

REMAKING THE BENCH: AN EXERCISE IN FUTILITY?

Kevin M. Scott* and Rorie Spill Solberg**

As presidents leave office, academics and pundits alike begin to evaluate the outgoing administration's legacy. The legacy is often parsed into separate spheres since presidencies may have major successes in one area but not others; domestic policy and foreign affairs are obvious divisions that are assessed separately. However, presidential legacies are also often linked to the make-up of the federal judiciary. As an executive leaves office, his mark on domestic policy may remain or grow if he has successfully "remade the judiciary."¹ As federal judges are appointed for life, a president's imprint on judicial policy can last for decades after he leaves office. Witness, as the epitome of this idea, Franklin Delano Roosevelt. Over the course of his more than three terms in office, he appointed a majority of the U.S. Supreme Court and 176 additional judges to the federal court system.² While Roosevelt died in office in 1945, four of his judges still sat on the federal courts 30 years later, including William O. Douglas on the Supreme Court.³ For this reason, it is instructive to take stock of a president's influence on the judiciary once his administration leaves office. However, as we proceed with this endeavor we often limit ourselves to examinations of the aggregate numbers with the exception of appointments to the Supreme Court. How many judges did the president successfully name to the courts? How do these judges compare, demographically and ideologically, to the judges of the previous administration? In the current climate of partisan polarization, scholars also examine the average time it takes for a nominee to be acted upon,⁴ and

* Analyst on the Federal Judiciary, Congressional Research Service, Ph.D, Ohio State University, 2002. This manuscript reflects the views of the authors and does not necessarily reflect the views of the Congressional Research Service or the Library of Congress. Please direct correspondence to kmscott@crs.loc.gov.

** Associate Professor, Department of Political Science, Oregon State University, Ph.D., Ohio State University, 1997.

1. See, e.g., SHELDON GOLDMAN, *Reagan and Meese Remake the Judiciary*, in *AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR* (Sheldon Goldman & Austin Sarat, eds. 2d ed. 1989).

2. Federal Judicial Center, *The Federal Judges Biographical Database*, available at <http://www.fjc.gov/public/home.nsf/hisj> (last visited Feb. 1, 2008).

3. *Id.*

4. See, e.g., NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005); and Sarah A. Binder & Forest Maltzman, *Senatorial Delay in Confirming Federal Court Judges, 1947–1998*, 46 *AM. J. POL. SCI.* 190 (2002).

whether the politics of delay affected the president's ability to place fully his footprint on the judiciary.⁵

Here we offer another perspective. We propose that significant limitations on presidents mean they can rarely remake the bench regardless of the number of judges or proportion of the judiciary that is replaced during their administrations. The culprit is not the usual suspect of partisan bickering or divided government, although these factors certainly contribute to the lack of overall influence and should be examined closely. The likely villain impeding presidential will is the structure of the judiciary itself. The judiciary is separated into 94 district courts and 13 circuit courts of appeals; each court has authority within its own boundaries. Examinations of hierarchical influences on judicial decision-making reveal the extent of judicial discretion.⁶ The specter of reversal does not greatly inhibit judges of either the district or circuit courts; the large caseloads of lower courts, in comparison to their appellate counterparts, and small percentage of litigants that choose to appeal losses, create an atmosphere of independence for judges on the district and circuit courts.⁷ Therefore, remaking the judiciary requires a critical mass of appointments distributed efficiently across the entire spectrum of the federal judiciary. The simple fact is that while most presidents appoint several hundred judges to the federal courts, they only appoint a few judges to any one bench, and thus have little influence over an entire district or circuit. Additionally, the general cycles of presidential politics, weaving back and forth between the two parties every 8 or 12 years, combined with the average tenure of a federal judge, means that presidents are often replacing departing judges with like-minded judges and thus not significantly altering the ideological tenor of the bench. In sum, overall presidential influence is muted by the historical trends and the overall size and decentralization of the judiciary.

In this paper, we outline several possible influences on the ability of presidents to shape the federal judiciary through their appointments. We focus on two classes of factors over which presidents have, at best, limited control: political factors (composition of state Senate delegations, composition

5. Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 *Judicature* 251 (2003).

6. See, e.g., Susan Haire, Stefanie Lindquist & Donald Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 *LAW AND SOC. REV.* 143 (2003); and Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 *AM. POL. SCI. REV.* 101 (2000).

7. *Id.* See also David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 *LAW AND SOC. REV.* 579 (2003).

of the Senate more generally, partisan control of the presidency) and institutional factors related to the judiciary (timing and method of judicial departures, age of appointees, passage of legislation altering appointment opportunities, including judicial retirement and new judgeships) that serve to filter a president's ambitions to remake the judiciary. We then explore the impact these factors have had on the district courts of the Seventh Circuit. We conclude that both political and institutional factors play a role in shaping the president's ability to leave a lasting imprint on the federal judiciary. Our findings should remind scholars and pundits alike that statements about how presidents shape the judiciary through their appointments should be qualified by an understanding of the nuances of the many factors that shape appointments to the federal judiciary.

I. POLITICAL INFLUENCES ON A PRESIDENT'S ABILITY TO SHAPE A COURT

The president's ability to influence the composition of any particular court may be considered as a function of several factors, some of which lie within at least limited control of presidents, while others lie outside of their control and force presidents to take advantage of opportunities to shape federal benches that may prove idiosyncratic. Because the president relies on the Senate for confirmation of his nominees, the partisan composition of the Senate plays a role in shaping the president's ability to influence the composition of the federal judiciary. The composition of the Senate plays less of a role in the confirmation of district court judges than court of appeals judges. Even in an era of heightened partisan conflict over the confirmation of federal judges, the overwhelming majority of district court nominees ultimately secure Senate confirmation; 87% of President Bush's nominees to the district courts had been confirmed by the Senate by the end of the 109th Congress (2005–2006), while only 75% of his nominees to the courts of appeals have been confirmed in the same time frame.

Nominations to the district courts are not, however, a place where the president has a free hand in making the selection. Norms of senatorial courtesy, protected by Senate institutions like the blue slip, have insured that home-state senators of both parties play a role in the selection of nominees to the district courts.⁸ When one or both of the home-state senators are of the

8. The shared roles of the president and the Senate in the selection and confirmation of nominees to the federal courts has been the subject of considerable scholarly treatment. Two particularly useful studies, from which this section borrows heavily, are: JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE*

president's party, they often recommend either one or several names to the White House, which then may make the final selection. Nominations to the district courts have long been viewed by senators as a form of political patronage, though the usage of district court appointments to reward political supporters has declined significantly in the past 50 years. Rather than using the appointments to reward political supporters (or provide sinecures to loyal staff), district court appointments increasingly reflect the appointment of individuals that senators (and the president) find ideologically agreeable. In many cases, district court judgeships can be proving grounds for elevation to the courts of appeals, which are increasingly important to the president and part of a broader ideological agenda for the courts.

If a president is interested in making over the judiciary in a particular ideological image, he will frequently encounter at least some form of home-state opposition to very liberal or conservative appointees. The use of the blue slip for judicial nominations empowers a senator who is not of the president's party to play a role in the selection and confirmation process. Though district court nominations are rarely not confirmed by the Senate, one may not necessarily take this as an indication that opposite-party senators merely go along with the president's choice of a nominee. More likely, they have some input at the selection stage to deflect problems further along in the selection and confirmation process.⁹

In the district courts of the Seventh Circuit, the president has frequently faced Senate delegations split between the two parties or unified in opposition to the president. In Illinois, the Senate delegation was represented by two senators from the same party as the president for only eight years (1969–1970 and 1993–1998) between 1953 and 2007; in 34 of those 54 years, the Senate delegation was split between Republican and Democratic senators. In Wisconsin, both senators were of the president's party for 18 of the 54 years

(1968) and SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

9. In some states, that consultation between senators (or their agents) and the White House is more formally structured, in the form of a selection commission. Even in the presence of a selection commission, the list of nominees recommended to the President comes from that state's senators. In other states, the consultation process is less formal, which may give the White House more freedom to choose candidates, but may cause problems later in the process if either senator does not feel as if they were fully consulted. In the states that comprise the Seventh Circuit, as of 2008, Illinois and Indiana did not use selection commissions, while the Wisconsin Federal Nominating Commission reviews applicants for district court judgeships in Wisconsin and court of appeals seats traditionally associated with Wisconsin. The charter for the Wisconsin Federal Nominating Commission can be found at http://www.judicialselection.us/uploads/documents/WI_charter_D88C3BA6A5469.pdf (Accessed March 1, 2008) (on file with authors).

(all for Democratic presidents), and the delegation was split between the two parties for 22 years between 1953 and 2007. In Indiana, the Senate delegation was split for only 16 years, while the Republicans controlled the presidency and both Senate seats for 18 of the 54 years between 1953 and 2007 (under Eisenhower, Reagan, and the first President Bush). As suggested above and in some scholarly literature,¹⁰ the president's greatest opportunity to have a free hand in selecting nominees to the lower courts occurs when neither of a state's senators belong to that party's delegation. Since 1953, that opportunity has existed for 12 years in Illinois, 14 years in Wisconsin, and 20 years in Indiana—a total of 46 “state-years” out of a total of 162 state-years over that time frame. These limited opportunities suggest that the president's influence on the district benches may not be as persuasive as many scholars believe.

Presidents, Senate leaders, and Judiciary Committee chairs have taken slightly different approaches to the role of home-state senators in nominations to the district courts and court of appeals over the last several presidential administrations. The fights over senatorial consultation almost always entangle the prerogatives of each branch of government and partisan considerations. President Johnson would not make a nomination to the lower courts without the approval of the Democratic senators of that state,¹¹ reflecting his earlier role as Senate majority leader involved in the confirmation of Eisenhower nominees to the federal bench. President Bush has generally articulated respect for the wishes of the home-state senators, but occasionally has nominated an individual who was opposed by their home-state senators.¹²

The role senators play in court of appeals nominations has changed considerably over the past fifty years. While senators continue to be protective of seats historically associated with their states, the occupants of those seats are now more clearly identified with the president's agenda than with senatorial influence. Though many scholars trace this change to Ronald Reagan, the fundamental shift in how court of appeals judges were selected happened in the Carter Administration. Sheldon Goldman, in tracing

10. See, e.g., Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy And Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

11. See GOLDMAN, *supra* note 8, at 173.

12. In the 110th Congress (2007–2008), several of President Bush's nominees to the courts of appeals have been criticized by Democrats as being nominated despite not being supported by their home-state senators. In one case, the nominee, E. Duncan Getchell, Jr., nominated to a seat traditionally associated with Virginia, was opposed by the Democratic and Republican senators of that state as not being on a list of acceptable candidates forwarded by both senators. See Manu Rayju, *Key Appeals Court Shifts To The Left, Stoking Election-year Partisan Fight*, The Hill, Feb. 20, 2008, at 6.

President Carter's use of selection commissions for nominees to the courts of appeals, noted Carter's interest in playing an active role in the process.¹³ Part of this interest derived from Carter's efforts to diversify the judiciary while reforming the selection process, but the desire to implement changes in the process had the additional consequence of giving the executive branch considerably more influence in nominations to the courts of appeals than it had prior to 1977.¹⁴ As a result, recent presidential nominations to the courts of appeals are more likely to reflect part of a broader presidential agenda to influence the structure of the judiciary. Appointments to the courts of appeals have generated controversy with increasing frequency over the last 30 years,¹⁵ but, for the most part, nominations to the Seventh Circuit Court of Appeals have been relatively free of controversy. President George W. Bush's two nominees to the Seventh Circuit, Diane Sykes and John Tinker, were both confirmed and, although the Sykes nomination generated a 70–27 vote in the Senate, neither nomination compares to the most controversial of the Bush nominations to the courts of appeals.

Two nominations to the Seventh Circuit Court of Appeals over the past 50 years, however, did generate considerable debate; both were made by President Reagan. Daniel Manion, nominated to an Indiana seat on the Seventh Circuit, was confirmed only after a vote of no recommendation from the Senate Judiciary Committee (controlled at the time by Republicans) and a confirmation vote in June 1986 that was the subject of a motion to reconsider a month later which failed by a tie vote. Slade Gorton, a Republican from Washington who voted for Manion's confirmation after extracting concessions from the White House, was narrowly defeated for reelection that November; his vote to confirm Manion likely played a role in that defeat.¹⁶ Reagan's nomination of Joel Flaum in 1983 to an Illinois seat on the Seventh Circuit Court of Appeals generated opposition, this time from critics who argued that Reagan's nominee was too liberal. Active support by Senator Charles Percy (R-IL) and Republican Governor Jim Thompson ultimately persuaded the Reagan Administration to nominate Flaum.¹⁷ At the time, Flaum was selected over Frank Easterbrook, who himself was later nominated and confirmed to the Seventh Circuit Court of Appeals.¹⁸

13. See GOLDMAN, *supra* note 8, at 238.

14. See GOLDMAN, *supra* note 8; Elliot Slotnick, *Judicial Selection Systems and Nomination Outcomes: Does the Process Make a Difference?*, 12 AM POL. Q. 225 (1984).

15. See *supra* note 4.

16. GOLDMAN, *supra* note 8, at 313.

17. *Id.* at 306.

18. *Id.* at 307.

II. INSTITUTIONAL FACTORS THAT INFLUENCE THE PRESIDENT'S ABILITY TO SHAPE A COURT

The variations in presidential nomination practices, and the contours of Senate confirmation of nominations to the district courts and courts of appeals remain territory that has been well-covered by scholarly analysis and critical commentary. But scholars and pundits alike tend to pay little attention to the timing of vacancies. Though there is scholarly literature on the departures of lower court judges and the factors that influence their decisions to exit,¹⁹ only two analyze the exit choices of district court judges.²⁰ Charles Franklin has noted that if federal judges depart the bench at random intervals (relative to serving terms of fixed length, as some state judges), then “the judiciary is remade at a pace that depends on the average length of judicial service” and “the policy effects of a new majority party depends primarily on past history of control of judicial appointments.”²¹

Franklin suggests that elected officials, particularly the president, might attempt to influence the judiciary by looking beyond ideology when determining who to nominate to federal judgeships. In particular, a president may, with congressional approval, choose to expand the size of the federal judiciary, appoint younger judges who may serve longer and outlast some of the cyclical turnover in presidents, and, perhaps more cynically, the president and Congress can encourage departures by active judges in order to create vacancies that can then be filled. They may do so by making active service less attractive to federal judges (failing to increase salary, limiting the resources judges have to do their work) or by making retirement more attractive to federal judges.

Presidents can act in ways to increase their influence over the federal judiciary, but doing so likely requires conscious choice and involves tradeoffs with other items on the presidential agenda. Particularly relevant to

19. Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987*, 52 J. POL. 457 (1990); James F. Spriggs II & Paul J. Wahlbeck, *Calling it Quits: Strategic Retirements on the Federal Courts of Appeals, 1893–1991*, 48 POL. RES. Q. 573 (1995); David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. Q. 458 (2000); Jessica Perry & Christopher J.W. Zorn, *A Model of Federal Judicial Retirements, 1789–2002*, Typescript: Pennsylvania State University (2007) (on file with authors); and Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CALIF. LAW REV. 1029 (2003).

20. See Barrow & Zuk, *supra* note 19, and Perry & Zorn, *supra* note 19.

21. Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 156 (Stephen B. Burbank and Barry Friedman, eds. 1992).

presidential influence over the judiciary are efforts to expand the judiciary and to make appointments to the judiciary more or less attractive to federal judges. Scholarship on the departure decisions of federal judges tends to find, for example, that the real salary of federal judges has at least a marginal effect on the tenure of federal judges (with judges more likely to depart as their real salary drops), but salary is only one component of the attractiveness of a position on the federal bench.²² A detailed analysis of the budget for the judiciary lies outside the scope of this article, but those factors which are most closely related to the quality of life for federal judges—salary and options to depart the bench—are subject to the control of Congress and a president may choose to keep in mind his influence over the bench as legislation to increase the salaries of federal judges proceeds through Congress.

Since 1953, there have been four significant increases in the real salaries of federal judges: 1955, 1965, 1969, and 1989 (taking effect in 1991). In most other years, real judicial salary has been allowed to slide as nominal salary has remained constant or increased at a pace slower than inflation.²³ In addition to increases in salary, adjustments to the retirement benefits of federal judges, and the qualification levels for those benefits, may increase or decrease the number of judges who choose to leave active status.²⁴ Significant changes to the retirement options available to lower federal court judges in the past 50 years occurred in 1954 and 1984, with changes in 1989 and 1996 that also may have affected the departure timing of some federal judges.

Before 1954, lower court judges could resign with salary (equivalent to what is today called retirement) provided that they had served for at least 10 years and were at least 70 years of age. Lower court judges could also take senior status if they met these criteria. At the time, senior status meant that federal judges could retain their office, staff, and clerks, but there were no workload requirements for federal judges on senior status. In 1954, Congress extended the option to take senior status to federal judges who were 65 years old and had 15 years of service, while reserving the right to resign with salary to those who were 70 years old and had 10 years of service. This meant that federal judges appointed at the age of 50 could take senior status at 65, but not resign with salary until they turned 70. It also created the possibility that judges (those who met the 65+15 requirement but not the 70+10 requirement)

22. *See supra* note 19.

23. Russell R. Wheeler & Michael S. Greve, *How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries*, Issues in Governance Studies, Brookings Institution-American Enterprise Institute, Apr. 2007.

24. Richard L. Vining, Jr., *A Competing Risks Model of Exits from the U.S. Courts of Appeals, 1954–2004*, paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL, Apr. 2007 (on file with authors).

would leave active service immediately, and their replacements could be named by President Eisenhower and, at the time, confirmed by a Republican Senate.

In 1984, Congress renamed “resignation with salary” to its more familiar “retirement” and extended it, as well as senior status, to any federal judge who met the criteria of the Rule of 80 (years of service and age adding to 80, from 65 years of age and 15 years of service to 70 years of age and 10 years of service).²⁵ The evidence that federal judges responded to this change in incentives—making senior status and retirement easier to achieve—is mixed. In 1983, 19 district court and court of appeals judges left senior status via retirement or senior status; in 1984, the number rose to 29. Despite the apparent strength of this trend, it is worth noting that 28 federal judges took senior status or retired in 1982, so any increase in departures in the period immediately following the enactment of new criteria governing senior status may not necessarily be attributable to the change in incentives for federal judges.

Two other subsequent changes reflect the ability of Congress and the president to encourage or discourage the departure of federal judges. In 1989, Congress outlined the criteria for qualifying for senior status and pay adjustments. Each year, senior status judges must handle the equivalent of 25% of the caseload of an active judge or serve the federal judiciary in an administrative capacity.²⁶ At the same time, Congress imposed, for the first time, limits on the outside income lower court judges—but not Supreme Court justices—may earn. In 1996, Congress further amended the provisions of senior status to allow judges to count work done in later years to fulfill the workload criteria for earlier years in which they did not meet the 25% threshold and to count administrative work toward the 25%.

25. 28 USC § 371 (c). Judges are not required to take senior status or retire when they meet the service and age requirements; the only way federal judges can lose their jobs is to be impeached by the House of Representatives and convicted by the Senate.

26. As of March 1, 2008, legislation was pending before the House (H.R. 3753) and the Senate (S. 1638) which would, among other things, raise the requirement for senior judges to 33% (from 25%) of the equivalent caseload of an active judge in order to qualify for senior status. For a useful history of legislation governing senior status for federal judges, see David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 Cornell L. Rev. 473 (2007). In 2008, Congress also passed, and the President signed, P.L. 110-77, the Court Security Improvement Act of 2007, which, among other things, amends 28 U.S.C. §296 to read: “a district judge who has retired from regular active service under section 371(b) of this title, when designated and assigned to the court to which such judge was appointed, having performed in the preceding calendar year an amount of work equal to or greater than the amount of work an average judge in active service on that court would perform in 6 months, and having elected to exercise such powers, shall have the powers of a judge of that court to participate in appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters.”

Presidents may also seek to win congressional support for increasing the size of the federal judiciary. Several scholars have noted that partisan considerations influence expansions of the federal judiciary, suggesting that divided control of Congress and the presidency would make Congress reluctant to grant new judgeships to a president of the opposing party.²⁷ Indeed, of the six significant expansions of the federal judiciary since 1953, only two (1970 and 1990) have occurred when the party opposing the president's has controlled both houses of Congress; the other four (1961, 1966, 1978, 1984) have occurred while the president's party controlled at least one house of Congress.²⁸ New judgeships represent an excellent opportunity to alter the federal judiciary; the 60 new district judgeships created in 1960 increased the size of the federal judiciary by nearly 20% (from 241 to 301 permanent judgeships); the addition of 116 permanent district judgeships in 1978 had an even greater impact in terms of percentage of seats added. The impact on individual courts can be even more notable: though most of the district courts in the Seventh Circuit added one or two judges with each increase in judgeships, the Northern District of Illinois increased to 27 judges (from 21) in the 1984 expansion. The opportunity for the president to appoint a substantial number of judges at one time almost certainly relies on the creation of new judgeships, as retirements and other departures occur too infrequently to regularly offer any significant number of simultaneous vacancies.

While these administrative provisions relating to the judiciary are often viewed through the prisms of judicial independence or the ability (or lack thereof) to recruit highly trained private practice lawyers to the federal judiciary, they may also be viewed as altering the incentives for federal judges to depart via retirement or taking senior status. Importantly, the method by which federal judges depart has no implications for the vacancy a president may fill, so encouraging judges to retire rather than take senior status should not be viewed from the perspective of creating vacancies. More generally, however, making retirement benefits more generous to federal judges may increase the number who depart immediately upon qualification. While this may prove attractive in the short term, it may prove problematic in the long

27. John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J. LAW & ECON. 435 (1996); John M. De Figueiredo, Gerald S. Gryski, Emerson H. Tiller & Gary Zuk, *Congress and Political Expansion of the U.S. District Courts*, 2 AM. LAW & ECON. REV. 107 (2000).

28. *Id.*

term as federal judges may eschew timing their departures to allow a president who shares their policy views to appoint their replacement.²⁹

One factor over which a president may have control is the age of his appointees. Table 1, below, outlines, for the district courts in the Seventh Circuit, the average age at the time of appointment for each president's appointees.

Table 1: Average Age At Appointment, Judges on the District Courts of the Seventh Circuit

President	Number of Appointees	Average Age
Eisenhower	11	54.5
Kennedy	8	52.5
Johnson	9	52.9
Nixon	10	48.5
Ford	7	49.6
Carter	12	47.4
Reagan	27	47.2
H.W. Bush	6	50.5
Clinton	22	49.6
W. Bush	7	43.7

Note: Does not include President George W. Bush's appointments of Joseph Van Bokkelen (N. IN), Frederick Kapala (N. IL), or Robert Dow (N. IL), all of whom have been confirmed in the 110th Congress. There are also existing vacancies (as of March 28, 2008) in the Northern District of Illinois, the Northern District of Indiana and the Southern District of Indiana. District judges serving on the district courts for the Eastern and Western Districts of Wisconsin have indicated their plans to take senior status upon the confirmation of a successor.

29. See Barrow & Zuk, *supra* at 19; Nixon & Haskin, *supra*, at 19; and Perry & Zorn, *supra*, at 19 for evidence that judges make strategic retirement decisions. See Susan B. Haire, Rorie L. Spill & Lisa M. Holmes, *Two-for-One: Judicial Decisions to Assume Senior Status in the Courts of Appeals*, paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL (2002) (on file with authors), and Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 JOURN. EMPIRICAL LEGAL STUD. 495 (2005) for evidence indicating judges on the courts of appeals take senior status as soon as they are eligible (or shortly thereafter), regardless of who may make the appointment to replace them.

As Table 1 indicates, the average age of federal judges appointed to the district courts of the Seventh Circuit has declined by almost 12 years in the past 10 presidential administrations, with the nominees of the current President Bush the youngest of any group of appointees by nearly four years. No president since Johnson has had an average age at appointment greater than 50; the average age of the current president's nominees to the district court of the Seventh Circuit is 3.5 years lower than any other president since 1953. With the appropriate caveats related to drawing conclusions from small, nonrandom samples, this data strongly suggests that more recent presidents are more cognizant of the age of their appointees to the federal bench than are their predecessors. As a consequence, the future may offer ever more limited opportunities for presidents to shape the bench; if President Bush's nominees must serve an average of 21 years before they qualify for senior status, they will not start retiring until 2022.

Presidents, then, have the opportunity, within the constraints that limit their ability to make appointments, to leave an imprint on the judiciary. They can support increases in the number of federal judgeships. They can make federal judicial service more or less attractive by advocating for or opposing salary increases for federal judges, by supporting or opposing legislation that makes departure more or less attractive and changes what criteria must be met in order for judges to qualify for retirement support. These changes alter the number of vacancies available for a president to fill, and presidents can actively attempt to appoint younger federal judges if they desire to make a lasting mark on the federal judiciary. The evidence presented here strongly suggests that presidents are increasingly cognizant of appointing younger federal judges, and the likely long-term impact of such a strategy, particularly in the absence of the creation of a significant number of new judgeships, is substantial.

III. PRESIDENTIAL IMPACT ON THE COURTS OF THE SEVENTH CIRCUIT

Against all of these considerations, it may prove instructive to evaluate what impact presidents have on district courts with their appointments. Table 2 presents, for each district court in the Seventh Circuit, and for each president since 1963, the number of appointments made to new judgeships, to replace judges appointed by a president of the same party, and to replace judges appointed by a president of the opposite party.

Table 2: Appointment by Presidents to the District Courts in the Seventh Circuit

	Northern Illinois	Eastern/Central Illinois	Southern Illinois	Northern Indiana	Southern Indiana	Eastern Wisconsin	Western Wisconsin
Kennedy	2/1/2	0/0/0	0/0/0	1/0/1	1/0/0	0/0/0	0/0/0
Johnson	1/0/1	0/0/1	0/1/0	0/0/0	1/0/0	1/1/0	0/0/1
Nixon	3/3/1	0/0/1	0/0/1	0/0/1	0/0/0	0/1/0	0/0/0
Ford	0/1/4	0/0/0	0/0/1	0/1/0	0/0/0	0/0/0	0/0/0
Carter	3/2/2	0/0/1 ^a	0/0/0 ^a	0/0/0	1/0/0	1/0/0	1/0/0
Reagan	5/3/5	0/1/1	1/0/0	2/1/2	0/2/1	0/2/0	0/1/0
H.W. Bush	1/1/1	1/0/0	0/0/1	0/0/0	0/0/0	0/0/1	0/0/0
Clinton	0/9/3	0/1/1	1/1/2	0/0/0	0/0/2	0/1/1	0/0/0
W. Bush	0/2/4	0/0/0	0/0/0	0/0/3	0/0/0	1/0/0	0/0/0
Total	15/22/22	1/2/5	2/2/5	3/2/7	3/2/3	3/4/2	1/1/1
Judgeships	30	4	4	5	5	5	2

Cell entries reflect the number of appointments that are: to new seats/to replace a judge appointed by a president of a different party/to replace a judge appointed by a president of the same party. For example, in the Northern District of Indiana, President Reagan appointed two individuals to new judgeships, one person to replace a judge appointed by a Democratic president, and two people to replace judges appointed by Republican presidents. Numbers do not include recess appointments not confirmed or nominees not confirmed by the Senate.

a. The Eastern District of Illinois was abolished in 1978 and its two judgeships were assigned to the Central and Southern Districts, which each received one judgeship. The Southern District also “contributed” two judgeships to the new Central District. President Carter appointed Harold Baker to the Eastern District of Illinois. Baker was transferred to the Central District when the Eastern District was dissolved. James Foreman, appointed to the Eastern District by President Nixon, was transferred to the Southern District of Illinois. At the same time, James Ackerman, appointed by President Ford, and Robert Morgan, appointed by President Johnson to the Southern District, were moved to the Central District of Illinois. Cell entries reflect initial appointments, but subsequent entries reflect movement of the seats.

In almost every district court in the Seventh Circuit, presidential appointments that are not made to fill new positions are more likely to be made to replace judges appointed by the same party as their own, rather than to “gain ground” in the composition of a bench by replacing judges appointed by the other party. The Northern District of Indiana is a particularly stark example of this tendency. Of nine appointments made to replace departing judges, seven (78%) were made to replace appointees of the same party, and only two were made to replace judges appointed by the other party. At the same time, opportunities occasionally arise that allow presidents to have a significant influence on a particular court. On the Northern District of Illinois, President Clinton appointed 12 judges to a bench that has 30 judgeships. Of his 12 appointments, 9 (75%) were to replace judges appointed by Republican presidents. Over the course of his 8 years in office President Clinton’s impact on the Northern District of Illinois was arguably greater than that of President Reagan, who appointed 13 judges (to a court that, at the time of his departure, had 21 judgeships), but who only made 3 appointments that replaced Democratic appointees and an additional 5 new judges. The Clinton appointees will likely remain on that court until at least 2009, meaning President Bush’s impact on that particular court will likely be limited, replacing only 2 Democratic appointees.

The Northern District of Illinois aside, small numbers can have significant impacts on the composition of a given bench. In the Southern District of Indiana, President Reagan appointed three judges to a bench that has five judges, giving his appointees a majority that only recently ended with the confirmation of Judge Tindler to the Seventh Circuit Court of Appeals. The Western District of Wisconsin has been served since 1981 by the same two judges, one of whom has recently announced his decision to take senior status. The long tenure of these two judges illustrate that, in courts where there are relatively few judgeships, the actual appearance of vacancies occur irregularly and may defy presidential attempts to shape the judiciary.

IV. DISCUSSION AND FURTHER RESEARCH

The results presented in Table 2 demonstrate the idiosyncratic nature of presidential influence but also demonstrate that one or two appointments can have a significant impact on a particular court. At the same time, the results presented in Table 2 do not take into account the mediating influence of divided or opposed home-state Senate delegations or the president’s relationship with the Senate. While President Nixon appointed seven judges to the Northern District of Illinois, all seven were considered by a Democratic Senate and required the approval of Charles Percy, the senior Republican

senator from Illinois throughout the Nixon Administration. No president has appointed a judge to the Western District of Wisconsin since 1981, so any talk of a presidential legacy in the district courts may sound odd to lawyers and pundits in Madison.

Though newspaper reporters, pundits, bloggers, and scholars are quite taken with the notion of a presidential legacy in shaping the courts, the truth is much more complex. Several factors limit the president's ability to give the courts a particular ideological cast. Presidents often have, at best, limited control over the composition of the Senate and the particular delegations that represent each state. Presidents can support and devote political capital to legislation that increases their ability to influence the judiciary (making retirement or other forms of departure more attractive to active judges), or presidents can encourage active judges to consider departure by refusing to support significant increases in judicial pay. Presidents can push Congress to create more judgeships, but they may not always be successful in doing so. One thing presidents certainly may do is seek to appoint judges who look forward to long careers on the federal bench, and the evidence presented here suggests that, at least on the district courts of the Seventh Circuit, an increasing tendency to adopt this strategy has taken hold.

But even presidents who find favorable Senate delegations, a willing Congress that may increase judgeships (and, ideally, refuse to increase salary but make retirement more attractive to federal judges) will find that their ability to remake any particular court remains largely dependent on the decision to depart made by federal judges themselves. Presidents may find unexpected opportunities—the 9 appointments President Clinton made to the Northern District of Illinois to replace Republican-appointed judges—but those opportunities largely reflect judges' decisions on departure. One strategy presidents may choose, and which offers the opportunity to shape the judiciary at several levels, is to elevate district court judges to the courts of appeals when vacancies arise on the courts of appeals. President Bush, with two appointments to the Seventh Circuit, promoted John Tinker to fill one vacancy, creating an as-yet-unfilled vacancy—the first that can be filled by Bush—in the Southern District of Indiana. President Clinton elevated two judges from the district courts to the Seventh Circuit Court of Appeals to fill the three vacancies on that court he could fill; the first President Bush elevated a district judge with his only appointment to the Seventh Circuit Court of Appeals.³⁰

30. More generally, 19 of President Clinton's 65 confirmed appointees to the courts of appeals (29%) were elevated from district courts; for President George W. Bush, as of March 1, 2008, 14 of 57 confirmed appointees to the courts of appeals (25%) were elevations. Since President Reagan's 1981

A more complete understanding of the processes that influence presidential influence on the courts needs to take into fuller account differences among presidents of the same party and the impact of Senators on the selection process for nominees to the district courts and courts of appeals. Doing so likely requires the collection and analysis of data on decisions made by district court judges in order to ascertain the impact that presidential appointments can have on the collective output of the federal courts. If Reagan nominees are, as literature has suggested, more conservative than Nixon nominees and Clinton nominees more conservative than Carter nominees, then simply using the party of the appointing president as a proxy for ideology understates the influence presidents have on the district courts and courts of appeals. But even analyses which purport to demonstrate the differences among cohorts of presidential nominees should reflect the role Senators play in narrowing the field of candidates for federal judgeships and lobbying for particular candidates. Those nuances are pivotal to understanding the influence presidents have on the work of the federal courts, and those nuances are largely missed by individuals too anxious to mark out a presidential legacy.

appointment of Sandra Day O'Connor to the Supreme Court, every justice confirmed to the Court was an active judge on the court of appeals at the time of appointment.