

# Presidential Legacies on the Federal Courts\*

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## Abstract

The president’s “judicial legacy” is an important but vaguely defined concept with significant implications for the composition of the federal judiciary and presidential influence over the courts. Judicial legacy reflects the ability of the president to influence politics and policy after departing office due to the lifelong tenure of federal judges. Using a simple mathematical model of judicial legacy based on the number of appointments made and the tenure of each judge on the courts I assess each president’s judicial legacy and patterns in these legacies over time. Generally, presidents are able to establish substantial legacies, but their influence over the courts decays rapidly after leaving office. Periodic court expansions, retirement and pension systems, and opportunities for promotions from lower to higher courts limit the president’s ability to use the judiciary to influence policy after leaving office and mitigate concerns about unelected judges shaping policy for decades.

## 1 Introduction

Presidents and other governmental executives concerned with their legacies after leaving office have limited opportunities to ensure the longevity of their policies. Presidents expend substantial energy building and maintaining their legacies, but once out of office the new administration has many opportunities to undo their work. Presidents can rescind the executive orders of their predecessors (Howell, 2003), work with Congress to change existing policy, and alter the implementation of existing policies and programs through the budget process and the bureaucracy (Berry, Burden, and Howell, 2010). The ability of new leaders to alter to policies of their predecessors is generally desirable in a democratic system, as elections should result in changes corresponding to the preferences of the majority (Dahl, 1957). If new leaders are overly constrained by the decisions of their predecessors, then they cannot fulfill the mandate of the voters for policy change. Consequently,

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the president has substantial powers over the administration of the government and how programs and policies are implemented, and presidents have relatively few mechanisms for constraining their successors.

Presidents have a few mechanisms for binding the next administration, but they are not consistently effective. Presidents can try to manipulate long-term budgetary politics to limit changes to economic programs. Conservative executives may try to constrain a liberal successor by leaving office with a large budget deficit that prevents their successor from establishing new spending programs (Persson and Svensson, 1989; Alesina and Tabellini, 1990). Presidents can also attempt to bind their successors' foreign policy through international commitments such as ongoing wars or treaties.<sup>1</sup>

The greatest power of the president to constrain his successors is through the appointment power. While there are many appointments that a president can make that will outlast his term, such as members of the Federal Reserve and other boards and commissions, the most important of these appointments are Article III judges, who serve for life (provided they exercise “good behavior”). Article III judges do not serve fixed terms and cannot be removed from office except in extraordinary circumstances. As a result, they are one of the president’s only opportunities to potentially affect government policy and administration long after departing from office and are therefore one of the most important elements of a president’s legacy (Segal, Timpone, and Howard, 2000; Kuersten and Songer, 2003). Judicial appointments help insure credible policy commitments and make it harder for future presidents and Congresses to change policies established by previous administrations (Landes and Posner, 1975; Gillman, 2008) and Presidents and co-partisan legislatures can use the structure of the courts and judicial appointments to entrench political ideologies and preferences (Balkin and Levinson, 2001; Gillman, 2002, 2006). For example, the current Supreme Court is majority Republican-appointed, and constrains the Obama administration’s actions on voting rights, marriage equality, and other issues (Allen, 2013). While the Supreme Court ultimately upheld the Affordable Care Act, several Republican judges in the district and appeals

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<sup>1</sup>The constitutional law on breaking treaties is unclear. Presidents have unilaterally withdrawn from treaties, but may be bound by the treaty to issue a notice of intent before doing so, which may prevent the president from withdrawing from the treaty immediately and constrain him for a time (Ackerman, 2002).

courts ruled against the constitutionality of the act in the preceding litigation. In *National Labor Relations Board v. Noel Canning*, which will be argued before the Supreme Court in the 2013 term, the three judge panel on the D.C. Court of Appeals that ruled against the constitutionality of President Obama’s recess appointments were all appointed by Republican presidents.

While the literature on the relationship and connections between the presidency and the judiciary is primarily focused on the Supreme Court (Yalof, 2008), the president’s appointment power and legacy over the courts is important at every level of the federal judiciary. This paper measures the magnitude of each president’s judicial legacies and evaluates the ability of presidents to use the appointment power to constrain future administrations. I measure judicial legacy at each of the three primary levels of the federal judiciary: the Supreme Court, the courts of appeals, and the district courts.

The ability to constrain succeeding administrations through the appointment of long-serving unelected judges has important implications for the functioning of a democracy. If presidents are actually able to use the judiciary to shape policy decades after leaving office, it could potentially prevent the federal government from responding to voters’ preferences. The problem of democratic judiciaries is a longstanding question in democratic theory, actively debated from the Constitutional Convention through the present (Tocqueville 1838, Dahl 1957, Epstein 2005, Cross 2008). While Hamilton argued that the courts would be the “least dangerous” branch, the Anti-Federalists were particularly worried about the independence of appointed judges.<sup>2</sup> Measuring judicial legacy helps us answer this question. If judicial legacies are long-lasting our concerns about their influence on democracy may be justified. If, however, legacies are short or decay quickly then we might be less concerned about this problem.

## 2 The Data

I use the Federal Judicial Center’s historical database of federal judges to measure and analyze presidential legacies on the courts.<sup>3</sup> The FJC database includes substantial information on each

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<sup>2</sup>Alexander Hamilton, Federalist Papers 78-83 and “Brutus,” XI, XII, and XV.

<sup>3</sup>*History of the Federal Judiciary*. <http://www.fjc.gov>. Web site of the Federal Judicial Center, Washington, DC. Data updated January 21, 2014.

judicial appointment, including the appointing president, the date when the judge received her commission, and dates of retirement, switch from active to senior status, and death. The database includes every Article III judicial appointment from George Washington to the present. Table 1 presents summary statistics from the FJC database.

I analyze this data for judges serving at the three primary levels of the federal judiciary: the Supreme Court, the courts of appeals, and the district courts.<sup>4</sup> While the size and structures of these courts have changed over time, from the first Judiciary Act in 1789 these courts have been the primary institutions of the federal judiciary (Wheeler and Harrison, 2005). The Supreme Court and the federal district courts were established in the Judiciary Act of 1789. The Judiciary Act of 1789 also established the first Circuit Courts. The Circuit Courts existed in various different forms from 1789 through 1911, when they were abolished by the Judicial Code of 1911. These courts were both federal trial courts as well as appeals courts.

The courts of appeals (often referred to now as circuit courts) were created in the Judiciary Act of 1891. These new courts eliminated the need of Supreme Court justices to “ride circuit” and created a level of the judiciary that mostly heard appeals from cases originating in the district courts. These courts continue in similar form and purpose to the present day. Due to the various changing forms of this middle level of the federal judiciary prior to 1891, I restrict the study of these courts to the courts of appeals and exclude the Circuit Courts and the judges that served on them.

### 3 Measuring Judicial Legacy

Judicial legacies can be conceptualized and evaluated in many different ways. Carp, Stidham, and Manning (2011) develops a model of the president’s ability to make an ideological mark on the courts based on four criteria: the president’s preference for ideological judges, the number of

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<sup>4</sup>I exclude the U.S. Court of International Trade (and its predecessor, the U.S. Customs Court), and the Article I courts (Territorial Courts, U.S. Court of Federal Claims). I also exclude the historical Circuit Courts, the Supreme Court of the District of Columbia, the Court of Claims and the Court of Customs and Patent Appeals. The Court of Claims and the Court of Customs and Patent Appeals were combined in 1982 into the Court of Appeals for the Federal Circuit, which I include in my analysis as part of the courts of appeals. I also exclude the U.S. Tax Court, bankruptcy courts, and military courts. Finally, I exclude courts made up of panels of federal judges, such as the Foreign Intelligence Surveillance Court (FISA). See <http://www.fjc.gov/history/home.nsf/page/courts.html>.

Table 1: Summary Statistics from the Federal Judicial Center Database

Court	First Year	Total Appts.	Appts. Per Year	Appts. Per Pres.	Avg. Tenure	Original Seats	Current Seats	Currently Serving
USSC	1789	117	0.53	2.67	16.06	6	9	9
USCA	1891	729	6.18	26.42	13.87	18	179	164
USDC	1789	2826	12.85	61.70	14.56	13	673	597

Notes: **USSC** = U.S. Supreme Court, **USCA** = Courts of Appeals, **USDC** = District Court. The Appeals Courts are those established by the Judiciary Act of 1891, and include the Court of Appeals for the Federal Circuit. Appointments per President excludes Obama. Tenure is calculated using all judges who have completed their service and excludes time served as a Senior Judge. Judges currently serving is as of January 21, 2014.

vacancies, the president’s political clout, and the judicial climate when appointing new judges. In his comprehensive study of nominations to the lower courts, Goldman (1997) considered a similar set of criteria: the president’s policy goals, partisan goals, and personal goals — his preference to favor those close to him. Others, including Epstein and Segal (2005) also consider the ideological consistency of the appointees and the degree to which the ideology of the appointees match that of the appointing president. From these works, the general components of presidential-judicial legacy are the number of appointments the president makes, the president’s approach to appointing judges, and ideological matching.

The importance of judicial tenure is understudied in the existing literature. Tenure is critical to judicial legacies for the simple reason that judges that serve longer have a greater influence than judges with shorter tenures. While there are certainly exceptional judges whom we may view as historically important and influential despite short tenures, we should expect that on average the influence of a longer-serving judge will be greater than those with shorter tenures because they hear and decide more cases. This paper measures judicial legacy by focusing on the number of judges appointed and the length of time each judge serves in their position. The interaction of the number of judges appointed and the lengths of their tenures define the magnitude of judicial legacy. Measuring judicial legacy in this way allows for two different interpretations. First, this measurement shows us the individual effect of each president of each president on the courts—the magnitude and duration of his personal legacy through the individuals that he chose to appoint.

Second, this measurement provides the longterm partisan influence of each president on the courts—the ability of each individual president to shift the partisan balance of the judiciary after leaving office.

### **3.1 Presidential-Judicial Partisan and Ideological Matching**

A substantial literature focuses on the connection between president and judicial appointee ideology (Epstein and Segal, 2011; Sunstein et al., 2006; Goldman, 1997). Implicit in this literature is the assumption that presidents want to appoint judges with similar ideological preferences. In practice, this means that most (if not all) judges appointed by the president belong to or are at least ideologically aligned with his political party (Carp, Stidham, and Manning, 2011; Epstein and Segal, 2005; Goldman, 1997). Zuk, Gryski, and Barrow (1993) shows that almost all judicial appointments from 1869-1992 share the same party as the appointing president. Many presidents are explicit in their desire to appoint judges who share their partisan ideology. For example, George W. Bush made clear that his primary goal was to appoint consistently conservative judges (Goldman et al., 2003, 2005; Goldman, Schiavoni, and Slotnick, 2009). Other presidents, such as Carter, Clinton, and Obama, have publicly prioritized gender and ethnic diversity in an effort to make the courts look “more like America” (Goldman, Slotnick, and Schiavoni, 2011; Epstein and Segal, 2005; Goldman et al., 2001; Gryski, Zuk, and Barrow, 1994; Goldman, 1981). However, even when selecting on traits such as diversity, presidents still nominate co-partisan judges. Sunstein et al. (2006) conducts a thorough empirical study of judicial decisions on the appeals courts and find substantial evidence that judges appointed by a Democratic president are significantly more likely to vote in the liberal direction than colleagues appointed by Republican presidents. Additionally, Miles and Sunstein (2006) finds that Supreme Court judges are more likely to affirm federal agency decisions when a co-partisan president is in office, and oppose them when a president of the opposite party is in office.

Furthermore, while presidential appointments are constrained by the Senate, presidents are generally successful at getting co-partisan nominees confirmed, even when the presidency and the Senate are controlled by different parties (Moraski and Shipan, 1999; Goldman, 1997). Norms such

as senatorial courtesy, where the president consults with the senior co-partisan senator from the state with vacancy, also help insure that president nominate co-partisan judges. While a co-partisan senator may not exist in every state where there is a judicial vacant, making this norm relevant only for some openings, the influence of a co-partisan senator is likely to produce a co-partisan judge.

While almost all judges share the same political party as their appointing president, this does not mean that the judge matches the ideology of the president or the party on all issues (Epstein and Segal, 2005; Yalof, 1999). First, there may not be a candidate who perfectly matches the president, or the presidential staff selecting the short-list of judicial nominees may not have perfect information on each candidate's views on each issue. Just as voters use party as a proxy in elections (Snyder and Ting, 2002), political party may be the best proxy for presidential administrations to use when selecting judges, especially at the lower levels where they have to appoint dozens of judges and do not necessarily have long judicial or publican records for each candidate to assess the candidates' views on each issue. Second, the issues that are most important to the president when nominating a judge may be different from the issues that judge faces when on bench many years later. The issues that the courts (especially the Supreme Court) address change significantly over time, and may not be anticipated by presidents when appointing likeminded judges (Epstein and Segal, 2011, 2005). For example, President Reagan nominated Anthony Kennedy to the Supreme Court in part because he knew Kennedy shared his views on constitutional protections for criminals, one the key issues before the court in the 1980s. However, Reagan could not anticipate Kennedy's changing views on same-sex marriage, which ultimately differed from Reagan's views in key cases such as *Lawrence v. Texas* (Epstein and Segal, 2005).

Additionally, judicial ideology, at least for Supreme Court justices, appears to change over time (Segal, Timpone, and Howard, 2000). Judicial ideology in the first few years as a judge is often a poor predictor of future ideology, and the ideal points of many judges shift significantly over their tenures (Epstein, Quinn, Martin, and Segal, 2007; Epstein, Martin, Quinn, and Segal, 2007). Judges often match the ideology of their appointing president in their first few years on the bench, but may diverge over time (Epstein and Segal, 2005). Despite changes in personal ideology, we

should still expect judges, on average, to match the ideology of their own (and their appointing president's) party. As the ideology of political parties evolve over time, judges will change as well. However, as both parties and judges evolve, these new ideologies may depart from the personal ideology of the appointing president.

### 3.2 Judicial Legacy Scores

I develop a measure of judicial legacy to compare the impacts the different presidents have had on the judiciary, both during and after their terms in office. The *judicial legacy score* is the sum of a president's influence on a given court for each year.

$$JLS_{pc} = \sum_{y=1789}^{2013} \frac{j_{pcy}}{\sum_{p \in P} j_{pcy}} \quad (1)$$

where  $p$  indicates the president,  $c$  the court,  $P$  the set of all presidents, and  $j_{pcy}$  the number of judges appointed by president  $p$  to court  $c$  serving in year  $y$ . This measure reflects both the length in years of a president's legacy and the magnitude in terms of the percentage of the court appointed. These two elements are equally important. A president who appointed one judge who served for ten years to a certain court would have the same score as a president who appointed two judges who each served for five years to the same court (holding the size of the court constant). The use of percentages of the judiciary rather than judge-years is important because it allows for the comparison of presidents across time. This measure reflects expansion of the judiciary (and the occasional contraction). Without adjusting for the size of the judiciary, the JLS rankings would roughly match the reverse orderings of presidents from the present, because recent presidents appoint more judges than their predecessors (except for on the Supreme Court).

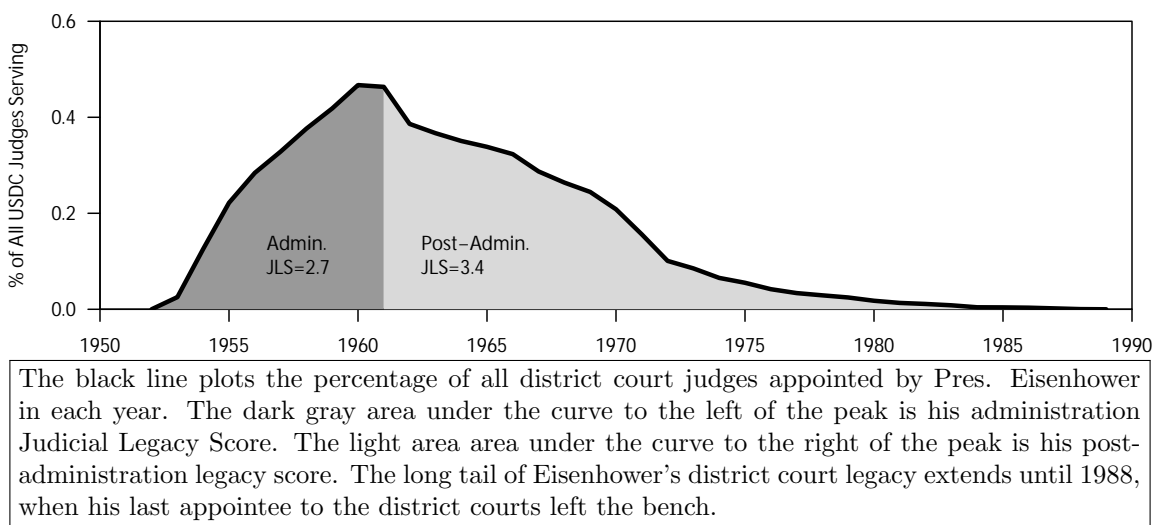
The denominator of the *JLS* measure,  $\sum_{p \in P} j_{pcy}$ , is the total number of judges serving on court  $c$  in year  $y$ . This is generally close to, but not always exactly, the number of authorized judgeships on the court. I use the total number of judges serving, rather than the number of authorized seats, because vacant seats can increase the influence of the judges serving on the court. These differences, however, are generally small, except in unusual circumstances where there are large



number of long-lasting vacancies (such as the current situation, where 16 of the 179 authorized seats on the courts of appeals and 66 of the 673 authorized seats on the district courts are vacant, and many of these vacancies have lasted for several years).<sup>5</sup>

This measure represents the area under a presidential “legacy curve” (Figure 1). This area can be divided into two parts. First, the area spanning the years of the president’s term in office represents the amount of influence the president had over the judiciary while in office. This is relevant to judicial proceedings to which the administration is a party. Second, the area covering the years after the president’s term in office represents the post-administration judicial legacy. This area is the administration’s legacy on the judiciary which impacts succeeding administrations and continues to support the appointing president’s ideology after he leaves office. It represents the change in partisan balance of the court due to the president’s appointments. This is what we think of as the conventional presidential judicial legacy (particularly for the Supreme Court). Figure 1 depicts these two components for President Eisenhower’s legacy on the U.S. district courts. The distribution peak coincides with 1961, the year when Eisenhower departed from office, and trails off with a “long tail” as his appointed judges retire.

Figure 1: Eisenhower’s District Court Legacy Curve and Judicial Legacy Scores



While this is a simple measure, it covers a variety of changes to judicial structure such that it

<sup>5</sup>“Current Vacancies in the Federal Judiciary,” <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>, May 21, 2013.

is comparable across presidents. *JLS* takes into account post-presidential changes to the structure of the judiciary. If subsequent Congresses and presidents pass legislation expanding the size of the courts, then the legacy contribution is reduced because the president’s share of the new judiciary decreases. *JLS* also reflects the diminished judicial legacy of presidents when their appointees are promoted by future presidents. Table 2 shows the presidents with the largest post-administration judicial legacies by court type (full results in the appendix). Figures 2, 3, and 4 present the judicial legacy curves for each president who appointed justices to the Supreme Court, courts of appeals, and district courts, respectively.

Table 2: Top Ten Post-Administration Judicial Legacy Scores by Court Type

Supreme Court		Courts of Appeals		District Courts	
Jackson	13.36	B. Harrison	6.88	Washington	10.48
F.D. Roosevelt	11.18	Reagan	6.71	Monroe	7.40
Reagan	10.54	F.D. Roosevelt	6.69	Jackson	6.88
Lincoln	10.39	Carter	5.66	F.D. Roosevelt	6.37
J. Adams	9.55	Clinton	5.44	Jefferson	5.90
Jefferson	7.86	Wilson	5.25	Reagan	5.57
Eisenhower	7.37	T. Roosevelt	4.83	Clinton	5.54
Washington	6.61	Eisenhower	4.41	Lincoln	5.51
Madison	6.28	L.B. Johnson	4.29	Carter	5.14
Nixon	6.20	Hoover	4.06	Grant	5.09

The Judicial Legacy Scores reveal some interesting results. First, we would expect George Washington to lead the rankings for both the Supreme Court and the district courts because he appointed 100% of the judges on each court, which were established in his first term. While Washington is first of the district courts, he is only eighth on the Supreme Court, because his nominees had relatively short tenures compared to the nominees of succeeding presidents. As shown in the top left panel of figure 2, the peak of his influence is high, but the long-tail after Washington leaves office is short. Like Washington on the district courts, Benjamin Harrison leads the rankings on the courts of appeals, which were established during his administration. The ten currently serving U.S. Circuit Court judges (including two previously appointed by Harrison) were assigned to the new courts of appeals, and Harrison appointed an additional nine judges to fill the

new court. Harrison appointed an additional judge to fill the seat of one of the original ten who died. As a result, Harrison left office after only one term having appointed twelve of the nineteen judges on the courts of appeals.

Jimmy Carter stands out on the rankings for the courts of appeals and district courts. Carter is often considered an unimportant president with respect to the courts because he is the only president to complete his term in office without appointing a Supreme Court justice.<sup>6</sup> However, Carter presided over the largest expansion of the courts in the modern era. The Omnibus Judgeship Act of 1978 created 152 new seats on the federal courts (Carp, Stidham, and Manning, 2011), 35 on the courts of appeals and 117 on the district courts. This gave Carter an unprecedented opportunity to build substantial legacies at both levels of the judiciary, as he did not have to wait for seats to open up through deaths or retirements to appoint new judges. As a result, Carter ranks fourth for influence on the courts of appeals and tenth for influence on the district courts, despite serving only one term in office.

In addition to measuring the influence and tenure of each president's appointees on the district courts, the legacy curve also shows us how each president's judges changed the partisan balance of the courts over time. If we assume that all of a president's nominees share his political party (in ideology if not in official voter registration), the legacy curve shows the effect of each president on partisan balance. For example, consider the first year after Eisenhower leaves office, where approximately 45% of the district court judges are his own appointees. If these judges were to be replaced immediately by Kennedy, his successor, the partisan balance of the court would shift by 45%. However, if Nixon had defeated Kennedy in 1960, such that Eisenhower's successor was a fellow Republican, then replacing Eisenhower's judges would not affect the partisan balance of the courts. We can think of judicial legacy as reflecting the change in partisan balance based upon the election results following the president's departure. If we assume that on average there is a 50% chance of each party winning, then a president's judicial legacy score is proportional to his actual effect on the partisan balance of the courts.

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<sup>6</sup>William Henry Harrison and Zachary Taylor both died in their first terms without appointing any Supreme Court justices. Andrew Johnson succeeded Lincoln and also did not appoint any justices because Congress decreased the size of the Supreme Court in 1866 to prevent Johnson from making any appointments.

Figure 2: Judicial Legacy Curves for the Supreme Court

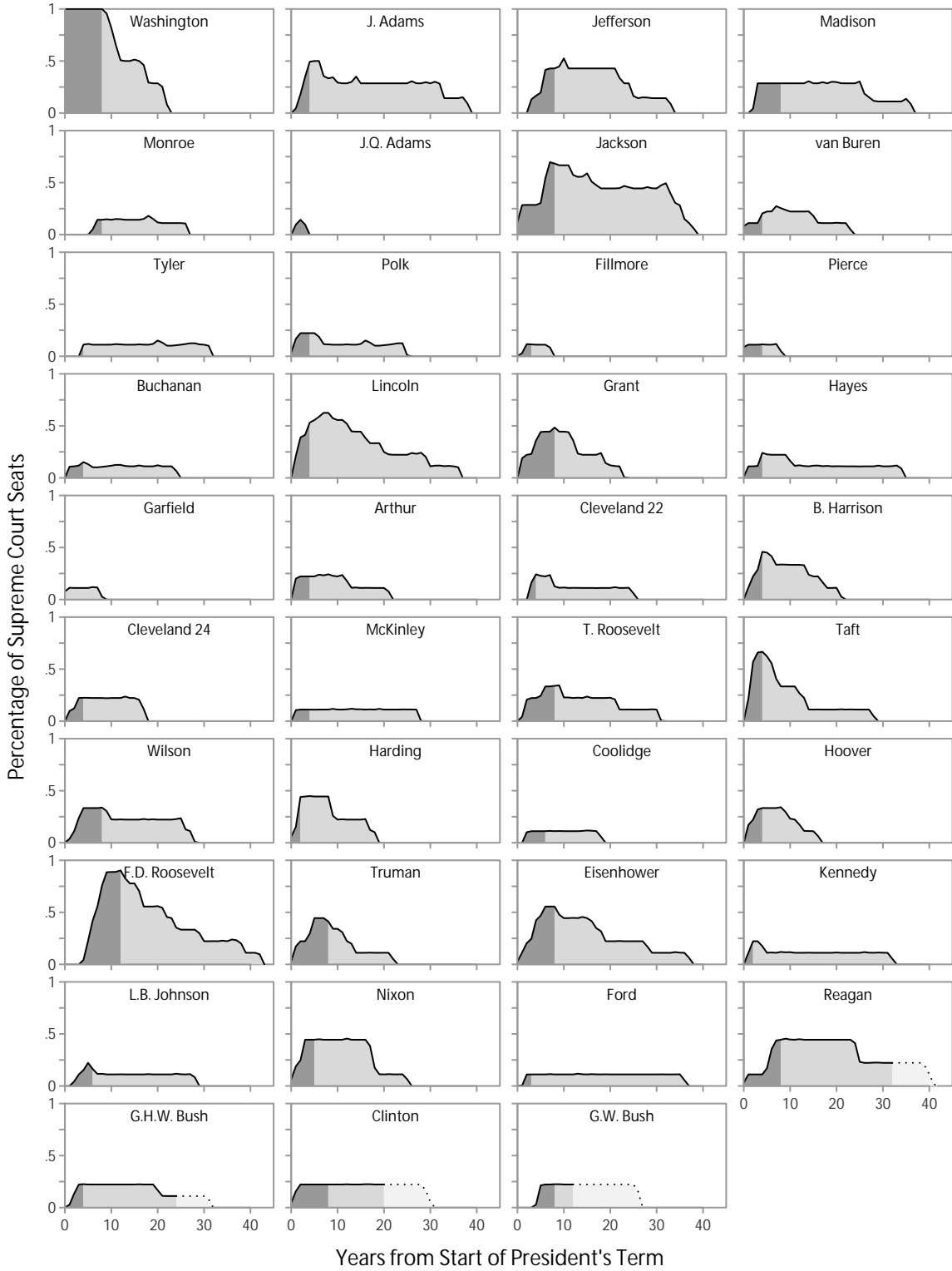


Figure 3: Judicial Legacy Curves for the Circuit Courts

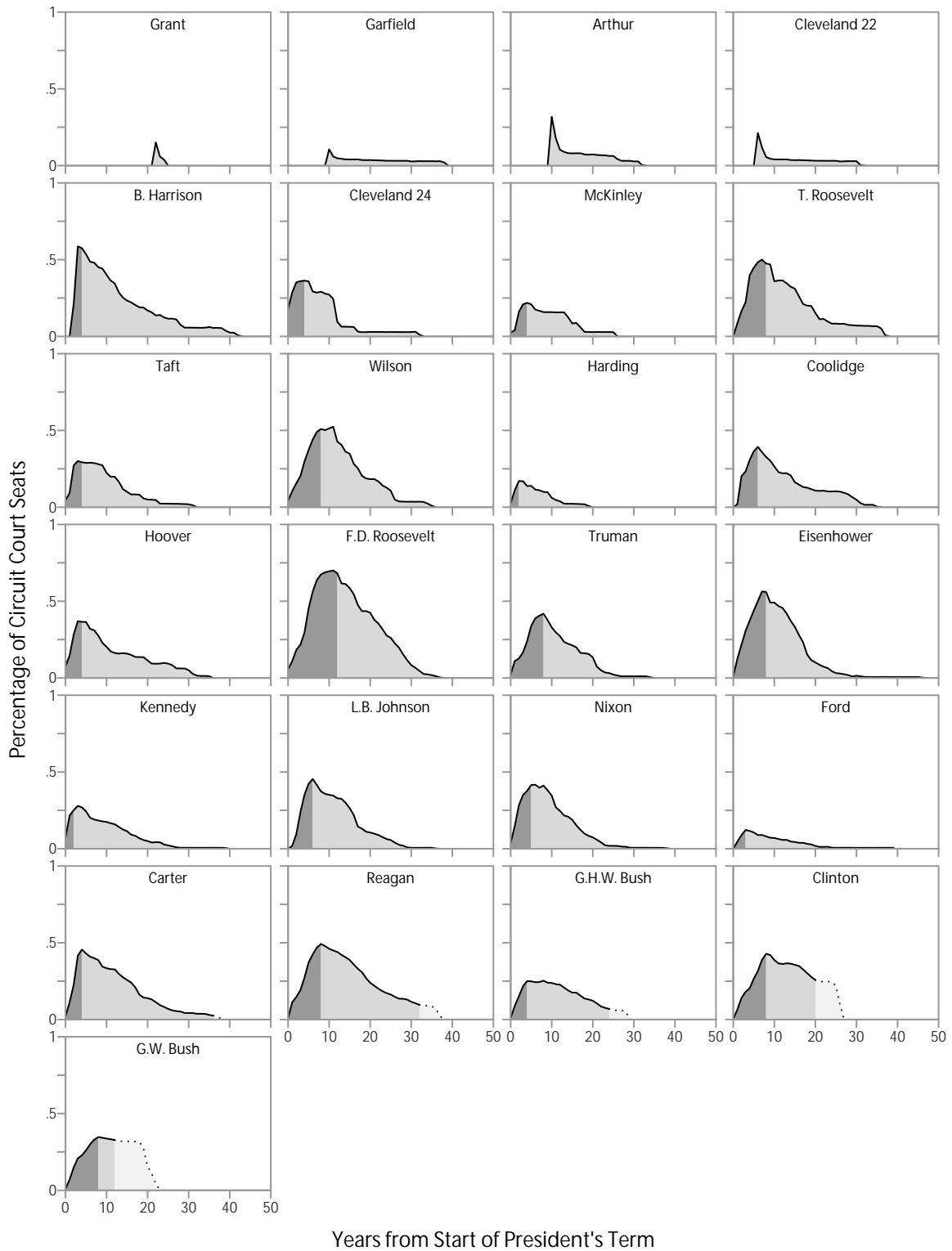
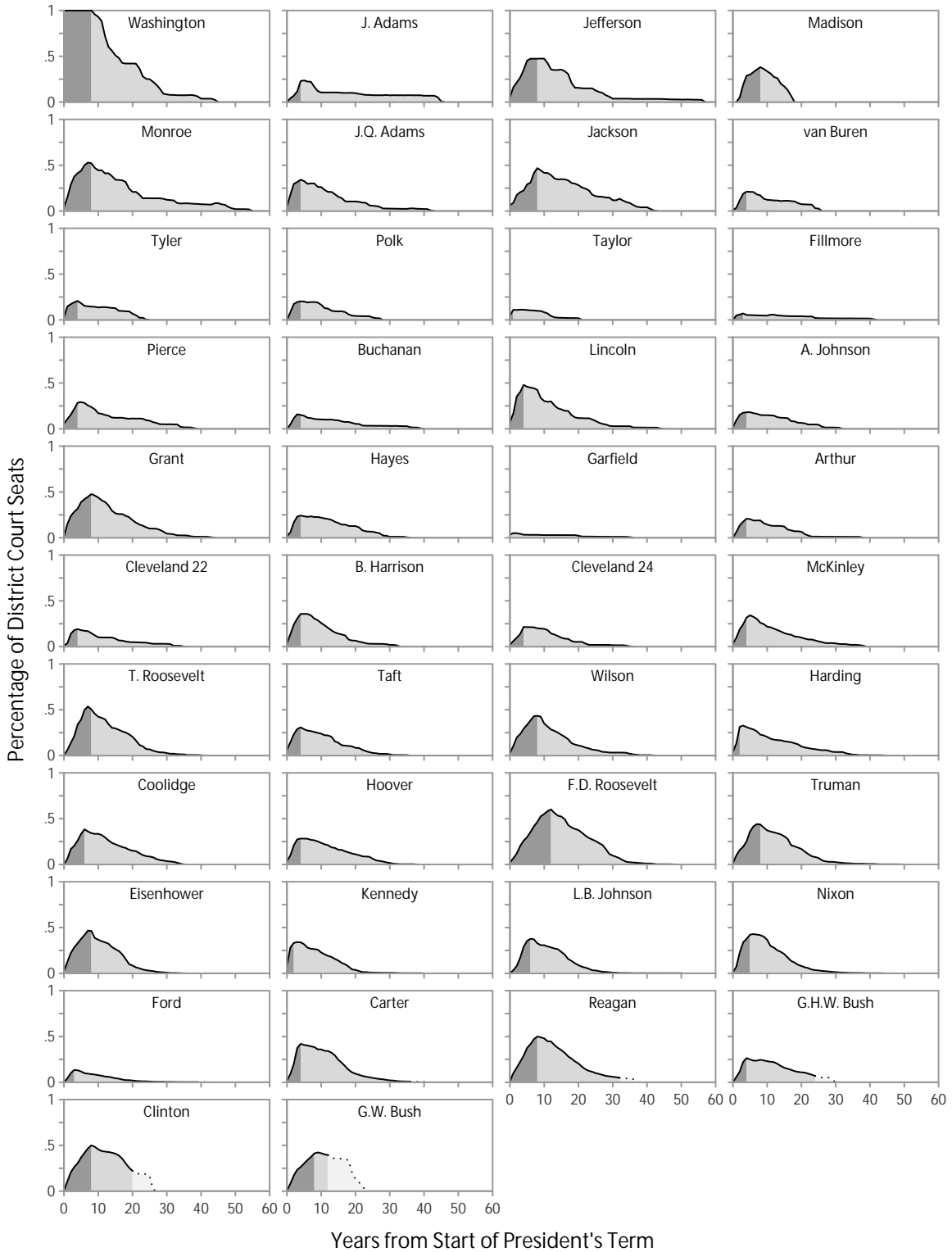


Figure 4: Judicial Legacy Curves for the District Courts



### 3.3 Data Coding and Classifying

The judiciary is a complex institution that has changed substantially over time. Consequently, measuring judicial legacy in a consistent way over time requires assumptions about how to treat different types of appointments and judicial service.

#### 3.3.1 Judicial Promotions

First, when a president appoints a sitting judge to a higher court, the promoted judge becomes a part of the promoting president's legacy. I treat this promotion of a single judge as the retirement of one judge on a lower court and the appointment of a second judge on a higher court.

District court judges are the most common source for circuit court appointments, and circuit court judge are commonly appointed to the Supreme Court. Since FDR took office in 1933, 37% of all appeals court judges previously served on a district court, and 50% of all Supreme Court judges previously served on a circuit court.<sup>7</sup> Presidential legacies of the appointing president can be altered by succeeding presidents who promote judges. When a judge appointed by President A is promoted by President B, I treat the promotion as the end of the judge's contribution to the legacy of President A and the start of the judge's contribution to President B. The logic behind this decision is that when promoting a judge, the president is choosing to make that judge part of his own legacy. By promoting a judge to a vacancy on a higher court, the president is also creating a new vacancy (which he then fills with a new appointment) on the judge's original court. The president is effectively replacing the previous president's appointment on the original court with one of his own, and filling the higher court vacancy with the judge of his choice.

The only exception to this pattern occurs when the president appoints an associate justice of the Supreme Court as chief justice.<sup>8</sup> In this case, the original appointing president's choice stays on the Supreme Court, but in a new role. However, I treat this promotion as shifting the judge's legacy contribution from the first president to the second president as well, because the promoting president is still filling an open position and creating a new position. For example,

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<sup>7</sup>Two justices, Charles Evans Whittaker and Sonia Sotomayor, served on both district and circuit courts prior to their appointments to the Supreme Court.

<sup>8</sup>Additionally, from 1893-1948, the D.C. Circuit Court had a Chief Justice appointed by the President. In 1948 this was changed to use the same chief judge selection results as the other courts of appeals.

President Nixon appointed William Rehnquist as an associate justice on the Supreme Court in 1971 and served in that role until 1986 when he was appointed Chief Justice by President Reagan. Reagan then appointed Antonin Scalia to replace Rehnquist as associate justice. By choosing to appoint Rehnquist as Chief Justice instead of any other possible nominee, Reagan receives credit for Rehnquist's future legacy contributions, as well as Scalia's contributions for appointing him to Rehnquist's old seat. Alternately, we can characterize this shift, and the resulting changes in legacy assignments, as Rehnquist resigning his associate justice position (ending his legacy for Nixon), and accepting a new position (beginning his legacy for Reagan).

### 3.3.2 Senior Status

Senior status is a semi-retirement option for federal judges over the age of 65 who have served for at least fifteen years.<sup>9</sup> Senior judges have greatly reduced workloads, and are only required to serve a minimum of approximately one quarter of a non-senior judge's caseload and responsibilities each year (though some take a larger or even full caseload).<sup>10</sup> When judges take senior status their seat on the court is considered vacant and the president can appoint a new judge to fill their seat.

In this analysis I do not consider periods of service as a senior judge as contributions towards presidential legacy. I drop senior judges because service as a senior judge is highly variable and indicates that the judge is choosing to take a step back from their full duties and influence on their court. Additionally, since the senior status option was not created until 1919, including senior judges reduces the comparability of judicial legacies across time. Prior to 1919 judges over the age of seventy could retire with a pension, and this option still exists for judges who do not choose senior status.

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<sup>9</sup>For judges over the age of 65, the required years of service decreases by one with each year. For example, a 70 year old judge only needs ten years of active service to qualify for senior status. See 28 USC § 371. Judges may also fully retire instead of taking senior status, or retire after a period of service as a senior judge.

<sup>10</sup>28 USC § 371 (e). Supreme Court justices who take senior status serve on district and circuit courts at the direction of the Chief Justice, and are referred to as retired justices instead of senior judges. Retired justices do not take part in Supreme Court cases.



### **3.3.3 Reassignments**

As the federal judiciary expanded over time with the creation of new district and circuit courts, judges were reassigned to new courts. Some early courts were also eliminated by Congress or transformed into new courts. Where judges were reassigned to new courts, I code these appointments as continuing to contribute to the legacy of the appointing president because these judges continue to serve without the influence of a new president altering their position. For example, in 1981 Congress divided the Court of Appeals for the Fifth Circuit to create a new Court of Appeals for the Eleventh Circuit. Twelve of the Fifth Circuit judges (and six senior judges) were reassigned to the new circuit. Since President Reagan did not choose these judges, but simply signed Congress' legislation creating the circuit and reassigning them, the reassigned judges continued to contribute to their appointing presidents' legacies.

### **3.3.4 Currently Serving Judges**

The final consideration for empirically measuring judicial legacies is the treatment of currently serving judges. Table 3 shows the breakdown by president and court of the 600 currently serving judges. To calculate judicial legacy scores for these eight presidents, I estimated the tenure for each currently serving judge based on the average tenure of judges who had completed their service on the same court and who had served at least as long as the currently serving judge. Appendix A explains this estimation process in more detail and presents forecasted tenure results.

## **3.4 Components of Judicial Legacy**

Judicial legacy is based on the number of appointments that a president makes and the tenure of his appointees. What are the key elements of these two factors? Appointments are driven by retirements and deaths, promoting judges to higher courts, increasing the size of the courts, and "inheriting" vacancies from a predecessor. Tenure is also based on rates of retirements or death, promotions, and possibly other factors such as the age of the judge when appointed.

Table 3: Currently Serving Judges By President\*

President	USSC	USCA	USDC
L.B. Johnson (1963-1969)			1
Ford (1974-1977)		1	1
Carter (1977-1981)		2	4
Reagan (1981-1989)	2	15	27
G.H.W. Bush (1989-1993)	1	10	34
Clinton (1993-2001)	2	41	124
G.W. Bush (2001-2009)	2	53	234
Obama (2009-2017)	2	42	172
Total	9	164	597

\*Currently serving as of January 1, 2013.

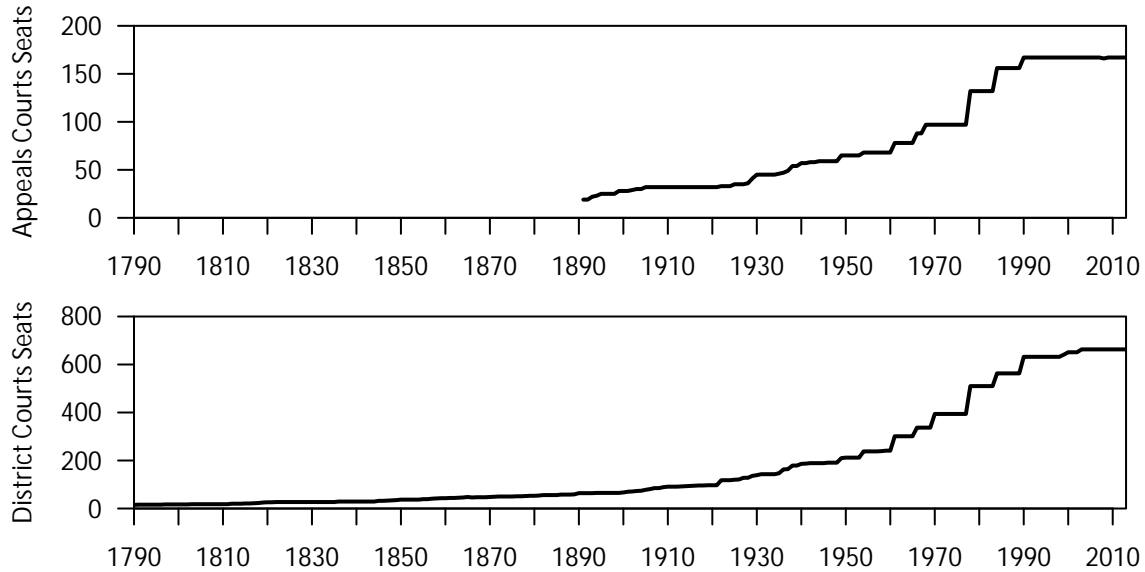
### 3.4.1 Number of Appointments

The number of judges a president is able to appoint is a key factor of his judicial legacy. The more judges a president appoints to a given court, the greater his potential legacy. Presidents do not have equal opportunities to establish judicial legacies. For example, Jimmy Carter did not have a single Supreme Court vacancy during his term. Yoon (2006) shows that different pension systems established by Congress over time affect retirement rates and therefore openings for new presidents to fill. Judges also may make retirement decisions based on presidential election results, and are more likely to retire when a co-partisan wins the presidency (Barrow and Zuk, 1990).

However, the number of judges that a president appoints is not simply a function of the retirements and deaths of sitting judges. While replacing sitting judges is a major source of appointments, expansions of the courts gives presidents additional opportunities to appoint judges. The number of judges on the district and appeals courts has increased substantially over time (the Supreme Court has not changed size since 1869, but varied somewhat in prior years). Congress has the power to change the size of the courts, and frequently does so. Congress generally increases the size of courts, but has also decreased the size of courts or eliminated courts when restructuring the judiciary. When the size of the judiciary increases, the sitting president is able to appoint

judges to these new seats. Court expansions are driven by increases in caseloads as well as partisan considerations. Congress is especially likely to create new seats on the courts when a new president is sworn into office and there is united government (de Figueiredo and Tiller, 1996; de Figueiredo et al., 2000). Figure 5 illustrates the expansion of the appeals and district courts.

Figure 5: Number of Authorized Judgeships by Court



An additional source of appointments comes from vacant seats left unfilled by the president’s immediate predecessor. These seats are a “bonus” towards judicial legacy. The new president is able to fill these seats only because his predecessor was unable to do so. For example, President Nixon started his term with a vacancy for Chief Justice of the Supreme Court due to Chief Justice Warren’s resignation in June of 1968 and President Johnson’s subsequent failure to fill the seat. Johnson appointed Associate Justice Abe Fortas to succeed Warren, but his nomination was filibustered in the Senate and Fortas withdrew his nomination. As a result, Nixon appointed Warren Burger as Chief Justice, and Burger went on to serve for over 17 years. Burger alone contributed 24% of Nixon’s total legacy and 21% of his post-presidency legacy in the Supreme Court. Had Johnson successfully filled the seat, Nixon’s legacy in the Supreme Court would have been greatly diminished and Johnson’s legacy greatly enhanced. One interesting note about these “bonus” appointees is that since the vacancy exists at the start of the president’s term, they are generally filled first. As

a result, a judge filling one of these vacancies serves might serve for a shorter period of time after the appointing president leaves office than a comparable judge appointed later in the president’s term. Thus, the average “bonus” appointees provide high value to the President’s administration legacy, but relatively less to the post-administration legacy than judges appointed later. Finally, leaving an open seat vacant at the end of a president’s term is a large missed opportunity for the president in building his judicial legacy. On average, we would expect judges appointed at the end of a president’s term to serve longer than those appointed earlier in the term, and as a result their contributions to the president’s post-administration legacy are larger.

Presidents can also boost their judicial legacies by promoting lower-level judges to higher court vacancies. This allows the president to not only fill the higher court seat with a judge of his choosing, but to fill the lower court seat as well. As a result, two seats filled with previous presidents’ appointees are replaced with the appointing president’s choices. Promoting judges in this way creates new vacancies and therefore new opportunities to build a substantial judicial legacy.

Table 4: Judicial Promotions to Higher Courts, 1933-2013

Court	Total Appointments	Total Promotions	Promoted By Same Pres.	Promoted By Diff. Pres.
USSC	38	19	8	11
USCA	601	222	65	157

All Supreme Court promotions are from the courts of appeals, all courts of appeals promotions are from the district courts. Excludes promotion of Justice to Chief Justice.

A second mechanism through which promoting judges enhances a president’s legacy is the practice of appointing some judges to lower level courts at the start of a presidency with the intention of promoting them to higher courts later on as vacancies arise. Early judges at the lower levels can serve as a “farm team,” gaining experience in preparation for future promotions. For example, George W. Bush appointed John Roberts to the D.C. Circuit Court of Appeals in 2003, and promoted him to the Supreme Court in 2005. President Reagan appointed Scalia to the D.C. Circuit in 1982, and promoted him to the Supreme Court in 1986. This practice increases judicial legacy by grooming confirmable candidates for the higher courts and by creating new vacancies

when the lower court judges are promoted.

### 3.4.2 Lengths of Tenure

The second essential component of judicial legacy is the tenure of each appointed judge. A president can fill a court with his appointees, but his legacy will be limited if those appointees leave their seats relatively quickly. For example, President Washington filled the entire Supreme Court (then only six members). This should ensure him a substantial legacy on the Supreme Court. However, the six justices then serving on the court when Washington left the presidency in 1797 served an average of only 7.7 additional years. As a result, despite appointing the entire court, Washington ranks only eighth in judicial legacy for the Supreme Court. In contrast, John Adams appointed only three justices to the court. These three justices averaged 22.2 years of service after Adams left the presidency, resulting in a much greater judicial legacy than Washington.

Given that judgeships are generally lifetime appointments, we should expect the main predictors of tenure to be the age of the judge when appointed, retirement options, and the likelihood of getting promoted to a higher court. Judicial tenure is surprisingly stable over time, and any change in tenure appears correlated with the relatively recent practice of appointing younger judges (Goldman, Schiavoni, and Slotnick, 2009; Yoon, 2003). Additionally, federal judges are more prestigious positions today than they were in the early years of the country, when judges often resigned to run for office or return to private practice. On a few occasions in the early 1800s, presidents nominated someone to the Supreme Court only to have their nominee decline the nomination. As a result, when we examine judicial tenure, especially from Roosevelt on, the time trend is relatively flat and changes are driven by the age of the judge when appointed.

Overall, judicial retirement decisions are generally based on pension systems and age rather than political factors (Yoon, 2003, 2005, 2006). Posner (1993) suggests that the judicial pension system provides a strong incentive to retire once vested, but that judges may not take their pensions upon vesting for other reasons. Presidents therefore have relatively little control over the tenure of their judges, especially those on district or appeals courts where retirement or taking senior status are attractive options once they are eligible. Furthermore, when the number of judges is small, luck

plays a large role in judicial tenure, as illness or death may reduce a judge's time on the bench. Presidents can attempt to reduce the luck factor by appointing younger judges, which increases the number of years the judges will serve before becoming eligible for senior status, and reduces the likelihood of death or illness early in the judges' tenures.

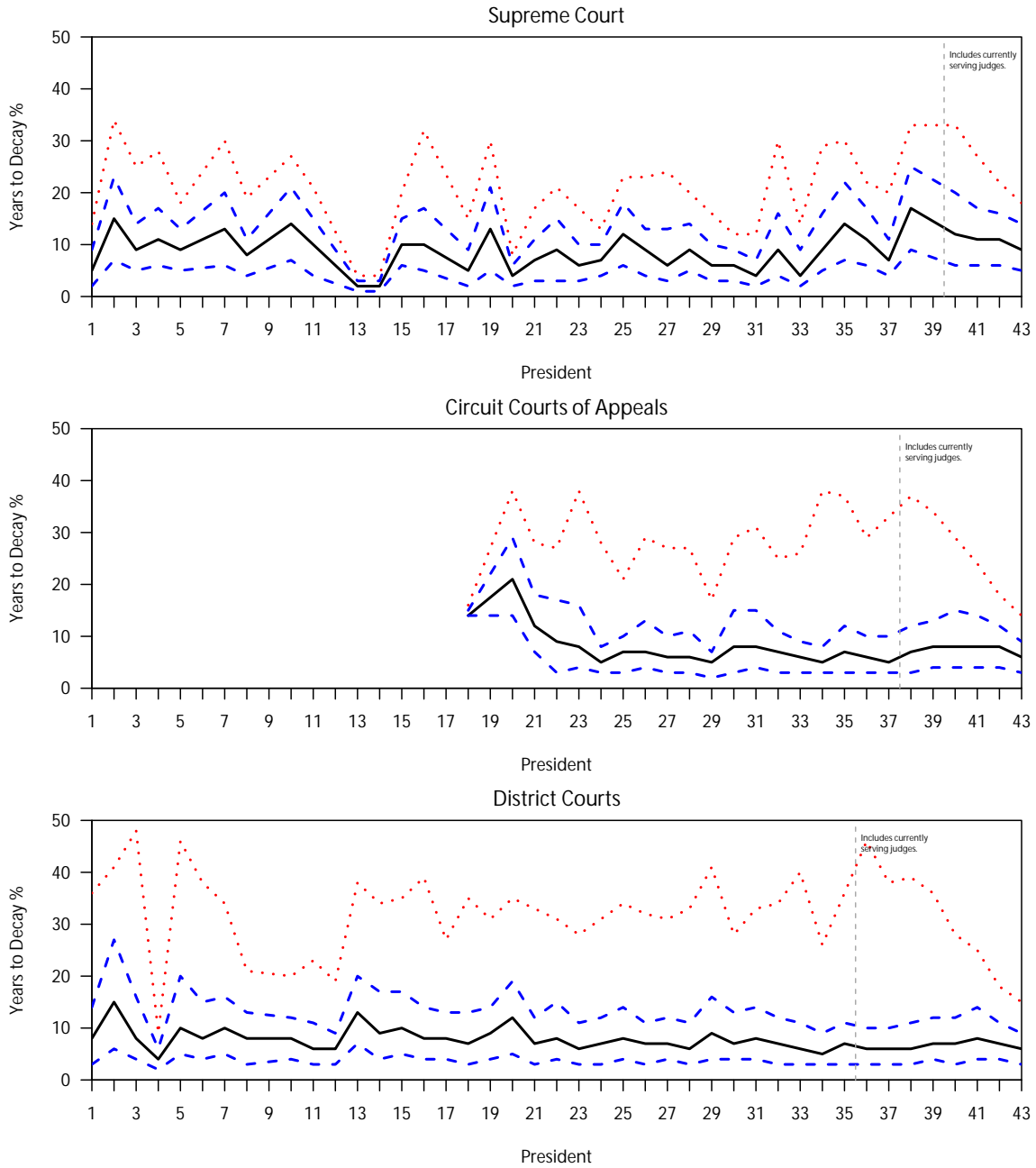
### 3.5 Legacy Duration and Decay

So far we have focused on the magnitude of judicial legacies — which factors increase or decrease the total post-administration legacy? However, the duration and rate of decay of the president's influence is equally important. Presidential influence over the judiciary is highest when the president leaves office. While in office, each vacancy or creation of a new seat serves to potentially increase the president's influence because it gives him another opportunity to appoint a judge. At the moment when he leaves office and his successor is sworn in, retirements, deaths, and promotions start to take their toll and diminish presidential influence.

The rate of presidential influence decay is an important metric for assessing the president's long-term legacy. To measure this, we can look at legacy half-lives — the number of years it takes for half of a president's post-administration legacy to be consumed. This is different from the number of years before half of a president's appointees leave their seats, or the number of years for a president's percentage of the judiciary to be reduced by half. These other measures do not fully capture the interactions between the number of appointments a president makes, the individual tenure of each judge appointed, and changes in the size of the courts after the president leaves office. As illustrated in the legacy curves in figures 3 and 4, presidential influence decreases at a roughly linear rate for most of the curve, and then becomes a "long tail" when the influence gets very small due to a small number of judges who stay on the bench for a long time. To measure the rates of decay and compare them across presidents, I calculate the number of years that it takes for  $p\%$  of each president's total legacy to be expended. Table 5 gives the minimum, mean, and maximum years for decay of 25%, 50%, 75%, and 100% (the departure of the last judge) for each court. Figure 6 graphs these percentiles for each president.

The results of these calculations reveal two important results. First, the half-lives of presidential

Figure 6: Decay Percentiles by Court and President



The solid line shows the years to 50% decay of the president's legacy. The dashed lines show the years for 25% (lower) and 75% decay. The dotted line shows the years to 100% decay.

Table 5: Decay Rates in Years Using JLS For All Presidents

Decay Percentile	Supreme Court			Circuit Courts			District Courts		
	min.	mean	max.	min.	mean	max.	min.	mean	max.
25	1	4.39	9	2	4.28	14	2	3.71	7
50	2	8.82	17	5	7.88	21	4	7.74	15
75	3	13.95	25	7	12.76	29	6	13.31	27
100	4	21.18	34	14	28.00	38	9	32.02	48

Each decay percentile corresponds to the number of years for p% of a president's judicial legacy to be expended. This is a function of the judicial legacy density curve, not the number of years for the influence in a given year to be half of the maximum level. Results include tenure projections for currently serving judges.

legacies are relatively short. Within two terms of a president's departure from office, on average half of his influence over the judiciary has been expended. Within roughly three to four terms, three quarters of his legacy on each court is expended. While the average years for the last judge to leave office (100%) is high, and has been as long as 48 years on the district courts, this represents a very small fraction of all judges and a similarly small share of presidential legacy.

Second, figure 6 shows that these rates are relatively constant (but noisy) over time. Despite recent attention to the appointment of younger judges and other concerns that might appear to reduce judicial turnover, presidential influence follows essentially the same pattern today as it did 200 year ago. Table 6 shows the simple OLS regression of half-life years on the year that each president left office. The first three models include all presidents. There is no significant relationship between the legacy half-life and time for the Supreme Court. The coefficients for the appeals and district court legacies are statistically significant and negative. This is due to the introduction of senior status in 1919, which gives incentives to judges to retire earlier than they did in the past. When the sample is restricted to presidents leaving office after 1919, this significance vanishes. Limiting the sample to the post-1919 period results in a weakly significant coefficient on Supreme Court half-lives. This is driven by a few long-tenured justices and the equal weighting of each president in the regression. For example, President Ford only appointed one justice, John Paul Stevens, to the Supreme Court, but Justice Stevens sat on the court for almost 35 years. As



a result, Ford’s legacy half-life on the Supreme Court is 17 years, and this is weighted equally to Truman’s legacy half life of seven years, even though Truman appointed four justices to Ford’s one.

Table 6: OLS of Half-Life on Presidential End Year

	(1)	(2)	(3)	(4)	(5)	(6)
	USSC	USCA	USDC	USSC	USCA	USDC
Pres. End Year	0.00612 (0.00986)	-0.0373** (0.0155)	-0.0151*** (0.00486)	0.0652** (0.0300)	0.00972 (0.0110)	-0.00839 (0.00932)
Constant	-2.815 (18.76)	80.19** (29.98)	36.43*** (9.240)	-118.7* (58.91)	-12.34 (21.69)	23.23 (18.31)
Observations	38	25	42	15	16	16
Years	All	All	All	1919+	1919+	1919+
R-squared	0.011	0.202	0.194	0.267	0.052	0.055

Standard errors in parentheses

\*\*\*  $p < 0.01$ , \*\*  $p < 0.05$ , \*  $p < 0.1$

The half-life analysis shows that presidential influence over the courts diminishes by half roughly eight years after the president leaves office, and that this rate of decay has not changed significantly over time. While presidents may appoint a large fraction of the judiciary, the combination of retirements, promotions, and expansions of the courts lead legacies to decay relatively quickly.

## 4 Conclusion

Our concerns about the democratic nature of a judiciary with judges that serve for life are based on the assumption that these judges serve for decades, making decisions long after the democratic government that appointed and confirmed them to office is out of power. This paper shows that this concern is generally overblown, and it is only a small share of judges who serve for decades after their appointing president leaves office. On average, half of a president’s influence over the courts is expended in roughly the first eight to nine years after he leaves office. This is a long time in *presidential time*, which is measured in four or eight years and is extremely constrained by the many objectives presidents face in office (Neustadt, 1990; Linz, 1998). For presidents, the ability

to exert some level of significant influence through their judicial appointees for an additional eight years is a significantly long time. However, compared to our concerns that this influence lasts for decades, eight years of significant influence preceding a long tail of limited influence does not seem like such a long time.

Furthermore, this paper highlights the critical mechanisms that help limit post-presidential influence on the courts. Periodic expansions of the courts reduce the influence of the current judges and create new opportunities for new presidents (and Senates) to change the composition of the courts. Retirement and pension systems also encourage turnover the reduce post-administration influence. Finally, the practice of promoting judges to higher courts creates new openings on the lower courts while simultaneously ensuring that the promoted judge is generally in line with the current political climate by making him or her go through another confirmation process.

These three mechanisms work primarily on the appeals and district courts, but not on the Supreme Court (with the exception of promoting an associate justice to Chief Justice). Since FDR's failed court-packing plan, no president or Congress has attempted to enlarge the Supreme Court, despite it's steadily increasing caseload. Supreme Court justices are also more likely to serve until death or retirement relatively late in their lives, rather than retire or take senior status once eligible. The rates of legacy decay on the Supreme Court are generally in line with the other courts, possibly because Supreme Court justices are usually older when appointed than judges on the other courts. However, the inability to expand the supreme court and the fact that judges only leave due to death or retirement means that turnover is lower and the influence of a single judge stays constant while they are on the court. As a result, the Supreme Court may be a larger problem for a democratic judiciary than the lower courts.

The ability to measure the magnitude of judicial legacies may help us reevaluate the influence of specific presidents on the judiciary. Washington's influence on the Supreme Court is surprisingly low given that he filled the entire court, while Jackson's influence is much higher than expected. FDR is expectedly high-ranked at all three levels of the court due to his nearly 13 years as president. It is also interesting that some presidents are very influential at some levels of the judiciary but not others. Both Eisenhower and Bush 41 left large legacies on the Supreme Court and the appeals

courts, but relatively small legacies on the district courts. Carter had no legacy on the Supreme Court, but very large legacies on the other courts. In addition, these measurements of judicial legacy provide a framework for predicting judicial legacy for recent and current presidents and forecasting their longterm impact. Finally, this approach will be useful used for future research on presidential appointments, judicial politics, and the long-term decay of political influence.

## A Predicting Tenure for Currently Serving Judges

Evaluating judicial legacy based on judicial tenure requires that the complete tenure of each judge in the sample is known. However, 600 judges or justices appointed by eight former presidents continue to serve in the federal courts. The complete tenure of these judges is therefore unknown, and as a result I cannot calculate the exact judicial legacy score of each of these eight presidents. To avoid dropping these presidents from the sample, I estimated the tenure of each currently serving judge based on the tenures of previous judges and conditional on the amount of time that each current judge had already served. I restricted the sample of judges used to predict tenure to those appointed by Roosevelt and succeeding presidents. This restriction makes little difference to the predictions, but reflects that judgeships in the modern era are a more prestigious and desired career than in earlier years and judges tend to hold their seats longer than judges in earlier periods. I also exclude judges who were appointed as recess appointments but never confirmed by the Senate.

For each current judge, I estimated tenure as follows:

$$T_{jc} = y + \tau_{jcy}$$

where  $T_{jc}$  is the total tenure of judge  $j$  on court type  $c$ ,  $y$  is the number of years judge  $j$  has already served on court  $c$  as of January 1, 2013, and  $\tau_{jcy}$  is the estimated future tenure of judge  $j$  on court  $c$  conditional on  $y$ .

$$\tau_{jcy} = \text{mean}(\{Y_{ic} - y | i \in c \text{ and } d_i == 1 \text{ and } Y_{ic} \geq y\})$$

where  $Y_{ic}$  is the number of years judge  $i$  served on court  $c$ ,  $y$  is the number of years currently serving judge  $j$  has already served, and  $d_i == 1$  indicates that judge  $i$  has completed his or her judicial tenure. Predicted future tenure is simply the conditional mean of additional tenure for all judges who served at least as long as judge  $j$  on court  $c$ .

These predictions are necessary to determine judicial legacy for these eight presidents. However, the predictions have negligible effects on the scores of the first four presidents in table 3, as most

of their judges have already retired. The results are increasingly significant for the other four presidents, as a significant share of each president’s appointees remain in their positions.

Table 7 shows the average number of years after 2013 that the currently serving judges on each court are predicted to serve. Note that the predictions are not strictly increasing with more recent presidents. This is because predictions are based on the number of years already served, and the predicted years are not decreasing with number of years already served for all ranges. For example, judges who have served 20 years might be predicted to served another three years. But judges who have served for 25 years might be predicted to serve six more years. This is because many judges in the 20-25 years of service interval retire or take senior status. However, judges who do not take senior status after 25 years may be more likely to delay senior status for even longer, or serve until their deaths, even though they qualify for senior status.

Table 7: Average Current and Predicted Years for Currently Serving Judges

President	USSC		USCA		USDC	
	Current	Predicted	Current	Predicted	Current	Predicted
L.B. Johnson					46.2	4.0
Ford			37.1	1.8	36.3	4.0
Carter			32.7	2.9	33.9	5.2
Reagan	25.6	8.5	28.0	5.0	26.9	4.9
G.H.W. Bush	21.2	7.7	21.5	4.9	21.4	5.5
Clinton	18.9	10.0	15.3	6.3	15.7	6.0
G.W. Bush	7.1	14.7	8.2	8.8	8.3	8.4

## A.1 Predicting Court Sizes

A second consideration when predicting judicial legacies is the potential for future increases in court sizes. While it is safe to assume that the Supreme Court will remain at nine seats, it is likely that the number of seats on the other courts will increase over the next thirty years.

I predict court sizes for the Circuit Courts and the district courts using an OLS regression of the size of the court on year using data from the last thirty years (1984-2013). In this period the

rate of increase appears relatively constant compared to the volatility of earlier periods. Table 8 shows the OLS model results used to predict court sizes from 2014 through 2029. Table 9 provides these estimates for select years.

Table 8: OLS of Court Size on Year for Predicting Future Court Sizes, 1984-2013

	USCA	USDC
year	0.437*** (0.0967)	4.168*** (0.498)
Constant	-715.3*** (193.2)	-7,744*** (996.1)
Observations	30	30
R-squared	0.422	0.714

Standard errors in parentheses

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Table 9: Estimated Number of Appointed Judges

Year	USCA	USDC
1980	124	469
1985	147	505
1990	155	536
1995	165	598
2000	156	607
2005	166	644
2010	161*	592*
2015	166	653
2020	168	674
2025	170	695
2030	173	716

\* There are fewer judges in 2010 than in 2005 because of a large number of vacancies: 21 on the Court of Appeals and 87 on the district courts.

Table 10: Post-Administration Judicial Legacy Scores by Court Type

Supreme Court		Circuit Courts		District Courts	
Jackson	13.36	B. Harrison	6.88	Washington	10.48
F.D. Roosevelt	11.18	Reagan	6.71	Monroe	7.40
Reagan	10.54	F.D. Roosevelt	6.69	Jackson	6.88
Lincoln	10.39	Carter	5.66	F.D. Roosevelt	6.37
J. Adams	9.55	Clinton	5.44	Jefferson	5.90
Jefferson	7.86	Wilson	5.25	Reagan	5.57
Eisenhower	7.37	T. Roosevelt	4.83	Clinton	5.54
Washington	6.61	Eisenhower	4.41	Lincoln	5.51
Madison	6.28	L.B. Johnson	4.29	Carter	5.14
Nixon	6.20	Hoover	4.06	Grant	5.09
Taft	5.02	Coolidge	3.91	T. Roosevelt	4.68
Harding	4.72	Nixon	3.88	Coolidge	4.49
G.H.W. Bush	4.69	G.W. Bush	3.83	Harding	4.43
Clinton	4.67	G.H.W. Bush	3.79	Nixon	4.30
B. Harrison	4.41	Truman	3.07	Truman	4.28
Wilson	4.14	Taft	3.06	G.W. Bush	4.24
T. Roosevelt	4.04	Kennedy	3.05	J.Q. Adams	4.15
Hayes	3.98	Cleveland 24	2.81	McKinley	3.92
G.W. Bush	3.94	McKinley	2.08	J. Adams	3.89
Ford	3.63	Arthur	1.75	Hoover	3.81
Grant	3.55	Ford	1.19	Pierce	3.75
Kennedy	3.49	Harding	1.15	L.B. Johnson	3.73
van Buren	3.34	Cleveland 22	1.14	Kennedy	3.66
Tyler	3.09	Garfield	1.07	B. Harrison	3.65
Cleveland 24	2.78	Grant	0.25	Wilson	3.64
Arthur	2.77	Washington	0.00	G.H.W. Bush	3.63
Hoover	2.67	J. Adams	0.00	Hayes	3.59
Cleveland 22	2.66	Jefferson	0.00	Eisenhower	3.43
McKinley	2.59	Madison	0.00	Taft	3.40
Polk	2.51	Monroe	0.00	Cleveland 24	2.53
L.B. Johnson	2.44	J.Q. Adams	0.00	A. Johnson	2.37
Monroe	2.43	Jackson	0.00	van Buren	2.35
Truman	2.36	van Buren	0.00	Arthur	2.31
Buchanan	2.23	Tyler	0.00	Polk	2.23
Coolidge	1.30	Polk	0.00	Tyler	2.14
Garfield	0.82	Taylor	0.00	Madison	2.11
Fillmore	0.42	Fillmore	0.00	Cleveland 22	2.10
Pierce	0.39	Pierce	0.00	Buchanan	2.09
J.Q. Adams	0.00	Buchanan	0.00	Taylor	1.22
Taylor	0.00	Lincoln	0.00	Ford	1.22
A. Johnson	0.00	A. Johnson	0.00	Fillmore	1.22
Carter	0.00	Hayes	0.00	Garfield	0.80



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