to offer a bargain of his own. If the Justices in R will accept a proposal on their eastern boundary, just south of Van Devanter, he will join in that Winning Coalition. Coalition L is powerless to do anything, for if they move toward Pitney, they lose McKenna to R.

The outcome of the bargaining is obvious. The uniquely favored location for a Winning Coalition also happens to be a point acceptable to all the Justices. Thus most of the cases will tend to fall in the unanimous region. Of course there is room for bargaining within that area, and on occasion a particularly important case will cause a Justice to make extra demands. When this happens, the Court may divide.

Now, if Wilson is to have an effect upon the Court, he must place his new Justice in such a way that he destroys the unique bargaining position of McKenna. At the same time he wants to have the output of the Court move to the southwest. The advice to Wilson is straightforward and intuitively obvious. Coalition L was able to come within one vote of winning when Lamar was still on the Court. If Lamar's replacement is a natural member of L, then that coalition should be a

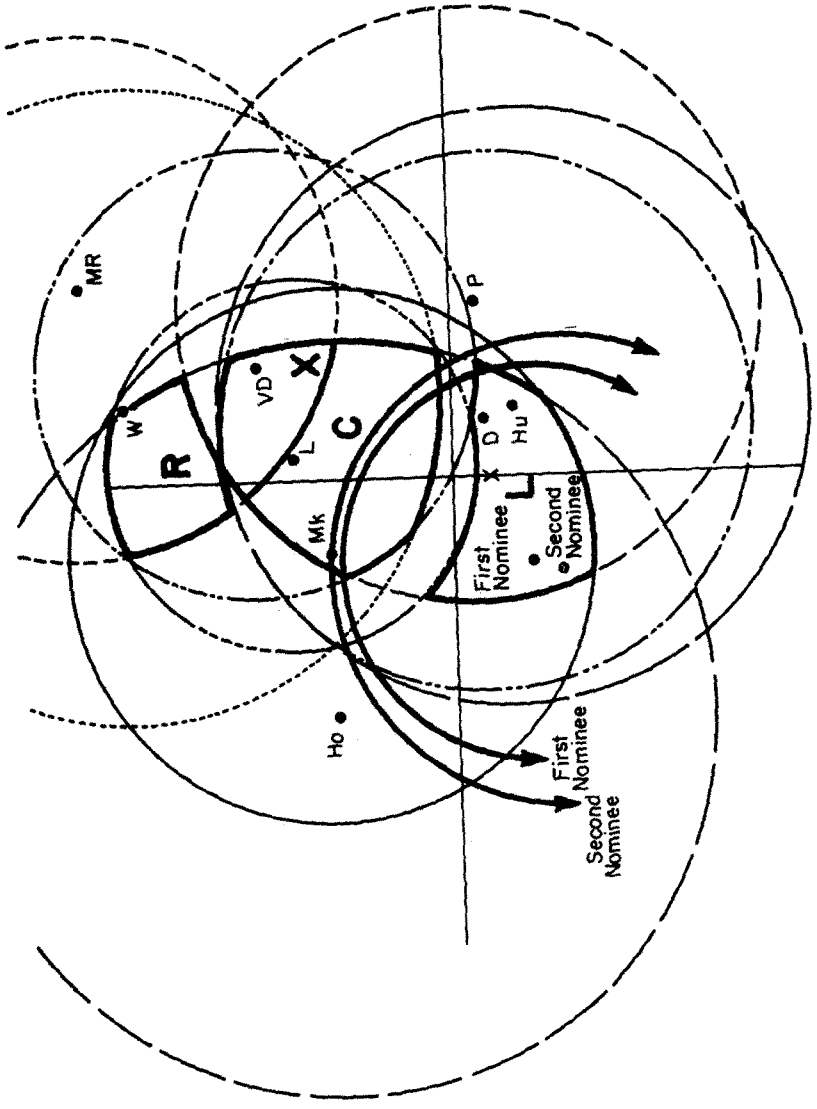


Figure 6

Court 1--Potentially Winning Coalitions

steady winner.

If Wilson takes this advice, the other Justices have little they can do. Even if they try to defeat L, by forming C, they will have to move the alternative so far south that there will be little distinction between L and C. This is because in order to form C, McKenna who would be the natural leader, needs two extra Justices. McReynolds is so far north that were he to join C, he would receive less than his security level. (The same is true if McKenna tries to go to the west for Holmes; coalition L can always get closer to Holmes than coalition C.)

The result of this ideal appointment would be a Winning Coalition composed of Holmes, Hughes, Day, Pitney, and the new Justice. But, because of the distance between Holmes and Pitney, it is not unreasonable to expect defections from one of these Justices. When this happens, it is most probable that McKenna will become the cruical fifth man. Finally, McReynolds should be the Justice most likely to dissent, followed closely by White.

As it happened, Wilson was uninterested in advice. He knew whom to appoint, and was vowed and determined to see Louis Dembitz Brandeis sit on the Supreme Court. Brandeis' nomination was confirmed by the Senate on June 5, 1916, after four months of hearings and debate (Daniels, pp. 543ff).

Two days after the confirmation of Brandeis, Charles Evans Hughes was chosen as the Republican nominee for the Presidency. Hughes resigned immediately, thus giving Wilson his third opportunity to name a Justice to the Court.

Removing Hughes from the Court broke up the Winning Coalition that Wilson had achieved with the appointment of Brandeis. Clearly, if the President could find an exact copy of Hughes, he could maintain that coalition, and a more liberal Court. But could the President, by the proper appointment, further liberalize the Court?

The short answer is no. Were Wilson to appoint the diametric opposite of McReynolds, that is, an uncompromising liberal, he would alienate either Pitney or Holmes, or both. The appointee cannot be too liberal, or Wilson's action will break up his new coalition.

But were the President to simply duplicate Hughes he would only maintain the status quo. He would be better advised to appoint a slightly more liberal Justice but one who is willing to compromise. In this way Wilson can assure the continuation of his Winning Coalition, and at the same time pave the way for any future appointments he might have. If he were to get other chances he could add progressively more liberal Justices, and move the policy output of the Court further into the southwest quadrant.

The advice, then, would be to select a Justice slightly to the southwest of the first appointee, but with an equally large zone of positive utility. Figure 6 above, shows both the projected nominees.

After considering a few other candidates, Wilson selected John Hessin Clarke to fill the Court vacancy. The nomination was confirmed ten days after being

announced (Baker, p. 116).

Results

In order to check the validity of the predictions outlined above, an analysis of the new Court is necessary. Between the start of the October term of 1916, and the death of Chief Justice White in 1921, the Court disposed of 124 cases dealing with substantive due process. Of those cases, 33 featured non-unanimous opinion coalitions. Those divided cases were scaled using the unfolding technique and the solution is depicted below (Figure 7). Again, there are eight points representing more than one case, thus only 17 points appear on the graph.

As in Court One, the solution is two dimensional and it is possible to delineate two clusters of cases, though the dividing line is not sharply etched. Cases toward the northeast represent opinions holding laws unconstitutional (points 9, 12, 14, 16, and 20, representing 8 cases); this would be the lassez-faire position. All the other points correspond to cases that uphold government regulation of business.

Comparing the configurations for Court One and Court Two, it is plain that they have much in common.[11] But they are different spaces, and cannot be directly compared. It makes no sense to compare the distances across two solutions and conclude that one is larger or smaller than the other. Scaling solutions are only relative, and comparisons must be made within solutions.

Returning now to the configuration for Court Two, it can be seen that Wilson's new appointees are virtual carbon copies of each other. Moreover, they are essentially in the position that was recommended above. Both Justices are quite liberal, but both are willing to compromise, as evidenced by their large zones of positive utility. Since Wilson acted in accord with the advice rendered, the next step is to check whether or not the output of the Court responded in the predicted fashion.

At first glance it is clear that the bulk of the cases falls in the southern end of the distribution. Of the 33 cases shown here, only eight find laws violative of due process. Of the whole sample of 124 cases, only 21 featured violations of the Constitution (less than 17 percent). Clearly the Court was less willing to support the lassez-faire argument than it had previously been.

Another indication of the Court's liberalization can be gained by reviewing the Justices' dissent figures on these cases. Those numbers are reported in Table 1 and cover both Courts. It is quickly apparent that the Court responded in three groups. The first group, consisting of White, Van Devanter, and McReynolds, increased their dissent rates by a good deal. These are the most conservative Justices. Holmes and McKenna increased in dissent by a much smaller degree; they found themselves joining both the liberals and conservatives in the minority. Day and Pitney actually dissented less frequently in Court Two.

[11]The similarity of the configurations was achieved by holding the points rigid and rotating the axes. Scaling solutions are invariant under rotational transformations.

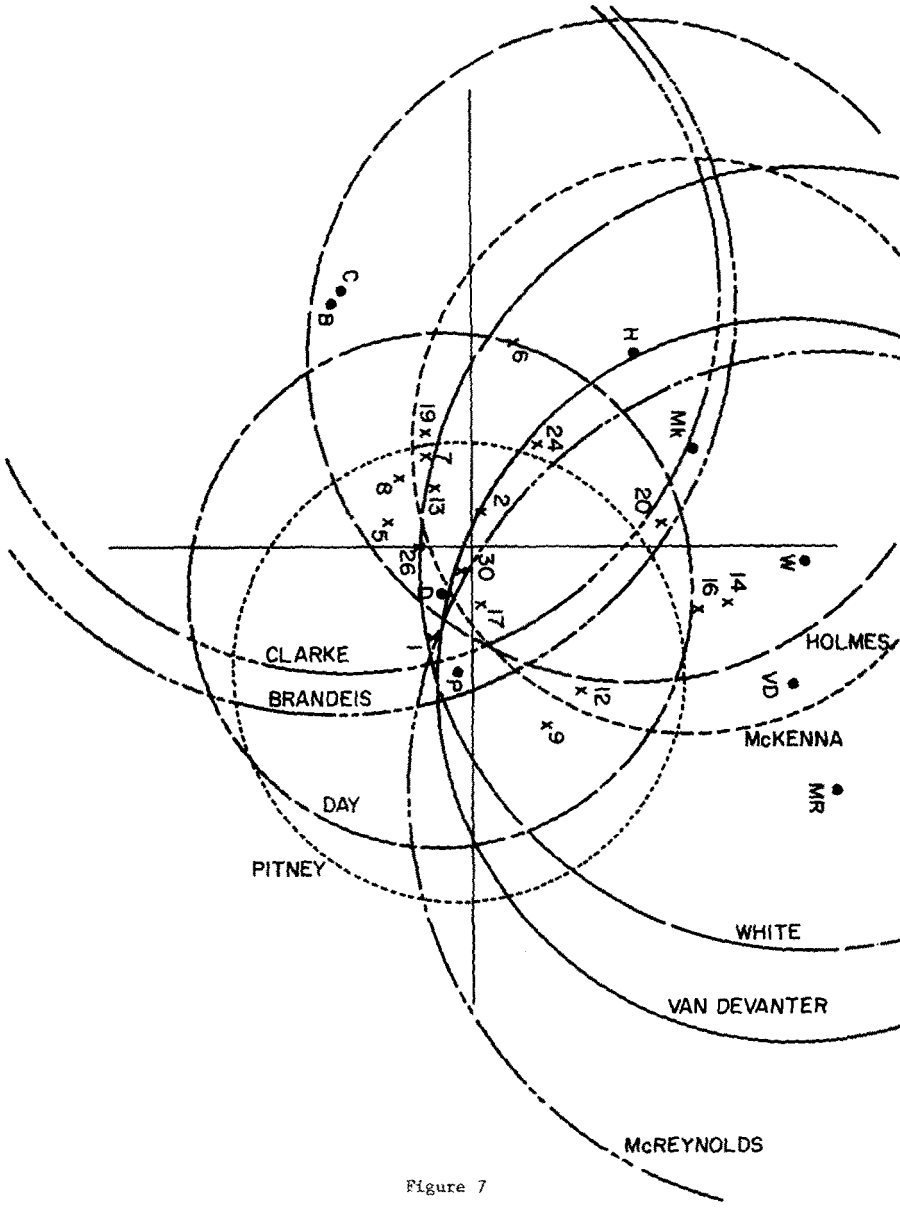


Figure 7

Due Process Cases--Configuration for Court 2

Key to Figure 7

W=White	D=Day	MR=McReynolds
Mk=McKenna	VD=Van Devanter	B=Brandeis
H=Holmes	P=Pitney	C=Clarke

TABLE 1
DISSENT RATES

	DUE PROCESS CASES				ALL CASES	
	COURT 1		COURT 2		COURT 2 ONLY	
JUSTICE	DISSENTS/%	RANK	DISSENTS/%	RANK	DISSENTS/%	RANK
WHITE	1/1.52	4	10/8.1	3	36/3.5	8
MCKENNA	2/3.03	3	9/7.3	4	50/4.9	5
HOLMES	3/4.54	2	9/7.3	4	46/4.5	6
DAY	2/3.03	3	3/2.4	7	31/3.0	9
HUGHES	1/1.52	4				
VAN DEVANTER	0/0	5	11/8.9	2	45/4.4	7
LAMAR	2/3.03	3				
PITNEY	4/6.06	1	7/5.6	6	61/6.0	3
MCREYNOLDS	4/6.06	1	24/19.4	1	56/5.5	4
BRANDEIS			7/5.6	6	75/7.4	1
CLARK			8/6.4	5	73/7.2	2
	N = 66		N = 124		N = 1014	

In addition, the dissent rates of Brandeis and Clarke are quite low. All these figures become more revealing when compared to the Justices' basic tendency to dissent, as determined by their rates gathered over all cases. Those figures are also presented in Table 1.

In the full sample the highest dissenters are Brandeis, Clarke, and Pitney. In comparison they dissent infrequently on due process cases. Conversely, White and Van Devanter are the second and third lowest dissenters on the full Court; here they record the second and third highest rates. The point is that these figures indicate a significant difference in the Justices' behavior. Clearly Brandeis and Clarke are willing to dissent, yet they apparently felt little need to record their disagreements on the due process issue.

The implication of the higher dissent rates for the conservatives is that the policy of the Court has moved away from them. Since it is accepted that the utility functions stay relatively constant, higher dissent rates mean more cases were outside of the zones of positive utility. In short, the distance from the liberals to

the cases is less than it had been, while the conservatives are farther from the opinions of the Court. This is the change that was predicted.

Looking at the coalitions that actually formed, it is obvious that the predictions hold up here as well. The minimum winning coalition that Wilson was counseled to build, Holmes, Day, Pitney, Brandeis and Clarke, failed to vote together and win only fifteen times (out of 124 cases). What is more, when defections did occur, they were usually counterbalanced; Brandeis and Clarke failed to vote together and win only eight times.

The greatest source of disagreement in this coalition is that between Pitney and Holmes (Pitney disagrees with Holmes twice as frequently as he disagrees with Brandeis). This is to be expected, and was indicated in the discussion above. When Pitney defects from the coalition, his place is usually taken by McKenna, thus keeping Brandeis and Clarke on the winning side. McReynolds was expected to be the greatest dissenter on the Court, and he achieves that distinction with room to spare. He authors more solo dissents than anyone; in fact Holmes is the only other Justice to offer a solitary dissensual vote (and he does so only once).

Two justices behave differently than expected. White was predicted to dissent a good deal, second only to McReynolds. He misses that distinction by only one vote, but the quantity of his dissents is surprising (only 10). Two explanations offer themselves: either, because he is the Chief Justice, he feels the need to be with the majority more than his position on the issue leads him to be, or he is, as not infrequently suggested, "erratic" (Bickel, p. 248). The second disappointment is Day, who votes with the conservative block more frequently than expected. His position in Court One suggested that he would be a steady liberal, and though his defections are not very numerous, they do occur more than predicted. Still, these two departures are not very serious, and do not greatly upset the model.

V. Summary

The aim of this paper has been to develop a strategy for Presidents to follow in Supreme Court appointments. Lest that strategy be obscured, it is a good idea to spell it out, step by step.

The first move for the President is to determine his own goals. What issue areas are important? What policy positions does he want the Court to espouse in these areas? Next the President must determine the situation confronting him. What is the alignment of the Court? How far from the President is the present majority? What are the prospects for future appointments?

It should be pointed out that answering these questions does not require a band of scaling experts. Clearly, the more precise the information, the more reliable will be the strategy choice, but experienced Court watchers provide quite usuable information on Supreme Court behavior. However the answers are obtained, they will determine the President's choice of what kind of Justice to appoint.

Obviously, an exhaustive list of Presidential strategies cannot be given here

but some simple examples can be noted. The easiest situation to prescribe for is the Court which already contains at least four Justices who share the President's position. By locating the new appointee at his ideal point, the President can assure himself a majority coalition.

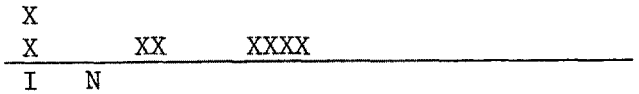
When there are less than four members agreeing with the President, the nominee must be located so that he can win the votes of at least four other Justices. What this means, precisely, will vary according to the specifics of the situation. For example, if only two Justices agree with the President, while all the rest are distributed on the same side away from his ideal, the nominee must be located close to the two most marginal members of the old majority.[12] If only one of the holdover Justices is in sympathy with the President, then the new jurist must be located between the three most marginal members of the old court.[13]

If none of the eight remaining Justices agrees with the President's position, his prospects for success depend entirely on where his ideal point is in reference to the distribution of Justice points. If all eight are carbon copies of each other, located far from the President, there is little he can do.[14] But if they are distributed fairly evenly, and the President is a centrist, an appointee right at the

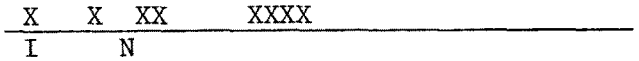
[12]The situation envisioned, in one dimension, would look like this (for convenience, the size of the Justices' zones of positive utility will be assumed equal here):

Where I is the President's Ideal Point

N is the nominee



13. For Example:



14. For Example:

ideal point might give him a Winning Coalition.[15] Even if he were in an extreme position, but with the same alignment of Justices, he could, by diverging from his ideal, obtain a relatively friendly Winning Coalition.[16]

The choice of proper strategy will depend on the specifics of the particular situation; each combination of Justice points, utility functions, and ideal point will dictate a different choice. The principle, however, should be clear: locate the nominee so as to break up the reigning coalition, and replace it with one more favorable to the President.

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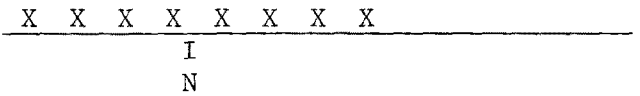
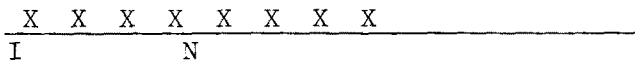
15. For Example:



16. For Example:



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