

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

KEVIN M. SCOTT

Administrative Office of the U.S. Courts

R. SAM GARRETT

Congressional Research Service

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 in determining whether the new judge will be nominated from the same state as the predecessor. Goldman refers to state affiliations on appeals courts (e.g., a "Missouri seat" or an "Ohio seat") as "state representation." Building on Goldman's work, we seek to accomplish two objectives. First, we demonstrate that although changes in state representation have declined over time, there are still occasions when 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.

Amid continuing political controversy and renewed scholarly interest, presidential appointments to the lower federal courts, particularly the courts of appeals, play an important role in defining a president's legacy. Like Supreme Court appointments, lower-court appointments long outlast a president's tenure. Lower-court appointments also provide the pool from which future Supreme Court justices often emerge. As we will show, however, a key aspect of nominations to the appellate courts remains largely unexplored.

Kevin M. Scott is an analyst for the Administrative Office of the United States Courts and a lecturer for Johns Hopkins University. His research interests include judicial appointments and decision making on appellate courts.

R. Sam Garrett is a specialist in American national government at the Congressional Research Service. He is also a research fellow at American University's Center for Congressional and Presidential Studies and an adjunct professor in the School of Public Affairs.

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History is replete with examples in which states' representation in the federal judiciary increased or decreased as a result of presidential appointment to the circuit courts. Often, these episodes are among the most contentious nominations to the federal judiciary. Despite the attention that senators and presidents give to geography in the appointment process, we argue that scholars' perceptions of the judicial appointment process do not account for the role geography plays in the president's selection, and the Senate's consideration, of court of appeals judges. Ignoring the role geography plays leaves scholars with incomplete perceptions of the appointment and confirmation process.

In this article, we attempt to ascertain the criteria presidents use when deciding which state to allot a particular vacancy on the circuit courts of appeals. This includes considering how the Senate might affect those choices. Better understanding that process, we argue, offers the prospect of illuminating historical patterns in judicial appointments that can help place today's controversies in a broader context. In addition to advancing our understanding of the judicial appointment and confirmation process, by exploring the role of geography in circuit court appointments, we analyze the impact of federal statutes that now provide a definitive role for geography in circuit court appointments. Understanding geography, then, becomes important for both theoretical and practical reasons.

Not surprisingly, much of the existing literature focuses on the transition from an outgoing appellate judge to a new nominee. This includes examining when judges choose to retire, thereby creating vacancies for a president to fill (Nixon and Haskin 2000; Spriggs and Wahlbeck 1995); whom a president chooses to nominate to the courts of appeals (Goldman 1997; Savchak et al. 2006); the timing of those appointments (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). This body of work has added considerably to scholars' knowledge about what determines successful or failed appeals court nominations.

Historically, 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). 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). In such cases, senators often squared off over who controlled appointments to the circuit courts. In several circuits, particularly before major expansions of the appellate bench in the second half of the 20th 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.

Subsequent changes in the size of the circuit courts, and other changes in federal law, allow all states to be accommodated with seats on the circuit courts. Indeed, despite the lack of scholarly attention to the subject, Congress has expressed its interest by passing two laws that appear to constrain the president's broad nomination powers granted in the Constitution. The first (and most relevant for our purposes) was enacted 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.¹ 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.²

Geography and Nominations to the District Courts and Supreme Court of the United States

Despite legislative interest in the topic, existing literature requires us to look elsewhere—specifically the district courts and the Supreme Court of the United States—to begin our exploration of the link between geography and appointments to the federal judiciary. For example, other work (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.³ Geography, however, can be important to those members of Congress whose states or districts are most affected by the appointment. Accordingly, 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 courtesies, embodied in the "blue slip" process, heavily influences most district court nominations, particularly if home-state senators share the president's party (Bell 2002; Binder 2007; Sheldon and Maule 1997; see also Sollenberger 2010). Despite the lack of scholarly attention to the subject, geography and the related topic of senatorial courtesy also clearly affect circuit court nominations.

The most explicit attention to geography appears in a small set of literature that considers this aspect of Supreme Court nominations. Henry Abraham (1983, 292-93) 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."⁴ 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).⁵ Taking a broader view, Hulbary and Walker (1980, 189) found evidence that 70% of

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

2. Nonetheless, if conflicts over nominations that violated these requirements arose, presidents might well argue that their broad Article II powers permit virtually any nomination.

3. In one exception, Killian (2008) includes an examination of geography in a limited sense by examining the minority population in states from which judges might be nominated. That article primarily addresses racial diversity on the circuit courts.

4. 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" (1943, 1).

5. Both nominations were unsuccessful.

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.⁶

Perspectives on Changes in State Representation: Inclusion and Political Loyalty

Sheldon Goldman (1997) is one of the few scholars to seriously consider the role geography plays in lower-court nominations.⁷ While concentrating primarily on non-geographic factors in his discussion of lower-court nominations, Goldman (1997) provides a theoretical starting point for our inquiry. He describes “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 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” (Goldman 1997, 136). For the purposes of this article, we adapt the term “state representation” to refer to the state from which a particular appellate judge was nominated.⁸ 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.

Goldman’s work provides insight into what the public record suggests about how geography has influenced presidential and Senate 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.

We suggest that Goldman’s work—and subsequent developments that are consistent with Goldman’s findings—reveal two major categories of arguments that surround actual or attempted changes in state representation. We refer to those categories as “inclusion” and “political loyalty.” The *inclusion* perspective is the most straightforward and emphasizes “deservedness” of a seat due to population, workload, or other factors that emphasize one state’s treatment compared with others in the circuit. The *political loyalty*

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

7. On a related note, data compiled by Gryski and Zuk (2007) provide comprehensive biographical information about confirmed lower-court judges since 1801. Data on the state from which the judge was nominated are included. These data come from the Senate *Executive Journal*, Executive Calendar, and Senate Judiciary Committee questionnaires.

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

perspective implies that senators and the states they represent should be rewarded with a circuit appointment (or not punished by losing a seat) due to their support of the president's agenda.

The first category, inclusion, would have been impossible in some historical cases. Well into the 20th 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. Since 1990, however, every circuit has had at least as many seats as states, obviating this need for rotation. Even in the First Circuit, which has the fewest seats (six), there is room to accommodate judges nominated from each of the four states within the circuit.

Goldman (1997) documents several examples of changes in state representation from the 1930s through the 1980s that highlight the inclusion perspective. In 1941, for example, Democratic Senator Prentiss M. Brown (Mich.) approached President Roosevelt and appealed for a Michigan nominee on both inclusion and loyalty 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, 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 in the debate over whether Stephen Trott's Ninth Circuit seat would go to a Californian or an Idahoan, a controversy we discuss in more detail below.

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 Harry 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 (1997, 209), a Hawaiian did receive a nomination to the next open seat on the court.

To take a more recent example, the Norman Randy Smith nomination to the Ninth Circuit in George W. Bush's second term was a complicated case, in which the state affiliation of the predecessor, Stephen Trott, was in dispute. Though Trott had been a practicing attorney in California prior to his appointment to the bench, his chambers, by the time he retired from active service, were in Idaho. For that reason, some senators contended that the nomination of Smith, an Idahoan, would have switched the seat from California to Idaho. In the case of Smith, whose nomination was eventually withdrawn (Smith was confirmed to another seat on the court), both California and Idaho senators defended their state's claim to the seat on inclusion grounds. California Senator Dianne Feinstein argued against the Smith 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 was underrepresented on the court.¹⁰

The second major category of arguments surrounding state representation that Goldman identifies concerns what we call *political loyalty*. 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, e.g., arguments from Michigan and Arkansas Democrats to Franklin Roosevelt in Goldman 1997, 45-47).

A series of changes on the Fifth Circuit during the 1990s also serves as a reminder that even if a president "rewards" one state by changing state representation, geographic balance on the circuits can vary over time. The relevant shifts began 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 Bill 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, Senators Trent Lott and Thad Cochran. Louisiana, however, was represented by two Democrats, Senators 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, Senators 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.

The geographic changes on the Fifth Circuit did not end there, however. When Henry Politz, a Louisianan, took senior status in 1999, President Clinton did not make a nomination to fill the seat; President George W. Bush's first nominee to the seat, however, Charles W. Pickering, Sr., was from Mississippi. Even after Pickering's recess appointment expired, President Bush nominated two more Mississippians, Michael Wallace and Leslie Southwick, with the Senate confirming the latter nominee in 2007. President 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. In sum, the same political forces that influenced the shift of the seat toward a Democratic state under Clinton's presidency may have influenced the "return" of the seat to Mississippi under President George W. Bush.

9. See, for example, Arnold (2006a, 2006b), Goldman (2006), and *Houston Chronicle* (2007, A7).

10. *Ibid.*

11. At the beginning of his administration, President Clinton appointed Lloyd Bentsen to be his secretary of the treasury. Upon Bentsen's resignation from the Senate, Governor 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 eventually confirmed to the seat in the 104th Congress. None of the senators in the affected states changed in the 1994 midterm elections.

Before proceeding, we note that although the debate over potential changes in state representation has tended to emphasize either the inclusion or political loyalty arguments, the two are not necessarily mutually exclusive. For example, 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.

Hypotheses

Historical practice and the existing literature suggest that changes in state representation are motivated by two issues: (1) political reward and (2) inclusion or representation based on perceived equity (inclusion).

Hypothesis 1: Changes 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.

Hypothesis 2: Changes 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.

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 and the Federal Circuit. Using the Attributes of Courts of Appeals Database (Gryski and Zuk 2007) updated through the end of the 110th Congress, 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 regional circuit courts.¹² This left 439 appointments that could have represented changes in state representation.¹³ Of those 439 possible changes, 102 appointments changed the state represented on the courts of appeals. Figure 1 indicates the percentage of possible changes in state representation that changed

12. In one known case, a judge was appointed to a circuit of which his state was not a part. As mentioned above, Stephen Trott, appointed to the Ninth Circuit in 1987 (confirmed in 1988) was, according to the Senate *Executive Journal*, nominated from Virginia. We classify the Trott appointment as a California appointment for purposes of this analysis, but take no position on Trott’s residency or whether the state “belonged” to any particular state. See, for example, Goldman (2006) and *Houston Chronicle* (2007).

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.

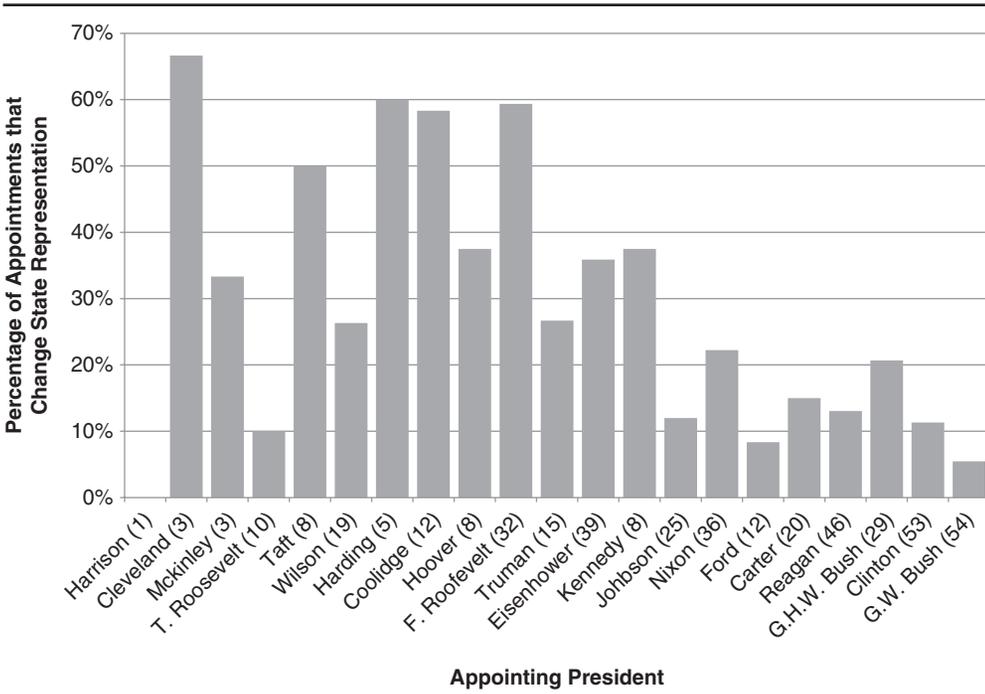


FIGURE 1. Percentage of Appointments to the Courts of Appeals that Changed State Representation, 1891-2008

Note: Parentheses following each president’s name indicate total number of qualifying appointments (nominations made to 1st-11th Circuits; second or later judge appointed to each seat).

under each president. The number in parentheses is the number of appointments in which state representation could have changed for a particular president.

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 40.5% (66 of 163) of appointments where a change was possible; presidents since 1964, including Johnson, have only changed state representation in 13.0% (36 of 276) of appointments where a change in state representation was possible. Such a 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). Presumably, the passage of time strengthened states’ claims to particular seats, even as political and demographic factors altered the position of each state 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 439 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 may choose to take sides in those disputes for his own reasons. Alternatively, 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.¹⁶

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. For example, the controversy over replacing Francis Murnaghan on the Fourth Circuit included debate over to which state the seat belongs. Senators Mikulski and Sarbanes opposed the confirmation of Claude Allen (a Virginian) because they argued the seat belonged to Maryland.¹⁷ As such, the attempt to replace Murnaghan with Allen is not included in our data.¹⁸

Third, as suggested previously, changes in state representation are not necessarily a zero-sum game. That is, "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" 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.¹⁹ 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.

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 the candidates recommended by Senator Henry Dworshak, the only Republican senator in the state. That vacancy went to Charles Merrill, of Nevada, but Oliver Koelsch (from Idaho) was nominated by Dwight Eisenhower to fill the next vacancy on the Ninth Circuit.

16. On a related note, we also assume equal interest and lobbying abilities by senators in affected states. On "bargaining" between senators and presidents regarding district court nominations, see Johnson and Songer (2002, 658-60). Scholars apparently have not explored such negotiations in detail for appellate nominations.

17. See, for example, Leahy (2004) and Lewis (2003).

18. President Obama nominated and the Senate confirmed Andre Davis, a Marylander, to replace Murnaghan.

19. Faris's active service on the Eighth Circuit only lasted ten months.

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 2009) 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.²⁰ 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. In Model 1, below, we then coded cases where there was a closer Senate delegation 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." In Model 2, we took the distance, relative to the president, between the predecessor's state and the closest other state in the circuit. In both models, Hypothesis 2 predicts that the coefficient will be negative—if the predecessor's state is closest (in Model 1; closer in Model 2) to the president, a switch should be less likely.

An illustration of how the two variables work might be useful. In 1989, John J. Gibbons, Jr., from New Jersey, departed active service on the Third Circuit Court of Appeals. The New Jersey Senate delegation in the 101st Congress (1989-1990) had a mean DW-NOMINATE score of $-.4705$, for an absolute distance from President George H. W. Bush (NOMINATE score $.468$) of $.9385$. The Pennsylvania (NOMINATE average $-.028$; distance from the president of $.496$) and Delaware (NOMINATE average $-.0695$; distance from the president of $.5375$) Senate delegations were closer to the president. For the variable in Model 1, then, a value of 0 is entered because the New Jersey delegation was not the closest to the president. For the variable in Model 2, the value for the variable is $-.4425$, the distance New Jersey was from the closest Senate delegation in the circuit relative to the president, Pennsylvania. Positive values for the variable in Model 2 indicate that the Senate delegation of the predecessor's state was the delegation closest to the president, so, as noted above, the expected sign on the variables in Models 1 and 2 is negative.

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 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

20. 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.

Carter: Kentucky and Ohio both had two Democrats (Huddleston and Ford; Metzbaum and Glenn) and Tennessee, like Michigan, had a split delegation (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, a Michigander, to the seat vacated by Judge McCree.²¹

Measuring equality of representation (the *inclusion* perspective) on a circuit can prove somewhat more problematic.²² 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 also included in this analysis. First, we include a lagged dependent variable for each circuit designed to assess whether one switch increases or decreases the likelihood of another switch, looking at the circuit as a whole rather than changes in a particular seat. This allows us to account for gains that may be designed to compensate for losses, as in the Kenyon-Faris-Thomas sequence on the Eighth Circuit. We choose this approach instead of using dummy variables 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), as such an approach would 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, which should make switches less common.

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.

As the models in Table 1 indicate, 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

21. 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.

22. 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.

TABLE 1
Determinants of Changes in State Representation on the U.S. Courts of Appeals, 1891-2008

<i>Variable</i>	<i>Model 1</i>	<i>Model 2</i>
Predecessor's State Ideologically Closest to President	-.022 (.308)	—
Ideological Distance Between Predecessor's State and Closest Other State in Circuit, Relative to President	—	-.608 (.454)
More States than Seats	2.024** (.318)	2.028** (.318)
Switch _{t-1}	.432 (.294)	.426 (.294)
1998-forward	-1.762* (.737)	-1.771* (.738)
Constant	-1.650** (.186)	-1.785** (.199)
Observations	427	427
χ^2 (d.f.)	80.07 (4)	81.87 (4)
Pr > χ^2	0.000	0.000

Cell entries are logistic regression coefficients. * $p < .05$, ** $p < .01$, two-tailed tests.

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 ($b = 2.024$ in Model 1, $\text{Pr} > |z| = .000$, two-tailed test) and a new judge is *less* likely to come from a different state than his or her predecessor after 1997 ($b = -1.762$ in Model 1, $\text{Pr} > |z| = .017$, two-tailed test). These results provide strong support to Hypothesis 1.

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 Model 1, where political alliance taps those instances where the senators representing the state of the departing judge are 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 ($b = -.022$, $\text{Pr} > |z| = .943$, two-tailed test). Whereas Model 1 assesses situations where the senators of the predecessor's states either were or were not the closest Senate delegation to the president in a circuit, Model 2 simply takes the distance between the Senate delegation of the predecessor's state and the Senate delegation of the state in the circuit next closest to the president. The results were similar; though the coefficient is signed correctly, it is not significant at conventional levels ($b = -.608$, $\text{Pr} > |z| = .180$, two-tailed test).

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 opponents. This absence of politically motivated movement in the allocation of seats on the courts of appeals may also 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, the substantive effects of the variables may be better illustrated using marginal effects, the change in the probability of the occurrence of the dependent variable given a unit change in the independent variable. If all the independent variables in Model 1 are set at their median values, the baseline probability of a switch in state representation is 16.1%. A switch in state representation is 43.1% more likely in a circuit with more states than seats than on a circuit where seats outnumber states. Changes in state representation are 12.9% less likely after 1997 than before, having set all of the other variables at their median values.²³

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 one.²⁴ 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 article 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.” We argue that this same framework applies 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 unfolded, both at

23. In Model 1, the median values are no switch on the previous appointment, the predecessor state's senators are not the closest delegation to the president, the appointment was made in or before 1997, and there were more seats on the court than states in the circuit. The marginal effects are similar for Model 2. A switch is 12.5% less likely after 1997 and 42.8% more likely in circuit with more states than seats than in other circuits. The median values for the variables remain the same as in Model 1, but the state closer to the president is .1575 units closer to the president than the predecessor state's Senate delegation ($x = -.1575$).

24. We do, however, find evidence of a more significant role for geography than Killian (2008).

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 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 the present. Disputes over state representation on the courts of appeals have 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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