



# **President Obama's First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan**

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## Summary

The process by which lower federal court judges are nominated by the President and considered by the Senate is of continuing interest to Congress. Recent Senate debates in 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 number and percentage of vacant judgeships in the federal judiciary and the effect of delayed judicial appointments on judicial vacancy levels. This report addresses these issues, and others, by providing a statistical analysis of nominations to U.S. circuit and district court judgeships during the first terms of President Obama and his four most recent predecessors. Some of the report's findings include the following:

- During his first term, President Obama nominated 42 persons to U.S. circuit court judgeships. Of the 42, 30 (71.4%) were confirmed, 5 (11.9%) had their nominations either withdrawn by the President or returned to the President and not resubmitted to the Senate, and 7 (16.7%) had their nominations returned to the President at the end of the 112<sup>th</sup> Congress and subsequently were renominated during the 113<sup>th</sup> Congress.
- During the first terms of the five most recent Presidents (Reagan to Obama), the 30 confirmed Obama circuit court nominees were tied with 30 Clinton nominees as the fewest number of circuit nominees confirmed. The percentage of circuit nominees confirmed during President Obama's first term, 71.4%, was the second-lowest, while the percentage confirmed during G.W. Bush's first term, 67.3%, was the lowest.
- Of the 173 persons nominated by President Obama to U.S. district court judgeships during his first term, 143 (82.7%) were confirmed, 6 (3.5%) had their nominations withdrawn or returned and not resubmitted, and 24 (13.9%) had their nominations returned to the President and were renominated during the 113<sup>th</sup> Congress.
- President Obama's first term, compared with the first terms of Presidents Reagan to G.W. Bush, had the second-fewest number of district court nominees confirmed (143 compared with 130 for President Reagan) and the second-lowest percentage of district court nominees confirmed (82.7% compared with 76.9% for President G.H.W. Bush).
- As it did during the first terms of Presidents Reagan, G.H.W. Bush, and Clinton, the circuit court vacancy rate during President Obama's first term increased (from 7.3% at the beginning to 9.5% at the end). Over the five most recent presidencies, G.W. Bush's first term was the only one during which the circuit court vacancy rate decreased (from 14.5% at the beginning to 8.4% at the end).
- As it did during the first terms of Presidents Reagan and G.H.W. Bush, the district court vacancy rate also increased from the beginning to the end of President Obama's first term (rising from 6.6% to 9.5%). President Obama is the only President during this period for whom the district court vacancy rate increased unaccompanied by the creation of new district court judgeships.
- The average number of days elapsed from nomination to confirmation for circuit court nominees confirmed during a President's first term ranged from 45.5 days

during President Reagan's first term to 277 days during President G.W. Bush's. For district court nominees, the average time between nomination to confirmation ranged from 34.7 days (Reagan) to 221.8 days (Obama).

- The median number of days from nomination to confirmation for circuit court nominees confirmed during a President's first term ranged from 28 days (Reagan) to 225.5 days (Obama). For district court nominees, the median time elapsed ranged from a low, again, of 28 days (Reagan) to 215 days (Obama).
- President Obama is the only one of the five most recent Presidents for whom, during his first term, both the average and median waiting time from nomination to confirmation for circuit and district court nominees was greater than half a calendar year (i.e., more than 182 days).

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## Introduction

The process by which lower federal court judges are nominated by the President and considered by the Senate has, in recent decades, been of continuing interest to Senators. During recent Senate debates 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.<sup>1</sup> 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 floor votes on confirmation.<sup>2</sup> Of related concern to the Senate have been increases in recent years in the number and percentage of vacant judgeships in the federal judiciary and the effect of delays in the processing of judicial nominations on filling judicial vacancies.<sup>3</sup>

This report seeks to inform the current debate in three ways: first, by providing a statistical analysis of President Barack Obama's nominees, during his first term, 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 of President Obama's judicial nominees, during his first term, in advancing through the Senate confirmation process with the success of the judicial nominees during the first terms 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 nomination statistics across the first terms of the five Presidents.

Most of the statistics presented and discussed in this report were generated from an internal CRS judicial nominations database. Other data sources, however, are noted where appropriate. The statistics account only for nominations made to U.S. circuit court and U.S. district court judgeships.<sup>4</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> See CRS Report R41942, *Vacancies on Article III District and Circuit Courts, 1977-2011: Data, Causes, and Implications*, by Denis Steven Rutkus.

<sup>4</sup> Statistics in this report for district court nominations include the relatively rare nominations made by a President to (continued...)

## 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.”<sup>5</sup> 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 concerns nominations made by President Obama and other recent Presidents to the U.S. circuit courts of appeals and the U.S. district courts (including the territorial district courts). Outside the report’s scope are the occasional nominations that these Presidents made to the nine-member U.S. Court of International Trade.

## U.S. Courts of Appeals

The U.S. Courts of Appeals 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 the nation is divided into 12 geographic circuits, each with a U.S. court of appeals. One additional nationwide circuit, the Federal Circuit, has specialized subject matter jurisdiction. Altogether, 179 appellate court judgeships for these 13 courts of appeals 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, 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.”

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(...continued)

territorial district court judgeships, which were established by Congress pursuant to its authority to govern the territories under Article IV of the Constitution. The three U.S. territorial courts are included in the report even though they are not Article III courts and their judges serve 10-year terms rather than “during good Behaviour.” They are accounted for because, like Article III district courts, territorial district courts hear cases arising out of federal law, their decisions may be appealed to a U.S. circuit court of appeals, and their judicial nominations are referred to the Senate Judiciary Committee. Additionally, Senate interest in district court nominations statistics often, if not always, extends to nominations to the territorial, as well as to the Article III, district courts.

<sup>5</sup> 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.

## U.S. District Courts

U.S. district courts are the federal trial courts of general jurisdiction. There are 91 Article III district courts: 89 in the 50 states, plus one in the District of Columbia and one more in 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.<sup>6</sup> Congress has authorized between 1 and 28 judgeships for each district court.<sup>7</sup>

Additionally, there are three U.S. territorial district courts established by Congress pursuant to its authority to govern the territories under Article IV of the Constitution. Judicial appointees to these courts serve 10-year terms, with one judgeship each in Guam and the Northern Mariana Islands, and two in the U.S. Virgin Islands.<sup>8</sup>

In sum, references throughout this report to U.S. district court judgeships include a total of 677 judgeships (673 Article III judgeships, of which 10 are temporary, and 4 territorial judgeships).

## Judicial Nominations and Confirmations During President Obama's First Term

This section provides a statistical analysis of President Obama's nominations to U.S. circuit courts of appeals and U.S. district courts from January 20, 2009, through January 19, 2013. It begins with a statistical summary of the confirmation status of President Obama's circuit and district court nominees who were nominated during his first term, including identifying the judicial circuits with the greatest and smallest percentage of circuit and district court judgeships that were filled by appointees of President Obama at the end of his first term (see "Variation Across Geographic Circuits in Number and Percentage of Confirmed Nominees"). 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 vacancy statistics at the end of his first term (see "U.S. Circuit and District Court Vacancies at Beginning and End of First Term").

## 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 January 19,

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<sup>6</sup> This total includes 10 temporary judgeships. See the U.S. Courts website at <http://www.uscourts.gov/JudgesAndJudgeships/AuthorizedJudgeships.aspx>.

<sup>7</sup> 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).

<sup>8</sup> While American Samoa is an overseas territory of the United States, it does not have a federal district court and has not been incorporated into a federal judicial district. The High Court of American Samoa is the court of general jurisdiction for the territory. The High Court has limited jurisdiction to hear cases under particular federal statutes. See Michael W. Weaver, "The Territory Federal Jurisdiction Forgot: The Question Of Greater Federal Jurisdiction In American Samoa," *Pacific Rim Law & Policy Journal Association*, vol. 17 (March 2008), p. 325.



2013.<sup>9</sup> President Obama, during his first term, nominated 42 persons to circuit court judgeships. Of the 42, 30 (71.4%) were confirmed by the Senate, and 5 (11.9%) failed to be confirmed after their nominations either were withdrawn by the President or returned to the President and not resubmitted to the Senate.<sup>10</sup> Additionally, 7 nominees (16.7%) had their nominations returned to the President at the end of the 112<sup>th</sup> Congress but have since been renominated during the 113<sup>th</sup> Congress (3 of whom, thus far, have been confirmed and 1 whose nomination has since been withdrawn by the President).<sup>11</sup>

**Table I. Confirmation Status of President Obama’s Judicial Nominees Who Were Nominated during the 111<sup>th</sup> and 112<sup>th</sup> Congresses**

	Total Nominees	Confirmed (during 111 <sup>th</sup> or 112 <sup>th</sup> Congress)		Returned (resubmitted during 113 <sup>th</sup> Congress)		Returned or Withdrawn (not resubmitted during 113 <sup>th</sup> Congress)	
		Number	Percentage	Number	Percentage	Number	Percentage
U.S. Circuit Courts	42	30	71.4	7	16.7	5	11.9
U.S. District Courts	173	143	82.7	24	13.9	6	3.5

**Source:** Internal CRS judicial nominations database.

**Notes:** This table shows the number and percentage of President Obama’s circuit and district court nominees who, during the 111<sup>th</sup> or 112<sup>th</sup> Congress, received Senate confirmation. This table also shows the number and percentage of President Obama’s nominees who had their nominations returned to the President at the end of the 112<sup>th</sup> Congress and who were renominated during the 113<sup>th</sup> Congress. The nominations of nominees under the heading “Returned or Withdrawn (not resubmitted)” were either returned to the President one or more times in either the 111<sup>th</sup> or 112<sup>th</sup> Congress (and not subsequently resubmitted in the 113<sup>th</sup> Congress) or were withdrawn by the President.

President Obama, during his first term, nominated 173 individuals to district court judgeships. Of the 173, 143 (82.7%) were confirmed by the Senate, and 6 (3.5%) failed to be confirmed after their nominations either were withdrawn by the President or returned to the President and not

<sup>9</sup> The most common ways in which a judicial nomination fails to receive Senate confirmation include (1) the full Senate voting against the nomination; (2) the President withdrawing the nomination, either because (i) the Senate Judiciary Committee has voted against reporting the nomination to the Senate, (ii) has made clear its intention not to act on the nomination, or (iii) because the nomination, even if reported, is likely to face substantial opposition on the Senate floor; (3) the nominee himself or herself has requested that the nomination be withdrawn; and (4) the Senate, without confirming or rejecting the nomination, returns 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.

<sup>10</sup> The 5 unconfirmed nominees were Robert N. Chatigny (nominated to the Second Circuit; nomination returned to the President), Edward C. DuMont (Federal Circuit; nomination withdrawn by the President), Goodwin Liu (Ninth Circuit; nomination withdrawn after cloture failed), Victoria F. Nourse (Seventh Circuit; nomination returned), and Steve Six (Tenth Circuit; nomination returned).

<sup>11</sup> William J. Kayatta Jr. was confirmed to the First Circuit Court of Appeals on February 13, 2013; Robert E. Bacharach was confirmed to the Tenth Circuit Court of Appeals on February 25, 2013; Richard G. Taranto was confirmed to the U.S. Court of Appeals for the Federal Circuit on March 11, 2013; and Patty Shwartz was confirmed to the Third Circuit Court of Appeals on April 9, 2013. The nomination of Caitlin J. Halligan to the U.S. Court of Appeals for the D.C. Circuit was withdrawn by President Obama on March 22, 2013. The nominations of Jill A. Pryor to the Eleventh Circuit and Srikanth Srinivasan to the D.C. Circuit are, as of this writing, pending before the Senate Judiciary Committee.

resubmitted to the Senate.<sup>12</sup> Additionally, 24 nominees (13.9%) had their nominations returned to the President at the end of the 112<sup>th</sup> Congress but have since been renominated during the 113<sup>th</sup> Congress (9 of whom, thus far, have been confirmed).<sup>13</sup>

In total, 173 (80.5%) of President Obama's circuit and district nominees were confirmed during his first term.

## **Variation Across Geographic Circuits in Number and Percentage of Confirmed Nominees**

President Obama's confirmed judicial appointees are not distributed uniformly across geographic circuits. The opportunity to appoint circuit and district court judges to a particular circuit depends upon the vacancies that exist when a President takes office or that 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 that are held by appointees of a President.<sup>14</sup>

At the conclusion of his first term, the greatest *number* of U.S. appeals court judgeships held by appointees of President Obama were to the Fourth Circuit (i.e., six confirmed nominees), the Second Circuit (five), the Ninth Circuit (five), and the Federal Circuit (three). In contrast, during his first term, no nominees of President Obama were confirmed to either the Eighth Circuit Court of Appeals<sup>15</sup> or to the U.S. Court of Appeals for the D.C. Circuit. President Obama is the first President in more than 50 years who has served a full four-year term without having a single nominee confirmed to the appellate court for the D.C. Circuit,<sup>16</sup> although he nominated two individuals to this bench in his first term.<sup>17</sup>

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<sup>12</sup> The six unconfirmed nominees were: Louis B. Butler Jr. (nominated to W.VI; nomination returned), Charles B. Day (MD; nomination withdrawn), Michael C. Green (W.NY; nomination returned), Arvo Mikkanen (N.OK; nomination returned), V. Natasha Perdeu Silas (N.GA; nomination returned), and Linda T. Walker (N.GA; nomination returned).

<sup>13</sup> Katherine P. Failla and Pamela Chen were confirmed, respectively, as a U.S. district judge for the Southern District of New York and for the Eastern District of New York, on March 4, 2013. Andrew P. Gordon was confirmed as a judge for the District of Nevada on March 11, 2013. On March 23, 2013, Kentanji B. Jackson was confirmed as a judge for the District of Columbia, Raymond P. Moore was confirmed as a judge for the District of Colorado, and Troy L. Nunley was confirmed as a judge for the Eastern District of California. On April 15, 2013, Beverly R. O'Connell was confirmed as a U.S. district judge for the Central District of California. Finally, on April 18, 2013, Derrick K. Watson was confirmed as a judge for the District of Hawaii and Analisa Torres was confirmed as a judge for the Southern District of New York. Of the remaining 15 district court nominations that were returned to President Obama at the end of the 112<sup>th</sup> Congress and resubmitted at the beginning of the 113<sup>th</sup> Congress, 1 (the nomination of Elissa F. Cadish as a judge for the District of Nevada) was withdrawn by the President on March 13, 2013, and 14, as of this writing, remain pending in the Senate (5 in committee and 9 on the *Executive Calendar*).

<sup>14</sup> The statistics reported in this sub-section 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.

<sup>15</sup> Jane Kelly was confirmed on April 24, 2013 (during President Obama's second term), to the Eighth Circuit Court of Appeals.

<sup>16</sup> See Bill Mears, "Obama nominee for federal appeals court withdraws," *CNN* online, March 23, 2013, at <http://www.cnn.com/2013/03/22/politics/court-nominee-withdraws>.

<sup>17</sup> President Obama first nominated Caitlin J. Halligan on September 29, 2010, and Srikanth Srinivasan on June 11, 2012.

President Obama's confirmed U.S. courts of appeals appointees held the greatest *percentage* of judgeships in the same circuits for which he also had the greatest number of confirmed nominees. Obama appointees, at the end of his first term, held 40.0% of circuit court judgeships on the Fourth Circuit Court of Appeals, 38.5% on the Second Circuit, 25.0% on the Federal Circuit, and 17.2% on the Ninth Circuit. In addition to the Eighth and D.C. Circuits, the circuits with the smallest percentage of judgeships held by Obama appointees included the Tenth Circuit Court of Appeals (8.3%) and the Seventh Circuit (9.1%).

For U.S. district courts, the greatest *number* of judgeships held by appointees of President Obama were to district courts located within the Ninth Circuit (27 confirmed district nominees), the Second Circuit (16), and the Fourth Circuit (15).<sup>18</sup> As of January 19, 2013, the two circuits with the fewest judgeships held by Obama district court appointees were the First Circuit (4) and the D.C. Circuit (5).

At the conclusion of his first term, the four regional circuits with the greatest *percentage* of district court judgeships held by President Obama's appointees were the D.C. Circuit (33.3% of district court judgeships), the Eighth Circuit (31.0%), the Seventh Circuit (27.7%), and the Fourth Circuit (26.8%). 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 confirmed, during his first term, to these same two circuits.

## **U.S. Circuit and District Court Vacancies at Beginning and End of First Term**

**Figure 1** displays the number of U.S. circuit and district court vacancies that existed when President Obama began his first 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 vacancies that existed at the end of the President's first term (January 19, 2013), broken down by vacancies for which a nomination was pending in the Senate Judiciary Committee, for which a nomination was pending on the Senate *Executive Calendar*, and for which no nomination was pending.

As **Figure 1** indicates, 26 more circuit and district court judgeships were vacant at the end of President Obama's first term than when President Obama took office (a total of 81 vacancies on January 19, 2013, compared with 55 on January 20, 2009).

Of the 81 vacancies that existed at the end of President Obama's first term, 31 (38.3%) were vacancies for which a nomination was pending prior to January 19, 2013. Of these 31 vacancies, 10 (32.3%) had a nomination pending on the *Executive Calendar*, while 21 (67.7%) had a nomination pending in the Senate Judiciary Committee.

Even if the 10 nominees with nominations pending on the *Executive Calendar* had been confirmed prior to the end of President Obama's first term, total vacancies at the end of President

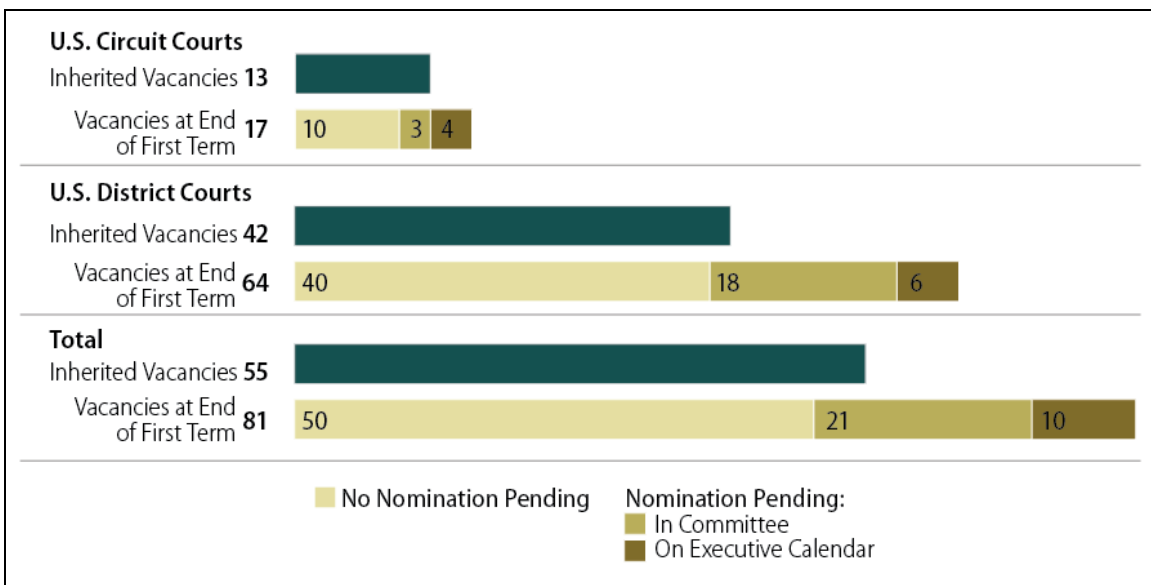
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<sup>18</sup> The number and percentage of district court judgeships held by Obama appointees in the Ninth Circuit does *not* include Jacqueline H. Nguyen, an Obama U.S. district court appointee confirmed during the 111<sup>th</sup> Congress, who was subsequently confirmed during the 112<sup>th</sup> Congress as a judge on the Ninth Circuit Court of Appeals. Ms. Nguyen is counted, consequently, as one of President Obama's circuit court appointees.

Obama’s first term would still have been greater than at the beginning. Specifically, 16 more circuit and district court judgeships (rather than 26) would have been vacant at the end of President Obama’s first term than when President Obama took office.

It should, however, be noted that if the 4 circuit court nominees with nominations pending on the *Executive Calendar* had been confirmed prior to the end of the 112<sup>th</sup> Congress, the number of circuit court vacancies would have been the same at the end of President Obama’s first term as at the beginning of it. Confirmation of the 4 circuit nominees would have reduced the end-of-first-term vacancy total to 13, equal to the 13 vacancies President Obama inherited at the start of his term.

**Figure 1. U.S. Circuit and District Court Judgeships: Number of Vacancies Inherited by President Obama and Number of Vacancies at End of First Term**



**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 that existed when President Obama took office on January 20, 2009 (i.e., “inherited vacancies”). The figure also shows the number of circuit and district court vacancies on January 19, 2013, broken down by the number of vacancies for which no nomination was pending prior to the end of President Obama’s first term, the number of vacancies for which a nomination was pending in committee at the end of the 112<sup>th</sup> Congress, and the number of vacancies for which a nomination was pending on the Senate Executive Calendar at the end of the 112<sup>th</sup> Congress.

**Figure 1** also shows that, of the 81 circuit or district court vacancies that existed at the end of President Obama’s first term, 50 (or 61.7%) were vacancies for which, as of January 19, 2013, the President had not selected a nominee. These 50 vacancies had been vacant, on average, at the end of President Obama’s first term, for 452.5 days (or, based on the median,<sup>19</sup> for 225 days). A notable number and percentage of these vacancies, however, occurred relatively late in President

<sup>19</sup> The “average” or “mean” is the arithmetic mean (both terms are used interchangeably throughout this report), while the “median” indicates the middle value for a particular set of numbers. In this case, the middle value for the number of days nominations had been pending without a nomination prior to the end of President Obama’s first term.

Obama's first term. Of the 50 vacancies without a pending nominee at the end of the President's first term, 23 (46.0%) did not become vacant until after July 1, 2012.<sup>20</sup>

**Figure 1** also reveals a more pronounced increase, from when President Obama took office to the end of his first term, in the number of district court vacancies than of circuit court vacancies. Specifically, while the number of circuit court vacancies at the end of his first term was 4 more than when President Obama took office on January 20, 2009 (i.e., 17 versus 13), the number of district court vacancies was 22 more (64 versus 42). In contrast, the number of district court vacancies under both Presidents Clinton and G.W. Bush declined from the beginning to the end of their first terms.<sup>21</sup>

This difference in the increased number of vacancies between circuit and district courts might reflect, in part, the longer amount of time President Obama took, at least during the first three years of his first term, 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.<sup>22</sup> 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.<sup>23</sup>

These statistics, however, should not be interpreted to mean that the increase in the number of circuit and district court vacancies from the time 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 concluding section of this report (see "Factors Influencing the Selection and Confirmation Process for U.S. Circuit and District Court Nominations"), 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.

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<sup>20</sup> The statistics reported in this paragraph were based on CRS analysis of data provided by the federal judiciary at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>.

<sup>21</sup> Ibid.

<sup>22</sup> 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/research/files/papers/2012/1/13%20nominations%20wheeler/0113\\_nominations\\_wheeler.pdf](http://www.brookings.edu/~media/research/files/papers/2012/1/13%20nominations%20wheeler/0113_nominations_wheeler.pdf) (hereinafter Wheeler, "Judicial Nominations and Confirmations").

<sup>23</sup> Ibid. Wheeler's calculations, to arrive at the mean and median number of days from vacancy to nomination, measured the time intervals that, during the Obama presidency, began from the date the departing incumbent announced his or her intention to leave active service at some future date; the date a vacancy was created if no announcement was made; or President Obama's inauguration day (i.e., January 20, 2009) if a vacancy had occurred by that date.

## 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 first terms of President Obama and his four immediate predecessors.<sup>24</sup> It first compares the number and percentage of confirmed U.S. circuit and district court nominees during the first terms from Presidents Reagan to Obama. It then provides, for the same Presidents, the circuit and district court vacancy rates that existed at the beginning of each President's first term with the rates at the end of his first term. The section concludes by comparing selected features of the Senate judicial confirmation process during the first terms of the five most recent Presidents. Specifically, it compares, for circuit and district court nominees, (1) the average and median number of days that elapsed from nomination to confirmation; (2) the average and median number of days from nomination to committee hearing; and (3) the average and median number of days from committee report to confirmation.

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 for the Senate to take final action on them. 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, during the first terms of Presidents Reagan through Obama, the total number of circuit and district court nominees, the total number of nominees confirmed, and the percentage confirmed. 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.

Among the five Presidents during their first terms, the table reveals that President G.H.W. Bush had the greatest number of circuit court nominees confirmed, 42. President Reagan had the greatest percentage of circuit nominees confirmed during a first term (86.8%). In contrast, President Obama had the second-lowest percentage of circuit court nominees confirmed (71.4%) and is tied with President Clinton for having the lowest number of circuit nominees confirmed, 30.

For district court nominees, Presidents Clinton and G.W. Bush are tied for the greatest number confirmed during the first term of a presidency (170). President G.W. Bush, however, had the greatest percentage of district court nominees confirmed during a first term (95.0%). President Obama, in contrast, had the second-lowest number of district court nominees confirmed (143) and the second-lowest percentage of district nominees confirmed (82.7%).

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<sup>24</sup> Statistical measures from the first terms of President Obama and his four immediate predecessors are included in this section of the report because CRS rarely receives requests for judicial nomination and confirmation statistics for Presidents prior to Ronald Reagan.

For circuit and district court nominees, combined, President G.W. Bush, of the five most recent Presidents, had both the greatest number and percentage of nominees confirmed during his first term (205 confirmed nominees, representing a confirmation rate of 88.7%). President Clinton had the second-greatest number of nominees confirmed during his first term (200), while President Reagan’s nominees had the second-highest confirmation rate (87.2%).

At the end of his first term, President Obama had the second-lowest number of combined circuit and district court nominees confirmed (173), and the second-lowest confirmation rate (80.5%).<sup>25</sup> The President with the lowest number of circuit and district court confirmed in his first term was Ronald Reagan (163), while President G.H.W. Bush had the lowest percentage of total nominees confirmed (77.4%).

**Table 2. U.S. Circuit and District Court Nominees of Five Most Recent Presidents: Number Nominated, Number Confirmed, Percentage Confirmed during First Term**

President	U.S. Circuit Courts			U.S. District Courts			Total		
	Number of Nominees	Number Confirmed	% Confirmed	Number of Nominees	Number Confirmed	% Confirmed	Number of Nominees	Number Confirmed	% Confirmed
Reagan	38	33	86.8	144	130	90.3	182	163	89.6
G.H.W. Bush	53	42	79.2	195	150	76.9	248	192	77.4
Clinton	41	30	73.2	198	170	85.9	239	200	83.7
G.W. Bush	52	35	67.3	179	170	95.0	231	205	88.7
Obama	42	30	71.4	173	143	82.7	215	173	80.5

**Source:** Internal CRS judicial nominations database.

**Notes:** This table shows, for each of the past five Presidents, the total number of individuals nominated for 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 were ultimately confirmed during a President’s second term. These individuals were not included in the number and percentage of confirmed nominees reported in the table.

The statistics presented in **Table 2** include nominees whose nominations were submitted by a President relatively late in the fourth year of his first term. For the Senate, however, there might not always be sufficient time in a session to process most of these late nominations prior to adjourning *sine die*. Consequently, the percentage of a President’s nominees confirmed during his first term ordinarily might be greater when relatively late nominations are removed from the analysis.

<sup>25</sup> If the 10 judicial nominees who have, thus far, been confirmed during the 113<sup>th</sup> Congress are included, President Obama has made a total of 183 *appointments* to circuit and district court judgeships. This number, at present, still places President Obama behind 2 of 3 Presidents since 1933 who have served a single term (or less). President Obama’s total currently ranks behind Presidents Carter (262) and G.H.W. Bush (191) and ahead of President Kennedy (122). Note that these numbers reflect the total number of *appointments*, not judges. Because some judges, for example, are elevated during any given presidency, they would be counted as two appointments, not one, for that President. This comparison is based on data provided by the Administrative Office of U.S. Courts (online at <http://www.uscourts.gov/JudgesAndJudgeships/JudgeshipAppointmentsByPresident.aspx>) and the internal CRS judicial nominations database.

The percentage of circuit court nominees, for example, confirmed during President Reagan's first term increased from 86.8% to 97.1% when excluding four nominees who were first nominated after July 1, 1984, and whose nominations were returned to the President at the end of his first term. Similarly, the percentage of district court nominees during President Obama's first term increased from 82.7% to 87.7% when excluding 10 nominees who were first nominated after November 1, 2012, and whose nominations were returned at the end of the President's first term.<sup>26</sup>

## **Circuit and District Court Vacancy Rates at Beginning and End of First Term**

The vacancy rate for circuit and district court judgeships (i.e., the percentage of authorized judgeships that are vacant) varies over the course of a presidency and is affected by the pace at which a President selects nominees for vacancies as well as the speed by which the Senate considers the President's nominees. **Table 3** compares, for President Obama and his four most recent predecessors: (1) the U.S. circuit and district court vacancy rates<sup>27</sup> at the beginning of each President's first term; (2) the circuit and district court vacancy rates at the end of his first term;<sup>28</sup> and (3) the change in circuit and district court vacancy rates from the beginning to the end of each President's first term.

**Table 3** reveals that, for circuit court vacancy rates during the five Presidents' first terms, only the first term of President G.W. Bush saw the vacancy rate decline from the beginning to the end of the term, decreasing from 14.5% to 8.4%. The circuit court vacancy rate increased the most for President Reagan, from 3.8% to 15.5%, and the least for President Obama, from 7.3% to 9.5%.

The increase in the vacancy rate following President Reagan's first term and G.H.W. Bush's presidency might be attributable, at least in part, to the creation of new circuit court judgeships during these Presidents' first terms. During President Reagan's first term, for example, the Federal Courts Improvement Act of 1982 created the Federal Circuit with a total of 12 new judgeships.<sup>29</sup> Additionally, the Bankruptcy Amendments and Federal Judgeship Act of 1984

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<sup>26</sup> An earlier "cut-off" date was used to identify circuit court nominees whose nominations were made by a President relatively late in his first term than was used for district court nominees because of the invocation by Senators, in recent decades, of the "Thurmond rule" on circuit court nominations during presidential election years (which include a President's fourth year in office). Specifically, since President Clinton's fourth year in office in 1996, circuit court nominations have not usually been acted upon by the full Senate after July 1<sup>st</sup> during presidential election years. In contrast, it is not uncommon for the Senate to continue acting upon district court nominations after July 1<sup>st</sup> during these same years. See CRS Report R42600, *Confirmation of U.S. Circuit and District Court Nominations in Presidential Election Years*, by Denis Steven Rutkus and Barry J. McMillion.

<sup>27</sup> The circuit (or district) court vacancy rate on any given date is the *percentage* of authorized circuit (or district) court judgeships that are vacant on that date. The rate, or percentage, is calculated by dividing the number of circuit (or district) court vacancies that exist on a date by the number of authorized circuit (or district) court judgeships existing on that same date.

<sup>28</sup> For this part of the analysis, the end of a President's term in office is considered January 19, the last full day prior to a President being inaugurated on January 20.

<sup>29</sup> P.L. 97-164 (April 2, 1982).



created 24 new circuit court judgeships.<sup>30</sup> Finally, during President G.H.W. Bush's first term, 11 new circuit court judgeships were created by the Judicial Improvements Act of 1990.<sup>31</sup>

As for district court vacancy rates during this period, President G.W. Bush's first term saw the greatest decline in the vacancy rate (from 8.3% to 3.6%)—perhaps reflecting the Senate's confirmation rate of 95.0% for district court nominees during his first term. The district court vacancy rate also declined under President Clinton, falling from 14.4% to 10.0%. During President Obama's first term, by contrast, the district court vacancy rate increased from the beginning to the end of his first term, rising from 6.7% to 9.5%.

The district court vacancy rates also increased during the first terms of Presidents Reagan (from 5.7% to 13.3%) and G.H.W. Bush (from 4.7% to 14.4%). However, these increases, as had the aforementioned increases in circuit vacancy rates, coincided with the creation of new judgeships during both President Reagan's and President G.H.W. Bush's first terms. During President Reagan's first term, the Federal Judgeship Act of 1984 created 53 new permanent district court judgeships. During President G.H.W. Bush's presidency, the Judicial Improvements Act of 1990 created 61 new permanent district court judgeships.

**Table 3. U.S. Circuit and District Court Vacancy Rates of Five Most Recent Presidents at Beginning and End of First Terms in Office**

President	U.S. Circuit Court Vacancy Rate			U.S. District Court Vacancy Rate		
	Jan. 20 of first year	Jan. 19 of fourth year	Change	Jan. 20 of first year	Jan. 19 of fourth year	Change
Reagan	3.8	15.5	+11.7	5.7	13.3	+7.6
G.H.W. Bush	6.0	10.1	+4.1	4.7	14.4	+9.7
Clinton	10.1	12.8	+2.7	14.4	10.0	-4.4
G.W. Bush	14.5	8.4	-6.1	8.3	3.6	-4.7
Obama	7.3	9.5	+2.2	6.7	9.5	+2.8

**Source:** Internal CRS judicial vacancies database.

**Notes:** This table shows, for each of the last five Presidents, the U.S. circuit and district court judgeship vacancy rates that existed at the beginning of a President's first term (January 20); the respective vacancy rates that existed at the end of his first term (January 19); and the change for the respective judgeships from the beginning to the end of his first term in office.

President Obama, in contrast, was the only White House occupant during this period for whom the district court vacancy rate increased during a presidential first term unaccompanied by the creation of new district court judgeships.

That the district court vacancy rate, over time, increased from the beginning to the end of President Obama's first term while not increasing during the first terms of his two immediate predecessors (Presidents Clinton and G.W. Bush) might, in part, be a function of the relative amounts of time taken by these Presidents to nominate persons to fill district court vacancies. As

<sup>30</sup> P.L. 98-353 (July 10, 1984).

<sup>31</sup> P.L. 101-650 (December 1, 1990).

mentioned above, according to one study, President Obama took 399 days, on average, during this 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.<sup>32</sup>

Additionally, as previously reported by CRS, on February 1 of President Obama's second and fourth years in office, there were a greater percentage of district court vacancies for which the President had not made a nomination (81.7% and 55.2%, respectively) than during the same points in time during the first terms of Presidents Clinton (72.8% and 41.5%) and G.W. Bush (48.5% and 13.8%).<sup>33</sup>

For his part, the speed with which a President submits judicial nominations to the Senate reflects factors both within an Administration's control and outside its control.<sup>34</sup> These factors are discussed further in the concluding section (see "Factors Influencing the Selection and Confirmation Process for U.S. Circuit and District Court Nominations").

## **Selected Features of the Senate Confirmation Process**

Like other parts of this report, the discussion under this heading is based upon nomination and confirmation statistics from each President's first term in office. Additionally, the statistics here largely account only for those nominees who were confirmed by the Senate during a President's first term (thus excluding from the analysis nominees who were never confirmed or who were later confirmed during a President's second term).<sup>35</sup>

### **Length of Time from Nomination to Confirmation**

**Figure 2** tracks by President, from Reagan to Obama, the average and median number of days from nomination to confirmation for all circuit and district court nominees confirmed during a President's first term. If a nominee was nominated more than once by a President during his first term in office, the first date he or she was nominated was used to calculate the days elapsed from nomination to confirmation.

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<sup>32</sup> Wheeler, "Judicial Nominations and Confirmations," p. 5.

<sup>33</sup> See CRS Report R42556, *Nominations to U.S. Circuit and District Courts by President Obama During the 111<sup>th</sup> and 112<sup>th</sup> Congresses*, by Barry J. McMillion.

<sup>34</sup> 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.

<sup>35</sup> An exception, where statistics include some unconfirmed nominees, is a sub-section that analyzes the length of time from first nomination to first hearing. Included in that analysis are those nominees who were nominated during a President's first term and who also had a hearing during that President's first term, regardless of whether their nomination was approved by the Senate.

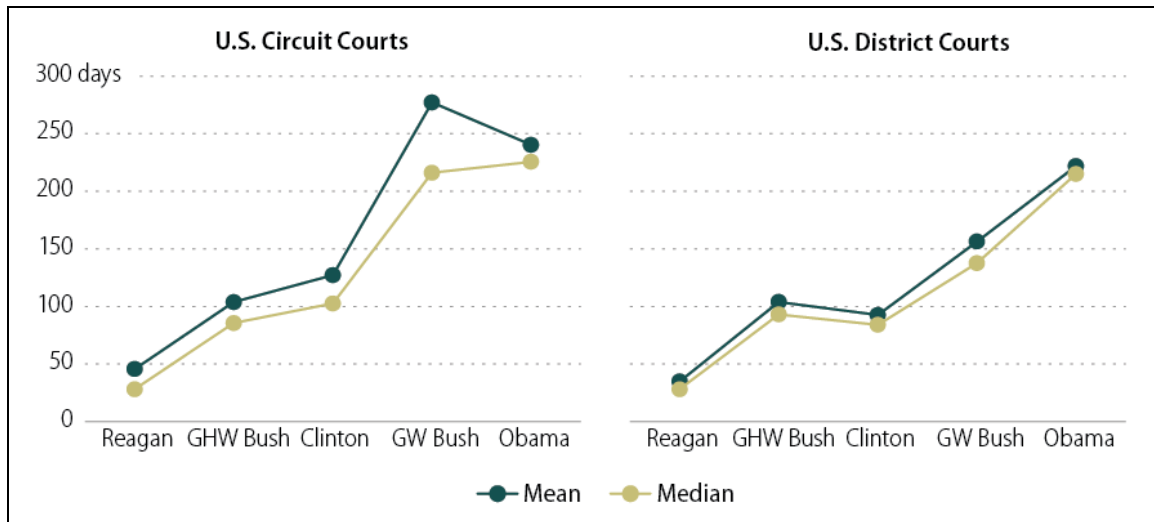
### U.S. Circuit Court Nominees

Overall, President G.W. Bush’s circuit court nominees who were confirmed during his first term waited, on average, the longest period of time from first nomination to confirmation (277.0 days). President Obama’s nominees waited, on average, the second-longest period of time (240.2 days) followed by the circuit court nominees of Presidents Clinton (127.1 days), G.H.W. Bush (103.7 days), and Reagan (45.5 days).

While President G.W. Bush’s circuit court nominees waited, on average, the longest period of time from nomination to confirmation, President Obama’s circuit court nominees had the longest median wait time from first nomination to confirmation (225.5 days).<sup>36</sup> This statistic shows that half of the circuit court nominees who were confirmed during President Obama’s first term waited more than 225.5 days from nomination to confirmation, while the other half waited less than 225.5 days.

The circuit court nominees who were confirmed during President G.W. Bush’s first term had a median wait time of 216.0 days followed, in decreasing order, by the circuit court nominees of President Clinton (102.5 days), G.H.W. Bush (85.5 days), and Reagan (28.0 days).

**Figure 2. U.S. Circuit and District Court Nominees of Five Most Recent Presidents: Mean and Median Number of Days from Nomination to Confirmation for Nominees During First Term**



**Source:** Internal CRS judicial nominations database.

**Notes:** This figure shows, for each of the past five Presidents, the mean and median number of days from first nomination to confirmation for all U.S. circuit and district court nominees who were confirmed during a President’s first term.

<sup>36</sup> Note that the median, or middle value for the nominees, is less affected by outliers or extreme cases, i.e. nominees whose elapsed time from first nomination to confirmation was unusually long or short. Consequently, the median might be a better indicator, generally, for indicating the elapsed time from nomination to confirmation experienced, typically, by a President’s nominees.

### ***U.S. District Court Nominees***

As for district court nominees, President Obama's confirmed nominees waited, on average, 221.8 days from nomination to confirmation. President G.W. Bush's district court nominees waited, on average, 156.2 days. The district court nominees confirmed during President Clinton's first term waited an average of 92.5 days while the nominees of Presidents G.H.W. Bush and Reagan waited 103.8 and 34.7 days, respectively.

The median waiting times from nomination to confirmation for district court nominees ranged from a high of 215.0 days during President Obama's first term to a low of 28.0 days during President Reagan's first term. The median waiting times from nomination to confirmation for the district court nominees for other Presidents during this period were 137.5 days (G.W. Bush), 93.0 days (G.H.W. Bush), and 84.0 days (Clinton).

President Obama is the only President during this period for whom, during his first term, U.S. circuit and district court nominees waited, both in terms of average and median number of days, more than half of a calendar year (i.e., more than 182 days) to be confirmed after being nominated.

The length of time it takes a President's judicial nominees, once nominated, to be confirmed by the Senate depends (in part) on the length of time nominees wait for a committee hearing and, once reported by the Senate Judiciary Committee, the length of time nominations remain on the *Executive Calendar* prior to being considered by the full Senate. These stages of the confirmation process are discussed next.

### **Length of Time from Nomination to Committee Hearing**

**Figure 3** tracks, for Presidents 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 a President's first term.

All nominees who received hearings during a President's first term were included in the calculations, regardless of whether they were eventually confirmed or their nomination was returned, withdrawn, or rejected by the Senate. In cases where a nominee received a hearing only after being renominated, the waiting time was calculated from the date of the *first* nomination to a committee hearing. Additionally, when nominees received more than one committee hearing, the statistics used to generate **Figure 3** measure only the length of time from the date a nominee was first nominated to the date of his or her *first* hearing.

### ***U.S. Circuit Court Nominees***

**Figure 3** shows that circuit court nominees of President G.W. Bush waited more days to receive a hearing than did the nominees of the other four Presidents.<sup>37</sup> The mean and median number of

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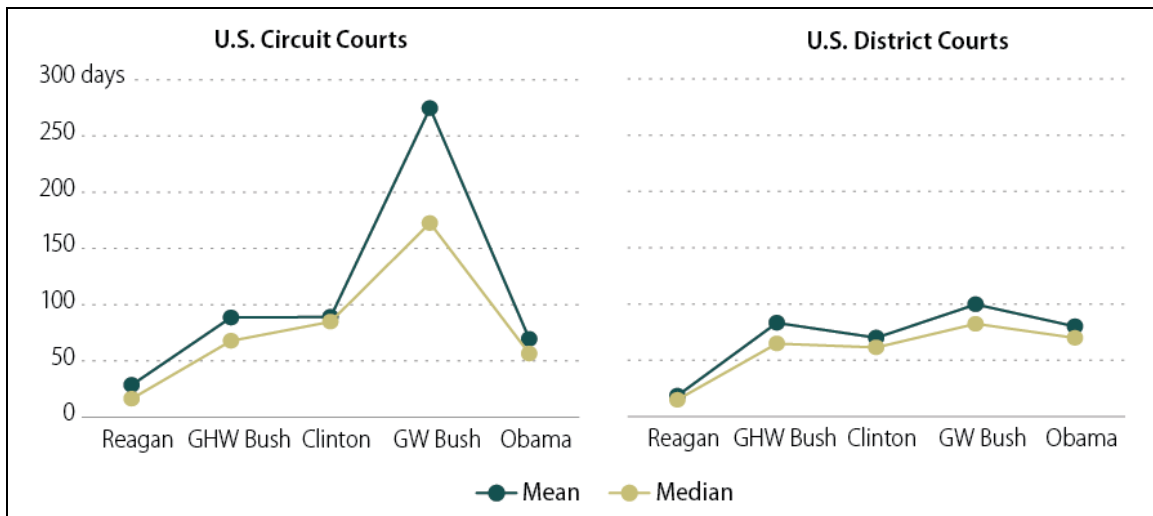
<sup>37</sup> Despite the relatively longer wait times for circuit court nominees to receive a hearing during President G.W. Bush's first term, a greater number of circuit court nominees received hearings during President G.W. Bush's first term than during the first terms of the other Presidents. Specifically, 50 circuit court nominees who were nominated during President G.W. Bush's first term also had hearings during his first term compared with 44 circuit court nominees during President G.H.W. Bush's first term, 38 during President Obama's, and 36 during both President Clinton's and (continued...)

days for a circuit court nominee to receive a committee hearing after being nominated ranged from a low of 28.7 and 16.5 days, respectively, during the Reagan presidency to 274.6 and 172.5 days, respectively, for the G.W. Bush presidency.<sup>38</sup>

President Clinton’s circuit court nominees waited an average of 89.2 days to receive hearings (although the median waiting time was slightly lower, i.e., 85.0 days). Similarly, as **Figure 3** shows, President G.H.W. Bush’s circuit court nominees waited an average of 88.7 days to receive hearings (with a median waiting time of 68.0 days).

Although a relatively low number and percentage of President Obama’s circuit court nominees were confirmed in his first term,<sup>39</sup> his circuit court nominees received hearings relatively quickly. His circuit court nominees 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 (28.7 days).

**Figure 3. U.S. Circuit and District Court Nominees of Five Most Recent Presidents: Mean and Median Number of Days from Nomination to Hearing for Nominees during First Term**



**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 U.S. circuit and district court nominees who received hearings during a President’s first term.

(...continued)

Reagan’s first terms. Source: Internal CRS judicial nominations database.

<sup>38</sup> 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).

<sup>39</sup> As discussed above, President Obama, compared with his four most recent predecessors, tied with President Clinton for the least number of circuit court nominees confirmed during a first term, and had the second-smallest percentage of circuit court nominees confirmed (see “Number and Percentage of Confirmed Judicial Nominees”).

### **U.S. District Court Nominees**

**Figure 3** 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 18.6 and 15.0 days, respectively, during the Reagan presidency to 99.8 and 82.5 days, respectively, during the G.W. Bush presidency.

The average waiting time, from first nomination to first hearing, for President Obama's district court nominees during his first term, 80.2 days, is close to the average waiting time experienced by district court nominees during the G.H.W. Bush presidency, 83.4 days. District court nominees who had hearings during President Clinton's first term waited, on average, 70.2 days from first being nominated to receiving their first hearing.

Finally, although the median waiting time from first nomination to first hearing during President Obama's first term (70.0 days) is less than the median waiting time during the G.W. Bush presidency (82.5 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 61.5 days, respectively) and more than 4.5 times higher than the median waiting time of 15.0 days for President Reagan's district court nominees.

### **Length of Time from Committee Report to Confirmation**

**Figure 4** 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 a President's first term. In effect, the figure shows the mean and median number of days nominees waited on the *Executive Calendar* prior to being confirmed by the Senate.

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.<sup>40</sup> **Figure 4** 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.

### **U.S. Circuit Court Nominees**

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 (7.8 days). The mean number of days from first committee report to confirmation for nominees who were confirmed during a President's first term increased from 7.8 days during the G.H.W. Bush

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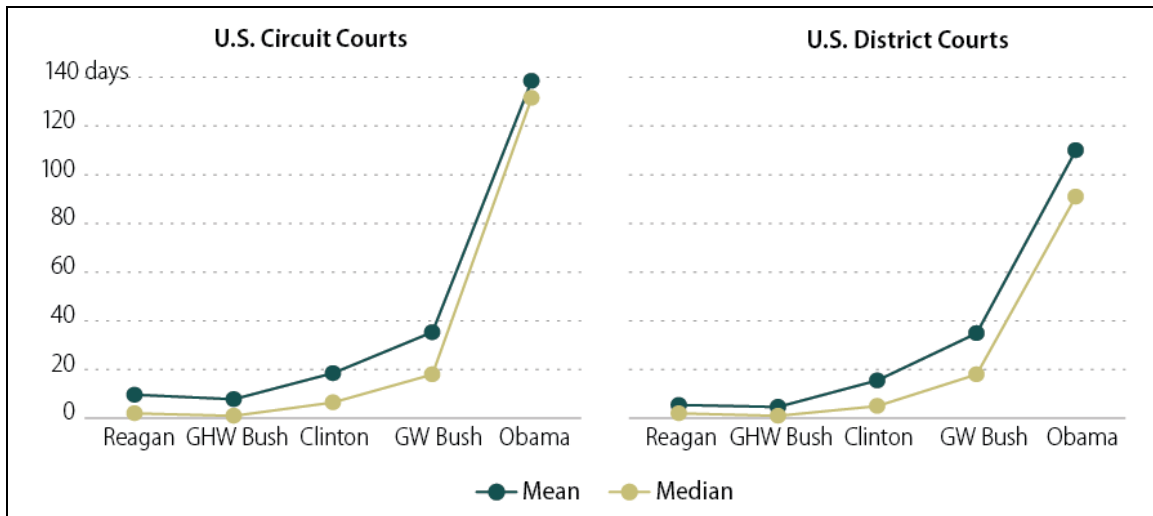
<sup>40</sup> For example, Susan L. Carney was nominated by President Obama to the Second Circuit Court of Appeals. Her nomination was initially reported out of committee on December 1, 2010, during the 111<sup>th</sup> Congress. Her nomination was returned to the President on December 22, 2010, and resubmitted on January 5, 2011. After being reported by the Judiciary Committee again on February 17, 2011, Ms. Carney's second nomination was confirmed on May 17, 2011, during the 112<sup>th</sup> Congress. Consequently, the dates used for calculating the number of days between Ms. Carney's nomination being reported out of committee and her confirmation are December 1, 2010, and May 17, 2011.

presidency to 18.5 days during President Clinton’s first four years in office. The average waiting time for circuit court nominees from first committee report to confirmation increased further, from President Clinton’s first term to President G.W. Bush’s first term, to 35.3 days, only to increase by over 100 days during President Obama’s first term, to an average of 138.5 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 President Clinton’s and G.W. Bush’s first terms. The median line graph for circuit court nominees in **Figure 4** shows that roughly half of President Clinton’s 30 confirmed circuit court nominees (during his first term) were confirmed within 6.5 days of their nominations being reported out of committee. Likewise, roughly half of President G.W. Bush’s 35 confirmed circuit court nominees (during his first term) were confirmed within 18 days of their nominations being reported.

In contrast, President Obama, during his first term, had no circuit court nominees confirmed within 25 days of first being reported out of committee.<sup>41</sup> Instead, the median number of days for President Obama’s 30 confirmed circuit court nominees is 131.5, 7.3 times greater than the median number of 18 days for the 35 confirmed circuit nominees of his immediate predecessor, President G.W. Bush.

**Figure 4. U.S. Circuit and District Court Nominees of Five Most Recent Presidents: Mean and Median Number of Days from Committee Report to Confirmation for Nominees during First Term**



**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 committee report to confirmation for all U.S. circuit and district court nominees who were confirmed during a President’s first term.

The *mean* number of days that elapsed from first committee report to confirmation for circuit court nominees during each President’s first term was greater than the *median* number of days

<sup>41</sup> Of U.S. circuit court nominees confirmed during President Obama’s first term, Jimmie V. Reyna, nominated by the President to the U.S. Court of Appeals for the Federal Circuit, waited the least amount of time (25 days) from committee report to confirmation. His nomination was reported by the Judiciary Committee on March 10, 2011, and approved by the Senate on April 4, 2011.

experienced by these nominees from the report to confirmation stage. 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 longer periods of time.<sup>42</sup> 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.

### ***U.S. District Court Nominees***

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 (4.6 days) than did the district nominees confirmed during the first terms of the four other Presidents. The average number of days increased to 15.5 days during President Clinton's first term and to 34.9 days during President G.W. Bush's first term. During the first term of the Obama presidency, the average number of days increased further, to 98.5 days, as 61 (42.7%) of President Obama's 143 confirmed district court nominees waited at least 100 days from first committee report to confirmation.<sup>43</sup>

As **Figure 4** 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 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 5.0 days for President Clinton's district court nominees confirmed during his first term. It then increased to 18 days for district court nominees confirmed during President G.W. Bush's first four years in office, and increased further, to 91 days, for nominees confirmed during President Obama's first term.

### ***U.S. Circuit and District Court Nominees Unopposed in Committee and on the Floor***

A notable change from previous Congresses to the 111<sup>th</sup> and 112<sup>th</sup> Congresses (i.e., during President Obama's first term) was an increase generally in waiting times from committee report to confirmation experienced by circuit and district court nominees. The longer waiting times on the *Executive Calendar* included the waiting times for nominees whose nominations were unopposed when reported out of the Senate Judiciary Committee and, ultimately, when approved by the full Senate.

For the purposes of this report, nominees described as "unopposed" were those whose nominations received zero "nay" votes when reported out of the Judiciary Committee *and*,

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<sup>42</sup> Examples of nominees who waited relatively long periods of time on the *Executive Calendar* include John M. Rogers, a Sixth Circuit Court of Appeals nominee of President G.W. Bush, who was first reported out of committee on July 11, 2002, and not approved by the Senate until November 14, 2002. Another example was A. Wallace Tashima, a nominee of President Clinton's to the Ninth Circuit Court of Appeals, whose nomination was first reported out of committee on July 28, 1995, and not approved until January 2, 1996.

<sup>43</sup> These 61 nominees included Ellen L. Hollander (waiting 191 days), Susan R. Nelson (190 days), John E. Dowdell (187 days), Paul W. Grimm (179 days), Malachy E. Mannion (155 days), and Lorna G. Schofield (154 days).



additionally, received zero “nay” votes when approved by the Senate.<sup>44</sup> Voice votes by the Judiciary Committee or the full Senate approving judicial nominations were considered votes for which a nominee received zero nay votes.<sup>45</sup>

**Table 4** reports, for Presidents Clinton to Obama, the number (and percentage) of nominees confirmed during each President’s first term whose nominations were reported out of committee *and* approved by the Senate without receiving any nay votes as well as the average and median number of days such nominees waited to be confirmed after their nominations were placed on the *Executive Calendar*. Presidents Reagan and G.H.W. Bush are omitted from this part of the analysis because over 95% of *both* their circuit and district court nominees’ nominations were reported out of committee with zero nay votes (or by voice vote) and were subsequently approved by the Senate with zero nay votes (or by voice vote).

**Table 4. U.S. Circuit and District Court Nominees of Three Most Recent Presidents: Average and Median Number of Days from Committee Report to Confirmation for Nominees Whose Nominations Were Unopposed in Committee and on the Floor**

President	U.S. Circuit Courts		U.S. District Courts	
	Number (%) of Confirmed Nominees Unopposed	Average (Median) Number of Days	Number (%) of Confirmed Nominees Unopposed	Average (Median) Number of Days
Clinton	28 (93.3)	16.9 (5.5)	170 (100)	15.5 (5.0)
G.W. Bush	23 (65.7)	29.3 (14.0)	165 (97.1)	32.4 (18.0)
Obama	16 (53.3)	124.7 (130.5)	104 (72.7)	89.0 (88.0)

**Source:** Internal CRS judicial nominations database.

**Notes:** This table shows, for each of the past three Presidents, the mean and median number of days from first committee report to confirmation for U.S. circuit and district court nominees, *confirmed* during a President’s first term, who received zero “nay” votes when reported out of the Judiciary Committee *and* when confirmed by the Senate. For the purposes of this report, voice votes held on a nominee’s nomination by either the committee or the full Senate are considered votes for which a nominee received zero “nay” votes.

<sup>44</sup> **Table 4** shows that, when comparing the U.S. circuit and district court nominees confirmed during the first terms of Presidents Clinton, G.W. Bush, and Obama, a smaller percentage of President Obama’s nominees were unopposed by at least one Senator when reported out of committee or confirmed by the full Senate. Specifically, 53.3% of President Obama’s circuit court nominees had zero nay votes cast against them in committee and, later, on the floor (compared with 93.3% of President Clinton’s nominees and 65.7% of President G.W. Bush’s nominees). As for district court nominees confirmed during each President’s first term, 72.7% of President Obama’s nominees had zero nay votes cast against them in committee and on the floor (compared with 100% of President Clinton’s nominees and 97.1% of President G.W. Bush’s nominees).

<sup>45</sup> So, for example, circuit court nominees of President Obama whose nominations were included in the calculations are Scott M. Matheson Jr. (nominated to the Tenth Circuit, reported out of committee by voice vote and confirmed by voice vote), Raymond J. Lohier Jr., (Second Circuit, reported out of committee by voice vote and confirmed 92-0), and Albert Diaz (Fourth Circuit, reported out of committee 19-0 and confirmed by voice vote). Examples of President Obama’s district court nominees included in the calculations are Jesus G. Bernal (nominated to the Central District of California, reported out of committee by voice vote and confirmed by voice vote), Catherine C. Eagles (Middle District of North Carolina, reported out of committee by voice vote and confirmed by voice vote), and Kimberly J. Mueller (Eastern District of California, reported out of committee by voice vote and confirmed by voice vote).

**Table 4** shows that, for circuit court nominees who had zero nay votes cast against their nominations, the average and median number of days from committee report to confirmation was greatest during President Obama’s first term (i.e., greatest during the 111<sup>th</sup> and 112<sup>th</sup> Congresses). Such nominees during President Obama’s first term waited, on average, for 124.7 days on the *Executive Calendar* prior to being confirmed (compared with 16.9 days during President Clinton’s first term and 29.3 days during President G.W. Bush’s first term). The median number of days followed a similar pattern, ranging from a high of 130.5 days during President Obama’s first term to a low of 5.5 days during President Clinton’s first term.

For district court nominees who had zero nay votes cast against their nominations (in committee and on the floor), the average and median number of days from committee report to confirmation was also greatest during President Obama’s first term. Such nominees waited, on average, 89 days to be confirmed after being reported, while district court nominees during President Clinton’s first term waited 15.5 days and those confirmed during President G.W. Bush’s first term waited 32.4 days. Similarly, the median number of days from committee report confirmation ranged from a high of 88 days during President Obama’s first term to a low of 5 days during President Clinton’s first term.

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

This final section identifies selected factors that may influence various statistical aspects of the lower court appointment process<sup>46</sup> 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.

### **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, is the number of judicial vacancies already in existence (i.e., the judicial vacancies a

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<sup>46</sup> 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 (see, for example, “Number and Percentage of Confirmed Judicial Nominees”).

President inherits when taking office). The number of inherited vacancies, in turn, is influenced by various factors. These include the frequency with which judicial departures occurred and new judgeships were statutorily created in the years or months immediately prior to a new presidency; the extent to which the outgoing President, during this same period, made nominations to fill judicial vacancies; and the rate at which the Senate confirmed these nominations before the new President took 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 (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 otherwise 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).<sup>47</sup> 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.<sup>48</sup>

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:

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<sup>47</sup> The appointment opportunities created by the 1984 and 1990 Acts are discussed further in the text above under the heading "Circuit and District Court Vacancy Rates at Beginning and End of First Term." See also CRS Report R41942, *Vacancies on Article III District and Circuit Courts, 1977-2011: Data, Causes, and Implications*, by Denis Steven Rutkus.

<sup>48</sup> 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. Nadine Cohodas, "Conservatives Pressing to Reshape Judiciary," *CQ Weekly*, vol. 43, Sept. 7, 1985, p. 1759.

... 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....<sup>49</sup>

## **The Selection of Nominees by a President**

The “hallmarks of the modern presidential role in judicial appointments are the selection, vetting, and evaluation of federal judicial nominees.”<sup>50</sup> A variety of factors can affect how long it takes a President to select, vet, and evaluate nominees to fill judicial vacancies. 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.<sup>51</sup> 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.

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.<sup>52</sup>

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 111<sup>th</sup> Congress. “The surest key to understanding the politics, processes, and outcomes of the Obama judicial selection record in the 111<sup>th</sup> 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 administration's legislatively driven domestic policy agenda, nor was it seen as a ‘legacy’ issue.”<sup>53</sup>

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

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<sup>49</sup> Wheeler, “Judicial Nominations and Confirmations,” p. 2.

<sup>50</sup> Lisa T. McElroy and John Cannan, “Obama's second term and the federal courts,” *Judicature*, vol. 96, no. 3, November/December 2012, p. 99 (hereafter McElroy and Cannon, “Obama's second term and the federal courts”).

<sup>51</sup> See, for example, Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, “Obama's Judiciary at Midterm,” *Judicature*, vol. 94, no. 6, May-June 2011, pp. 265, 279, 288-291 (hereafter Goldman, “Obama's Judiciary at Midterm”).

<sup>52</sup> 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 Denis Steven Rutkus.

<sup>53</sup> Goldman, “Obama's Judiciary at Midterm,” p. 272.

the same point in the G.W. Bush Administration, especially for circuit court nominees.<sup>54</sup> 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 American Bar Association's (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."<sup>55</sup>

## **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 have been 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 ABA's Standing Committee on the Federal Judiciary.<sup>56</sup> Some of these factors might also contribute to other features of the confirmation process discussed in this report, for example, 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."<sup>57</sup> Divided government, though, may affect the procedural strategies used to oppose a President's nominees. 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.<sup>58</sup>

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<sup>54</sup> 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/research/files/papers/2010/4/07%20judicial%20nominations%20wheeler/0407\\_judicial\\_nominations\\_wheeler.pdf](http://www.brookings.edu/~media/research/files/papers/2010/4/07%20judicial%20nominations%20wheeler/0407_judicial_nominations_wheeler.pdf).

<sup>55</sup> Ibid.

<sup>56</sup> 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.

<sup>57</sup> Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford, CA: Stanford University Press, 2005), p. 191.

<sup>58</sup> 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.

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.<sup>59</sup>

Another factor that affects the length of time it takes the Judiciary Committee to process a judicial nomination is the amount of information on a nominee that Senators and their staff review prior to holding hearings or reporting a nomination. Additionally, any committee member can request that a vote on a nomination be postponed for one week or until the next committee meeting, whichever is later. Consequently, final committee action on some nominations might be delayed when a recess or adjournment occurs.<sup>60</sup>

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 noncontroversial and received bipartisan support from the committee, significant delays in filling a judicial vacancy might occur when a judicial nomination, after having been 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.<sup>61</sup>

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 related to 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 related to their state. If a home state Senator has no objection to a nominee, the blue

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<sup>59</sup> 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 the time that 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.

<sup>60</sup> McElroy and Cannon, "Obama's second term and the federal courts," p. 101.

<sup>61</sup> See CRS Report 98-712, "Holds" in the Senate, by Walter J. Oleszek. See also Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks—How the American Constitutional System Collided With the New Politics of Extremism* (New York, NY: Basic Books, 2012), p. 92. Mann and Ornstein argue that "Senators have increasingly used holds, their ability to block consideration of a nominee indefinitely, as a broader partisan weapon to keep presidents from filling key positions, including many qualified and usually noncontroversial nominees."

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 Committee have required a return of positive blue slips by both a state's Senators before allowing consideration of a nomination.<sup>62</sup>

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. During President Obama's first term, for example, circuit and district court nominations were reported by the Judiciary Committee only after home state Senators returned positive blue slips for the nominations. Nevertheless, the average (and median) time during which circuit and district court nominations waited on the Senate *Executive Calendar* before being confirmed, as discussed above, reached historically high levels (see "Length of Time from Committee Report to Confirmation").<sup>63</sup>

A new standing order in the 113<sup>th</sup> Congress, however, might serve to facilitate negotiations arranging for floor consideration of district court nominations (circuit court nominations are not affected). Under a new procedure in effect for just this Congress, the Senate could move more quickly to final action on district court nominations supported by at least three-fifths of the Senate. Specifically, if cloture is invoked on a district court nomination in accordance with Rule XXII of the Senate, post-cloture consideration is reduced from a maximum of 30 hours to 2 hours. Generally, district court nominations are considered pursuant to unanimous consent agreements, in part because of the greater amount of time necessary to consider them through the cloture process in the absence of unanimous consent. The majority leader, when the new standing order was approved, indicated that the intent is to continue to negotiate unanimous consent agreements for the consideration of nominations.<sup>64</sup> The ability to more quickly vote on district court nominations in the absence of unanimous consent, however, might facilitate unanimous consent negotiations and, therefore, reduce the waiting time from committee report to final Senate action for such nominations during the 113<sup>th</sup> Congress.<sup>65</sup>

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<sup>62</sup> See CRS Report RL 34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus.

<sup>63</sup> See, again, **Figures 4 and 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.

<sup>64</sup> Sen. Harry Reid, Remarks in the Senate, *Congressional Record*, daily edition, January 24, 2013, p. S272.

<sup>65</sup> For further discussion, see CRS Report R42996, *Changes to Senate Procedures in the 113<sup>th</sup> Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki.

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