

Assessing Changes in State Representation on the U.S. Courts of Appeals*

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April 4, 2007

*Prepared for presentation at the annual meeting of the Midwest Political Science Association, April 14, 2007, Chicago, Ill. This paper represents the views of the authors, not necessarily those of the Congressional Research Service, Library of Congress, or any other institution with which the authors are affiliated.

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Abstract

When a seat becomes vacant on a federal court of appeals, the President has the opportunity to nominate a new judge for the Senate's consideration. Geography is often a factor in the decision, particularly whether the new judge will be nominated from the same state as the predecessor. Goldman (1997) refers to state affiliations on appeals courts (e.g., a "Missouri seat" or an "Ohio seat") as "state representation." In this paper, we seek to accomplish two objectives. First, we demonstrate that while changes in state representation have declined over time, there are still occasions where presidents change the state representation of seats. Second, we investigate and analyze changes in state representation of circuit court judges confirmed since 1891 to test hypotheses about factors that influence changes in state representation. In particular, we attempt to assess whether state changes are based on criteria related to equity of representation (seat rotation; representation reflective of state population) or whether the evidence suggests that presidents use political considerations when making changes in state representation.

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Amid continuing political controversy and renewed scholarly interest, presidential appointments to the lower federal courts, particularly the courts of appeals, continue to play an important role in defining a president's legacy. Like Supreme Court appointments, lower court appointments long outlast a president's tenure in office and provide the pool from which future Supreme Court justices emerge. Almost every aspect of the process of federal appointment to the courts of appeals has received recent scholarly attention. A focus on when judges choose to retire, creating vacancies for a president to fill (Nixon and Haskin 2000; Spriggs and Wahlbeck 1995), who a president chooses to nominate to the courts of appeals (Goldman 1997; Savchak, et al. 2006), the timing of that appointment (Massie, Hansford, and Songer 2004) and the amount of time required to confirm nominees to the courts of appeals (Bell 2002; Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle 2002), has added considerably to scholars' knowledge about the determinants of a successful or failed nominations to the courts of appeals.

Historically, however, nominations to the courts of appeals (and to the district courts) were not known as touchstones of ideological controversy; rather, they were viewed as a component of presidential and senatorial patronage (Goldman 1997; Hall 1979). In the realm of positions senators have to offer their loyal supporters, lifetime appointments to the courts of appeals certainly would rank high on the list. Unsurprisingly, then, senators often squared off over who controlled appointments to these positions. In several circuits, particularly before major expansions of the appellate bench in the second half of the twentieth century, there were more states than seats, so vacancies could easily give rise to interstate and intraparty disagreements over which state (and which candidate) deserved the position. In this paper, we explore that decision, attempting to ascertain the criteria presidents used when deciding which state to allot a particular vacancy on the circuit

courts of appeals. Better understanding that process, we argue, offers the prospect of illuminating historical patterns in judicial appointment that can help place today's controversies in a broader context.

The Role of Geography in Judicial Appointments

Federal law places virtually no constraints on presidential nominations to federal courts. Article II of the U.S. Constitution grants the President broad powers to “nominate, and by and with the advice and consent of the Senate...appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States,” (U.S. Constitution, Art. II, sec. 2). That broad grant of presidential authority, and the associated Senate consultation process, also applies to lower court nominees. Various priorities can influence each side's decision-making process surrounding judicial nominations. At least one such factor — geography — is scarcely discussed in scholarly or popular literature, but plays a key role in judicial-nomination politics. As we show, however, geography can play a major role in the debate over nominees to the federal circuit courts.

Other work (see, for example, Giles, Hettinger and Peppers 2001; Gryski, Zuk and Barrow 1994; Hartley 2001; Martinek, Kemper and Van Winkle 2002; Segal 2000; Solowiej, Martinek and Brunell 2005) addresses lower-court nominees' racial, gender or partisan attributes, but does not discuss geography. By contrast, a small set of literature considers the connection between geography and nominations to the Supreme Court of the United States. For example, Henry Abraham (1983, 292-293) observed that Wiley B. Rutledge's teaching experience in several states provided President Franklin D. Roosevelt with an attractive way to “indulge his repeatedly expressed desire to nominate someone from west

of the Mississippi.”¹ Richard Nixon also reportedly used geography as a component of his “Southern Strategy” when nominating Clement Haynsworth, Jr. and G. Harrold Carswell to the Court (Daniels 1978, 226).² Taking a broader view, Hulbary and Walker (1980, 189) found evidence that 70% of Supreme Court justices confirmed between 1789 and 1967 “were selected because the President desired representation of a particular region on the Court.” Interestingly, however, they argued that “[g]eographical representation as a motivating criterion for the nomination of justices tends to depress judicial quality. Justices chosen for reasons other than being from the ‘right’ state or region obtained significantly higher performance scores” in an index those scholars constructed.³

In contrast to work on Supreme Court appointments, research on the role geography plays in circuit court nominations is virtually nonexistent. Even senators may be unlikely to follow most lower-court nominations closely — except those from their “home state or region” (Binder and Maltzman 2002, 191). Sheldon Goldman (1997) is perhaps the only published author to seriously consider the role geography plays in lower court nominations.⁴

Goldman (1997), while concentrating primarily on non-geographic factors in his discussion of lower-court nominations, provided a theoretical starting point for considering the role geography plays in circuit court nominations. He described “state representation” as follows: “At the circuit court level, party leaders and senators expect that their state will be represented on the bench by a citizen of that state. Larger states feel entitled to more

¹ A *Washington Post* report at the time noted that Rutledge’s nomination “brought hearty responses from Western Congressmen, who have felt their section neglected in court appointments in the past.” “Judge Rutledge Widely Praised As Choice for Supreme Court.” *The Washington Post*, Jan. 12, 1943, p. 1.

² Both nominations were unsuccessful.

³ For additional background on early debate over geography and judicial nominations, see Sheldon and Maule (1997, chapter 1).

⁴ On a related note, data compiled by Zuk, Barrow, and Gryski (1997) provide comprehensive biographical information about confirmed lower-court judges since 1801. Data on the state from which the judge was nominated, are included in those data. According to Gryski, these data come from the Senate *Executive Journal*, Executive Calendar and Senate Judiciary Committee questionnaires (correspondence with authors May 2006).

than one seat on their circuit. Smaller states in circuits in which there are not enough seats to go around expect that they will have a turn at representation (1997, 136).”

Despite the lack of scholarly attention to the issue of geography in court of appeals appointments, policymakers have demonstrated a continued interest in the issue. In recent decades, Congress has passed two laws that appear to constrain the president’s broad nomination powers granted in the Constitution. The first (and most relevant to this paper) was passed in 1997 and requires that “In each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit,” (28 U.S.C. §44(c)), meaning that each state within a circuit should have at least one representative among the court’s active judges. At least theoretically, this suggests that when a vacancy on a circuit court occurs, if a state has no representative on the bench, the president would be required to make a nomination from that state.⁵ Second, the same section of U.S. Code requires that circuit judges (except on the District of Columbia Circuit) “be a resident of the circuit for which appointed at the time of his appointment and thereafter while in regular active service,” (28 U.S.C. §44(c)), suggesting that potential nominees must reside within the circuit at the time of nomination and while in active service on the bench. Both requirements, focusing on geography, apparently constrain presidential choices and ensure that diverse state interests will be represented on the circuit courts.⁶

We build both on Goldman’s work and other relevant, historical examples in an attempt to provide a clearer picture of the choices presidents and senators make when choosing nominees to the courts of appeals. Goldman’s work provides insight into what the public record suggests about how geography has influenced presidential and Senate

⁵ This provision was enacted as part of P.L. 105-119. See 111 Stat. 2493.

⁶ Nonetheless, if conflicts over nominations that violated these requirements arose, the president might well argue that his broad Article II powers permit virtually any nomination.

decisions about particular nominees. Using that work as a starting point, we explore how consistent state representation has been in particular seats, across circuits and over time; and what factors might influence changes in state representation. In doing so, we hope to improve our understanding of judicial nominations and presidential decision making, and Senate influence on those decisions. For the purposes of this paper, we adapt (from Goldman) the term “state representation” to refer to *the state from which a particular appellate judge was nominated*.⁷ We focus particularly on “state representation” establishing *the custom of particular circuit court seats being affiliated with nominees from one state consistently and over time*.

Historical Perspectives on State Representation

Home-state senators of the President’s party have a large influence on the selection of district court judges (Sheldon and Maule 1997, 147). The tradition of senatorial courtesy, embodied in the “blue slip” process, heavily influences most district court nominations, particularly if home-state senators share the President’s party (Bell 2002, 594; Binder 2007; Sheldon and Maule 1997, 158-159). The circuit courts have received less attention. Historically, meeting the current requirement of each state having at least one of “its” judges on a circuit court would have been impossible. Well into the twentieth century, some circuits contained too few seats to accommodate a representative from each state within the circuit, even if the President and the Senate had wished to have such an arrangement. As Goldman (1997, 36, 148) notes, smaller states’ best hope was often that they would be represented more or less through a rotational process. Today, even in the

⁷ As discussed below, the “nomination state” for nominees is based on Senate documents, but does not necessarily constitute legal “residency.”

First Circuit, which has the fewest seats (six), there is room to accommodate judges nominated from each of the four states within the circuit.⁸

Goldman (1997) documents several examples of changes in state representation from the 1930s through the 1980s. The following discussion reviews Goldman's account of selected cases, and identifies patterns in changes in state representation to guide our inquiry. That discussion, however, is not exhaustive. As explained above, for the 1930s-1980s period, some circuits would not have had enough seats for each state to be represented on the court, and there was no such legal requirement, as there is today.

Goldman's account suggests that, in many cases, senators from states without any (or, in their view, too few) judges on their circuit argued that their states "deserved" a nominee out of fairness. We might call this approach the *inclusion* argument, since it essentially calls for a seat having a place at the judicial table. Often, public positions did not extend beyond this mere appeal to fairness. On a related note, however, senators sometimes invoked arguments related to *workload* (in which senators suggested that a nominee should come from their state because much of the court's docket originated in that state), *population* (in which the state's size compared with others on the circuit is said to justify a nomination), and *political loyalty* (in which senators appeal for nominees from their states based, at least in part, on their past support for the President's policies). Nonetheless, each theme reflected a broader call for inclusion.

According to Goldman, in 1941, Democratic Sen. Prentiss M. Brown (Mich.) approached President Franklin Roosevelt and appealed for a Michigan nominee on both inclusion and population grounds. Brown wrote to Roosevelt: "I think Michigan is entitled to this place [a Sixth Circuit vacancy]. Ohio has had two judges....Tennessee has two,

⁸ The First Circuit includes Maine, Massachusetts, New Hampshire and Rhode Island. The circuit also includes Puerto Rico.

Kentucky has one and Michigan one....We are the second State [in the Sixth Circuit] in size. We are the only one without a Democratic appointment.” Brown reportedly added that, “We in Michigan badly need your assistance now,” (Goldman 1997, 45-46). Population concerns were also prominent in at least one Truman administration nomination, and, as noted elsewhere in this paper, in the debate over whether the now-senior judge Stephen Trott’s Ninth Circuit seat would go to a California or an Idahoan.

Inclusion arguments suggest that unrepresented states might be particularly likely to receive a nomination when new seats are created, thereby bypassing potential conflicts of changing representation in an existing seat when a vacancy occurs. This appears to be the case for Wyoming — which had never had a Tenth Circuit seat — during the Truman administration. When a new Tenth Circuit seat was created, Wyoming’s senators successfully lobbied Truman to nominate the state’s U.S. attorney, John C. Pickett, to the seat (Goldman 1997, 91). Hawaii senator Hiram Fong (R) made similar appeals when new Ninth Circuit seats were created during the Nixon Administration. Those nominations eventually went to candidates from other states, but, according to Goldman, a Hawaiian did receive a nomination to the next open seat on the court (Goldman 1997, 209).

Political loyalty concerns are common in cases in which relevant senators share the president’s party. In such cases, while also citing other reasons for their states “deserving” a seat, senators have often reminded presidents of their previous support for the administration agenda and requested that their efforts be rewarded through a nomination from their states (see, for example, arguments from Michigan and Arkansas Democrats to Franklin Roosevelt in Goldman 1997, 45-47).

More recent examples suggest that state representation continues to play an important role in the selection of nominees to the courts of appeals. In 1995, a Fifth Circuit seat changed state affiliation from Mississippi to Louisiana (with the James L. Dennis

confirmation). Most recently, President George W. Bush has made two nominations, both ultimately unsuccessful, that would have changed state representation. First, had Claude Allen been confirmed to the Fourth Circuit, such an appointment would have switched representation from Maryland to Virginia. As is noted elsewhere in this paper, the Norman Randy Smith nomination was a complicated case, in which the predecessor Stephen Trott's state affiliation was in dispute, although some senators contended that the Smith nomination would have switched the seat from California to Idaho. In the Smith case — whose nomination was eventually withdrawn (Smith was confirmed to another seat on the court) — California senator Dianne Feinstein argued against the nomination largely on workload and population grounds. [According to](#) media accounts, Feinstein suggested that much of the circuit's work was initiated in California and that, proportionally, another California nominee would better reflect her state's share of the circuit population.⁹ Idaho senators Michael Crapo and Larry Craig countered that the nomination should go to Idaho because, among other reasons, their state lacked representation on the court (an inclusiveness argument).¹⁰

Hypotheses

Available evidence suggests that changes in state representation are motivated by two issues: (1) political reward and (2) issues related to inclusion or representation based on perceived equity.

Hypothesis 1: Switches in state representation are more likely to occur when senators representing other states in a circuit are ideologically closer to the president than senators representing the state of an outgoing court of appeals judge.

⁹ See, e.g., Kyle Arnold, "9th Circuit nominee creates turf battle between Idaho, California," *Seattle Post-Intelligencer*, Feb. 17, 2006; Kyle Arnold, "Feinstein blocks nomination of Idaho judge to 9th Circuit," *SFGate.com*; Mar. 1, 2006; T.R. Goldman, "'Western States Clash Over Appeals Seat,'" *Legal Times*, Feb. 27, 2006.; and "Bowing the Democrats, Bush shifts appeals court nominee." *Houston Chronicle*, Jan. 17, 2007, p. A7.

¹⁰ *Ibid.*

If ideological affinity correlates with changes in state representation on the courts of appeals, one would expect that the states that “lose” seats would fall victim to shifting political fortunes, which may occur either through changes in presidential administrations or through changes in a state’s Senate delegation. Two recent shifts in state representation on the Fifth Circuit demonstrate that presidents may seek to reward senators of their own party when vacancies arise. When Judge Charles Clark, a Mississippian, retired in 1992, President George H.W. Bush did not make a nomination to replace Clark. In 1994, President Clinton nominated James Dennis, of Louisiana, to fill the seat vacated by Judge Clark. At the time, Mississippi (Judge Clark’s state) was represented by two Republicans, Sens. Trent Lott and Thad Cochran. Louisiana was, however, represented by two Democrats, Sens. John Breaux and J. Bennett Johnston. The other state in the Fifth Circuit, Texas, was represented for most of the 103rd Congress by two Republicans, Sens. Phil Gramm and Kay Bailey Hutchison.¹¹ President Clinton, then, switched the appointment from Mississippi, a state with two Republican senators, to Louisiana, a state represented in the Senate by two Democrats. When Henry Politz, a Louisianan, took senior status in 1999, President Clinton did not make a nomination to fill the seat; President Bush’s first nominee to the seat, Charles W. Pickering, Sr., was from Mississippi. Even after Pickering’s recess appointment expired, President Bush’s most recent nominee to the position, Leslie Southwick, is a Mississippian. President George W. Bush, then, switched another seat from Louisiana, represented throughout his presidency by at least one Democratic senator, to Mississippi, represented in the Senate by two Republicans. The same political forces that influenced the shift of the seat towards a Democratic state under

¹¹ At the beginning of his administration, President Clinton appointed Lloyd Bentsen to be his Secretary of Treasury. Upon Bentsen’s resignation from the Senate, Gov. Ann Richards appointed Robert Krueger, a Democrat, to serve until a special election in June, 1993, won by Kay Bailey Hutchison. James Dennis was first nominated in June 1994 to the Clark seat on the Fifth Circuit. That nomination was returned at the end of the 103rd Congress and Dennis was successfully nominated to the seat in the 104th Congress. None of the senators in the affected states changed in the 1994 midterm elections.

Clinton's presidency may have influenced the "return" of the seat to Mississippi under the current President Bush.

Political forces might play a role in changes in state allocation of seats within a circuit, but senators also make claims about what constitutes "fair" representation. Those claims invariably reflect the desire for inclusion on a circuit, or a belief that workload or population changes in the circuit should translate into a reallocation of seats among states. One important consideration in this type of claim, however, is that states can secure additional representation by adding seats to a particular circuit as well as by switching the representation of a current seat when another vacancy occurs. In other words, obtaining desired state representation is not necessarily resolved in one nomination scenario.

Hypothesis 2: Switches in state representation are more likely to occur when one state claims it is underrepresented on the circuit relative to other states in the circuit.

As suggested above, ascertaining what criteria can be used to evaluate whether a state is or is not underrepresented on its circuit can prove problematic, and one can imagine senators from different states mustering different arguments and data to support their claims. One state, for example, may make a claim based on workload, while others make claims based on population. One can envision a scenario where the two are not equal; a rise in immigration cases, for example, would affect some states (Texas, New Mexico, Arizona, California) differently than other states in the same circuit without shifts in population. Nonetheless, as the historical examples cited above indicate, some notion of fairness or equity is a consistent theme in senatorial concern about which state is represented in a particular seat.

Data

Before discussing the measures of the independent variables and the analysis conducted, some appreciation of the scope of changes in state representation may properly

frame the discussion. A change in state representation is only possible in a limited series of events; the first occupant of any seat cannot be a switch and switches are effectively limited to the 11 regional circuits, as different practices apply for appointments to the DC Circuit. Using the Attributes of Courts of Appeals Database (Gryski and Zuk 2007) updated through March 2007 (the most recent confirmation being Thomas Hardiman to the Third Circuit), we identified changes in seat representation by looking for changes in the dataset’s “state” variable, which represents geographic succession within each seat in the 11 circuit courts. In one case, a judge was appointed to a circuit outside of his state; that observation was excluded from the analysis.¹² This left 425 possible changes in state representation.¹³ Of those 425 possible changes, 100 appointments changed the state represented on the courts of appeals. One noticeable trend is the (uneven) decline in the occurrences of changes over time. **Figure 1** indicates the percentage of possible changes in state representation that changed under each president. The number in parentheses is the number of appointments in which state representation could have changed for a particular president.

Figure 1 Here

As **Figure 1** indicates, there has been a steady decline over time in the number of appointments that change the state represented on a particular circuit court of appeals. Presidents before Lyndon B. Johnson changed state representation in 39.8% (64 of 161) appointments where a change was possible; presidents since 1964, including Johnson, have

¹² Stephen Trott, appointed to the Ninth Circuit in 1987 (confirmed in 1988) was, according to the Senate *Executive Journal*, nominated from Virginia. The Trott appointment became controversial after he took senior status, as President Bush attempted to replace him with an Idaho judge (Trott’s chambers had been in Idaho) and California’s senators asserted that doing so cost them a seat (before moving to the East Coast, Trott had been an attorney in California). We take no position on Trott’s residency or whether the seat “belonged” to any particular state. See, e.g., T.R. Goldman, “Western States Clash Over Appeals Seat,” *Legal Times*, Feb. 27, 2006.; and “Bowling the Democrats, Bush shifts appeals court nominee,” *Houston Chronicle*, Jan. 17, 2007, p. A7.

¹³ Though Congress created circuit judgeships in 1801 (the Judiciary Act of 1801, or the “Midnight Judges Act”), those judgeships were abolished in 1802. The circuits, however, continued to exist until 1869 without authorized judges. In 1869, Congress created circuit judgeships that were folded into the modern courts of appeals with passage of the Evarts Act in 1891. The judges appointed under the 1869 statute are not included in our analysis, but they are used for purposes of succession, so a judge appointed in 1893 to a position created in 1869 may still be characterized as a change in state representation.

only changed state representation in 13.6% (36 of 264) of appointments where a change in state representation was possible. This shift clearly indicates that, as the size of the appellate bench increased, it became possible to ensure all states representation on their respective circuits (indeed, by 1997, it was required by law that each state have a judge on its circuit court of appeals) and, presumably, the passage of time strengthened states' claims to particular seats, even as state politics altered each state's representation in the Senate and states grew in population (and political influence) relative to the other states in their circuit.

Methods

To attempt to ascertain what factors influence a president's decision to nominate a judge to the court of appeals from a different state than that judge's predecessor, we collected data on each of the 425 appointments where a change in state representation could have occurred. As discussed above, the dependent variable reflects whether or not a change in state representation occurred when a vacancy arose in a particular seat on the courts of appeals. The unit of analysis, then, is the vacancy, which represents an opportunity to make a change in state representation; our statistical analysis attempts to ascertain if there was a change in state representation with a successful nominee to fill that vacancy.¹⁴

Given this approach, there are three considerations that merit notice. First, our approach effectively assumes that every state has at least one candidate that would be acceptable to both the president and that state's senators.¹⁵ Senators, even of the same party, may disagree on who that acceptable candidate is (Binder 2007), and the president

¹⁴ Future research may seek to uncover not only if there was a switch in state representation, but to which state the president switches the seat on a particular court of appeals.

¹⁵ On occasion, this may not be true. Goldman (1997, 137) recounts the retirement from the Ninth Circuit of William Healy, of Idaho, in 1958. The Justice Department rejected all of the candidates recommended by Sen. Henry Dworshak, the only Republican senator in the state. That vacancy went to a nominee from another state, but Oliver Koelsch was nominated (from Idaho) to fill the next vacancy on the Ninth Circuit.

may choose to take sides in those disputes for his own reasons, or a president may avoid a political feud, even among senators of his own party, and choose from another state if doing so may help the president accomplish his goals. Second, and perhaps more important, we do not consider here failed nominees to a particular vacancy and, as an extension, may not fully cover the choices presidents make. Given that changing state representation with a nomination may lay a foundation for opposition to a nominee, we likely understate the number of *attempts* to change state representation on courts of appeals. In the recent controversy over replacing Stephen Trott on the Ninth Circuit, Sens. Feinstein and Boxer opposed the confirmation of Norman Randy Smith (an Idahoan) because they argued the seat belonged to California.¹⁶ Smith was confirmed by the Senate after President Bush withdrew his nomination to replace Trott and resubmitted Smith as a nominee to replace Thomas Nelson, also from Idaho. The Trott vacancy remains unfilled.

Third, “losses” by a state in terms of the number of seats a state holds on its circuit court of appeals may be compensated by “gains”, either by a switch in the next vacancy, which would restore a particular state’s allotment of seats on the courts of appeals. For example, in September 1933, William Kenyon, an Iowan, died. His replacement was Charles Faris, a Missourian. Two years later, Faris took senior status, and was replaced by Seth Thomas who, like Kenyon, was an Iowan.¹⁷ By our accounting, both the Faris and Thomas appointments represent changes in state representation, even if the net effect, whether intended or not, was to “restore” the seat to Iowa—every occupant of this seat has been an Iowan since Thomas. Few changes in state representation, or attempts to compensate states that lose seats, are as obvious as this example. One should also recall that a state that “loses” a seat may gain a new seat when Congress enacts legislation to

¹⁶ Lawrence Hurley, “9th Circuit Nomination Prolongs Calif., Idaho Battle,” Jan. 10. 2007, *Daily Journal*.

¹⁷ Faris’s active service on the Eighth Circuit only lasted ten months.

increase that circuit's number of authorized judgeships. To return to the Trott example, Congress is considering legislation to add one seat to the Ninth Circuit, which may clear the way for an Idahoan to occupy the Trott — if the president chose to make such a nomination.¹⁸

To evaluate the political options the president has at the time the vacancy occurs (with the vacancy date marked by the Gryski and Zuk database), we calculated the mean first dimension DW-NOMINATE (Poole 2007) score for a state's senators in the Congress in which the vacancy occurred. For the state in which the vacancy occurred, we then calculated the absolute distance from the president's ideal point to the mean of the state's two senators.¹⁹ We then repeated this process for each of the other states in the circuit (the states to which a seat could be switched when the vacancy arose) and then determined if there was any state in the circuit whose Senate delegation was ideologically closer to the president than the state that had held the seat. If there was a closer Senate delegation, the variable is coded as "0"; if the state Senate delegation of the incumbent judge is closest to the president at the time the vacancy occurs, then the variable is coded as "1."

This approach should accurately reflect a president's considerations when weighing his options with a given vacancy; Senate delegations with smaller ideological distances from the president will generally indicate that both senators in a state delegation are of the president's party. Party dynamics do not fully explain a president's choices, however; the president may feel more comfortable rewarding senators he views as more loyal to his agenda than those who have been less loyal, something which ideological distance scores should reflect. For example, in March 1977, Wade McCree, of Michigan, resigned to become

¹⁸ Jon Kyl, "Kyl Adds New Judgeship to Federal Court of Appeals for Arizona, Western States," Mar. 1, 2007. Available at: http://kyl.senate.gov/record_print.cfm?id=269944.

¹⁹ For the 52nd to 83rd Congresses, there are no DW-NOMINATE coordinates calculated for the president. As a proxy for the president's position in these Congresses, the median value of Senators in the president's party in the Congress is used.

President Jimmy Carter’s solicitor general and left a vacancy on the Sixth Circuit. At that time, early in the Carter administration, Michigan’s delegation in the Senate was split between a Democrat (Riegle) and a Republican (Griffin). The other three states in the Sixth Circuit had delegations in the Senate more closely aligned with President Carter: Kentucky and Ohio both had two Democrats (Huddleston and Ford; Metzenbaum and Glenn) and Tennessee had a split delegation as well (Sasser and Baker). All three delegations, on average, were closer to President Carter than the Michigan delegation. Despite that political opportunity, President Carter nominated Damon Keith to the seat vacated by Judge McCree.²⁰

Measuring equality of representation on a circuit can prove somewhat more problematic.²¹ As a proxy for “underrepresented”, we sought to measure situations where states had no representative on their respective courts of appeals at the time a vacancy occurred. This variable is coded as “1” in situations where there were more states in a circuit than seats on that circuit’s court of appeals. In such cases, presidents might have chosen rotation among states in a circuit in order to preserve balance on that circuit. Historically, this situation was quite common; before the Eighth Circuit split in two in 1929, it had 13 states and six judgeships. Although this ratio of states to seats was exceptional, several circuits required rotation until recently, including the First Circuit, which did not add a fourth judgeship until 1978.

Two control variables are included in this analysis. First, we include a lagged dependent variable within each circuit. This variable is included to assess whether one switch increases or decreases the likelihood of another switch. This allows us to account for

²⁰ Although several factors likely went into Carter’s decision, McCree was the first African American to serve on the Sixth Circuit. Judge Keith, his successor, was the second African American to serve on that circuit.

²¹ In an ideal world, data would be available dating to 1891 chronicling the number of cases decided in the district courts in a particular state and the number of those cases that were appealed. These data may be available from a variety of sources, including annual reports by the Attorney General of the United States, but we were unable to collect such data from any reliable source for a sufficient period of time.

gains that may be designed to compensate for losses, as in the Kenyon-Faris-Thomas sequence on the Eighth Circuit. One might argue that further controls might be appropriate; dummies for circuit-level or seat-level “norms” (some circuits have been more stable than others; some seats have changed hands more often than others, even within a circuit), but such an approach may also run the risk of substituting “specific ignorance” for theoretically interesting factors. The final control variable in our model is for vacancies that arose after 1997, when Congress enacted legislation requiring every state to be represented on its circuit court of appeals.

Results

Table 1 presents results of a logit estimation in which the dependent variable is whether the successful nominee to a vacancy was nominated from a different state than his or her predecessor.

Table 1 Here

As **Table 1** indicates, changes in state representation were modeled as a function of whether the previous vacancy resulted in a change in state representation, whether the state of the judge whose exit created the vacancy was politically closer to the president than all the other states in the circuit, whether there were more states than seats on a particular court of appeals, and whether the vacancy occurred after 1997. Our results strongly suggest that, on balance, arguments of inclusion are more likely than arguments of political loyalty to surround successful attempts to get the president to change state representation. The replacement for an outgoing judge was more likely to come from a different state if the circuit has more states than it does seats on its court of appeals ($b=.434$, $\text{Pr}>|z|=0.000$, two-tailed test) and a new judge is *less* likely to come from a different state than his or her predecessor after 1997 ($b=-1.329$, $\text{Pr}>|z|=0.074$, two-tailed test). These results provide strong support to Hypothesis 2.

On the other hand, presidents appear not to have (or at least, not to exercise) a free hand, using appointments to the courts of appeals to reward political supporters or punish political enemies. In an admittedly blunt measure of political proximity, which required the senators representing the state of the departing judge to be closer to the president than the senators representing any other state in the circuit, we find that the coefficient, while signed correctly, is not statistically significant ($\Pr > |z| = .682$, two-tailed test). A measure that more accurately reflects a president's political considerations may produce more robust results, but, as measured here, our results indicate that presidents do not freely reallocate seats on the courts of appeals among the states to reward political allies and punish political allies. This absence of politically motivated movement in the allocation of seats on the courts of appeals may be seen by the statistical insignificance of the lagged dependent variable in this case. If a change in seat allocation occurred in the previous vacancy, presidents are neither more nor less likely to make another switch on the next vacancy. The coefficient is positive, but not statistically significant, suggesting, if anything, that one switch in state representation may lead to another.

As is often the case with maximum likelihood coefficients, marginal effects, the change in the probability of the occurrence of the dependent variable given a unit change in the independent variable, may help illuminate the substantive effects. If all the independent variables are set at their median values, the baseline probability of a switch in state representation is 16.5%. A switch in state representation is 43.4% more likely in a circuit with more states than seats than on a circuit where seats outnumber states. Changes in state representation are 11.5% less likely after 1997 than before, having set all of the other variables at their median values.

Discussion

The cases of changes in state representation discussed above reveal that although state representation is an important factor in many nominations, it is not necessarily a deciding factor. Indeed, if state representation were the primary factor in circuit-court nominations, we would expect nothing but geographic continuity across seats, circuits and time — which our data demonstrate is not the case. Similarly, the historical record perhaps reveals more about why presidents choose *not* to change state representation than about the instances when they do so. State representation is so consistent in seats that it must be a notable part of presidents' nomination choices, although it is unclear whether that consistency occurs out of mere tradition or active choice. Like all judicial nominations, some changes appear simply to have been the president's prerogative.

This paper is a beginning rather than an end. We have attempted to establish how common changes in state representation have been since the modern circuit courts were established in 1891 and where such changes occurred. As Daniels (1978, 235) observes in his exploration of state and regional representation among Supreme Court justices, “[t]his analysis presumed the importance of the geographic factor...as a requirement in the selection of persons to serve on the Court. This focus on geography was not intended to deny the significance of other factors in the recruitment process, but to isolate and explicate any underlying historical trends or patterns in the selection process through an examination or aggregate geographic data.” This paper is very much in the same vein with respect to nominees to the courts of appeals.

Our research suggests several possibilities for future inquiry. As noted above, now that we have a baseline for how frequently changes in state representation have occurred, an obvious question is how the decision-making behind those changes actually unfolded, both at the presidential and senatorial levels. Some of Goldman's work suggests that

senators convinced presidents to make nominations on state representation grounds, but, to some degree, this is “selecting on the dependent variable.” There are undoubtedly cases in which senators lobbied for or against changes in state representation but, because they were unsuccessful or not “serious” efforts, they remain outside the public record. What explains why presidents choose not to make changes in state representation, or why some senators were unsuccessful in lobbying for their causes? Some of these answers will remain known only to the principals, but archival or interview research utilizing presidential, Senate, and judicial sources could provide additional insight.

We also know little about how geographic representation affects district court nominations, although Goldman (1997) briefly considers the point. It is possible, however, that conflicts arise between two senators in the same state and that similar representation battles occur. It is also possible that informal arrangements between senators to divide policy issues and geographic areas of their states (Schiller 2000) preclude major conflicts over district court nominees.

Finally, a logical extension of the topics raised here concerns impact on the judiciary itself. Potential questions arise on at least two fronts. First, what impact do state representation conflicts have on nominees before and after confirmation (if successful)? More generally, the inclusion argument discussed above suggests that senators feel their states should “receive” particular nominations. It is unclear, however, how geographic diversity affects judicial decision-making, policy expertise or collegiality.

The political process that underlies the process of judicial nominations, while certainly familiar in its basic contours to scholars and citizens alike, contains nuances that may escape the concerted attention of those focused on present. Disputes over “state representation” to the courts of appeals is an issue that has eluded systematic scholarly analysis. In large part, this oversight is legitimate; changes in state representation on the

courts of appeals are far less common today than in the early years of the modern courts of appeals. Scholars, then, are right to focus on ideological disagreements and the implications of presidential attempts to fill the appellate bench with ideological allies. At the same time, our understanding of how the process has evolved to the current, highly charged nomination and confirmation process we now observe may benefit from historical perspective. In particular, scholars and practitioners who recollect a simpler, perhaps less controversial process of the nomination and confirmation of court of appeals judges (as evidenced by markedly shorter confirmation times for nominees) may benefit from realizing that conflict has always been a part of the process of appointment and confirmation of court of appeals nominees.

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Table 1: Determinants of Changes in State Representation on the U.S. Courts of Appeals, 1891-2007

<i>Variable</i>	<i>b</i> ($\hat{\sigma}$)
Switch _{t-1}	.3931 (.2963)
Predecessor's State Ideologically Closest to President	-.1554 (.3794)
More States than Seats	2.0236 (.3170)
1998-forward	-1.3291 (.7433)
Constant	-1.6246 (.1731)
Observations	405
χ^2 (d.f.)	68.35 (4)
Pr>χ^2	0.000

Figure 1: Percentage of Appointments to the Courts of Appeals that Changed State Representation, By President, 1891-2007

