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"State Representation" in Appointments to Federal Courts of Appeals

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Abstract. This report provides an overview and analysis of changes in state representation of circuit court judges confirmed since 1891, when Congress created the modern regional appeals courts. The data reveal that some seats are consistently filled by judges from the same state. Other seats are filled by judges from various states in that circuit. Overall, changes in state representation have occurred in 24% of confirmed nominations since 1891. Changes in state representation were more common prior to the 1960s than in recent decades; 14% of appointments to circuit courts after the Kennedy Administration have changed state representation. The frequency of those changes has also varied by circuit.

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CRS Report for Congress

"State Representation" in Appointments to Federal Courts of Appeals

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Summary

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. One scholar refers to the custom of maintaining state continuity in seats within a court (e.g., a "Missouri seat" or an "Ohio seat") as "state representation." Federal statutes currently require that judges "reside" in the circuit at the time of appointment and while in active service, and that each state within the circuit be represented among the court's judges, but do not require that particular seats be reserved for nominees from particular states.

This report provides an overview and analysis of changes in state representation of circuit court judges confirmed since 1891, when Congress created the modern regional appeals courts. The data reveal that some seats are consistently filled by judges from the same state. Other seats are filled by judges from various states in that circuit. Overall, changes in state representation have occurred in 24% of confirmed nominations since 1891. Changes in state representation were more common prior to the 1960s than in recent decades; 14% of appointments to circuit courts after the Kennedy Administration have changed state representation. The frequency of those changes has also varied by circuit. This report will be updated when any future changes in state representation occur.

Background. The federal courts of appeals, often called "circuit courts," remain the last avenue of appeal for all but the handful of cases heard by the Supreme Court of the United States. Eleven regional circuits cover the 50 states and U.S. territories. Each circuit court includes at least three states, and is currently authorized to have between six and 28 judgeships. A total of 179 authorized judgeships are available to the courts of appeals, although not all positions are currently filled.[1] There are also courts of appeals

[1] See Administrative Office of the U.S. Courts. "Table C, U.S. Courts of Appeals, Additional Judgeships Authorized by Judgeship Acts"; available at [http://www.uscourts.gov/history/tablec.pdf]. The 179 authorized judgeships include the Court of Appeals for the District of (continued...)

for the District of Columbia Circuit and the Federal Circuit, but those courts do not have the same connection to state geography as the regional circuit courts of appeals.

The Constitution of the United States empowers the President to make nominations for judicial vacancies, with "advice and consent" from the Senate.[2] "State representation" — what one scholar describes as particular judicial seats on the circuit courts being affiliated with particular states — is customary for many seats, but it is not a formal requirement.[3] A 1997 law[4] requires that every state within a circuit be represented among appeals court judges by a resident of that state. In addition, except for the D.C. and Federal Circuits, appeals nominees must "reside" within the circuit at the time of appointment and "thereafter while in active service."[5] Otherwise, the President is not required by statute to nominate appeals judges from particular states. Selection of appellate nominees is generally the product of consultation between the President and Senators representing states within the circuit in question.

Some high-profile nominations to circuit court judgeships have been controversial, in part because they represented changes in state representation. At least three such cases have occurred since the mid-1990s. In 1995, a dispute emerged over the nomination of James L. Dennis, a Louisianan nominated to a Fifth Circuit seat previously occupied by Mississippian Charles Clark.[6] Dennis was eventually confirmed by the Senate. Some Senators also publicly objected to the nominations of Claude Allen (Fourth Circuit) and Norman Randy Smith (Ninth Circuit) on state-representation grounds.[7] Allen, from Virginia, was first nominated to the court in 2003 after the death of Judge Francis Murnaghan of Maryland. Allen's nomination was eventually returned to the President at the end of the 108th Congress without Senate approval. The nomination was not resubmitted in the 109th Congress, and the seat remains vacant as of this writing. In December 2005, President George W. Bush nominated Norman Randy Smith of Idaho to

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[1] (...continued)
Columbia Circuit and the Court of Appeals for the Federal Circuit, each of which has 12 judges.

[2] U.S. Constitution, Art. II, Sec. 2.

[3] This report adopts the term "state representation" from Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven, CT: Yale University Press, 1997), pp. 136-137. Other works or scholars could use alternative terminology.

[4] According to P.L. 105-119 § 307 (1997) (codified at 28 U.S.C. 44 § (c)), "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." See also 111 Stat. 2493.

[5] 28 U.S.C. § 44(c).

[6] The Dennis nomination was also controversial for other reasons. The Senate floor debate on his nomination, including a discussion of geography, appears in *Congressional Record*, vol. 141, part 19 (Sept. 28, 1995), pp. 26781-26797.

[7] On the Allen nomination, see, for example, Statement of Sen. Barbara S. Mikulski, in U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Claude A. Allen, of Virginia, to be Circuit Judge for the Fourth Circuit; and Mark R. Filip, of Illinois, to be District Judge for the Northern District of Illinois*, hearing, 108th Cong., 1st sess., Oct. 28, 2003, S.Hrg. 108-48 (Washington: GPO, 2004), p. 8. On the Smith nomination, see, for example, Office of Sen. Dianne Feinstein, "Statement by Senator Dianne Feinstein on the Nomination of Randy Smith to the 9th Circuit Court of Appeals," press release, Mar. 1, 2006.

a seat on the Court of Appeals for the Ninth Circuit. California Senator Dianne Feinstein publicly objected to the nomination, stating that Smith's confirmation would result in a "transfer of a judgeship from California to Idaho."[8] Senator Barbara Boxer, also from California, and other Senators also objected to the nomination.[9] By contrast, Idaho Senators Larry Craig and Michael Crapo, and others, contended that Smith should be confirmed to the seat because its previous occupant, Judge Stephen S. Trott, maintained chambers in Idaho, and because judges from various states had previously held the seat.[10] At the beginning of the 110th Congress, President Bush renominated Smith to fill Judge Trott's vacancy, but later withdrew that nomination and renominated Smith to replace Judge Thomas Nelson, who had taken senior status. Nelson was originally nominated from Idaho.[11] The Senate confirmed Smith to the Nelson seat on February 15, 2007. In addition, according to media accounts, Virginia and North Carolina Senators in 2006 urged the President to nominate a judge from their states to fill the vacancy created by the resignation of Fourth Circuit judge Michael Luttig, of Virginia, from the court.[12] As of this writing, no nominee has been named to that seat.

Methodology. This report relies primarily on the *Multi-User Database on the Attributes of United States Appeals Court Judges, 1801-1994*,[13] compiled by Auburn University political scientists Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski. Professor Gryski provided CRS with partially updated data, which CRS supplemented with information from the Federal Judicial History Office at the Federal Judicial Center (FJC), the FJC's Federal Judges Biographical Database, the Legislative Information System (LIS) nominations database, the Senate *Executive Journal*, and other sources, to make relevant portions of the database current. This report limits the inquiry to 1891-

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[8] "Statement by Senator Dianne Feinstein on the Nomination of Randy Smith to the 9th Circuit Court of Appeals."

[9] See, for example, Kyle Arnold, "Feinstein blocks nomination of Idaho judge to 9th Circuit," Associated Press/SFgate.com, Mar. 1, 2006, available at [http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/03/01/state/n223054S82.DTL].

[10] Ibid; and Office of Sen. Michael Crapo, "Craig, Crapo Applaud Smith Nomination," press release, Dec. 16, 2005. For a brief overview of Judge Trott's views on his geographic connection to the seat, see Stephen S. Trott, "Stephen S. Trott: Reader's piece about Judge Trott was packed with mistakes," *Idaho Statesman* online, Apr. 5, 2006, available at [http://www.idahostatesman.com/apps/pbcs.dll/article?AID=/20060405/NEWS0503/604050314/1001/NEWS].

[11] See Keith Perine, "In Conciliatory Move, Bush Nominates Judge Smith to 9th Circuit Idaho Seat," *CQ Today*, Jan. 16, 2007.

[12] See, for example, Tim Funk, "Tar Heels wanted for appeals court: Burr, Dole prod president for more N.C. presence," *Charlotte Observer* online [charlotte.com], June 9, 2006, available at [http://www.charlotte.com/mld/observer/news/local/14776354.htm].

[13] The full citation for the original data is "Zuk, Gary, Deborah J. Barrow, and Gerard S. Gryski. *Multi-User Database on the Attributes of United States Appeals Court Judges, 1801-1994* [Computer file]. ICPSR06796-v1. Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski, Auburn University [producers], 1996. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1997." Gerard S. Gryski provided partially updated data to CRS, which made additional modifications.

2007, since Congress established the modern circuit courts in 1891.[14] According to Professor Gryski, information in the *Multi-User Database* on the state from which judges were nominated came from the Senate *Executive Journal*, Judiciary Committee questionnaires, and the Executive Calendar.[15] Using the Senate *Executive Journal* and the LIS nominations database, a CRS reference assistant[16] manually checked in the *Multi-User Database* all cases of apparent changes in state representation (e.g., a judge nominated from Florida replacing a judge from Georgia). CRS also conducted random checks of changes in state representation and other cases listed in the *Multi-User Database*, and found only minimal clerical errors.[17] In the few cases of conflict between the *Multi-User Database* and CRS research, the authors relied on information listed in the President's nominating statement in the Senate *Executive Journal* or the LIS nominations database as the decisive record. Based on this methodology, the *Multi-User Database* appears to be highly reliable. For this report, CRS limited the database to 435 cases in which changes in state representation were possible, meaning that the first appointee to each seat was omitted since those appointments necessarily could not have represented changes.

Changes in State Representation on Federal Courts of Appeals. The data indicate that a seat is usually filled by a judge nominated from the same state as the predecessor in that seat. Where changes to state representation on the regional circuit courts of appeals have occurred, some patterns can be discerned. First, slightly more than three-quarters of confirmed nominations did not change state representation. Second, a noteworthy decline in the number of changes in state representation has occurred, particularly in the past 40 years. Third, some circuits have experienced greater changes in state representation than others. One explanation for the latter two patterns might be a practice of rotating seats among smaller states,[18] particularly before a federal statute required that each state be represented on its circuit court and before Congress created enough judgeships within each circuit to allow each state to be represented at the same time. The Court of Appeals for the First Circuit, for example, covers the states of Maine, Massachusetts, New Hampshire, and Rhode Island. Until 1978, the court had only three authorized judges, so not all of the states could be represented on the court simultaneously. In general, however, the public record contains very limited information about why changes in state representation occurred.

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[14] See 26 Stat. 826. This legislation is commonly known as the "Evarts Act."

[15] This information is based on e-mail correspondence with Prof. Gerard S. Gryski, Auburn University, May 26, 2006. The state from which a judge was nominated is the state listed in the *Multi-User Database*, as described in the methodology above. This report takes no position on whether this reflects the legal residence of a nominee.

[16] Mabel Gracias, a staff member in the CRS Knowledge Services Group, performed these checks.

[17] This includes one change in state representation. The *Multi-User Database* identified Judge Jeter C. Pritchard, who was confirmed to the Court of Appeals for the Fourth Circuit in 1904, as having been nominated from South Carolina. The Senate *Executive Journal* indicates that Pritchard was nominated from North Carolina.

[18] Sheldon Goldman, *Picking Federal Judges*, pp. 136-137.

Table 1 summarizes changes in state representation across the regional circuit courts since 1891. The cells in the table list the number of changes in state representation each President made in each circuit (e.g., "1 of 2," meaning one change in state representation out of two total appointments to that circuit). Of the 435 opportunities for changes in state representation since 1891, 104 confirmed nominations (24%) resulted in such changes.[19] Viewed differently, slightly more than three-quarters of all appellate vacancies have been filled by judges nominated from the same states as their predecessors. The 104 switches count the *total* number of changes in state representation, so if a state "loses" a seat but "regains" one at a later date, it would be counted as two switches in **Table 1**. Accordingly, the 24% figure does not reflect net "gains" or "losses" by states on their respective circuit courts of appeals. Although the subtotals — for each President and each circuit — suggest variation in changes in state representation, one should exercise caution when generalizing from isolated data points. Because vacancies in a given circuit have occurred infrequently, any change in state representation could have had a substantial impact on the values in each cell of **Table 1**. Summary percentages provide information only about how common changes in state representation have been in a particular circuit or presidency, not the political context surrounding those changes, such as the impact of negotiations between the President and the Senate.

Some circuit court seats experienced changes early in their histories, but have since stabilized. Other seats experienced frequent changes throughout their histories. **Table 1** shows that changes in state representation were relatively common through the Kennedy Administration compared with more recent Administrations. Specifically, 40% of nominations through the Kennedy Administration marked changes in state representation, compared with 14% for the Johnson Administration through the present. In fact, half or more of all circuit court nominations for Presidents Cleveland, Taft, Harding, and Franklin Roosevelt represented changes in state representation. By contrast, beginning with the Johnson Administration, no more than 22% (Nixon) of any President's appointments have changed state representation. Most have resulted in substantially fewer changes. President George W. Bush (6%) has the lowest percentage of changes in state representation since Benjamin Harrison. President Clinton had the fourth-lowest (11%) percentage. Some Presidents may have been able to compensate a state that "lost" a seat by appointing a judge from that state to a new seat when an additional judgeship was created, but no new appellate judgeships have been created since 1990.

Table 1 also shows that changes in state representation have varied by circuit. The Eleventh Circuit, created from the old Fifth Circuit in 1981,[20] has experienced no changes in state representation. State representation in the Second Circuit has also been very stable over time. On that circuit, only four of 51 appointments to the court (8%) have resulted in changes in state representation. By contrast, approximately 30%-40% of appointments have signaled changes in state representation on the First, Fourth, Eighth, and Ninth Circuits.

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[19] Percentages in this section were rounded to the nearest whole number.

[20] 94 Stat. 1994.

Table 1. Appeals Court Appointments, 1891-2007: Summary of Changes in State Representation

President	1st Circuit	2nd Circuit	3rd Circuit	4th Circuit	5th Circuit	6th Circuit	7th Circuit	8th Circuit	9th Circuit	10th Circuit	11th Circuit	Total
Harrison	—	—	—	—	—	0 of 1	—	—	—	—	—	0 of 1 (0%)
Cleveland	—	—	0 of 1	1 of 1	—	0 of 1	1 of 1	1 of 1	0 of 1	—	—	3 of 6 (50%)
McKinley	—	—	—	—	—	1 of 1	0 of 1	—	0 of 1	—	—	1 of 3 (33%)
T. Roosevelt	—	0 of 3	0 of 1	0 of 1	—	0 of 1	0 of 2	1 of 2	—	—	—	1 of 10 (10%)
Taft	0 of 2	—	2 of 2	—	—	1 of 3	—	1 of 1	—	—	—	4 of 8 (50%)
Wilson	1 of 3	0 of 3	1 of 3	1 of 1	2 of 4	0 of 1	0 of 3	0 of 1	—	—	—	5 of 19 (26%)
Harding	—	0 of 1	—	1 of 1	—	—	—	1 of 2	1 of 1	—	—	3 of 5 (60%)
Coolidge	—	2 of 3	—	2 of 2	1 of 1	1 of 2	0 of 1	1 of 1	2 of 2	—	—	7 of 12 (58%)
Hoover	0 of 2	—	—	1 of 1	1 of 1	0 of 1	0 of 1	0 of 1	1 of 1	—	—	3 of 8 (38%)
F. Roosevelt	3 of 3	0 of 2	3 of 6	1 of 1	1 of 2	1 of 3	1 of 4	3 of 3	2 of 4	4 of 4	—	19 of 32 (59%)
Truman	0 of 1	0 of 1	0 of 2	—	0 of 4	0 of 1	2 of 3	0 of 1	2 of 2	—	—	4 of 15 (27%)
Eisenhower	0 of 1	0 of 7	1 of 1	2 of 3	1 of 4	1 of 4	2 of 5	1 of 5	4 of 7	2 of 2	—	14 of 39 (36%)
Kennedy	—	—	0 of 1	—	—	0 of 1	1 of 1	2 of 2	0 of 2	0 of 1	—	3 of 8 (38%)
Johnson	2 of 2	0 of 2	0 of 4	1 of 1	0 of 5	0 of 3	0 of 2	0 of 3	0 of 2	0 of 1	—	3 of 25 (12%)
Nixon	0 of 1	0 of 4	1 of 7	1 of 3	0 of 3	2 of 4	0 of 4	1 of 3	2 of 4	1 of 3	—	8 of 36 (22%)
Ford	—	0 of 3	—	0 of 1	0 of 3	—	0 of 2	0 of 1	1 of 2	—	—	1 of 12 (8%)
Carter	1 of 1	—	0 of 1	0 of 1	0 of 5	0 of 4	—	0 of 1	2 of 5	0 of 2	—	3 of 20 (15%)
Reagan	—	2 of 5	0 of 6	0 of 3	0 of 5	0 of 5	1 of 6	1 of 5	3 of 5	0 of 4	0 of 2	7 of 46 (15%)
G.H.W. Bush	0 of 4	0 of 3	0 of 2	0 of 2	2 of 4	2 of 3	0 of 1	1 of 2	1 of 4	—	0 of 4	6 of 29 (21%)
Clinton	0 of 2	2 of 9	0 of 5	0 of 3	1 of 3	0 of 4	1 of 3	1 of 3	1 of 14	0 of 3	0 of 4	6 of 53 (11%)
G.W. Bush	0 of 1	0 of 5	0 of 7	0 of 2	1 of 4	0 of 7	0 of 1	0 of 7	2 of 7	0 of 6	0 of 1	3 of 48 (6%)
Total	7 of 23 (30%)	4 of 51 (8%)	8 of 49 (16%)	11 of 27 (41%)	10 of 48 (21%)	9 of 50 (18%)	9 of 41 (22%)	15 of 45 (33%)	24 of 64 (38%)	7 of 26 (27%)	0 of 11 (0%)	104 of 435 (24%)

Source: CRS analysis of "Zuk, Gary, Deborah J. Barrow, and Gerard S. Gryski. *Multi-User Database on the Attributes of United States Appeals Court Judges, 1801-1994* [Computer file]. ICPSR06796-v1. Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski, Auburn University [producers], 1996. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1997." Gerard S. Gryski provided partially updated data to CRS, which made additional modifications. Data are current as of September 4, 2007.

Note: Cell entries reflect the number of appointments that changed state representation on a circuit court of appeals and the number of total appointments that are not to new seats. For President George W. Bush, Charles Pickering Sr., a Fifth Circuit recess appointee, is included.