Volume 22 Number 2

Summer 2012

Law & Courts

NEWSLETTER OF THE LAW & COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION

Budging the Bench: The 'Nuclear Option' and Preference Disparity at the U.S. District Court Level

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In the spring of 2005, President George W. Bush was embarking on his second term of office and was laying out a wide ranging agenda during a state of the union address to a country that faced numerous challenges. In the international context, the United States was engaged in the two front campaign of the *War on Terrorism*, with sectarian violence and protest on the rise in the run up to elections of new governments in Afghanistan and Iraq. On the domestic front, the structure and leadership of a homeland security and counter-terrorism programs were in debate, the country was in the midst of an intermittent recovery from economic recession, budget deficits were accumulating, and a significant restructuring of the Social Security program was on the table. In addition to these significant issues, President Bush used this opportunity to address another less salient topic. He spoke of the importance of the judicial appointment process in the following statement:

> Because courts must always deliver impartial justice, judges have a duty to faithfully interpret the law, not legislate from the bench. As President, I have a constitutional responsibility to nominate men and women who understand the role of courts in our democracy, and are well qualified to serve on the bench—and I have done so. The Constitution also gives the Senate a responsibility: Every judicial nominee deserves an up-or-down vote (Bush 2005).

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Of course, the timing of this assertion on appointment powers was not coincidental. The Senate soon would be in the midst of a historic partisan showdown over rules governing federal judicial appointments and "up-or-down vote" would be an oft repeated call for change.

In retrospect this episode within the Senate seems incongruent with the times, but the controversy had long roots and real implications. Debate focused upon Senate Majority Leader William Frist's (R-TN) proposed Senate Resolution 138 (108th Congress) that would alter filibuster / cloture requirements for nominations subject to the Article II, Advice and Consent power. Under this proposed rule change, the threshold for invoking cloture, or terminating a filibuster challenge, would incrementally decline until a simple majority could call for an up-or-down vote upon a nominee (Beth 2005; Palmer 2005). This proposal was better known as the "nuclear option;" a reference to the Democratic minority's threat to abstain from future unanimous consent agreements that are necessary for the Senate to proceed with its day-to-day business. Thus, both the composition of the federal bench and the legislative calendar hung in the balance as deliberation began.

Over six days, the floor of the Senate was consumed by the topic in a debate that is remarkable in scale and content. The printed record associated with judicial appointments would comprise more than 260 pages of the Federal Register.[1] On the last day of deliberation, Senator Ben Nelson (D-NE) came to the floor with a statement titled "Putting Partisanship Aside" (Nelson 2005), which offered details of the compromise agreement that brought this incident to a close. Negotiations amongst 14 moderates from both parties had yielded a compromise whereby the filibuster / cloture requirement remained unchanged and most of the stalled nominees would now move forward to confirmation. With the status quo maintained and a legislative stalemate averted, the Senate would soon return to its regular business.

As an isolated event, this senatorial dispute over the "nuclear option" appears to be enigmatic, but contests over judicial appointments have arisen throughout the history of the Constitution. The origin of judicial review in *Marbury v. Madison* (1803), the contested appointment of Justice Brandeis (Abraham 2008, 135), FDR's failed "court-packing" attempt (Nelson 1988), and modern appointment controversies associated with Robert H. Bork and Clarence Thomas (Gerhardt 2003, 234) offer relevant examples. The "nuclear option" dispute is somewhat unique with respect to the past, since it marked an expanded focus that now comprised the lower federal courts. In an era of stable Supreme Court membership, the lower court appointment process became the active arena for elected branch contests over the composition of the judiciary (Hartley and Holmes 2002). Institutions, such as the norm of senatorial courtesy (Binder and Maltzman 2004; Hendershot 2010), the judiciary committee's blue slip (Binder 2007), and legislative holds and filibusters (Steigerwalt 2010), were being utilized in new ways to impede the once routine path to confirmation. Within this context, the lower court appointment process devolved into a historic period of delay and gridlock (Binder and Maltzman 2002; Martinek, Kemper and Van Winkle 2002).

This modern conflict over judicial appointments can best be seen through Axelrod's (1984) concept of tit-for-tat retaliation over the ideological construct of the judicial branch. Both the Democratic and Republican Parties have used the institutions of appointment in an attempt to sculpt this collection of life tenured policy makers in their preferred image. Both point to past instances of partisan obstruction to executive's nominees and therefore in a retaliatory manner invoke these same tools to keep vacancies open for future changes in control of the White House. However, we have little systematic evidence about which party has had the upper hand with respect to the ongoing game.

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[1] The debate can be found in the 109th Senate Congressional Record, Vol. 151, Nos. 66, 67, 68, 69, 70, and 71. Utilizing the daily issue summaries, the judicial appointment topic could be found on May 18th (issues 7 and 9), 19th (issue 4), 20th (issue 7), 23rd (issues 8, 13, 15, and 42), 24th (issues 8, 9, 11, 13, and 37), and 25th (issues 7, 9, 11, 13, 15, and 19).

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Mapping Changes at the U.S. District Court Level

Conceptualizing preference changes in federal courts becomes more challenging as we move from the Supreme Court down through the circuit and district court levels. On one hand, it is reasonably straightforward to understand that replacing a liberal justice with a conservative (or *vice versa*) should alter the position of the median justice of a nine-person court. Figures invoking a simple liberal-conservative ideological continuum can effectively relate these movements and convey potential implications for decision-making outcomes. The more numerous judgeships and geographical boundaries found at the lower federal court, however, make such tools unsuitable to the task, and thus a mapping strategy offers a more useful means to relate data associated with levels of ideological disparity and change over time. In this instance, all that is needed is a wide-ranging source of preference data and simple mapping software to generate visual evidence regarding the relative success of the Democratic and Republican parties in their attempts to budge the bench within district court context.

The following figures are the product of such a strategy and provide some insight on the interaction of elected and judicial branch actors[2] within the appointment process of district court judges, this analysis considers the successful appointments to these state level jurisdictions[3] that took place from 1901 to 2004 (Hendershot 2010), or just prior to the Senate debate over the "nuclear option." These successful appointments are associated with new proxies of district court judges' preferences (Hendershot and Tecklenburg 2011), which are a product of Poole and Rosenthal's (1997) DW Nominate scores of senators and presidents and are similar to the preference measurement strategies of the courts of appeals (Giles, Hettinger, and Peppers 2001).

The Giles, Hettinger and Peppers scores are constructed with a singular formula predicated on the assumption of a traditional senatorial courtesy norm, but these district court preference positions come in four unique forms – an *executive point*, a *traditional courtesy point*, a *selection point* and a *confirmation point*. The judge's executive point is represented by the appointing president's DW Nominate position when available and the presidential party median in the Senate when not. The traditional courtesy point represents the calculated mean of the presidential position and the most distant home state senator of the same party. Both are temporally static meaning that the calculation of the formula is consistent throughout the entire sample period. However, the selection and confirmation points take into account cyclical appointment regimes of senatorial influence (Hendershot 2010). The calculating formula is temporally dynamic and considers the robustness of senatorial constraints within the selection and confirmation of these judges. Depending upon the appointment regime, the calculated score alternatively invokes the most ideologically distant home state senator, the Judiciary Chairman position, or the opposing party median at the floor stage.[4] These selection and confirmation points thus account for independent executive vetting practices (Goldman 1997) and broader conflict over judicial appointments within the modern era.

Annual databases of district court membership[5] were created and reconciled. Within these 50 state-level databases, each judge was then associated with his or her four preference positions, making it possible to construct the annual median positions of each state between 1901 and 2004. These medians are plotted for the 48

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[2] The district court judges also play a part in the game, since they can initiate vacancies through resignation, retirement, or the assumption of senior status.

[3] The analysis excludes the District of Columbia and U.S. District Courts and the various territorial courts that did not have representation in the Senate.

[4] An appendix with the ideal points and calculation matrices of the four scores can be found on the author's webpage at: http://plaza.ufl.edu/mehender/preferencepage.htm.

[5] These data account for all active and confirmed U.S. District Court judges as of October 1st in each year and do not comprise those judges in senior status (Vining 2009).

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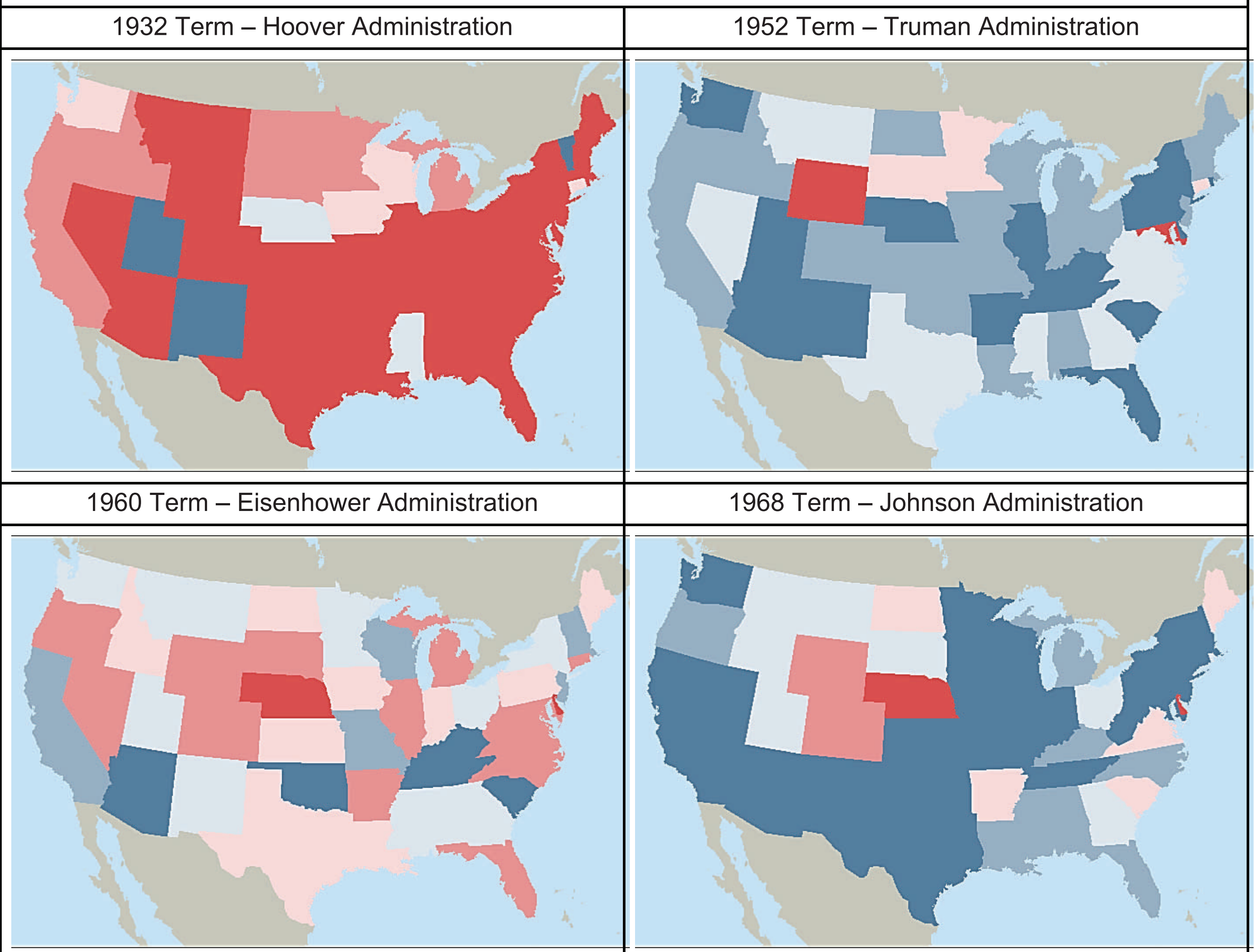
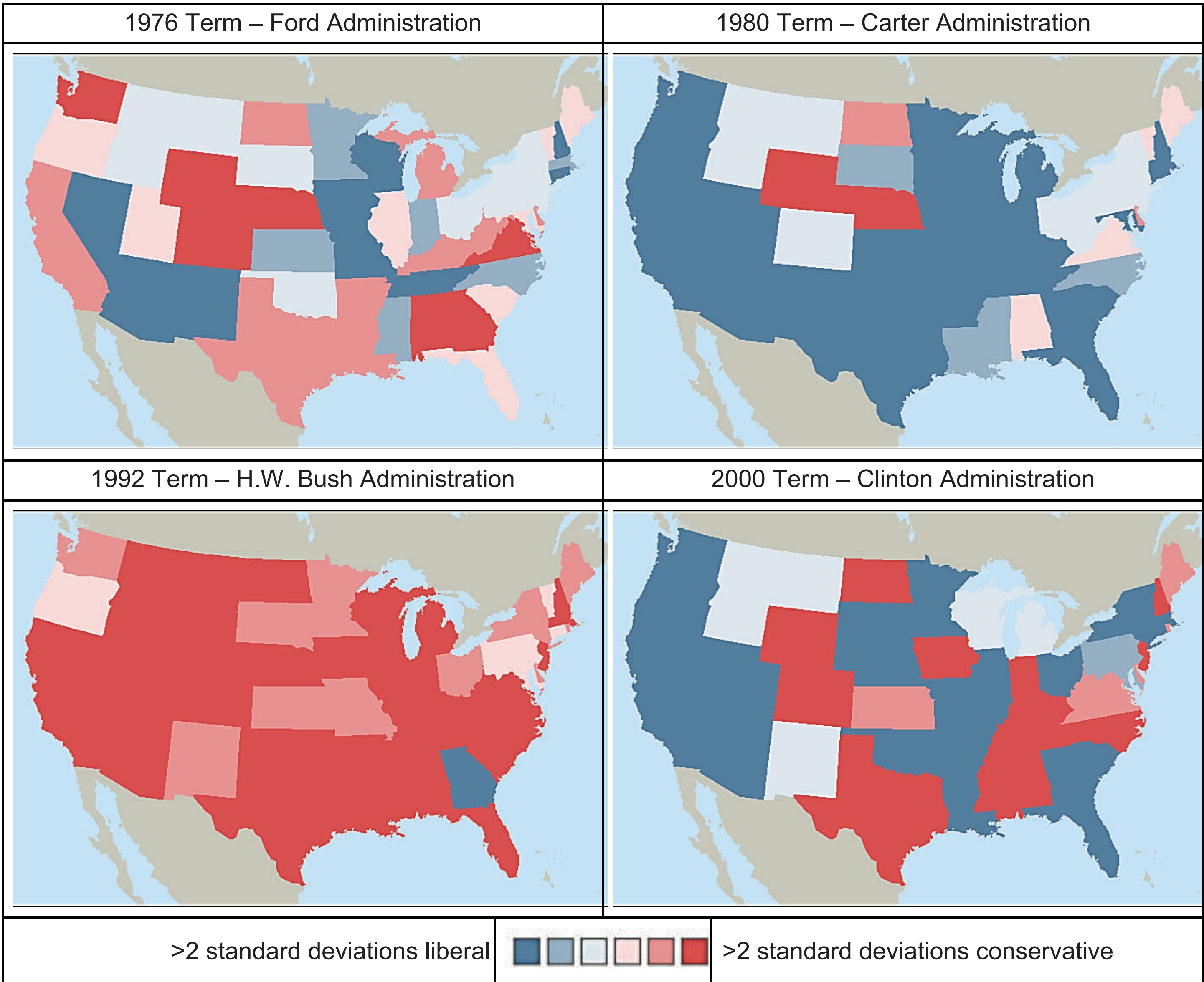
contiguous states at changes in partisan control of the executive branch since the Hoover administration. They are depicted in standard deviation intervals (*i.e.,* less than 1 standard deviation; greater than 1 standard deviation; greater than 2 standard deviations) from the mean position of all these courts for the entire sample period.

The district court medians at the end of Republican and Democratic administrations are presented in Figure 1. These values are functions of the traditional courtesy based measures and account for a uniform norm of senatorial courtesy with members of the president's party. Following the Hoover administration, almost all of the 48 contiguous states were stocked with conservative appointees, but less populous states (i.e., New Mexico, Utah, Nebraska and Mississippi) either leaned slightly liberal or were closer the sample period mean – the national mean position from 1901-2004. The subsequent New Deal administration and President Truman's appointees tended to pull the state medians back toward this mean, with the exception of the Northern Plains region and a couple of Eastern holdovers such as Connecticut and Maryland. Liberal gains are again evident in the less populated Southwest, but some larger states such as Illinois, Pennsylvania, and New York were now more firmly liberal.

Figure 1: U.S. District Court State Median Positions at Changes in Control of the White House





Note: State level median positions of the traditional courtesy point measure for U.S. District Courts in the 48 contiguous states. Scale is based on the mean (.084) and standard deviation (.145) of the mean position of all 50 U.S. District Courts for the entire sample period.

These transitions are emulated between the Eisenhower and Johnson presidencies. President Eisenhower's gains are located in the Central Southwest and the Great Plains and Mountain regions. Increases in the number of authorized judgeships[6] during the Kennedy and Johnson era (Barrow, Zuk and Gryski 1996) contributes to a more liberal distribution of preferences with the exception of the Northern Plains and Mountain regions. The traditional South, however, tended to remain more moderate due to the influence of Southern Democrat senators within the appointment process (Hendershot 2010). This geographically weak party structure, ongoing realignment (Carmines and Stimson 1989), and further expansion of the district court bench[7] afforded opportunities for the Nixon and Ford administration to push the South toward a more conservative direction. In addition to these states, the Pacific West, North Central and Middle Atlantic areas make substantial movements to the right.

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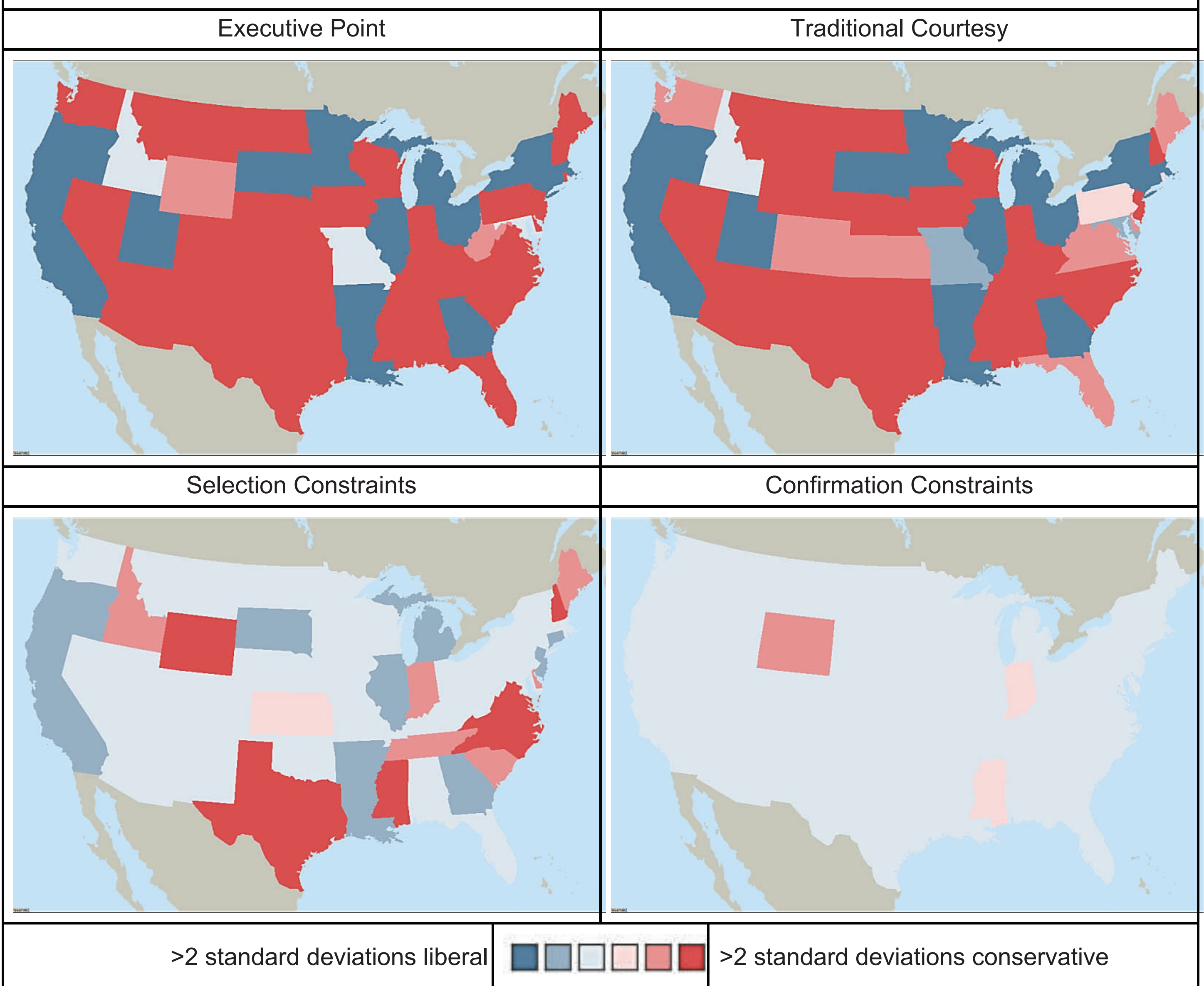
[6] In 1961, or the beginning of the Kennedy Administration, 60 new positions were authorized and an additional 36 were allocated in 1966.

[7] During President Nixon's first term, 57 new District Court judgeships were authorized.

Figure 2: U.S. District Court State Median Positions at the 2004 Term

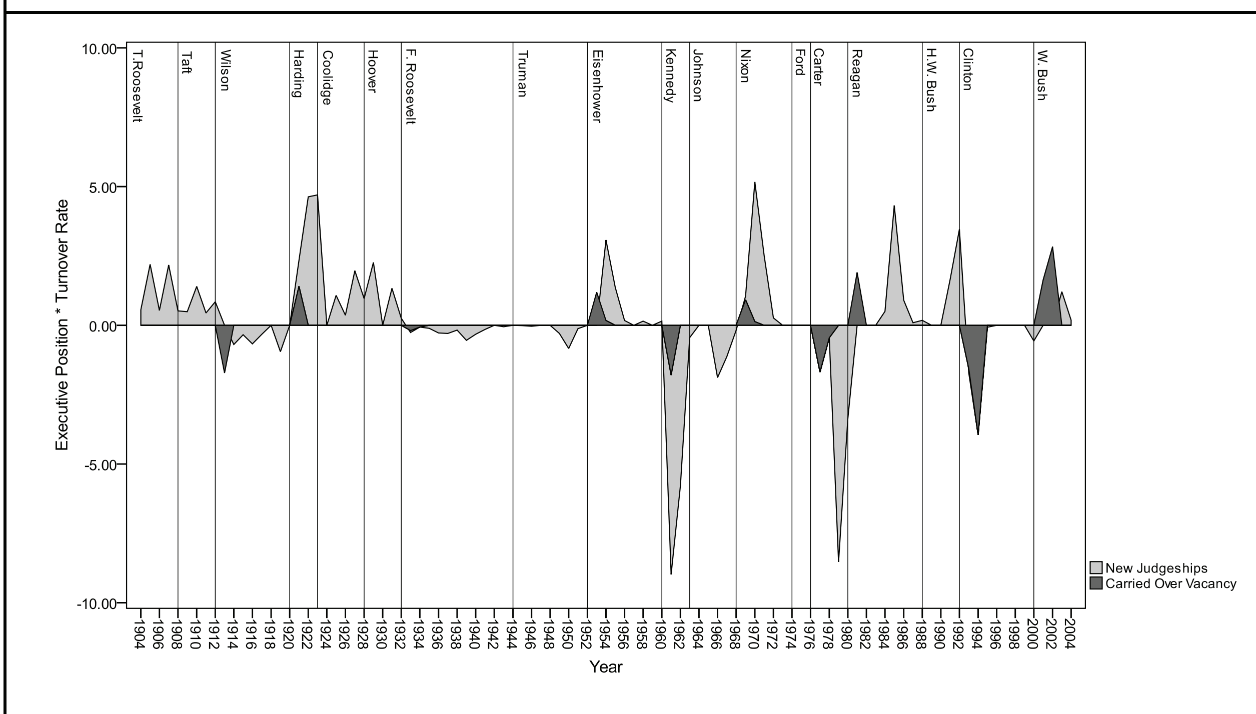


Note: State level median positions of the traditional courtesy point measure for U.S. District Courts in the 48 contiguous states. Scale is based on the mean (.084) and standard deviation (.145) of the mean position of all 50 U.S. District Courts for the entire sample period.

Is Either Party Winning and Does it Affect Decision-Making Outcomes?

As the above figures suggest, major changes in the distribution of district court preferences are a function both of the creation of new judgeships and confirmation conflict that engenders carry-over vacancies. These types of opportunities are in a sense the currency of the appointment contest and provide another means to assess which party, if any, is ahead in the game. One way to leverage this aspect is through an evaluation of turnover rates. Figure 3 presents an interaction variable of executive preference positions and the turnover rates associated with new judgeships and carried over vacancies. This plot more concisely depicts modern tit-for-tat conflict between the two parties. In the early portion of the sample, expansion of the bench took place at an incremental pace. Some evidence of carried over vacancies can be found between the Taft, Wilson, and Harding presidencies, but generally these new seats were filled in a rapid fashion. President Eisenhower inherited some vacancies from Truman who was known for taking stubborn stances in the appointment of trusted friends (Goldman 1997).

Figure 3: Packing the U.S. District Courts



Note: U.S. District Court appointments to the 50 state courts (District of Columbia and territorial courts are excluded). Values represent the current executive position multiplied by turnover rate. To control for expansion of the bench due to the authorization of new judgeships, turnover rates are calculated with a 3 year lag of the number of authorized judgeships.

Major opportunities to affect changes in district court membership occur during the rapid expansion of the bench in the Kennedy and Johnson presidencies. Democrats in Congress provided considerable numbers of new positions and along with holdover vacancies were able to draw the bench toward a liberal direction (*see* Figure 1 above). Not all of these positions were filled by the end of Johnson's term, and President Nixon too had new positions to fill. Nonetheless, Nixon had a relatively fewer opportunities to affect the ideological composition of the district court bench.

The second wave of court-packing takes place under President Carter. Following the Watergate crisis, Democratic Party resistance in the Senate created a number of carried over vacancies and then a large number of new seats were created. President Reagan was able to fill some of these seats at the beginning of his first term but expansion was more limited thereafter. Many of the new seats established at the end of President H.W. Bush's single term ended up vacant at the beginning of the Clinton administration. Democratic Party efforts to expand the bench under Carter and then stymie H.W. Bush's appointments engendered partisan retaliation when Republicans later took control of the Senate. President Clinton's nominees that faced a Republican Senate were prone to conflict and a number of carried over vacancies existed at the beginning of the W. Bush presidency.

An analysis of these two vacancy types thus points to a fairly competitive sequence of partisan moves to sway the district courts, with successful expansion of the bench under Kennedy and Carter, and subsequent resistance to H.W. Bush's nominees, evincing a moderately sized advantage for the Democratic Party. The question remains, however, whether such movements are actually reflected in district court decision-making? Here too, the evidence suggests that this competition matters. Figure 4 presents an overlay plot of predicted probabilities for the sample

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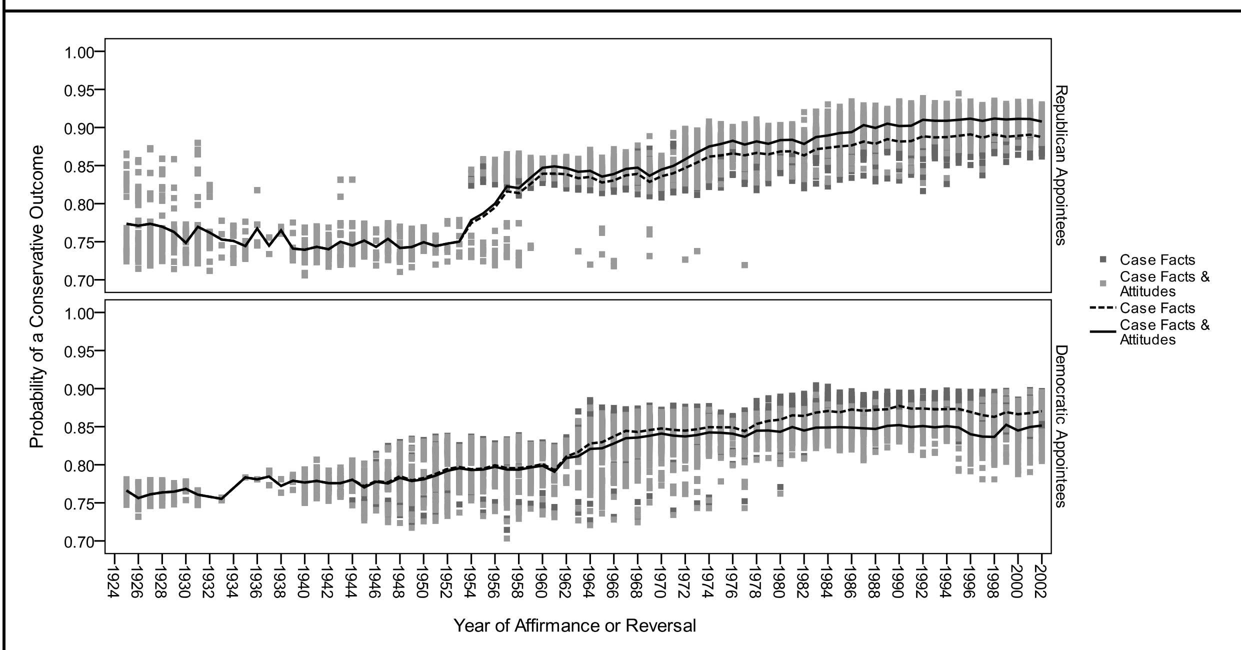
of appealed district court decisions found in the U.S. Court of Appeals Databases.[8] This plot stems from the best performing cyclically constructed preference specification in Hendershot and Tecklenburg (2011) and offers some leverage on the magnitude of attitudinal effects at this level. The darker shaded markers represent probabilities of the sample after controlling for case facts alone. The lighter shaded markers incorporate both case facts and attitudinal influences.

As expected, ideological influences move the mean probability value in a more conservative direction for Republican appointees and in a more liberal direction for Democrat appointees. While the differences associated with attitudinal effects are limited (*i.e.,* approximately +/- 3 to 4 percent; in aggregate more than 90% for recent Republican appointees versus less than 85% for Democratic appointees), such differences do exist and have been slowly incorporated into the decision-making calculus over time. Therefore, the observed conflict over these judicial appointments is not simply related to partisan retaliation within the confirmation process, but also to growing ideological influences that have become ingrained in district court decision-making.

Figure 4: Attitudes and Facts In U.S. District Court Decision-Making



Note: Probabilities generated with King, Tomz, and Wittenberg's (2000) Clarify software. Estimated model output (Hendershot and Tecklenburg 2011) is an unweighted specification of the confirmation cycle ideal point (Model 8 in Table 4). All case fact and ideology variables are set to the subsample mean values of the appointing president-regime categories.

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[8] Donald R. Songer, *The United States Courts of Appeals Database*. National Science Foundation Grant SES-8912678. Ashlyn K. Kuersten and Susan B. Haire, *The United States Courts of Appeals Database Update*. National Science Foundation Grant SES-9911284.

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As an isolated event the "nuclear option" debate that took place at the beginning of George W. Bush's second term can appear to be an example of simple partisan intransigence. From the longer term perspective, it seems to be just the latest example of tit-for-tat conduct (Axelrod 1984) in parties' attempts to align the judicial branch with their competing ideological platforms. The story that emerges from this analysis of the U.S. District Courts is that Republicans did have a reasonable case to make about Democrat's past conduct within the appointment game. Democratic Party efforts to expand the bench during the Kennedy and Carter administrations represented a divergence from the more incremental rate of adding new judgeships and similar opportunities provided to Republican presidents were relatively smaller in scale.

The bipartisan compromise that emerged from this debate essentially maintained the status quo and George W. Bush's second term and the interval of unified control of the Senate almost certainly helped establish some parity between the parties with respect to district court appointments. Interestingly, it is the Democrats in the Senate who recently have been discussing potential revisions to the cloture norm and legislative holds. For the time being, then, it seems that these retaliations continue in current political context. In the absence of successful attempts to further increase the number of authorized judgeships, the implication for the ideological composition of the district courts most likely are contained. These inter-branch contests over nominees act to moderate partisan swings in the composition of these courts. Presidents' abilities to effectively budge the bench are most effective through court-packing strategies that either afford new appointment opportunities or stave off appointment for successor presidents. With the House and Senate respectively controlled by Republicans and Democrats the prospects for new seats are low. The narrow balance of power in the Senate will subject some of President Obama's late term nominees to gridlock. Yet the absence of substantial numbers of these will tend to keep the district court mean within traditional intervals.

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