



Christine Balderas

## **Judicial Nominations in the First Fourteen Months of the Obama and Bush Administrations**

**Russell Wheeler**

**F**ourteen months into the Obama administration, continuing complaints abound about the pace of judicial nominations, Republican obstructionism, and Democrats' treatment of Bush nominees. This brief highlights some characteristics of Obama and Bush nominations at the end of March 2002/10. Among other things:

- Bush made considerably more nominations than has Obama;
- proportionately more Obama nominees have gotten hearings, and more quickly;
- confirmation rates after four months of the nomination date are slightly higher for Obama's circuit nominees than for Bush's, but the time from nomination to confirmation for Obama circuit appointees is considerably higher than for Bush's;
- Obama's circuit nominees are, on average, four years older than Bush's. Obama nominees' proportion of white males is noticeably lower than among Bush nominees;
- despite the relative paucity of nominees, Obama has already had a small effect on the courts of appeals in terms of the party-of-appointing-president balance;
- Obama district nominees from states where senators use committees to screen district judge candidates to forward to the White House display some process and background differences compared to his other district nominees.



**Russell Wheeler** is a visiting fellow in Governance Studies at the Brookings Institution and president of the Governance Institute.

## The Nomination-Confirmation Process

The time from vacancy to nomination during the first 14 months of the Obama administration is longer than under the Bush administration at the same point, especially for circuit nominees. The difference may reflect the time and energy consumed by the Sotomayor confirmation and the press of other business. But the Bush administration, although it had no Supreme Court vacancy at the time, was dealing with the aftermath of the 9/11 attacks. The difference may also reflect in part time consumed by American Bar Association vetting of potential nominees, which Obama brought back into the pre-nomination stage.

Same-party control of the White House and Senate is increasing the rate and timing of hearings for nominees in the 111<sup>th</sup> Congress compared to the rate of those at this point in the 107<sup>th</sup> (2001-02), but having little effect on overall confirmation rates.

### Nominations

Critics on the left bemoan the slow pace of nominations—56 compared to 97 Bush

nominations by April 2002. Eleven prominent law professors, for one example, recently asked the administration to “act with far more energy and dispatch.” This table depicts nominations through March and comparable data from 2002, as well as vacancies inherited and vacancies after 14 months:

### Nominations Submitted Through March

	Nominees submitted	Average days- vac. to nom.	Vacancies on 1/21 ('01, '09)	Vacancies on 3/31 ('02, '10)
<b>OBAMA</b>				
<b>Court of Appeals</b>	18	220	13	18
<b>District Court</b>	38	284	41	84
<b>All</b>	56	263	54	102
<b>BUSH</b>				
<b>Court of Appeals</b>	28**	139	27	31
<b>District Court</b>	69	264	54	63
<b>All</b>	97	228	81	94

\* “Date of vacancy” is January 21, 2001/2009 for vacancies in place on those dates. For others, it’s the date the vacancy occurred or on which the incumbent announced it in advance.

\*\* I exclude Roger Gregory, whom President Clinton recess-appointed to the Fourth Circuit’s court of appeals, and who was renominated by President Bush and confirmed by the Senate.

Responding to a Delaware newspaper inquiry about the three-year district court vacancy in that state, a White House spokesperson said the administration “has moved swiftly to fill vacancies considered to be judicial emergencies, and the pace of nominations overall has significantly increased.”

The pace clearly has picked up. Of its 18 appellate nominations, a third (six) were submitted since January 1, as were almost half the district nominations (17 of 38). The claim is partly true as to vacancies that the United States Judicial Conference labels “judicial emergencies” based on the vacancy’s age and the caseload of the court in question. Fourteen of Obama’s 18 appellate nominations were for the 17 judicial emergencies in place at some point since January 2009, but only nine district nominations were for the 22 comparable district court judicial emergencies.

The greater time for Obama to submit nominees is likely due in part to the pre-nomination candidate vetting by the American Bar Association’s Standing Committee on the Federal Judiciary, which for over 50 years has rated the qualifications of would-be federal judges. Until the Bush administration, it did so while potential nominees were under White House consideration. The Bush administration ended that arrangement, so the committee started its investigation once the White House made the nomination. The Obama administration has brought the committee, and thus the additional 30 to 45 days typically consumed by its investigations, back into the pre-nomination stage.



Hearings by March 31, 2002/2010

Obama nominees, compared to Bush nominees, continue to fare much better in getting Senate Judiciary Committee hearings—77 percent of all nominees versus 49 percent for all Bush nominees through March. A more reasonable timeframe, though, is the rate of hearings for nominations submitted before February—giving the committee two months to schedule a hearing. This table displays the number and rate of hearings for pre-February nominees and average days for hearings for all pre-February nominees.

Obama nominees, compared to Bush nominees, continue to fare much better in getting Senate Judiciary Committee hearings—77 percent of all nominees versus 49 percent for all Bush nominees through March.

**Hearings for Pre-February Nominees**

	Nominations thru January	Hearings thru March	Average days, nom. to hrg. for pre Feb/ noms.
<b>OBAMA</b>			
<b>Court of Appeals</b>	12	12 (100%)	48
<b>District Court</b>	26	24 (92%)	39
<b>All</b>	38	36 (95%)	42
<b>BUSH</b>			
<b>Court of Appeals</b>	28	9(32%)	145
<b>District Court</b>	61	38 (62%)	96
<b>All</b>	90	47 (52%)	105

(rev., 4/19/10)

All 12 of Obama’s pre-February circuit nominees have received hearings, as have all but two of his comparable district nominees (both are South Carolina nominees submitted on December 22). That compares starkly with the 32 percent and 62 percent rate of hearings for Bush’s pre-February nominees. Obama’s pre-February nominees also got hearings sooner than did Bush’s – 42 days, on average, from nomination, compared to 105. Of course, the committee in 2001-02 had many more nominees to consider. Eventually, all but one of Bush’s pre-April district nominees received hearings in the 107<sup>th</sup> Senate (one nomination was withdrawn after a “not qualified” ABA rating) and all but one of his pre-April circuit nominees received hearings, 18 in the 107<sup>th</sup> Senate and nine after renomination in subsequent, Republican-controlled, Senates.

And just as the Obama administration has lengthened the time to make nominations by reinserting the ABA review into the prenomination process, so too the time from nomination to hearing for Bush nominees likely reflects in part the time for the ABA committee to complete its post-nomination investigations.

Confirmations

As to nominations submitted before December—giving the full Senate four months to act—Obama’s confirmation rates are higher than those for Bush’s circuit nominees (58 percent versus 22 percent), but not his district nominees (79 percent

versus 97 percent). Despite the strong Democratic Senate majority, Obama’s circuit nominees’ confirmations have taken much longer than Bush’s circuit nominees – an average of 202 days versus 154. Four of Obama’s seven circuit appointees waited more than 180 days for confirmation. Two of Bush’s six circuit appointees did. But Obama’s pre-December district confirmations took slightly less time than Bush’s. This table shows all confirmations in the first 14 months; no post-December nominees of either administration got confirmed by the end of March.

### Confirmations by March 31, 2002/2010 for Pre-December Nominees

	Nom’s	Conf’s	Average days	180days +	contested vote*
<b>OBAMA</b>					
<b>Court of Appeals</b>	12	7 (58%)	202	4	1
<b>District Court</b>	14	11 (79%)	112	0	0
<b>All</b>	26	18 (69%)	147	4	1
<b>BUSH</b>					
<b>Court of Appeals</b>	27	6 (22%)	154	2	0
<b>District Court</b>	37	36 (97%)	121	4	0
<b>All</b>	64	42 (66%)	126	6	0

\*-defined here as floor action in which “no” votes were 25% or more of yes votes

Senate floor votes on either administration’s pre-December nominees were almost all unanimous. Obama’s first appellate nominee, the Seventh Circuit’s David Hamilton, faced the only contested vote (as defined above) in either 14-month period (59-39), although the vote on the Fourth Circuit’s Andre Davis was 72-16.

Eventually, the 107<sup>th</sup> Senate confirmed 68 of Bush’s 69 district nominees submitted by the end of March (one was withdrawn). It confirmed 15 of his 28 pre-April circuit nominees. Later Senates confirmed seven more, upon renomination. Overall, the 107<sup>th</sup> Senate confirmed 85 of Bush’s 99 district nominees, and later Senates confirmed 13 more upon renomination. Of those not confirmed in the 107<sup>th</sup> Senate, eight had been nominated after August. The 107<sup>th</sup> Senate confirmed 16 of Bush’s 2001-02 circuit nominees (31 nominees in all), with nine more confirmed upon renomination in later Senates.

### Characteristics of Nominees

Obama’s first-14-month circuit nominees are older than Bush’s. His nominees (circuit and district) include proportionately fewer white men, slightly more Hispanics, substantially more African-Americans and Asian-Americans, and more sitting judges.

### Age of circuit nominees

To date, Obama's circuit nominees have been, at time of nomination, on average about four years older than Bush's. The mean and median ages of Bush's nominees in his first 14 months were both 50.2. Obama's nominees have a mean age of 54.2 and median of 56.1. The average age at appointment of all of circuit judges named by Bush is 49.6 (according to Professor Sheldon Goldman and his colleagues).

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Obama's few nominees at this 14-month juncture are more heavily weighted than were Bush's toward women and ethnic minorities—only 30 percent of Obama nominees are white males.

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### Race and ethnicity

Obama's few nominees at this 14-month juncture are more heavily weighted than were Bush's toward women and ethnic minorities—only 30 percent of Obama nominees are white males. The percentage of white males among President Bush's first 14-month nominees—68 percent overall—was slightly higher than that of all his appointees 2001-08: 64 percent of all his circuit appointees were white males as were 67 percent of his district appointees.

**Nominations by Gender, Race, and Ethnicity of Pre-April Nominees**

	All nominees	White men	White women	Afric-Amer	Hisp.	Asian Amer
<b>OBAMA</b>						
<b>Court of Appeals</b>	18	5 (28%)	4 (22%)	5(28%)	2 (11%)	2 (11%)
<b>District Court</b>	38	12 (32%)	11 (29%)	9 (24%)	2 (5%)	4 (11%)
<b>All</b>	56	17 (30%)	15 (27%)	14 (25%)	4 (7%)	6 (11%)
<b>BUSH</b>						
<b>Court of Appeals</b>	28	18 (64%)	7 (25%)	2 (7%)	1 (4%)	0
<b>District Court</b>	69	48 (70%)	11 (16%)	6 (9%)	4 (6%)	0
<b>All</b>	97	66 (68%)	18 (19%)	8 (8%)	5 (5%)	0

Percentages on this and other tables may not total 100 due to rounding.

The other percentages are revealing, although the few numbers on which they're based demands caution in making comparisons. Note, however:

- The proportion of Obama's Hispanic nominees to the lower courts is slightly higher than Bush's at this point, seven percent versus five percent. (Eventually, 10 percent of Bush's district appointees were Hispanic, the highest proportion of any president. Five percent of his appellate appointees were Hispanic, below Clinton's proportion.)
- The six Asian-Americans among Obama's 56 nominees would increase the complement of active Asian-American judges from eight at the start of his term to fourteen, if they are all confirmed. Two Asian-American district judge nominees have been confirmed, but district court nominee Edward Chen (ND-Cal, nominated August 6, 2009) and February circuit nominee

Goodwin Lui (CA-9) have encountered strong Republican resistance, and Second Circuit nominee Denny Chin has been waiting for confirmation since October 6.

*Vocational backgrounds*

In his first 14 months, Obama, more than Bush, has turned to sitting judges as nominees, 64 percent versus 47 percent. Only one of his 18 circuit nominees came from private practice, and 14 were state or federal judges at the time of nomination. Of Bush’s 28 circuit nominees at this point, seven were practicing lawyers and 17 were sitting judges. After eight years, 49 percent of all his 61 circuit appointees were sitting judges, a percentage generally in line with those of recent predecessors.

As to district judges, Obama at this stage is continuing a steady trend since the 1950s—fewer private practitioners and more sitting judges. Sixty-seven percent of President Eisenhower’s district court appointees came from the practicing bar, versus 39 percent and 34 percent respectively for Clinton and Bush. Thirty-four percent of Obama’s first-14 month district nominees were practitioners, and 61 percent were sitting judges. Forty-six percent of Bush’s pre-April district nominees were practitioners and 42 percent were sitting judges. (Over eight years, 49 percent of his district appointees were judges.)

**Pre-April Nominees’ Vocational Backgrounds**

	All nominees	State judges	Fed judges	Priv practice	Prosec’rs	Profs
<b>OBAMA</b>						
<b>Court of Appeals</b>	18	4 (22%)	10 (56%)	1 (6%)	1 (6%)	2 (11%)
<b>District Court</b>	38	14 (37%)	8 (21%)	13 (34%)	2 (5%)	1 (3%)
<b>All</b>	56	18 (32%)	18 (32%)	14 (25%)	3 (5%)	3 (5%)
<b>BUSH</b>						
<b>Court of Appeals</b>	28	8 (29%)	9 (32%)	7 (25%)	2 (7%)	2 (7%)
<b>District Court</b>	69	23 (33%)	6 (9%)	32 (46%)	6 (9%)	2 (3%)
<b>All</b>	97	31 (32%)	15 (15%)	39 (40%)	8 (8%)	4 (4%)

**Impact on the Courts’ Party-of-Appointing-President Balance**

In his first 14 months, Obama nominated, proportionately, slightly more individuals to court of appeals seats previously held by Republican appointees than had Bush to seats previously held by Democratic appointees. Obama has already been able to shift slightly the number of courts of appeals with a majority of Democratic appointees, and, with some luck, should be able to shift more by the end of his current term.



Replacing appointees of the other party

A president’s ability to influence federal court decisions depends in part on how many of his appointees replace appointees of the other party, especially on the courts of appeals. A common reference point is the proportion of active circuit judges appointed by presidents of either party. (“Active” status refers to judges serving full-time, as opposed to those in senior (semi-retired) status, who often carry a reduced caseload.)

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At end of March, 2010, seven of Obama’s 18 circuit nominations (38 percent) were to seats previously held by Republican appointees.

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Seven of Obama’s 18 circuit nominations (39 percent) were to seats previously held by Republican appointees. At the same point in 2002, seven of President Bush’s 28 circuit nominations (25 percent) were to judgeships previously held by Democratic appointees. In eight years, President Bush appointed over a third of the active circuit judges in office at the end of his term, but only 25 percent of his appointees replaced Democratic appointees. By contrast, 52 percent of President Clinton’s circuit appointees replaced Republican appointees.

Data on appointing party are suggestive but hardly dispositive. In some types of cases (e.g., criminal procedure) Democratic and Republican appointee decisions differ little, although in other types (e.g., involving environmental regulation), the party-of-appointing president is a fairly good, but hardly foolproof, predictor of circuit judges’ decisions. And courts of appeals make almost all their decisions through randomly selected three-judge panels, which will not necessarily reflect the appointing-party balance on the entire court. And active circuit judges are not the only judges on the panels; senior judges of the court and visiting judges, mainly district judges, serve on panels.

Nevertheless, one might suspect that senators of the opposing party would be more energetic in resisting nominees who would replace appointees of their party. The numbers to date as to pre-December nominees, although very small, present a mixed picture.

**Confirmation Rates for pre-December Nominees, Controlling for Appointing Party of Previous Incumbent**

	All nominees	Confirmed	Nom’s to replace other party appointees	Confirmed
<b>OBAMA</b>				
<b>Court of Appeals</b>	12	7 (58%)	5	3 (60%)
<b>District Court</b>	14	11 (79%)	5	4 (80%)
<b>All</b>	26	18 (69%)	10	7 (70%)
<b>BUSH</b>				
<b>Court of Appeals</b>	27	6 (22%)	7	0
<b>District Court</b>	37	36 (97%)	7	7 (100%)
<b>All</b>	64	42 (66%)	14	7 (50%)

The confirmation rates for Obama nominees who would replace Republican

appointees are almost identical to his overall confirmation rates, as is the rate for Bush’s district appointees. But at this same point, the Senate had confirmed six Bush circuit nominees, but none of them was a nominee to a judgeship previously held by a Democratic appointee. In eight years, the confirmation rate for Bush’s circuit nominees was 73 percent (including confirmations of those renominated in later Congresses), but it was 76 percent for nominees to seats held by Republican appointees and 64 percent to Democratic-appointee-seats.

*Party-of-appointing-president balance on the courts of appeals*

Obama’s eventual impact on the composition of the courts of appeals is impossible to predict at this point, although his appointees have already increased the number of appellate courts with Democratic-appointee majorities from two to three. In eight years, President Bush was able to increase the proportion of Republican appointees as active circuit judges from 44 percent to 55 percent and the number of courts of appeals with a majority of Republican appointees from five to nine.

The table below shows, for each court, judges in active status on January 21, 2009 and 14 months later, along with vacancies, pending nominations, and the dates on which four judges have announced they will leave active status. (The overall number of Democratic appointees—66 in January 2009 and today—is unchanged because some of those appointees in active status in January 2009 have since gone senior.)

The table after it summarizes these figures.

**Party-of-Appointing President Balance in the Courts of Appeals at the Start of the Obama Administration and After Fourteen Months**

Circuits (Judgeships)	January 21, 2009			March 31, 2010			Pending Nom’s	Future vacancies
	Rep. App	Dem. App.	Vacant	Rep. App	Dem. App.	Vacant		
1 <sup>st</sup> (6)	3	2	1	3	3			
2 <sup>nd</sup> (13)	6	7		5	4	4	3	
3 <sup>rd</sup> (14)	6	6	2	6	7	1	1	
4 <sup>th</sup> (15)	5	5	5	5	7	3	2	
5 <sup>th</sup> (17)	13	4		12	4	1	0	
6 <sup>th</sup> (16)	10	5	1	10	5	1	1	11/21/2010
7 <sup>th</sup> (11)	7	3	1	7	3	1	0	
8 <sup>th</sup> (11)	9	2		9	2			
9 <sup>th</sup> (29)	11	16	2	11	15	3	2	
10 <sup>th</sup> (12)	8	4		7	4	1	1	6/30/2010
11 <sup>th</sup> (12)	7	5		7	5			8/29/2010
DC (11)	6	3	2	6	3	2	0	
FED (12)	8	4		7	4	1	1	5/31/2010
Total: 179	99	66	14	95	66	18	11	4

This table summarizes the changes.

Court of appeals with	January 21, 2009	March 31, 2010
Strong Republican appointee majorities*	5 <sup>th</sup> , 6 <sup>th</sup> , 7 <sup>th</sup> , 8 <sup>th</sup> , 10 <sup>th</sup> , DC, FED (n=7)	5 <sup>th</sup> , 6 <sup>th</sup> , 7 <sup>th</sup> , 8 <sup>th</sup> , DC (n=5)
Weak Republican-appointee majorities	1 <sup>st</sup> , 11 <sup>th</sup> (n=2)	2 <sup>nd</sup> , 10 <sup>th</sup> 11 <sup>th</sup> , FED (n=4)
Even	3 <sup>rd</sup> , 4 <sup>th</sup> (n=2)	1 <sup>st</sup> (n=1)
Weak Democratic-appointee majorities	2 <sup>nd</sup> , 9 <sup>th</sup> (n=2)	3 <sup>rd</sup> , 4 <sup>th</sup> , 9 <sup>th</sup> (n=3)
Strong Democratic-appointee majorities*		

\*--defined here as courts on which appointees of one party are at least double those of the other.

Most noticeable is the Fourth Circuit's appellate court, where Republican appointees dominated the active judge ranks during most of Bush's eight years in office, despite the persistence of two vacancies, one from 1994, the other from 2000. Senior status decreased their numbers toward the end of Bush's term. Obama has filled two of the five Fourth Circuit vacancies he inherited. If he's able to fill the other three—a big “if”—that court will have a strong majority of Democratic appointees.

What further changes in the appointing-party balance might Obama be able to achieve in his current term? If he manages to fill, say, half the current vacancies, plus two Republican-appointee vacancies to occur in the next six months (in the 11<sup>th</sup> and Federal circuits), that would shift the overall balance to 93 Republican appointees, 76 Democratic appointees, with ten vacancies. The individual appellate courts could look like this:

Court of appeals with	January 21, 2009	If Obama fills half the current vacancies by 2012
Strong Republican appointee majorities	5 <sup>th</sup> , 6 <sup>th</sup> , 7 <sup>th</sup> , 8 <sup>th</sup> , 10 <sup>th</sup> , DC, FED (n=7)	5 <sup>th</sup> , 8 <sup>th</sup> (n=2)
Weak Republican-appointee majorities	1 <sup>st</sup> , 11 <sup>th</sup> (n=2)	6 <sup>th</sup> , 7 <sup>th</sup> , 10 <sup>th</sup> 11 <sup>th</sup> , DC, FED (n=6)
Even	3 <sup>rd</sup> , 4 <sup>th</sup> (n=2)	1 <sup>st</sup> (n=1)
Weak Democratic-appointee majorities	2 <sup>nd</sup> , 9 <sup>th</sup> (n=2)	2 <sup>nd</sup> , 3 <sup>rd</sup> , 4 <sup>th</sup> , 9 <sup>th</sup> (n=3)
Strong Democratic-appointee majorities		

Speculating further, what if he were able to fill half the current vacancies, but also half the judgeships currently occupied by 30 active status Republican appointees who are eligible today for senior status? The result: 79 Republican appointees, 90 Democratic appointees, and 10 vacancies, and the individual courts could have this breakdown.

Court of appeals with	January 21, 2009	If Obama also fills half the judgeships held by Rep. app'ees now eligible for senior status.
Strong Republican-appointee majorities	5 <sup>th</sup> , 6 <sup>th</sup> , 7 <sup>th</sup> , 8 <sup>th</sup> , 10 <sup>th</sup> , DC, FED (n=7)	5 <sup>th</sup> , 8 <sup>th</sup> (n=2)
Weak Republican-appointee majorities	1 <sup>st</sup> , 11 <sup>th</sup> (n=2)	6 <sup>th</sup> , 10 <sup>th</sup> (n=2)
Even	3 <sup>rd</sup> , 4 <sup>th</sup> (n=2)	7 <sup>th</sup> , DC (n=2)
Weak Democratic-appointee majorities	2 <sup>nd</sup> , 9 <sup>th</sup> (n=2)	1 <sup>st</sup> , 2 <sup>nd</sup> , 3 <sup>rd</sup> , 11 <sup>th</sup> , FED (n=5)
Strong Democratic-appointee majorities		4 <sup>th</sup> , 9 <sup>th</sup> (n=2)

This table depicts no more than an outside possibility—from Democrats’ standpoint, a prospect anywhere from overly rosy to a pipedream. Fewer than half of today’s senior-status eligible Republican appointees might take senior status, and Obama would likely be unable to name all their replacements. And additional Democratic appointees might take senior status, but Obama might be unable to get their replacements confirmed. On the other hand, perhaps some Republican appointees who become senior-status eligible by early 2012 (about 10 in addition to the current 30) will step down from active service and Obama might fill some of those vacancies. And there is an off-chance, but only that, that Congress will create additional judgeships and do so in time for Obama to fill some of them; bills currently pending reflect the Judicial Conference recommendation of 12 additional circuit judgeships. Finally, one or more Supreme Court vacancies between now and the end of the current Obama term could throw even these iffy prognostications into the dustbin.

In short, look for modest changes in the composition of the courts of appeals over the next two and a half years.

### **In-state Committees to Screen Candidates for Submission to the White House**

In the Bush administration, senators in nine states used committees to screen district court candidates for submission to the White House. In 2009, senators (and in a few cases, House members) in an additional eleven states (and the District of Columbia) created vetting committees. Committee proponents, including the American Bar Association in a 2008 resolution, argue that a candidate might have smoother sailing to nomination and then to confirmation had that person received a committee’s stamp of approval, especially if the committee were bi-partisan and included lawyers and non-lawyers. Furthermore, they say, committees might be more likely than senators and their staffs to seek out candidates who are women or

members of ethnic and racial minorities, as well as sitting judges, who may not have as much political clout as private practitioners.

This table shows the states with committees, the vacancies that have been in place at some point between January 21, 2009 and March 31, 2010, (not including announced future vacancies to occur after March 31) and nominations to those vacancies.

**Committee States, Vacancies and Nominations, January 21, 2009-March 31, 2010**

	Vacancies	Nominations		Vacancies	Nominations
Alabama*	1	1	Michigan	2	1
California	11	7	Minnesota	1	0
Colorado	2	1	North Car.	3	1
Connecticut	0	0	Ohio	2	2
Dist. of Col.*	4	0	Oregon	2	0
Florida	2	1	Pennsylvania	4	0
Georgia**	5	2	Texas ***	6	0
Hawaii	1	0	Vermont	1	1
Illinois	7	2	Washington	2	1
Maine*	0	0	Wisconsin	2	2
Massachusetts	1	0	<b>TOTAL</b>	<b>59</b>	<b>22</b>

\*Appointed by House members/delegates

\*\*Georgia House Democrats have created a committee. The two Republican senators use a separate committee to review potential nominees proposed by the White House.

\*\*\*There has been a dispute between the two Republican senators, who have appointed some Democrats to the committee they used in the prior administration, and Texas House Democrats over the roles of each in proposing and approving potential nominees.

The next table shows some differences between nominees from committee and non-committee states. For example, 37 percent of vacancies in committee states had nominees by March 31, versus 43 percent of the vacancies in non-committee states, while 86 percent of committee state nominees had hearings by March 31, versus 75 percent of non-committee state nominees.

Confirmation rates were 36 percent and 19 percent respectively (but two nominations who are encountering stiff resistance, Edward Chen and Louis Butler, were endorsed by robust committees in their states—California and Wisconsin).

There are noticeable differences in the vocational backgrounds—68 percent of committee state nominees are sitting judges, versus 44 percent of non-committee state nominees. And 23 percent of committee state nominees are white males, versus 44 percent of non-committee state nominees. Except for Asian American nominees, however, so far there is little difference as to other race or ethnicity variables. The table, moreover, should be viewed with caution because of the low numbers. And being a nominee from a committee state is not necessarily the same as being a committee-endorsed nominee. Also, differences that appear attributable

68 percent of committee state nominees are sitting judges, versus 44 percent of non-committee state nominees.

to committees may in fact reflect long-standing recruitment patterns in a particular state.

### Comparing Nominees from Committee and Non-Committee States

	Committee states	Non-committee states
<b>Vacancies (Jan. 2009-March , 2010)</b>	59	37
Nominations	22 (37% of vacancies)	16 (43% of vacancies)
Nominations within 8 months of vacancy	9 (41%)	5 (32%)
Average days from vacancy to nomination	281	282
<b>Nominees</b>	22	16
Hearings by March 31	19 (86%)	12 (75%)
Nominees submitted by Jan. 31	12	13
Hearings for pre-Feb. nominees	12 (100%)	11 (85%)
Average days, nomination to hearing	36	44
Confirmations by March 31	8 (36%)	3 (19%)
Nominees submitted by Nov. 31	10	4
Confirmations for pre- Dec. nominees	8 (80%)	3 (75%)
Average days, nom'n to confirmation	115	104
State or federal judge	15 (68%)	7 (44%)
Private practice	6 (27%)	7 (44%)
Prosecutors	--	2 (12%)
Professors	1 (5%)	--
White males	5 (23%)	7 (44%)
White women	7 (32%)	4 (25%)
African Americans	5 (22%)	4 (25%)
Hispanic	1 (5%)	1 (6%)
Asian American	4 (18%)	0

### Additional Comments

Probably the four most striking things about the current and previous administrations' early nominees are, still, 1) the relative paucity of Obama administration nominees; 2) proportionately more hearings, faster, for Obama nominees; 3) higher confirmation rates for, but longer times for Senate action on, Obama's circuit nominees; and 4) the demographic comparisons between the two sets of nominees.

One might expect higher confirmation rates for Obama nominees. For one thing, electoral victory was more decisive than Bush's, justifying a more plausible case for popular support for his programs, including his judicial nominations, most of whom have been fairly moderate. (Only Goodwin Lui has prompted much

enthusiasm from the left wing of Democratic court watchers.) And, Obama deals with a strong Democratic majority in the Senate, unlike Bush, who faced a Senate for most of the 107<sup>th</sup> Congress controlled narrowly by Democrats. On the other hand, the comparatively modest differences in how appointees of either party decide most types of cases makes a strong case for more confirmations by both the 107<sup>th</sup> and 111<sup>th</sup> Senates.

The considerably longer time for Obama's circuit appointees to get confirmed is due, according to Republicans, largely to the Senate's preoccupation with health care and other major legislation, although they concede that Republicans have held up nominees by refusing to grant unanimous consent for floor action, even for nominees who, when finally approved, received no negative votes. According to a Fox News paraphrase, a Republican spokesman said Democrats "could get around that by filing cloture," which they have done in some cases. But, especially for non-controversial nominees, what's the point of refusing unanimous consent except to gum up the works?

How things will play out in the rest of the 111<sup>th</sup> Congress is anyone's guess, but anticipation of the upcoming mid-term elections is unlikely to increase the confirmation rate. And, throw in a Supreme Court vacancy in the next few months and lower court vacancies may grow even greater.

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The Brookings Institution  
1775 Massachusetts Ave., NW  
Washington, DC 20036  
Tel: 202.797.6090  
Fax: 202.797.6144  
[www.brookings.edu/governance.aspx](http://www.brookings.edu/governance.aspx)

**Editor**

Christine Jacobs

**Production & Layout**

John S Seo

**E-mail your comments to  
[gscomments@brookings.edu](mailto:gscomments@brookings.edu)**

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