



Nominations to U.S. Circuit and District Courts by President Obama During the 111th and 112th Congresses

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Summary

Recent Senate debates in the 112th Congress over judicial nominations have focused on issues such as the relative degree of success of President Barack Obama's nominees in gaining Senate confirmation (compared with other recent Presidents) as well as the effect of delayed judicial appointments on judicial vacancy levels. The following report addresses these issues, and others, by providing a statistical overview of President Obama's nominees to U.S. circuit court of appeals and U.S. district court judgeships, current through May 31, 2012. Findings include the following:

- President Obama thus far in his presidency has nominated 41 persons to U.S. circuit court judgeships, 29 of whom have been confirmed.
- Of the 150 persons nominated thus far by President Obama to U.S. district court judgeships, 117 have been confirmed.
- The greatest number of President Obama's circuit court nominees have been confirmed to the U.S. Court of Appeals for the Fourth Circuit (6) and the Second Circuit (5).
- The greatest number of President Obama's district court nominees have been confirmed to judgeships located within the Ninth Circuit (22) and the fewest to district court judgeships within the First Circuit (3).
- District court vacancies have grown in number over the course of the Obama presidency, from 42 judgeships vacant when President Obama took office to 59 at present. There currently are 13 circuit court vacancies (the same number as when President Obama took office).
- During the Obama presidency thus far, fewer circuit court nominees have been confirmed by the Senate than were confirmed during the first terms of any of the four preceding Presidents (Reagan through G.W. Bush).
- Likewise, fewer Obama district court nominees have been confirmed by the Senate than were confirmed during the first terms of the four preceding Presidents.
- President Obama is the only one of the three most recent Presidents to have begun his fourth year in office with more circuit and district court judgeships vacant than when he took office.
- During the Obama presidency, the average waiting time from nomination to committee hearing has been, thus far, 69.6 days for circuit court nominees and 83.2 days for district court nominees.
- During the Obama presidency, the average waiting time from Senate Judiciary Committee report to Senate confirmation has been 139.7 days for circuit court nominees and 105.1 days for district court nominees.

Various factors might help explain differences or variation found in judicial appointment statistics across recent presidencies.

- A President's opportunities to make circuit and district court appointments will be affected by the number of judicial vacancies existing at the time he takes

office, as well as by how many judges depart office, and how many new judgeships are statutorily created, during his presidency.

- The time taken by a President to select nominees for judicial vacancies may be affected by whether the selection of lower court nominees must compete with filling a Supreme Court vacancy, whether the selection process itself is a priority for a President, the level of consultation between a President and a nominee's home state Senators, and the time taken by home state Senators to make judicial candidate recommendations.
- Institutional and political factors which may influence the processing of judicial nominations by the Senate include ideological differences between the President and the opposition party in the Senate, the extent of interest group opposition to certain nominees, the presence or absence of "divided government," the point in a congressional session when nominations arrive in the Senate, whether nominees have the support of both of their home state Senators, and whether the blue slip policy of the Senate Judiciary Committee requires the support of both home state Senators before a nominee can receive a hearing or committee vote.

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Introduction

The process by which lower federal court judges are nominated by the President and confirmed by the Senate has, in recent decades, been of continuing interest to Congress. During Senate debates in the 112th Congress over judicial nominations, differing perspectives have been expressed about the relative degree of success of a President's nominees in gaining Senate confirmation, compared with nominees of other recent Presidents.¹ Senate debate often has concerned whether a President's judicial nominees, relative to the nominees of other recent Presidents, encountered more difficulty or had to wait longer, before receiving consideration by the Senate Judiciary Committee or up-or-down votes on confirmation.² Of related concern to Congress have been increases in recent years in the number and percentage of vacant judgeships in the federal judiciary and the effect of delayed judicial appointments on judicial vacancy levels.³

This report seeks to inform the current debate in three ways: first, by providing a statistical overview of President Obama's nominees thus far to U.S. circuit court of appeals and U.S. district court judgeships, and of any actions taken on their nominations by the Senate Judiciary Committee and the full Senate; second, by using various statistical measures to compare the success to date of President Barack Obama's judicial nominees in advancing through the Senate confirmation process with the success of the judicial nominees of the four most recent preceding Presidents (Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush); and third, by identifying various factors which might help explain differences or variations found in judicial appointment statistics across the five presidencies.

Most of the statistics presented and discussed below were generated from an internal CRS judicial nominations database. Other data sources, however, are noted where appropriate. The statistics account only for nominations made by Presidents Reagan through Obama to U.S. circuit court and U.S. district court judgeships established by Congress under Article III of the Constitution.⁴

¹ See, for example, Sen. Patrick J. Leahy, "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, February 7, 2012, p. S362-S363, in which Senator Leahy stated:

Three years into President Obama's first term, the Senate has confirmed a lower percentage of President Obama's judicial nominees than those of any President in the last 35 years. The Senate has confirmed just over 70 percent of President Obama's circuit and district nominees, with more than one in four not confirmed.

See also Sen. Chuck Grassley, "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, April 16, 2012, pp. S2311-S2312, in which Senator Grassley stated:

This year we have been in session for about 37 days, including today. During that time we will have confirmed 15 judges. That is an average of better than one confirmation for every 2 ½ days we have been in session. With the confirmation today, the Senate will have confirmed nearly 75 percent of President Obama's [A]rticle III judicial nominations.

² See, for example, contrasting views on these and related issues in floor remarks of Senators Leahy and Grassley in "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, May 7, 2012, pp. S2907-2908 (Leahy) and pp. S2909-2910 (Grassley); and in "Nomination of George Levi Russell III, To Be United States District Judge for the District of Maryland," Remarks in the Senate, *Congressional Record*, daily edition, May 14, 2012, pp. S3117-3119 (Leahy) and pp. S3120-3121 (Grassley).

³ See CRS Report R41942, *Vacancies on Article III District and Circuit Courts, 1977-2011: Data, Causes, and Implications*, by (name redacted).

⁴ Statistics in this report for district court nominations do not include the relatively rare nominations made by the President to territorial district court judgeships, which were established by Congress pursuant to its authority to govern the territories under Article IV of the Constitution.

On March 12, 2012, an agreement was reached by Senate Majority Leader Harry Reid and Senate Republican Leader Mitch McConnell identifying 14 lower court nominations that would receive up-or-down Senate confirmation votes by May 7, 2012. The statistics provided in this report include Senate confirmation of the 14 nominees subject to the March 12, 2012, agreement between the two Senate leaders, the confirmation of two additional district court nominees on May 14, 2012, and the confirmation of Paul J. Watford to the Ninth Circuit Court of Appeals on May 21, 2012.⁵

Article III Lower Courts

Article III, Section I of the Constitution provides, in part, that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” It further provides that justices on the Supreme Court and judges on lower courts established by Congress under Article III have what effectively has come to mean life tenure, holding office “during good Behaviour.”⁶ Along with the Supreme Court, the courts that constitute the Article III courts in the federal system are the U.S. circuit courts of appeals, the U.S. district courts, and the U.S. Court of International Trade.

As mentioned above, this report focuses on nominations made by President Obama and other recent Presidents to the U.S. circuit courts of appeals and the U.S. district courts. Outside the report’s scope are the occasional nominations that these Presidents made to the nine-member Court of International Trade or to the territorial district courts.⁷

U.S. Courts of Appeals

These courts take appeals from federal district court decisions and are also empowered to review the decisions of many administrative agencies. Cases presented to the courts of appeals are generally considered by judges sitting in three-member panels. Courts within the courts of appeals system are often called “circuit courts” (e.g., the First Circuit Court of Appeals is also referred to as the “First Circuit”), because they are divided into 12 geographic circuits and one additional nationwide circuit, the Federal Circuit, which has specialized subject matter jurisdiction. Altogether, 179 appellate court judgeships are currently authorized by law. The First Circuit (comprising Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico) has the fewest number of authorized appellate court judgeships (i.e., 6), while the Ninth Circuit (comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has the most, 29.

In this report, nominations to U.S. courts of appeals judgeships are frequently referred to as “circuit court nominations.”

⁵ The two nominees confirmed on May 14, 2012, were George Levi Russell, III, to be U.S. District Judge for the District of Maryland, and John J. Tharp, to be U.S. District Judge for the Northern District of Illinois.

⁶ Pursuant to this constitutional language, Article III judges may hold office for as long as they live or until they voluntarily leave office. A President has no power to remove them from office. Article III judges, however, may be removed by Congress through the process of impeachment by the House and conviction by the Senate.

⁷ Territorial courts are not Article III courts, and their judicial appointees serve 10-year terms, with one judgeship each in Guam and the Northern Mariana Islands, and two in the U.S. Virgin Islands.

U.S. District Courts

These are the federal trial courts of general jurisdiction. Altogether, there are 91 Article III district courts: 89 in the 50 states, plus one in the District of Columbia, and one more in the Commonwealth of Puerto Rico. Each state has at least one U.S. district court, while some states (specifically California, New York, and Texas) have as many as four. Altogether, 673 Article III U.S. district court judgeships are currently authorized by law.⁸ Congress has authorized between 1 and 28 judgeships for each district court.⁹

Judicial Nominations and Confirmations under President Obama

This section provides a statistical overview of President Obama's appointments to U.S. circuit courts of appeals and U.S. district courts from January 20, 2009, through May 31, 2012. It begins with a statistical summary of the current confirmation status of President Obama's circuit and district court nominees. It then examines the extent to which circuit and district judgeships in each of the nation's judicial circuits are filled by appointees of President Obama. It concludes by comparing the number and percentage of circuit and district court judgeships that were vacant at the start of the Obama presidency with current vacancy statistics.

Confirmation Status of President Obama's Judicial Nominees

Table 1 provides a statistical summary of the confirmation status of individuals nominated by President Obama to U.S. circuit and district courts between January 20, 2009, and May 31, 2012.¹⁰ Thus far, President Obama has nominated 41 persons to circuit court judgeships. Of the 41, 29 (70.7%) have been confirmed by the Senate, 6 (14.6%) have failed to be confirmed after their nominations either were withdrawn by the President or returned to the President and not resubmitted to the Senate,¹¹ and 6 (14.6%) currently have nominations pending (2 in the Senate Judiciary Committee and 4 on the Senate Executive Calendar).¹²

⁸ This total includes 10 temporary judgeships. See the U.S. Courts website at <http://www.uscourts.gov/JudgesAndJudgeships/AuthorizedJudgeships.aspx>.

⁹ The Eastern District of Oklahoma has 1 judgeship (the smallest number among Article III district courts), while the Southern District of New York and the Central District of California each have 28 judgeships (the most among Article III district courts). Note that these figures do not include "roving" judgeships, i.e., judgeships shared by two or more federal district courts.

¹⁰ The most common ways in which a judicial nomination fails to receive Senate confirmation include (1) the full Senate voting against the confirmation; (2) the President withdrawing the nomination because the Senate Judiciary Committee has voted against reporting the nomination to the Senate or has made clear its intention not to act on the nomination, or because the nomination, even if reported, is likely to face substantial opposition on the Senate floor, or because the nominee has requested that the nomination be withdrawn; and (3) the Senate, without confirming or rejecting the nomination, returning the nomination to the President under Rule XXXI, paragraph 6 of the *Standing Rules of the Senate* after it has adjourned or been in recess for more than 30 days.

¹¹ These 6 unconfirmed nominees include Robert N. Chatigny (nominated to the Second Circuit; nomination returned to the President), Edward C. DuMont (Federal Circuit; nomination withdrawn by President), Caitlin J. Halligan (D.C. Circuit; nomination returned after cloture failed), Goodwin Liu (Ninth Circuit; nomination withdrawn after cloture failed), Victoria F. Nourse (Seventh Circuit; nomination returned), and Steve Six (Tenth Circuit; nomination returned).

¹² The two circuit court nominees whose nominations are pending before the committee are Robert E. Bacharach (continued...)

President Obama has nominated 150 individuals to U.S. district court judgeships. Of the 150, 117 (78.0%) have been confirmed by the Senate, 6 (4.0%) have failed to be confirmed after their nominations either were withdrawn by the President or returned to the President and not resubmitted to the Senate,¹³ and 27 (18.0%) currently have nominations pending (15 in the Senate Judiciary Committee and 12 on the Senate Executive Calendar).¹⁴

In total, 146 (or 76.4%) of President Obama's circuit and district nominees were confirmed between January 20, 2009, and May 31, 2012.¹⁵

Table 1. Confirmation Status of President Obama's Judicial Nominees
(As of May 31, 2012)

	Total	Confirmed		Returned or Withdrawn		Nomination Pending (Committee)		Nomination Pending (Executive Calendar)	
		Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
U.S. Circuit Courts	41	29	70.7	6	14.6	2	4.9	4	9.8
U.S. District Courts	150	117	78.0	6	4.0	15	10.0	12	8.0

Source: Internal CRS judicial nominations database.

Notes: This table shows the number and percentage of President Obama's circuit and district court nominees who, since the start of the Obama presidency on January 20, 2009, have received Senate confirmation, who (under the heading "Returned or Withdrawn") have seen their nominations failed to be confirmed, or who currently have nominations pending on the Senate Executive Calendar or in committee. The nominations of nominees under the heading "Returned or Withdrawn" were either returned to the President one or more

(...continued)

(Tenth Circuit nominee) and Jill A. Pryor (Eleventh Circuit). The four circuit court nominees whose nominations are currently pending on the Senate Executive Calendar include Andrew D. Hurwitz (Ninth Circuit), William J. Kayatta, Jr. (First Circuit), Patty Shwartz (Third Circuit), and Richard G. Taranto (Federal Circuit).

¹³ These nominees include Louis B. Butler, Jr. (nominated to W. WI; nomination returned), Charles B. Day (MD; nomination withdrawn), Michael C. Green (W. NY; nomination returned), Arvo Mikkanen (N. OK; nomination returned), V. Natasha Perdue Silas (N. GA; nomination returned), and Linda T. Walker (N. GA; nomination returned).

¹⁴ The 15 district court nominees whose nominations are pending before the committee are Terrence G. Berg (E. MI), Jesus G. Bernal (C. CA), Matthew W. Brann (M. PA), Elissa F. Cadish (NV), Brian J. Davis (M. FL), Shelly Deckert Dick (M. LA), John E. Dowdell (N. OK), Thomas M. Durkin (N. IL), Frank P. Geraci, Jr. (W. NY), Paul W. Grimm (MD), Malachy Edward Mannion (M. PA), Rosemary Marquez (AZ), Fernando M. Olguin (C. CA), Lorna G. Schofield (S. NY), and Mark E. Walker (N. FL). The 12 district court nominees whose nominations are currently pending on the Senate Executive Calendar are Gonzalo P. Curiel (S. CA), Gershwin A. Drain (E. MI), John T. Fowlkes, Jr. (W. TN), Jeffrey J. Helmick (N. OH), Timothy S. Hillman (MA), Mary G. Lewis (SC), Kevin McNulty (NJ), Stephanie M. Rose (S. IA), Michael P. Shea (CT), Robert J. Shelby (UT), Michael A. Shipp (NJ), and Robin S. Rosenbaum (S. FL).

¹⁵ Including 2 confirmed Supreme Court nominees, a total of 148 of President Obama's nominees have been confirmed to federal district courts, appeals courts, and the Supreme Court. This number, at present, places President Obama behind 9 of 12 Presidents since 1933. President Obama's total currently ranks ahead of President Truman (136 confirmed nominees), President Kennedy (129), and President Ford (60). This comparison is based on data provided in Nadine Cohodas, "Conservatives Pressing to Reshape Judiciary," *CQ Weekly*, vol. 43, September 7, 1985, p. 1760 (hereinafter Cohodas, "Conservatives Pressing to Reshape Judiciary") and the internal CRS judicial nominations database.

times (and not subsequently resubmitted after being returned for the final time) or were withdrawn by the President.

Variation Across Geographic Circuits in Number and Percentage of Confirmed Nominees

Overall, President Obama's 29 confirmed circuit court nominees currently fill 16.2% of the nation's 179 authorized circuit court judgeships, while his 116 confirmed district court nominees currently fill 17.2% of the nation's 673 authorized Article III district court judgeships.¹⁶

President Obama's confirmed judicial appointees, however, are not distributed uniformly across geographic circuits. The opportunity to appoint circuit and district judges to a particular circuit depends upon the vacancies which exist when a President takes office or which subsequently arise during his presidency. As a result, there will be variation at any given time both in the number of nominees a President succeeds in having confirmed across geographic circuits and in the percentage of judgeships across circuits which are held by appointees of a President.

Figure 1 and **Figure 2** reveal notable variation among the 12 geographic circuits and the Court of Appeals for the Federal Circuit in the number of U.S. circuit and district court judgeships held by President Obama's appointees as well as in the percentage of circuit and district judgeships in each circuit held by his appointees.¹⁷

As **Figure 1** shows, President Obama has appointed the greatest *number* of U.S. appeals court judges to the Fourth Circuit (i.e., 6 confirmed nominees), the Second Circuit (5), the Ninth Circuit (4), and the Federal Circuit (3). In contrast, as of this writing, no nominees of President Obama have been confirmed to either the Eighth Circuit Court of Appeals or the U.S. Court of Appeals for the D.C. Circuit. The Eighth Circuit, comprising Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, does not (as of May 31, 2012) have any existing vacancies.¹⁸ There are presently, however, three vacancies on the D.C. Circuit, including Supreme Court Chief Justice John G. Roberts's former seat on the court.¹⁹ If no appointment to the D.C. Circuit occurs before January 20, 2013, President Obama will be the first President in more than 50 years who has served a full four-year term without having a single nominee confirmed to this court.²⁰

¹⁶ These figures are based on the number of active, full-time circuit and district court judgeships authorized as of 2011 and do not include judges who continue to serve part-time as a result of taking senior status following retirement. The number and percentage of Obama district court appointees does not include Jacqueline H. Nguyen, an Obama U.S. district court appointee confirmed during the 111th Congress who was subsequently confirmed during the 112th Congress as a judge on Ninth Circuit Court of Appeals. The district court judgeship that she vacated upon her elevation to the Ninth Circuit is not counted as filled by an Obama appointee because someone has not yet been appointed to take Judge Nguyen's place on the court. Ms. Nguyen is counted, consequently, as one of President Obama's circuit court appointees. Note, however, that Judge Nguyen is counted in **Table 1** both as one of President Obama's circuit court nominees who has been confirmed and as one of his confirmed district court nominees.

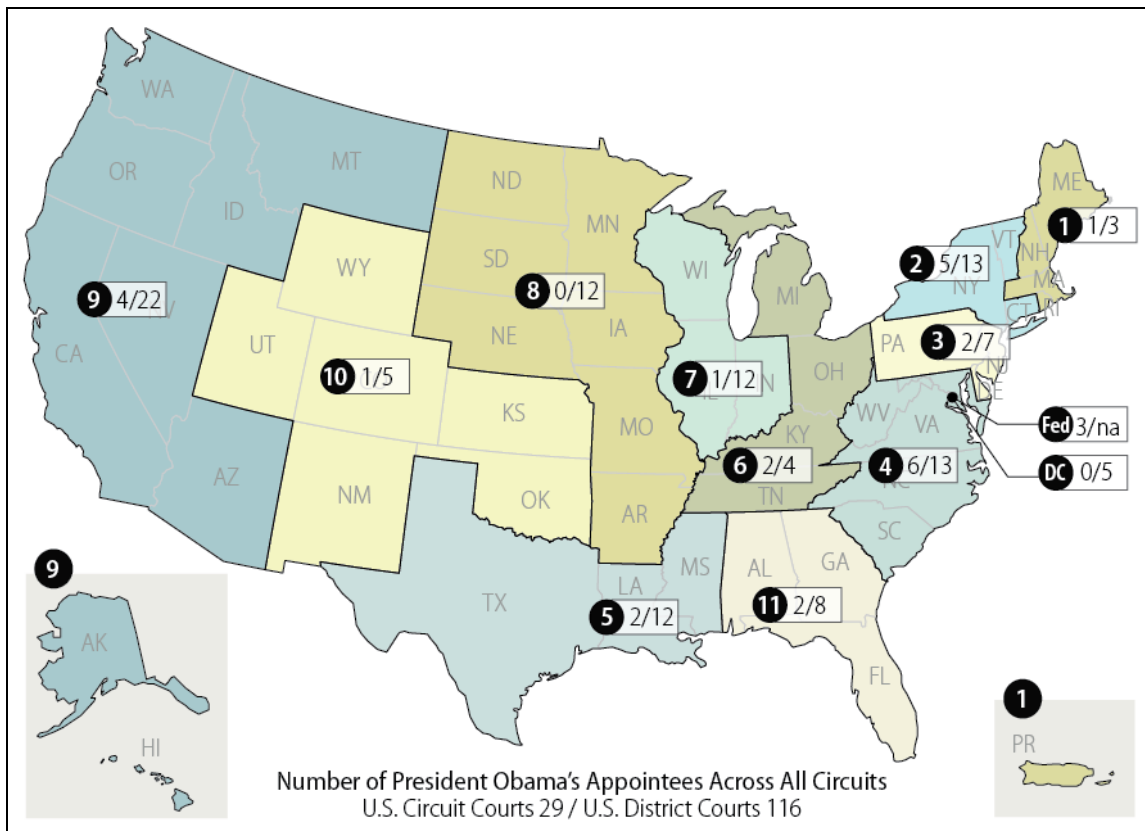
¹⁷ The **Appendix** shows the data used for **Figure 1** and **Figure 2**.

¹⁸ A list of current vacancies is available on the U.S. Courts website at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>.

¹⁹ Two of the three vacancies on the D.C. Circuit Court of Appeals existed prior to President Obama taking office. Chief Justice Roberts's seat has been vacant since September 29, 2005, and A. Raymond Randolph's seat has been vacant since November 1, 2008.

²⁰ See Joan Biskupic, "Analysis: Obama Yet To Make A Mark On Key U.S. Court," *Reuters*, February 24, 2012, (continued...)

Figure 1. Number of Authorized U.S. Circuit and District Court Judgeships Held by Appointees of President Obama by Geographic Circuit (as of May 31, 2012)
(U.S. Circuit Court / U.S. District Court)



Source: Internal CRS judicial nominations database.

Notes: This figure shows, for the 12 geographic circuits and the Court of Appeals for the Federal Circuit, the number of authorized U.S. appeals and district court judgeships held by appointees of President Obama. The number or letters within each black circle identify the judicial circuit. The number to the left of the slash mark lists, for the circuit in question, the number of court of appeals judgeships held by Obama appointees. The number to the right of the slash mark indicates the number of district court judgeships in the circuit held by Obama appointees. The different colors used for the map are solely for distinguishing the boundaries of the geographic circuits.

As for U.S. district courts, **Figure 1** shows that President Obama has had the greatest *number* of judges appointed to district courts located within the Ninth Circuit (22 confirmed district nominees), the Second Circuit (13), and the Fourth Circuit (13).²¹ Under President Obama, at least one district court judge has been appointed in each circuit. The two circuits with the fewest confirmed Obama district court nominees are the First Circuit (3) and the Sixth Circuit (4).

The circuits in the federal judiciary vary in the number of appellate and district court judgeships that are statutorily authorized. Consequently, the circuits in which a President appoints the largest

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<http://www.reuters.com/article/2012/02/24/us-court-obama-idUSTRE81N0MQ20120224>.

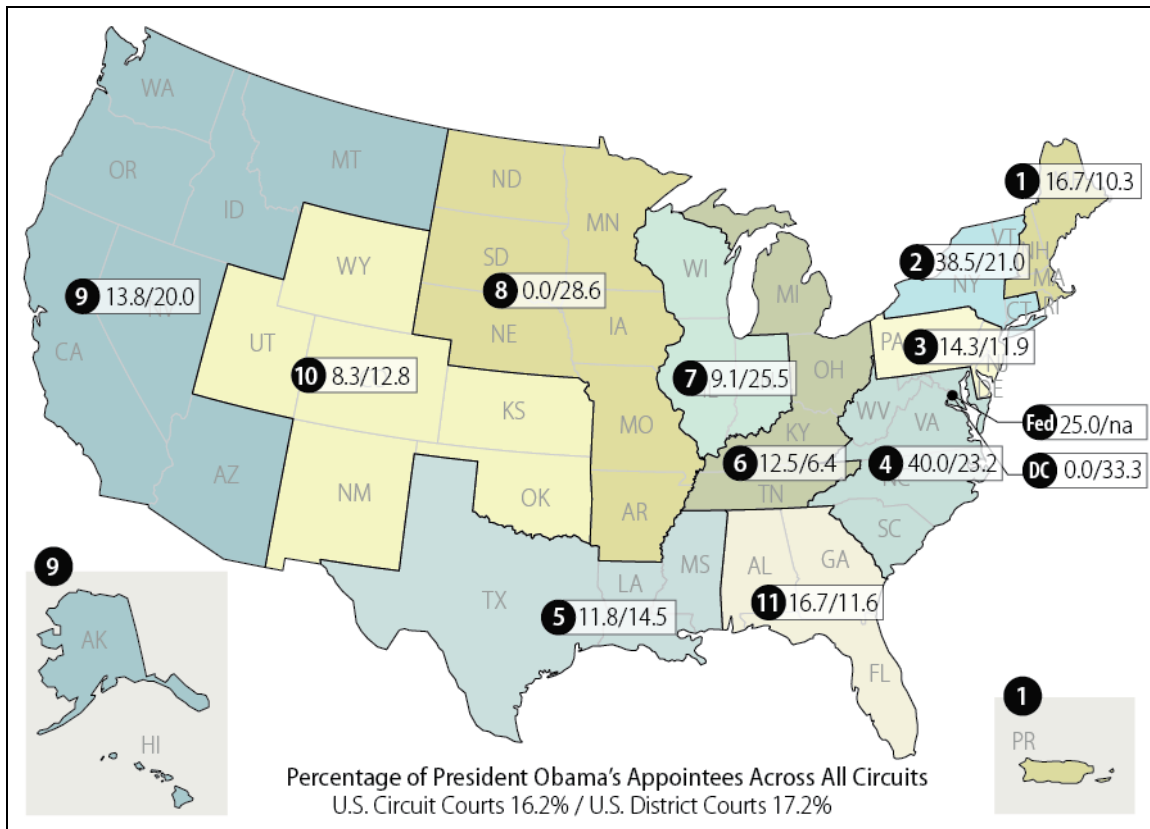
²¹ As mentioned above, Jacqueline H. Nguyen is counted as one of President Obama's three circuit court appointees currently serving on the Ninth Circuit and not as one of the President's district court appointees in the Ninth Circuit.

(or smallest) *number* of nominees might not always correspond to the circuits in which his appointees also constitute the largest (or smallest) *percentage* of sitting judges.

Figure 2 shows, however, that President Obama's confirmed U.S. courts of appeals nominees hold the greatest *percentage* of seats in three of the same circuits to which he also has the greatest *number* of confirmed nominees (with the exception of the Ninth Circuit). Obama appointees now account for 40.0% of circuit judges on the Fourth Circuit Court of Appeals, 38.5% on the Second Circuit, and 25.0% on the Federal Circuit.

Figure 2. Percentage of Authorized U.S. Circuit and District Court Judgeships Held by Appointees of President Obama by Geographic Circuit (as of May 31, 2012)

(U.S. Circuit Court / U.S. District Court)



Source: Internal CRS judicial nominations database.

Notes: This figure shows, for the 12 geographic circuits and the Court of Appeals for the Federal Circuit, the percentage of authorized U.S. appeals and district court judgeships held by appointees of President Obama. The number or letters within each black circle identify the judicial circuit. The number to the left of the slash mark lists, for the circuit in question, the percentage of court of appeals judgeships held by Obama appointees. The number to the right of the slash mark indicates the percentage of district court judgeships in the circuit held by Obama appointees. The different colors used for the map are solely for distinguishing the boundaries of the geographic circuits.

Currently, in 5 (of 13) judicial circuits, President Obama's U.S. courts of appeals appointees account for a greater percentage of active appellate judges than Obama circuit court appointees do

across the nation as a whole (i.e., greater than 16.2%). In addition to the three circuits already identified, the other two are the First Circuit (16.7%) and the Eleventh Circuit (also 16.7 %).²²

The three circuits with the greatest percentage of President Obama's district court appointees are the D.C. Circuit (33.3% of district court judgeships), the Eighth Circuit (28.6%), and the Seventh Circuit (25.5%). Notably, President Obama's success in having district court nominees confirmed in the D.C. and Eighth Circuits is in contrast to having no circuit court nominees, thus far, confirmed to these same two circuits.

Overall, in 6 (of 12) geographic circuits, President Obama's district court appointees currently occupy a greater percentage of authorized district court judgeships than Obama's district court appointees do across the nation as a whole (i.e., greater than 17.2%).²³ In addition to the D.C., Eighth, and Seventh Circuits, these six circuits include the Fourth Circuit (23.2% of district court judgeships), the Second Circuit (21.0%), and the Ninth Circuit (20.0%).

Comparison of Inherited Vacancies with Current Vacancies

Figure 3 displays the number of U.S. circuit and district court vacancies that existed when President Obama began his current term on January 20, 2009. For the purposes of this report, these vacancies are referred to as "inherited vacancies." The figure also provides the number of current vacancies (as of May 31, 2012), broken down by vacancies for which a nomination currently is pending in the Senate Judiciary Committee, vacancies pending on the Senate Executive Calendar, and vacancies for which no nomination is currently pending.

As **Figure 3** indicates, 17 more circuit and district court judgeships are vacant than when President Obama took office (a total of 72 current vacancies, as of May 31, 2012, compared with 55 on January 20, 2009).

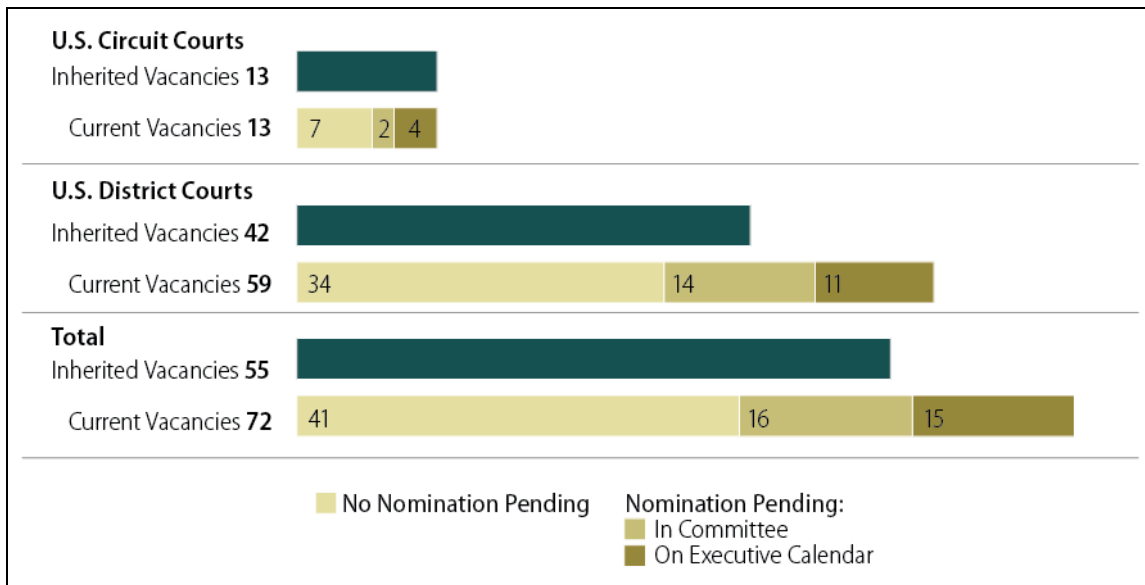
For there to be fewer circuit or district court vacancies at the end of President Obama's current term than the 55 judgeships vacant when his term began, at least 18, or 54.5%, of the 33 nominations pending in committee or on the Executive Calendar, as of May 31, 2012, would have to be confirmed during the remainder of this Congress.²⁴ Further, in the likely event of judicial departures in the months ahead creating more court vacancies, reducing total vacancies would require confirmation of more than 18 nominees.

²² Following President Obama's first two years, the U.S. courts of appeals in the Second, Third, and Fourth Circuits switched from having either a Republican-appointed majority or being evenly divided between the appointees of Republican and Democratic presidents to each having a Democratic-appointed majority. Additionally, the First Circuit Court of Appeals switched from having a Republican-appointed majority to being evenly divided. Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, "Obama's Judiciary at Midterm," *Judicature*, vol. 94, no. 6, May-June 2011, p. 299 (hereafter Goldman, "Obama's Judiciary at Midterm").

²³ Note that the Federal Circuit consists only of a court of appeals (i.e., it does not include district court judgeships).

²⁴ This calculation includes two district court nominees whose nominations are pending and who were nominated for future vacancies. Paul W. Grimm, whose nomination is pending in committee, was nominated for a vacancy that will occur on June 8, 2012, and Stephanie M. Rose, whose nomination is pending on the Senate Executive Calendar, was nominated for a vacancy that will occur on July 1, 2012. Because these vacancies do not currently exist, however, neither of these pending nominations is included in **Figure 3** as one of the 25 district court vacancies with a nomination pending either in committee or on the Senate Executive Calendar (or as one of the 31 total current vacancies with a nomination pending).

Figure 3. U.S. Circuit and District Court Judgeships: Number of Vacancies Inherited by President Obama and Number Currently Vacant
(As of May 31, 2012)



Source: Internal CRS judicial nominations database and CRS analysis of data provided by the Administrative Office of the United States Courts at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>.

Notes: This figure shows the number of circuit and district court vacancies which existed when President Obama took office on January 20, 2009 (i.e., “inherited vacancies”). The figure also shows the number of current circuit and district court vacancies broken down by vacancies for which no nominations are currently pending, vacancies for which nominations are currently pending in committee, and vacancies for which nominations are currently pending on the Senate Executive Calendar.

Recent presidential election years, however, provide examples of Senate confirmation of more than 18 judicial nominations after May 31. Specifically, in 5 of the last 8 completed presidential election years, the Senate has confirmed more than 18 circuit or district court nominations after May 31. The numbers of post-May 31 confirmations of circuit or district court nominations in these 5 presidential election years, starting in 1980, were as follows: 32 in 1980; 28 in 1984; 31 in 1992; 28 in 2004; and 22 in 2008.²⁵

Figure 3 also indicates that of the 72 current circuit or district court vacancies, 41 (or 56.9%) are vacancies for which, as of May 31, 2012, the President had not selected a nominee. These 41 vacancies have been vacant, on average, for 551.8 days.²⁶ Of the 41, 34 (82.9%) are district court vacancies and 7 (17.1%) are circuit court vacancies. Finally, of the 41, 17 (41.5%) are presently classified as “judicial emergencies” by the Judicial Conference of the United States.²⁷ Of these 17 judicial emergencies, 14 (82.4%) are district court vacancies.

²⁵ Internal CRS judicial nominations database.

²⁶ The median number of days vacant for these 41 vacancies is 250.0 days. Calculations are based on CRS analysis of data provided by the federal judiciary at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>.

²⁷ A judicial emergency for a circuit court vacancy is defined as any vacancy in a court of appeals where adjusted case filings per appellate panel are in excess of 700 or any vacancy that is in existence more than 18 months where adjusted (continued...)

Figure 3 also reveals a much more pronounced increase, from when President Obama took office to the present, in the number of district court vacancies than of circuit court vacancies. Specifically, while the current number of circuit court vacancies is the same as when President Obama took office on January 20, 2009 (i.e., 13), the current number of district court vacancies is 17 more (59 versus 42).

This difference in the increased number of vacancies between circuit and district courts might reflect, in part, the longer amount of time President Obama has taken to name individuals to district court vacancies than to circuit court vacancies. According to one study, President Obama took, on average, during his first three years in office 399 days to make nominations for district court vacancies versus 230 days to make nominations for circuit court vacancies.²⁸ The median figures for the time needed by President Obama to make nominations followed a similar pattern, with a median of 364 days from appointment opportunity to nomination for district court nominations and 198 days for circuit court nominations.²⁹

These statistics, however, should not be interpreted to mean that the increase in the number of circuit and district court vacancies from when President Obama took office is solely the function of the speed with which the President has submitted nominations to the Senate. As discussed further in the third section of this report, factors outside an Administration's control also influence the number of vacancies that exist at any given time and the length of time that the vacancies remain unfilled. These include the rate at which judges depart office and institutional and political factors related to the processing of nominations in the Senate.

Comparison of President Obama with Recent Predecessors

This section uses various statistical measures to compare the judicial nomination and confirmation processes at work during the Obama and other recent presidencies. It first compares the number and percentage of confirmed U.S. circuit and district court nominees from Presidents Reagan to Obama. It then provides, for Presidents Clinton to Obama, a comparison of the number of circuit and district court vacancies inherited by each of the three Presidents and the number of vacancies that existed on February 1 of their second, third, and fourth years in office. It concludes by comparing selected features of the Senate judicial confirmation process during the tenures of

(...continued)

filings are between 500 to 700 per panel. For district court vacancies, a judicial emergency exists when a district court has weighted filings in excess of 600 per judgeship; or a vacancy is in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; or any district court with more than one authorized judgeship and only one active judge. A list of vacancies considered "judicial emergencies" by the Judicial Conference is available on the U.S. Courts website at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>.

²⁸ See Russell Wheeler, "Judicial Nominations and Confirmations after Three Years – Where Do Things Stand," *Governance Studies at Brookings*, January 13, 2012, at http://www.brookings.edu/~media/Files/rc/papers/2012/0113_nominations_wheeler/0113_nominations_wheeler.pdf (hereinafter Wheeler, "Judicial Nominations and Confirmations").

²⁹ Ibid. Wheeler's calculations, to arrive at the mean and median number of days from vacancy to nomination, measured the time intervals that began from the date the departing incumbent announced his or her intention to leave active service at some future date, or the date a vacancy was created if no announcement was made, or Inauguration Day (i.e., January 20) if a vacancy had occurred by that date.

the five most recent Presidents. Specifically, it compares, for circuit and district court nominees, (1) the time that elapsed from first nomination to first committee hearing; (2) the time from first committee report to confirmation; and (3) the percentage of confirmed nominees receiving Senate roll call votes.

This report, it should be acknowledged, does not analyze or take a position on the number or percentage of a President's judicial nominees that would be appropriate for the Senate to confirm; on the average (or median) length of time that would be appropriate for, or needed by, the Senate Judiciary Committee to process judicial nominations, or the Senate to take final action on them; or on whether confirmation of circuit and district court nominations should occur by roll call vote or voice vote. Similarly, this report does not analyze or take a position on the appropriate amount of time for an Administration to select nominees for circuit and district court judgeships.

Number and Percentage of Confirmed Judicial Nominees

Table 2 presents the total number of circuit and district court nominees, the total number of nominees confirmed, and the percentage confirmed during the first terms of Presidents Reagan through Obama. While Presidents sometimes have nominated particular individuals to a court more than once, this table counts such nominees only once. In other words, it does not account for multiple nominations of the same individual.

The table reveals that President G.H.W. Bush had the greatest total number of circuit court nominees confirmed among the five Presidents during their first terms (i.e., 42 confirmed nominees). President Reagan had the greatest percentage of circuit nominees confirmed during a first term, 86.8%. In contrast, President Obama thus far has had the second-lowest percentage of circuit court nominees confirmed, 70.7%, and the lowest number of circuit nominees confirmed (i.e., 29).

For district court nominees, President Clinton had the greatest number confirmed during the first term of a presidency for this period (i.e., 169). This number was followed closely by that for President G.W. Bush (168). President G.W. Bush, however, had the greatest percentage of district court nominees confirmed during a first term (nearly 95%). President Obama, thus far, has had the lowest number of district court nominees confirmed (117) and the second-lowest percentage of district nominees confirmed (78.0%).

Table 2. U.S. Circuit and District Court Nominees of Five Most Recent Presidents During Their First Term

President	U.S. Circuit Courts			U.S. District Courts		
	Number of Nominees	Number Confirmed	Percentage Confirmed	Number of Nominees	Number Confirmed	Percentage Confirmed
Reagan	38	33	86.8	148	129	87.2
G.H.W. Bush	53	42	79.2	191	148	77.5
Clinton	41	30	73.2	197	169	85.8
G.W. Bush	52	35	67.3	177	168	94.9
Obama (as of May 31, 2012)	41	29	70.7	150	117	78.0

Source: Internal CRS judicial nominations database.

Notes: This table shows, for each of the last five Presidents, the total number of individuals nominated for Article III circuit and district court judgeships during a President's first term as well as the number and percentage of nominees confirmed during his first term. Note that some individuals nominated during the first term of a President are ultimately confirmed during a President's second term. These individuals are not included in the number and percentage of confirmed nominees reported in the table.

Inherited Vacancies and Subsequent Vacancies at Selected Dates

Table 3 and **Table 4** compare, for President Obama and his two most recent predecessors, (1) the number of U.S. circuit and district court vacancies that each inherited at the beginning of his presidency; (2) the number of circuit and district court vacancies as of February 1 of each President's second, third, and fourth years in office; and (3) the percentage of circuit and district court vacancies without nominees on February 1 of each of those years. Presidents Reagan and G.H.W. Bush are omitted from this particular table due to data limitations in identifying vacancies and nominations that existed for those vacancies during their two presidencies. February 1 is used as the approximate date for the beginning of a President's second, third, and fourth years in office.

Table 3 reveals that President Clinton inherited 17 vacancies at the beginning of his first term, a number which had decreased to 12 by February 1 of his fourth year in office. Of the three most recent Presidents, President Clinton is the only one for whom the percentage of circuit court vacancies without nominees was 50% or higher at the beginning of his second, third, and fourth years in office. As mentioned below in the discussion accompanying **Table 4**, President Obama is alone among the three Presidents in holding this distinction for district court nominees.

Table 3. U.S. Circuit Courts: Inherited Vacancies and Vacancies as of February 1 of Second, Third, and Fourth Years in Office for Three Most Recent Presidents

President	Number of Inherited Vacancies	As of Feb. 1 of Second Year		As of Feb. 1 of Third Year		As of Feb. 1 of Fourth Year	
		Number of Vacancies	Percentage with No Nominee	Number of Vacancies	Percentage with No Nominee	Number of Vacancies	Percentage with No Nominee
Clinton	17	19	73.7	16	81.2	12	50.0
G.W. Bush	26	31	25.8	25	44.0	17	11.8
Obama	13	20	60.0	17	47.1	16	43.7

Source: CRS analysis of data provided by the Administrative Office of the United States Courts at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>.

Notes: This table shows, for each of the last three Presidents, the number of U.S. circuit court vacancies that existed at the beginning of that President's term (i.e., "inherited vacancies"); the number of circuit court vacancies that existed as of February 1 of his second, third, and fourth years in office; and the percentage of circuit court vacancies on February 1 of each year for which no individuals were nominated by the President.

President G.W. Bush inherited a greater number of circuit court vacancies than either Presidents Clinton or Obama (i.e., 26 vacancies). The number of circuit court vacancies increased during President G.W. Bush's first year in office, reaching 31 by February 1 of his second year, but subsequently decreased to 25 and 17, respectively, on February 1 of his third and fourth years in office. This general pattern, of the number of vacancies increasing during the first year in office

and then decreasing over the subsequent two years, also characterized both President Clinton's and Obama's tenures.

Notably, President G.W. Bush is the only President of the three for whom the percentage of vacancies without nominees was below 50% at the beginning of his second, third, and fourth years in office. This, as mentioned below, was also the case for district court vacancies during the G.W. Bush presidency. In other words, at the beginning of President G.W. Bush's second, third, and fourth years in office, circuit and district court nominees had been selected for a majority of the vacancies which existed at those times.

President Obama inherited fewer circuit court vacancies than either Presidents Clinton or G.W. Bush. Of the three Presidents, however, he is the only one who began his fourth year in office with more vacancies than existed when he took office (as is also the case with district court vacancies under President Obama). The percentage of circuit court vacancies without nominees was below 50% at the beginning of President Obama's third and fourth years in office. In contrast, the percentage of district court vacancies without nominees was, as **Table 4** reveals, above 50% at the beginning of those years of the Obama presidency (at 53.6% and 55.2%, respectively).

As **Table 4** shows, President Clinton inherited a greater number of district court vacancies than either Presidents G.W. Bush or Obama. Some of the 89 vacancies inherited by President Clinton were attributable to the creation of 74 new district court judgeships in 1990, of which 25 still were unfilled at the start of his presidency on January 20, 1993.³⁰ The number of district court vacancies in existence at the beginning of each of President Clinton's first four years in office steadily decreased, going from 89 to 81 to 53 to 41. It was not until the beginning of his fourth year in office, however, that the percentage of vacancies without nominees dropped below 50% (in contrast to the 72.8% and 81.1% of district court vacancies with no nominee as of February 1 of the second and third years, respectively).

President G.W. Bush inherited 59 district court vacancies when he assumed office on January 20, 2001. The number of vacancies increased from 59 to 68 from the beginning of his first year to the beginning of his second year but, as with President Clinton, the number of vacancies subsequently decreased: from 68 vacancies at the beginning of his second year in office, to 36 vacancies a year later, and to 29 vacancies on February 1 of his fourth year.

Notably, the percentage of district court vacancies without nominees was below 50% as of February 1 of the second, third, and fourth years of the G.W. Bush presidency (in contrast to the higher percentages shown at the same points during the Clinton and Obama presidencies). By February 1, 2004, this percentage had decreased to 13.8%, a result, in part perhaps, of what has been characterized as President G.W. Bush's "well-oiled nomination machinery."³¹

³⁰ The Federal Judgeship Act of 1990 (P.L. 101-650) created 11 new circuit court judgeships and 74 new district court judgeships (5 of which were temporary).

³¹ Wheeler, "Judicial Nominations and Confirmations," p. 5.

Table 4. U.S. District Courts: Inherited Vacancies and Vacancies as of February 1 of Second, Third, and Fourth Years in Office for Three Most Recent Presidents

President	Number of Inherited Vacancies	As of Feb. 1 of Second Year		As of Feb. 1 of Third Year		As of Feb. 1 of Fourth Year	
		Number of Vacancies	Percentage with No Nominee	Number of Vacancies	Percentage with No Nominee	Number of Vacancies	Percentage with No Nominee
Clinton	89	81	72.8	53	81.1	41	41.5
G.W. Bush	59	68	48.5	36	36.1	29	13.8
Obama	42	82	81.7	84	53.6	67	55.2

Source: CRS analysis of data provided by the Administrative Office of the United States Courts at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>.

Notes: This table shows, for each of the last three Presidents, the number of U.S. district court vacancies that existed at the beginning of that President's term (i.e., "inherited vacancies"), the number of district court vacancies that existed as of February 1 of his second, third, and fourth years in office, and the percentage of district court vacancies on February 1 of each year for which no individuals were nominated by the President.

President Obama inherited 42 district court vacancies, fewer than either Presidents Clinton or G.W. Bush. Despite this, a higher number of district court vacancies existed at the beginning of his second, third, and fourth years in office than at corresponding points during the Clinton and G.W. Bush presidencies. Additionally, President Obama is the only President among the three for whom the percentage of district court vacancies without nominees was above 50% on each February 1 of his second, third, and fourth years in office.

That district court vacancy figures have, over time, been greater during the Obama presidency than during the Clinton and G.W. Bush presidencies might be, in part, a result of the time taken for President Obama to nominate persons to fill district court vacancies. According to one study, President Obama took 399 days, on average, during his first three years to make such nominations, compared with 366 days, on average, for President Clinton during his first three years, and 272 days, on average, for President G.W. Bush during his first three years.³²

As mentioned previously, the speed with which a President submits judicial nominations to the Senate reflects factors both within an Administration's control and outside its control. These factors are discussed further in the section entitled "Factors Influencing the Selection and Confirmation Process for U.S. Circuit and District Court Nominations."

Selected Features of the Senate Confirmation Process

This section provides, by presidency (from Reagan to Obama), comparative statistics of several features of the Senate confirmation process for circuit and district court nominees.³³ The

³² Ibid.

³³ For a detailed discussion of the process used by the Senate to consider a President's judicial nominations, see CRS Report RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by (name redacted).

calculations represented graphically in **Figures 4** through **6** are based on nomination and confirmation statistics from each President's entire tenure, whether it was one or two terms.³⁴

Length of Time from First Nomination to First Committee Hearing

Figure 4 tracks, by presidency (from Reagan to Obama), the mean and median number of days from first nomination to first committee hearing for all circuit and district court nominees who received hearings during the period January 20, 1981, through May 31, 2012.³⁵

All nominees who received hearings are included in the calculations, regardless of whether they were eventually confirmed or their nomination were returned, withdrawn, or rejected by the Senate. In cases when a nominee received a hearing only after being renominated, the waiting time is calculated from the date of the *first* nomination to the committee hearing. Additionally, when nominees received more than one committee hearing, the statistics used to generate **Figure 4** measure only the length of time from a nominee's first nomination to his or her *first* hearing.

Figure 4 shows that during the 1981 to 2012 period, circuit court nominees of President G.W. Bush waited more days to receive a hearing than did the nominees of the other four Presidents. The mean and median number of days for a *circuit court* nominee to receive a committee hearing after being nominated ranged from a low of 43.1 and 23.0 days, respectively, during the Reagan presidency to 246.8 and 145.0 days, respectively, for the G.W. Bush presidency.³⁶ The calculations for the G.W. Bush nominees from first nomination to first hearing included relatively long waiting periods for nominees such as Priscilla R. Owen (waiting 440 days from first nomination to first hearing), Deborah L. Cook (630 days), Jeffrey S. Sutton (630 days), Richard A. Griffin (721 days), and David W. McKeague (951 days).

Circuit court nominees during the Clinton presidency were the only other group of circuit court nominees during the 1981 to 2012 period who waited, on average, more than 100 days from first nomination to first hearing. President Clinton's circuit court nominees waited an average of 120.2 days to receive hearings (although the median waiting time was lower, i.e., 91.0 days). As **Figure 4** shows, these longer waiting times under President Clinton were a distinct increase over the

³⁴ **Table 2** presents nomination and confirmation statistics based on a President's first term, whereas **Figures 4** and **5** present statistics covering each President's entire tenure, whether it was one or two terms. The author takes this approach for two reasons. First, because President Obama is currently in the fourth year of his presidency, comparing his judicial nomination success with that of his four immediate predecessors (in terms of the number and percentage of confirmed circuit and district court nominees) is arguably more informative using statistics only for the first four years of the other presidencies. **Table 2** provides such statistics, and allows for a useful comparison of the relative success of Presidents in having their nominees confirmed during an initial four-year period. Second, the data presented in **Figure 4** and **Figure 5** measure average and median time spans of certain phases of the judicial confirmation process in the Senate which, in the case of some nominees, straddled two terms of a presidency. For example, a nominee may have been nominated during a President's first term but not have received a hearing until his second term, or have had his nomination first reported out of committee during a President's first term but not have been confirmed until the President's second term. As a result, an accurate measure of the average waiting time from first nomination to first hearing or from first report to confirmation must include a President's entire tenure.

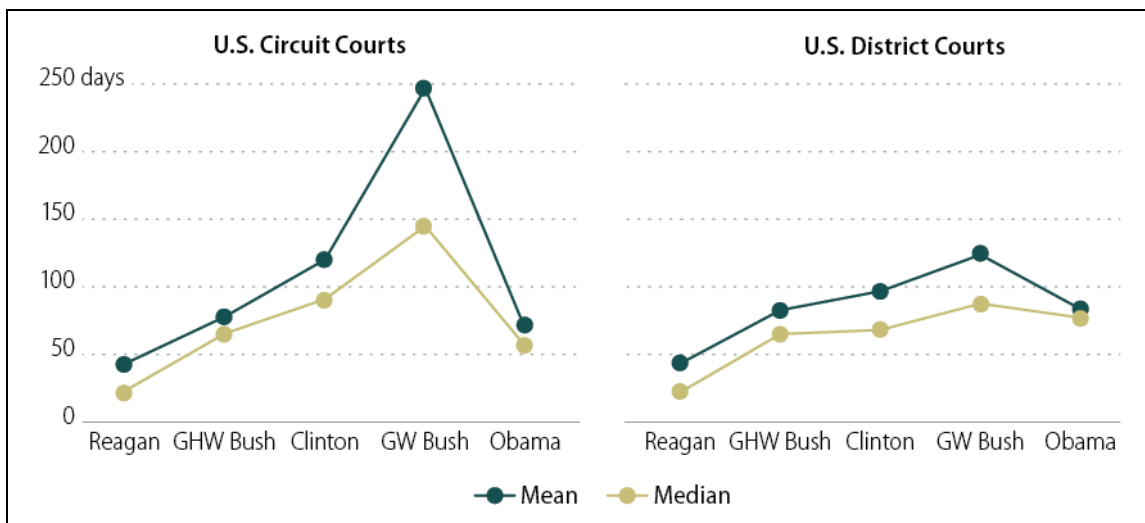
³⁵ "Mean" indicates the arithmetic mean, or average, while the "median" indicates the middle value for a particular set of numbers. The mean may not always sufficiently reflect the time from nomination to committee hearings for many nominees if, among them, there are nominees whose time to a first hearing was much longer or shorter than that of the other nominees in the group. By contrast, the median, or middle value for the nominees, is less affected by nominees whose elapsed time from first nomination to first hearing was unusually long or short.

³⁶ The **Appendix** shows the data used for **Figure 4**.

average and median waiting times of 78.0 days and 65.5 days, respectively, experienced by the circuit court nominees of President G.H.W. Bush.

Finally, although President Obama, compared with his four most recent predecessors, has had fewer, and the second-smallest percentage of, circuit court nominees confirmed (see **Table 2** above), his circuit court nominees have waited, on average, less time from first nomination to first hearing, 69.6 days, than the circuit nominees of Presidents G.H.W. Bush, Clinton, and G.W. Bush. Only President Reagan's circuit nominees waited, on average, less time from first nomination to first hearing (i.e., 43.1 days).

Figure 4. U.S. Circuit and District Court Nominees of Five Most Recent Presidents (January 20, 1981, to May 31, 2012): Mean and Median Number of Days from First Nomination to First Hearing



Source: Internal CRS judicial nominations database.

Notes: This figure shows, for each of the last five Presidents, the mean and median number of days from first nomination to first hearing for all Article III circuit and district court nominees *who received hearings*. The numbers used to generate **Figure 4** accounted for nominations made over a President's entire tenure, whether it was one or two terms.

Figure 4 shows, by presidency, less striking differences in the amount of time *district court* nominees, compared with circuit court nominees, waited for hearings. The mean and median number of days from first nomination to first hearing for district court nominees ranged from a low of 43.2 and 22.0 days, respectively, during the Reagan presidency to 123.5 and 87.5 days, respectively, during the G.W. Bush presidency.

As with circuit court nominees during the 1981 to 2012 period, the average waiting time from first nomination to first hearing for district court nominees increased with each presidency from Reagan to G.W. Bush but subsequently declined during the Obama presidency. The average waiting time, thus far, for President Obama's district court nominees from first nomination to first hearing, 83.2 days, is now nearly the same as the average waiting time experienced by district court nominees during the G.H.W. Bush presidency, 82.6 days.

Although the median waiting time, at present, from first nomination to first hearing during the Obama presidency (77.0 days) is less than the median waiting time during the G.W. Bush

presidency (87.5 days), it is higher than the median waiting times for district court nominees during the G.H.W. Bush and Clinton presidencies (65.0 and 68.0 days, respectively) and more than three times higher than the median waiting time of 22.0 days for President Reagan's district court nominees.

Length of Time from First Committee Report to Confirmation

Figure 5 shows, by presidency (from Reagan to Obama), the mean and median number of days from first committee report to confirmation for all circuit and district court nominees who were confirmed during the period January 20, 1981, to May 31, 2012.³⁷ These calculations include days elapsed for nominations which were reported out of committee only to be returned to the President, subsequently resubmitted by the President, reported again by the Judiciary Committee, and then confirmed by the Senate.³⁸ **Figure 5** shows that, in general, both the mean and median waiting time between committee report and confirmation increased from presidency to presidency, starting with the circuit and district court nominees of President G.H.W. Bush.

For confirmed circuit court nominees, the fewest days, on average, that elapsed from first committee report to confirmation occurred during the G.H.W. Bush presidency (i.e., 7.8 days). The mean number of days from first committee report to confirmation increased over 10 times from the G.H.W. Bush presidency to the Clinton presidency, from 7.8 to 82.2 days. From the Clinton presidency to the G.W. Bush presidency, the average waiting time for circuit court nominees from first committee report to confirmation increased slightly to 83.1 days, only to increase substantially, by nearly 57 days, under President Obama to an average (thus far) of 139.7 days.

The median number of days from first committee report to confirmation also increased after President G.H.W. Bush but remained relatively short during the Clinton and G.W. Bush presidencies. The median line graph for circuit court nominees in **Figure 5** shows that roughly half of President Clinton's 65 confirmed circuit court nominees (during his two terms) were confirmed within 14 days of their nominations being reported out of committee. Likewise, roughly half of President G.W. Bush's 61 confirmed circuit court nominees (during his two terms) were confirmed within 18 days of their nominations being reported. In contrast, President Obama has, thus far, had no circuit court nominees confirmed under 25 days of their nominations first being reported out of committee. Instead, the median number of days for President Obama's 29 confirmed circuit court nominees is 132.0, roughly 7.3 times greater than the median number of 18 days for the 61 confirmed circuit nominees of his immediate predecessor, President G.W. Bush.

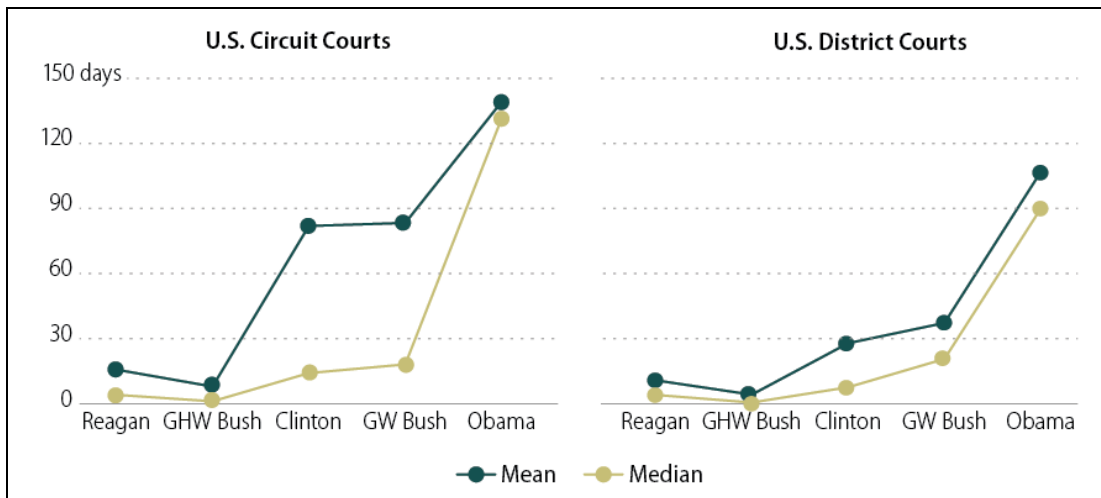
The *average* number of days that elapsed from first committee report to confirmation for circuit court nominees during the Clinton and G.W. Bush presidencies was noticeably greater than the *median* number of days experienced by these nominees for the report to confirmation stage.

³⁷ The **Appendix** shows the data used for **Figure 5**.

³⁸ For example, Eric Clay was nominated by President Clinton to the Sixth Circuit Court of Appeals. His nomination was initially reported out of committee on April 26, 1996, during the 104th Congress. His nomination was returned to the President on October 4, 1996, and resubmitted on January 7, 1997. After being reported by the Judiciary Committee again on May 22, 1997, Mr. Clay's second nomination was confirmed on July 31, 1997, during the 105th Congress. Consequently, the dates used for calculating the number of days between Mr. Clay's nomination being reported out of committee and his confirmation were April 26, 1996, and July 31, 1997.

These differences reflect the fact that many noncontroversial nominees were confirmed relatively quickly after their nominations were reported out of committee (thus, pushing down the median figures) while a smaller number of cases stayed on the Senate Executive Calendar for relatively lengthy periods of time, and often involved multiple nominations of the same individual.³⁹ These outliers (the nominees experiencing relatively lengthy waits between first report and confirmation) had a greater statistical effect on the average number of days between first report and confirmation than on the median number of days.

Figure 5. U.S. Circuit and District Court Nominees of Five Most Recent Presidents (January 20, 1981, to May 31, 2012): Mean and Median Number of Days from First Committee Report to Confirmation



Source: Internal CRS judicial nominations database.

Notes: This table shows, for each of the last five Presidents, the mean and median number of days from first committee report to confirmation for all Article III circuit and district court nominees. The numbers used to generate **Figure 5** reflect a President's entire tenure, whether it was one or two terms.

As with President G.H.W. Bush's confirmed circuit court nominees, district court nominees during his presidency waited, on average, a shorter time from first committee report to confirmation (i.e., 4.6 days) than did the district nominees of the four other Presidents. The average number of days increased to 28.2 days during the Clinton presidency and to 37.5 days during the G.W. Bush presidency. During the Obama presidency, the average number of days, thus far, has increased further to 105.1 days as 42 (35.9%) of President Obama's 117 confirmed district court nominees waited at least 100 days from first committee report to confirmation.⁴⁰

As **Figure 5** shows, the median number of days between first committee report and confirmation of district court nominees by presidency also increased during this period, starting with the

³⁹ For example, the nomination of Priscilla R. Owen, a four-time nominee of President G.W. Bush, was first reported out of committee on March 27, 2003, and not confirmed until May 25, 2005. Another example includes William A. Fletcher, a two-time nominee of President Clinton, whose nomination was first reported out of committee on May 16, 1996, and not confirmed until October 8, 1998.

⁴⁰ These 42 nominees included Benita Y. Pearson (waiting 313 days), William J. Martinez (250 days), Catherine C. Eagles (224 days), Kimberly J. Mueller (224 days), John A. Gibney, Jr. (203 days), Michael H. Simon (195 days), Susan Richard Nelson (190 days), and Jesse M. Furman (155 days).

nominees of President G.H.W. Bush. From the low median of 1.0 days for nominees during the G.H.W. Bush presidency, the median increased to 8.0 days for Clinton district court nominees. It then increased about 2.6 times from the Clinton to G.W. Bush presidency, to 21.0 days, and about 4.3 times from the G.W. Bush to Obama presidency, to 90.0 days.

Percentage of Confirmed Judicial Nominees Receiving Senate Roll Call Votes

Roll call votes are not required to confirm nominations, but the recorded vote is an increasingly common element of unanimous consent agreements that provide for Senate consideration of judicial nominations. **Figure 6** shows, for Presidents Reagan to Obama, the percentage of confirmed U.S. circuit and district court nominees who were approved by Senate roll call votes rather than by voice votes.⁴¹ The figure accounts for roll call votes on circuit and district court nominees recorded during each President's entire tenure, whether it was one or two terms.

As the figure reveals, a relatively small percentage of President Reagan's and G.H.W. Bush's circuit and district court nominees received Senate confirmation by roll call votes. According to CRS data, 5 (or 6.0%) of President Reagan's 83 confirmed circuit nominees and 1 (2.4%) of G.H.W. Bush's 42 circuit court nominees were approved by roll call votes.⁴² Additionally, only 1 district court nominee was confirmed by roll call vote during the Reagan presidency⁴³ and no district court nominees were confirmed by roll call votes during G.H.W. Bush's presidency.

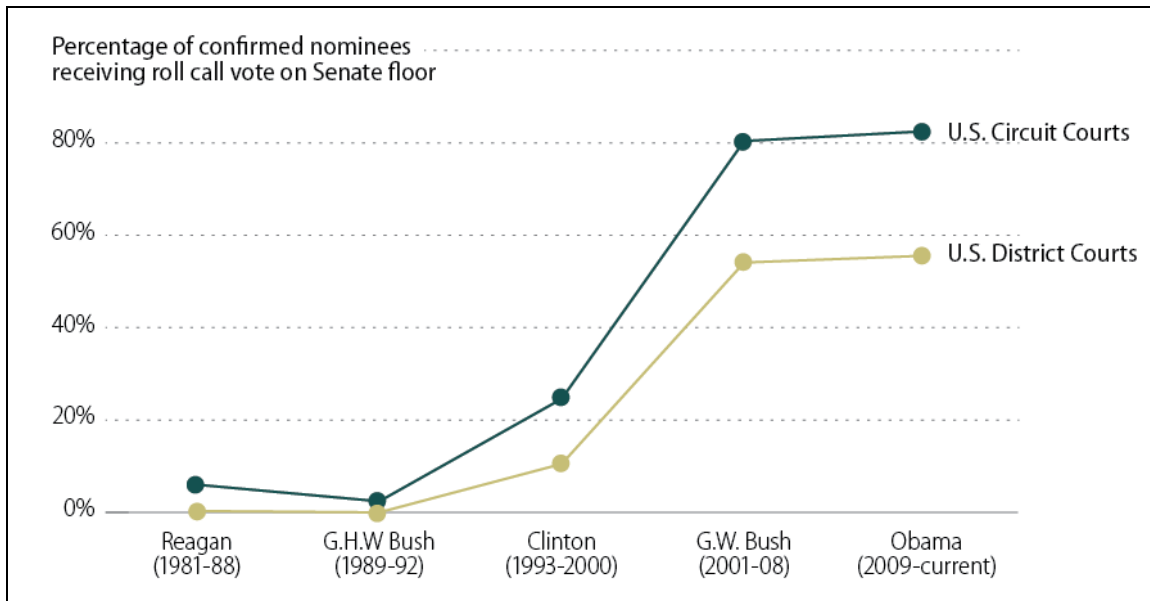
Confirmation by roll call votes became more common during the Clinton presidency, with 16 (24.6%) of 65 confirmed circuit court nominees and 32 (10.5%) of 305 confirmed district court nominees receiving Senate roll call votes. It was not, however, until President G.W. Bush's tenure that a majority of lower court nominees were approved by roll call (rather than by voice) votes, with 49 (80.4%) of 61 circuit court nominees and 141 (54.0%) of 261 district court nominees confirmed in this way. This trend has continued under President Obama, with 24 (82.8%) of 29 confirmed circuit court nominees receiving roll call votes and 65 (55.6%) of 117 district court nominees receiving roll call votes (as of May 31, 2012).

⁴¹ The **Appendix** shows the data used for **Figure 6**.

⁴² According to CRS records, the 5 confirmed Reagan circuit court nominees who received roll call votes were James L. Buckley (D.C. Circuit; confirmed 84-11), Alex Kozinski (Ninth Circuit; 54-43), Daniel A. Manion (Seventh Circuit; 48-46), David B. Sentelle (D.C. Circuit; 87-0), and James H. Wilkinson, III (Fourth Circuit; 58-39). The G.H.W. Bush circuit nominee who received a roll call vote was Edward E. Carnes (Eleventh Circuit; 62-36).

⁴³ Sidney A. Fitzwater (N. TX), first nominated by President Reagan on October 29, 1985, was confirmed 52-43.

Figure 6. U.S. Circuit and District Court Nominees of Five Most Recent Presidents (January 20, 1981, to May 31, 2012): Percentage of Confirmed Nominees Approved by Roll Call Votes



Source: Internal CRS judicial nominations database.

Notes: This figures shows, for Presidents Reagan to Obama, the percentage of confirmed U.S. circuit and district court nominees who were confirmed by roll call votes (rather than by voice votes).

Factors Influencing the Selection and Confirmation Process for U.S. Circuit and District Court Nominations

This final section identifies selected factors which may influence various statistical aspects of the lower court appointment process⁴⁴ and variation in these statistics across presidencies.

The factors are organized and discussed in the approximate order in which they influence the selection and confirmation process from its initial to final stages: from (1) the appointment opportunities a President has during his tenure; to (2) the process used by an Administration for identifying, vetting, and selecting judicial nominees; to (3) the processing of a President's judicial nominations by the Senate.

The factors discussed below do not constitute an exhaustive list of independent variables that affect confirmation rates, and are not always readily quantifiable in terms of how they affect the selection and confirmation process for judicial nominees.

⁴⁴ Such aspects, discussed above in this report, include how many nominations a President makes to fill judgeships during his tenure, how long a President takes to select nominees, how quickly the Senate processes a President's nominations, and how many and what percentage of a President's judicial nominations are ultimately confirmed.

Appointment Opportunities

Opportunities for a President to make circuit and district court appointments arise when judgeships are vacant or are scheduled to become vacant. Various factors influence the number of such opportunities a President will have during his tenure in office. One such factor, at the start of a presidency, will be the number of judicial vacancies already in existence (i.e., the judicial vacancies a President inherits when taking office). The number of inherited vacancies, in turn, will be influenced by various factors. These include the frequency with which judicial departures occur and new judgeships are statutorily created in the years or months immediately prior to the new presidency; the extent to which the outgoing President, during this same period, makes nominations to fill judicial vacancies; and the rate at which the Senate confirms these nominations before the new President takes office.

A large number of judicial vacancies created before the start of a new presidency might or might not result in many appointment opportunities for the incoming President. Much would depend on how prompt the previous President was in making nominations to fill newly created judicial vacancies and on how willing the Senate was to confirm those nominations. The different rate, for instance, at which the Senate confirmed district court nominations immediately prior to the G.W. Bush and Obama presidencies was one factor in how many district court appointment opportunities each President inherited upon taking office. During the presidential election year of 2000, 56 district court nominations were pending in the Senate, of which 31 (or 55.4%) were confirmed. In contrast, during the presidential election year of 2008, 37 district court nominations were pending in the Senate, of which 24 (64.9%) were confirmed. This variation contributed to differences in the number of appointment opportunities for Presidents G.W. Bush and Obama.

Legislation creating new judgeships might also provide a new President with the opportunity to appoint a greater number of judges than he might have inherited. Legislation substantially increasing the number of authorized judgeships was enacted in 1978 (Omnibus Judgeship Act, P.L. 95-486); 1984 (Bankruptcy Amendments and Federal Judgeship Act, P.L. 98-353); and 1990 (Federal Judgeship Act, P.L. 101-650).⁴⁵ The large number of district court vacancies, for example, inherited by President Clinton contributed, in turn, to the relatively large number of district court confirmations during his presidency. The large number of district court vacancies inherited by President Clinton was, in part, the result of 74 new district court judgeships created by the Federal Judgeship Act of 1990.

Over the course of a presidency, opportunities for a President to make circuit and district court appointments continue to be affected by the rate at which judges depart office (by taking senior status, retiring, resigning, or dying). During some presidencies, substantial new judicial appointment opportunities also have arisen because of the statutory creation of new circuit and district court judgeships. Both factors—judicial departures and the statutory creation of new judgeships—can, throughout a President’s tenure, affect the number of persons nominated by the President and the number confirmed by the Senate.⁴⁶

⁴⁵ See CRS Report R41942, *Vacancies on Article III District and Circuit Courts, 1977-2011: Data, Causes, and Implications*, by (name redacted).

⁴⁶ President Reagan, for example, early in his second term eclipsed the total number of judicial appointments made by President Carter as a result, in part, of the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Cohodas, “Conservatives Pressing to Reshape Judiciary,” p. 1759.

For example, a study found that, largely as a result of judges retiring from full-time service on the bench, President Obama was confronted during his first three years in office with more judicial vacancies than his two immediate predecessors:

92 judges took senior status in the first three years of the Obama administration compared to 72 and 70 in the Clinton and Bush administrations' first three years.... Had district judges taken senior status in Obama's first three years at the same rate they did under Clinton or Bush, there would have been almost no increase in vacancies....⁴⁷

The Selection of Nominees by a President

A variety of factors can affect how long a President takes to select a nominee to fill a judicial vacancy. These factors include how many individuals are involved in identifying and vetting potential nominees, the specific selection criteria a President desires to emphasize in identifying nominees, whether a Supreme Court vacancy occurs, and, if so, the resources devoted to filling that vacancy.⁴⁸ A vacancy on the Supreme Court, for example, occurred early in both the Clinton and Obama Administrations, and in both instances, while the Administrations' searches were underway for a Supreme Court nominee, the Presidents sent few lower court nominations to the Senate.⁴⁹

The level of consultation between a President and a nominee's home state Senators also can influence the President's pace in selecting nominees for judicial vacancies. Home state Senators traditionally play an important role in the selection of district and, to a lesser extent, circuit court judges. The pace might be slowed by communication or other difficulties between the President and those Senators who represent states with vacant federal judgeships. Additionally, if the home state Senators are themselves slow in recommending a candidate, or if they and the President cannot agree on a suitable candidate, the nomination of an individual to fill a vacant judgeship may be delayed.⁵⁰

Another factor affecting a President's pace in selecting judicial nominees is the degree of priority he attaches to the process. According to one account, for example, judicial selection may not have been a priority for the Obama Administration during the 111th Congress. "The surest key to understanding the politics, processes, and outcomes of the Obama judicial selection record in the 111th Congress," according to the account, is "the recognition that judges were not seen as a priority by those closest to the President. Judicial selection was not a major focal point in the

⁴⁷ Wheeler, "Judicial Nominations and Confirmations," p. 2.

⁴⁸ See, for example, Goldman, "Obama's Judiciary at Midterm," pp. 265, 279, 288-291.

⁴⁹ In 1993, for example, President Clinton did not send his first district court nominations to the Senate until August 6. Likely delaying the President's initial selection of lower court nominees in 1993 was the March 19, 1993, announcement by Justice Byron R. White of his intention to retire from the Supreme Court when it adjourned for the summer. President Clinton engaged in a three-month search for Justice White's successor, announcing, on June 14, 1993, his selection of Ruth Bader Ginsburg as his Supreme Court nominee. For the President, selecting and nominating a person to fill a vacancy on the Supreme Court evidently took priority over providing the Senate with nominations to lower court judgeships. The Ginsburg nomination, in turn, was a primary object of attention for the Senate Judiciary Committee during June and July 1993, and subsequently as well for the Senate, which voted to confirm Justice Ginsburg on August 3, 1993, four days before the start of its August recess. As it had with the President, the Ginsburg nomination, for the Judiciary Committee and the Senate as a whole, presumably would have taken priority over lower court nominations had any been received prior to the Supreme Court nomination.

⁵⁰ For more information on the role of home state Senators, see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by (name redacted).

[A]dministration's legislatively driven domestic policy agenda, nor was it seen as a 'legacy' issue."⁵¹

Finally, the speed at which a President selects nominees might be influenced by the length of his Administration's vetting process. One recent study, for example, found that the time from vacancy to nomination during the first 14 months of the Obama Administration was longer than at the same point in the G.W. Bush Administration, especially for circuit court nominees.⁵² The greater time for President Obama to submit nominees, the study said, was likely due in part to the pre-nomination candidate vetting by the ABA's Standing Committee on the Federal Judiciary. The G.W. Bush Administration, the study noted, chose not to have its judicial candidates rated by the ABA committee (prior to submitting them to Congress). By contrast, the Obama Administration "brought the committee, and thus the additional 30 to 45 days typically consumed by its investigations, back into the pre-nomination stage."⁵³

The Processing of Judicial Nominations by the Senate

As in the nominee selection stage, the processing of judicial nominations by the Senate from first nomination to final Senate action is also affected by many institutional and political factors. Various studies, for example, have concluded that how long lower federal court nominees wait in the Senate confirmation process, from first nomination to final action, is affected by such factors as the extent of ideological differences between the President and the opposite party in the Senate, or of interest group opposition to certain nominees. Other factors cited were whether nominees had "champions" on the Senate Judiciary Committee, the point in a session when nominations arrived in the Senate, and the kind of ratings given nominees by the American Bar Association's Standing Committee on the Federal Judiciary.⁵⁴ Some of these factors might also contribute to other features of the confirmation process discussed in this report, e.g., whether a nominee is ultimately confirmed, and, if so, whether he or she is confirmed by roll call vote rather than voice vote.

The presence or absence of "divided government" (with the President and Senate majority of opposite political parties) also might influence the processing of judicial nominations by the Senate. One study concludes, however, that whether the President and Senate majority are of the same party or not, "presidents continue to select judges according to the same criteria and the Senate confirms or does not confirm nominations according to the same criteria."⁵⁵ Divided government, though, may affect the procedural strategies used to oppose a President's nominees.

⁵¹ Goldman, "Obama's Judiciary at Midterm," p. 272.

⁵² Russell Wheeler, "Judicial Nominations in the First Fourteen Months of the Obama and Bush Administrations," *Governance Studies at Brookings*, April 7, 2010, p. 2, at http://www.brookings.edu/~media/Files/rc/papers/2010/0407_judicial_nominations_wheeler/0407_judicial_nominations_wheeler.pdf.

⁵³ Ibid.

⁵⁴ See Lauren Cohen Bell, "Senatorial Discourtesy: The Senate's Uses of Delay to Shape the Federal Judiciary," *Political Research Quarterly*, vol. 55 (September 2002), pp. 589-607; Sarah A. Binder and Forrest Maltzmann, "Senatorial Delay in Confirming Federal Judges, 1947-1998," *American Journal of Political Science*, vol. 46 (January 2002), pp. 190-199; Wendy L. Martinek, Mark Kemper, and Steven R. Van Winkle, "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998," *Journal of Politics*, vol. 64 (May 2002), pp. 337-361; and Nancy Scherer, Brandon L. Bartels, and Amy Steigerwalt, "Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process," *Journal of Politics*, vol. 70, no. 4 (2008), pp. 1026-1039.

⁵⁵ Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford, CA: Stanford University Press, 2005), p.191.

It has been suggested, for example, that Senators “may rely on certain types of ... tactics during the confirmation process more or less depending on” whether the party controlling the presidency is also the majority party in the Senate.⁵⁶

Some factors might influence how quickly judicial nominations are processed at the committee level but not on the floor (and vice versa). For example, the role of the ABA’s Standing Committee on the Federal Judiciary in evaluating judicial candidates may be seen as a factor in the time that a circuit or district court nomination is pending in the Judiciary Committee (but not in the time that a reported nomination is pending on the Senate Executive Calendar). If the ABA committee’s role is (as it usually has been over the decades) to evaluate judicial candidates before the President selects a nominee, then the ABA’s evaluation does not add to the time between when the President makes a nomination and the Senate Judiciary Committee reports it. If, however, the ABA’s role is (as it was during the G.W. Bush presidency) to evaluate only *after* a person has been nominated, then the time taken for that evaluation will add to the total time that the nomination is pending in the Judiciary Committee.⁵⁷

Once a nomination has been reported from committee, the time taken until final Senate action might be influenced by political or other factors not present (or minimally so) at the committee level. Even if a nominee is non-controversial and received bipartisan support from the committee, significant delays in filling a judicial vacancy might occur when a judicial nomination, after being placed on the Executive Calendar, is blocked for one reason or another from floor consideration by Senators through the use of “holds,” or objections to unanimous consent requests.⁵⁸

Finally, another factor that might affect the processing of judicial nominations by the Senate (and, thus, judicial confirmation statistics) is the blue slip policy of the Senate Judiciary Committee, as set by its chair. Under this policy, which dates back to at least 1917, the committee chair seeks the assessment of Senators regarding various nominations for offices in their states, including those for U.S. district court judgeships, U.S. circuit court judgeships, U.S. attorneys, and U.S. marshals.

In practice, the chair sends a blue-colored form to both home state Senators regarding judicial nominations in their state. If a home state Senator has no objection to a nominee, the blue slip is returned to the chair with a positive response. If a Senator, however, has misgivings about the nominee and wants to stop or slow committee action, he or she can decide not to return the blue slip, delay returning it, or return it with a negative response. Most chairs of the Judiciary

⁵⁶ Ibid. Scherer elaborated that if the majority party in the Senate also holds the White House, filibusters by Senators belonging to the minority party become more prevalent, whereas blue-slip vetoes and other delaying tactics are more common during divided government.

⁵⁷ Hence, the increase from the Clinton presidency to the G.W. Bush presidency in the mean and median number of days from first nomination to first hearing for circuit and district court nominees might be regarded as attributable, in part, to the waiting time during the Bush presidency between when the Judiciary Committee received a nomination and subsequently received the ABA’s report on a nominee. A Brookings Institution report noted, however, that the “much longer wait time for Bush’s circuit nominees to get hearings ... is explained only partly by the timing of the ABA investigations. (Thirteen Bush nominees got hearings in 2003 – after Republicans took control of the Senate; five of those 13 had first been nominated in 2001 or 2002, creating initial-nomination-to-hearing times mostly in the 600 day range).” Wheeler, “Judicial Nominations and Confirmations,” p. 7.

⁵⁸ See CRS Report 98-712, “*Holds in the Senate*,” by (name redacted). See also Laura Litvan, “Republicans May Block Nominees After Obama Recess Appointments,” *Bloomberg*, January 27, 2012, <http://www.bloomberg.com/news/2012-01-26/republicans-may-impede-some-judges-after-recess-appointments.html>.

Committee have required a return of positive blue slips by both a state's Senators before allowing consideration of a nomination.⁵⁹

It should be noted, however, that the return of positive blue slips by both home state Senators does not always lead to a relatively speedy confirmation. In the 112th Congress, circuit and district court nominations have been reported by the Judiciary Committee only after home state Senators returned positive blue slips for the nominations. Nevertheless, the average time in the current Congress during which circuit and district court nominations have been pending on the Senate Executive Calendar before being confirmed has reached historically high levels.⁶⁰

⁵⁹ See CRS Report RL 34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by (name redacted).

⁶⁰ See, again, **Figure 4** and **Figure 5**. A specific example includes David Hamilton, an early Obama nominee who was eventually confirmed to the Seventh Circuit Court of Appeals. Mr. Hamilton had the support of Senator Evan Bayh as well as the "strong support of the respected senior Senate Republican Richard Lugar" (Goldman, "Obama's Judiciary at Midterm," p. 267). Nonetheless, the Hamilton nomination was on the Senate Executive Calendar for 168 days, approximately 85 days more than the average time from committee report to confirmation for circuit court nominees under President G.W. Bush and 83 days more than the average time for circuit court nominees under President Clinton.

Appendix. Data Used for Figures 1, 2, and 4 through 6

Data Used for Figures 1 and 2

Table A-1. Number and Percentage of U.S. Circuit and District Court Judgeships Held by Appointees of President Obama by Regional Circuit (as of May 31, 2012)

Regional Circuit	First	Second	Third	Fourth	Fifth	Sixth	Seventh
# of Authorized Circuit Court Judgeships (2011)	6	13	14	15	17	16	11
Number of Obama Appointees	1	5	2	6	2	2	1
Percentage of Obama Appointees	16.7	38.5	14.3	40.0	11.8	12.5	9.1
# of Authorized District Court Judgeships (2011)	29	62	59	56	83	62	47
Number of Obama Appointees	3	13	7	13	12	4	12
Percentage of Obama Appointees	10.3	21.0	11.9	23.2	14.5	6.5	25.5
Regional Circuit	Eighth	Ninth	Tenth	Eleventh	D.C.	Fed.	Total
# of Authorized Circuit Court Judgeships (2011)	11	29	12	12	11	12	179
Number of Obama Appointees	0	4	1	2	0	3	29
Percentage of Obama Appointees	0	13.8	8.3	16.7	0	25.0	16.2
# of Authorized District Court Judgeships (2011)	42	110	39	69	15	n/a	673
Number of Obama Appointees	12	22	5	8	5	n/a	116

Regional Circuit	First	Second	Third	Fourth	Fifth	Sixth	Seventh
Percentage of Obama Appointees	28.6	20.0	12.8	11.6	33.3	n/a	17.2

Source: Internal CRS judicial nominations database.

Data Used for Figure 4

Table A-2. U.S. Circuit and District Court Nominees of Five Most Recent Presidents (January 20, 1981, to May 31, 2012): Mean and Median Number of Days from First Nomination to First Hearing

President	U.S. Circuit Courts		U.S. District Courts	
	Mean	Median	Mean	Median
Reagan	43.1	23.0	43.2	22.0
G.H.W. Bush	78.0	65.5	82.6	65.0
Clinton	120.2	91.0	96.6	68.0
G.W. Bush	246.8	145.0	123.5	87.5
Obama	69.6	56.5	83.2	77.0

Source: Internal CRS judicial nominations database.

Data Used for Figure 5

Table A-3. U.S. Circuit and District Court Nominees of Five Most Recent Presidents (January 20, 1981, to May 31, 2012): Mean and Median Number of Days from First Committee Report to Confirmation

President	U.S. Circuit Courts		U.S. District Courts	
	Mean	Median	Mean	Median
Reagan	15.6	4.0	11.2	4.5
G.H.W. Bush	7.8	1.0	4.6	1.0
Clinton	82.2	14.0	28.2	8.0
G.W. Bush	83.1	18.0	37.5	21.0
Obama	139.7	132.0	105.1	90.0

Source: Internal CRS judicial nominations database.

Data Used for Figure 6

Table A-4. U.S. Circuit and District Court Nominees of Five Most Recent Presidents (January 20, 1981 to May 31, 2012): Number and Percentage of Confirmed Nominees Confirmed by Roll Call Votes

U.S. Circuit Courts			
President	# of Nominees Confirmed	# of Confirmed Nominees Receiving Roll Call Vote	% of Confirmed Nominees Receiving Roll Call Vote
Reagan	83	5	6.0
G.H.W. Bush	42	1	2.4
Clinton	65	16	24.6
G.W. Bush	61	49	80.3
Obama	29	24	82.8
U.S. District Courts			
President	# of Nominees Confirmed	# of Confirmed Nominees Receiving Roll Call Vote	% of Confirmed Nominees Receiving Roll Call Vote
Reagan	290	1	0.34
G.H.W. Bush	148	0	0
Clinton	305	32	10.5
G.W. Bush	261	141	54.0
Obama	117	65	55.6

Source: Internal CRS judicial nominations database.

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