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Reuters/ Kevin Lamarque - A testimony before the Senate Judiciary Committee on Capitol Hill in Washington.

Judicial Nominations and Confirmations in the 111th Senate and What to Look For in the 112th

Russell Wheeler

On January 1, 2011, Chief Justice John G. Roberts challenged the “political branches to find a long-term solution to [the] recurring problem” in the “process of filling judicial vacancies.” Complaints in the first two years of the Obama administration about the paucity and slow pace of nominations and confirmations and complaints that many nominees were “out of the mainstream” recalled similar complaints over the last 18 years. There are no agreed-upon standards for the pace of the process and confirmation rate, but we can compare Obama’s first two years with those of his two immediate predecessors.⁺

President Obama, in the 111th Congress (2009-10), had a 60-40 Democratic Senate majority for about half the term, then 59-41 (counting, as Democrats, Independents who caucused with the Democrats). President Clinton, in the 103rd Congress (1993-94) had a 57-43 Senate Democratic majority. President Bush faced a 51-49 Democratic Senate majority for most of the 107th Congress (2001-02).

As to outcomes:

- Obama essentially matched Bush, but not Clinton, on court of appeals (or “circuit” or “appellate”) confirmations, but had less success than either Clinton or Bush on district judge confirmations, both as to confirmation rates and time from nomination to confirmation.
- Obama had, in two years, a slightly greater effect than either predecessor in their first two years in changing the party-of-appointing president balance on the courts of appeal.
- Obama’s appointees included, proportionately, fewer white males and members of the private bar.
- Obama district court nominees from states where senators used committees to screen potential nominees don’t appear much different from nominees in other states in terms of background or how they fared in the nomination and confirmation process.



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The Larger Picture

The story since the 1977 start of the Carter administration has been one of gradual decline in the rate of court of appeals confirmations but of district judge confirmation rates in the high 80s or better, except for President George H.W. Bush’s 79 percent. (His 96 percent district judge confirmation rate in his first two years dropped to 70

⁺ The raw data analyzed here come principally from the Federal Judicial Center’s Biographical Directory of Federal Judges (at <http://www.fjc.gov/history/home.nsf/page/judges.html>), THOMAS’s “Search Presidential Nominations” page (at <http://thomas.loc.gov/home/nomis.html>), and Web searches for some biographical data. Some pre-Clinton nomination and appointment data come from D. Rutkus and M. Sollenberger, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003*, Updated February 23, 2004 (Congressional Research Service (at <http://www.senate.gov/reference/resources/pdf/RL31635.pdf>)).

percent in his second two years, perhaps because he submitted 146 nominations, almost three times as many as in the previous Senate.)

Nominations and Confirmations by Administration, Carter through W. Bush

	<u>Courts of Appeal</u>		<u>District Courts</u>	
	Nominations *	Confirmations	Nominations *	Confirmations
Carter	61	56 (92 %)	223	203 (91 %)
Reagan	94	83 (88 %)	309	290 (94 %)
H.W.Bush	53	42 (79 %)	187	148 (79 %)
Clinton	90	66 (73 %)	348	305 (87 %)
W. Bush	84	60 (71 %)	284	261 (92 %)

*This table counts an individual renominated in a subsequent Congress as a single nominee.

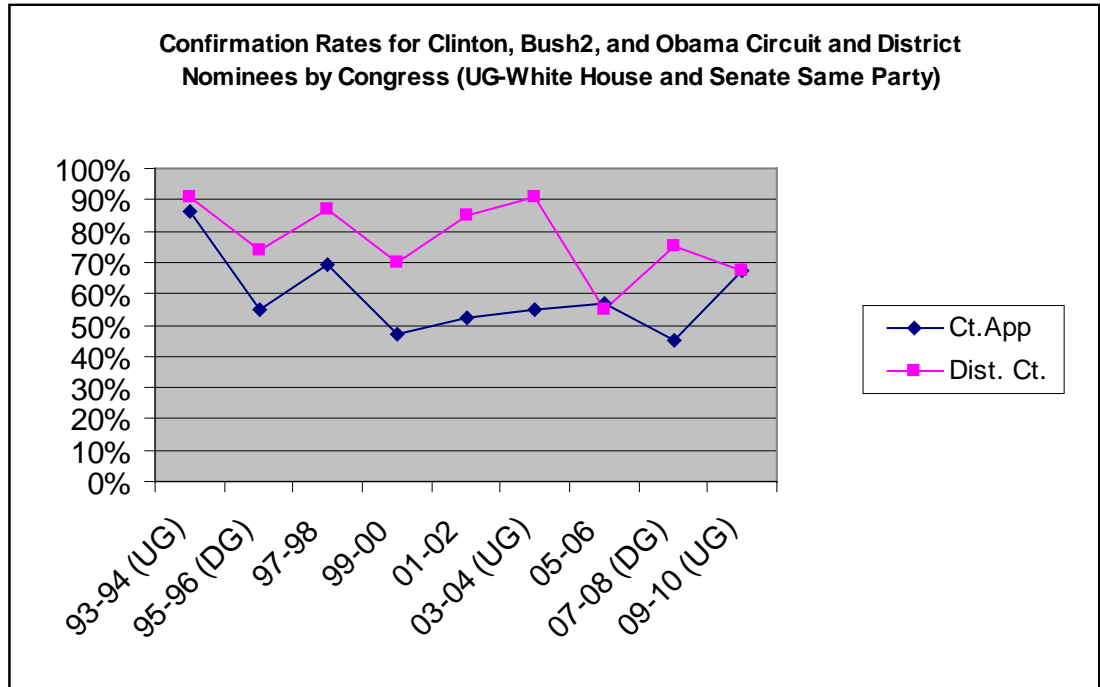
Figures for an entire administration hide variations from Congress to Congress. The table below provides confirmation rates for each Congress since the 103rd (1993-94, Clinton's first); the chart displays the data graphically. "UG indicates unified-party control of the White House and Senate, "DG" the opposite; no designation means continuation of the situation from the prior Congress.

Confirmation Rates in the 107th through the 111th Senates

	93-94 (UG)	95-96 (DG)	97-98	99-00	01-02	03-04 (UG)	05-06	07-08 (DG)	09-10 (UG)
CA	86 %	55 %	69 %	47 %	52 %	55 %	57 %	45 %	67 %
DC	91 %	74 %	87 %	70 %	85 %	91 %	55 %	75 %	67 %

* This table counts renominations in subsequent Senates, and thus rates are lower than the overall confirmation rates shown earlier, which counted a person who was renominated in subsequent Senates as a single nominee.

Confirmation Rates for Clinton, Bush2, and Obama Circuit and District Nominees by Congress (UG-White House and Senate Same Party)



Clinton’s confirmation rates dropped noticeably in the 104th Congress (1995-96), when Republicans took control of the Senate, and his reelection loomed. They bounced back slightly in the 105th Congress, but dropped again in the 106th (1999-2000). Bush’s appellate confirmation rates stayed low in each Congress. In the entire 18 year period, appellate confirmation rates topped 80 percent only once, in Clinton’s first two years. District confirmation rates were more volatile, dropping, for example, from 91 percent to 78 percent in Clinton’s first term and from 91 percent to 55 percent between 2003-04 and 2005-06.

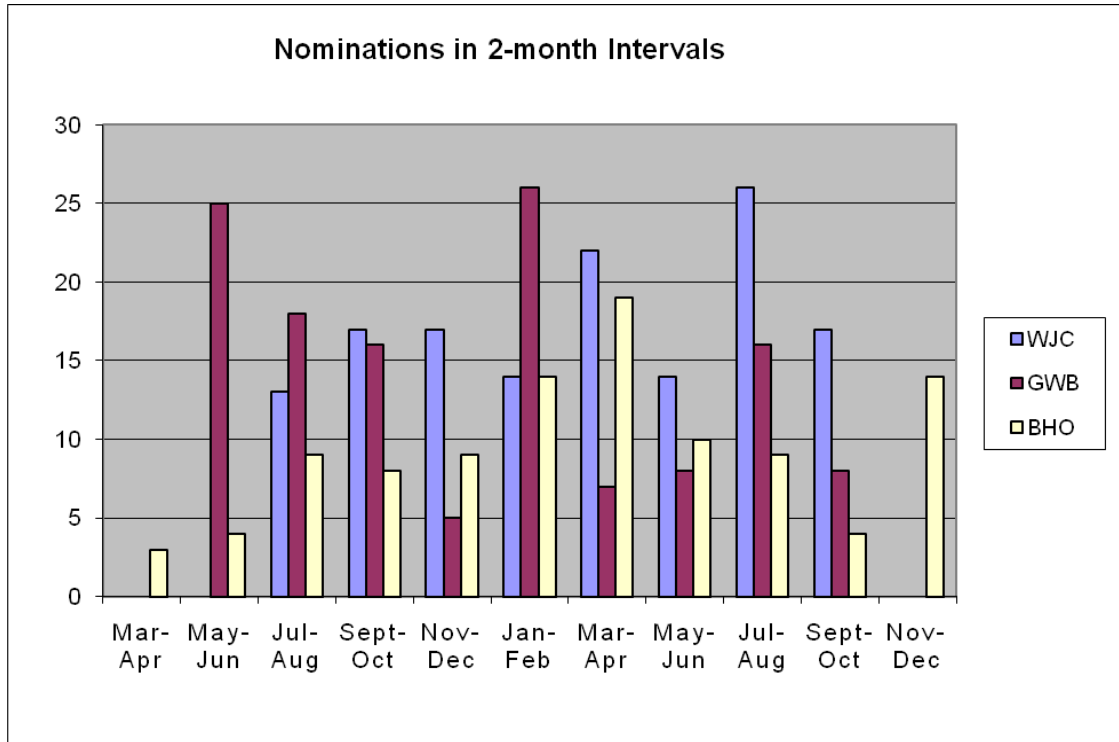
Comparing the Rate and Pace of Judicial Nominations and Confirmations in Obama’s First Congress

Nominations and Hearings

The chart below provides a birds-eye view of nomination patterns during the first two years of the Clinton, Bush, and Obama administrations, combining circuit and district nominations in two-month intervals (starting with March-April 1993, 2001, and 2009). Obama, for example, submitted three nominations in March-April of 2009. Over the two years, Clinton nominated 140 people, Bush 129, and Obama 103.

Bush was the quickest out of the box, with 25 nominations in May and June of 2001 (most of them circuit nominees), and then another 26 in January 2002 (mainly district nominees). Obama, by contrast, submitted relatively small numbers of nominees (the 19 in March-April 2010 was his peak).

Bush wrapped up his circuit nominees by June 2002 but made 24 district nominations in July to October. Obama submitted 23 district and one circuit nominee after June 2010. Clinton submitted 38 district and 5 circuit nominees in June to September, 1994.



As to circuit nominees, the table below shows that Obama and Clinton inherited about the same number of circuit vacancies and sent the Senate roughly the same number of nominees—22 and 25. Bush inherited more vacancies and submitted more nominations.

Although both Clinton and Bush were able to reduce slightly the number of appellate vacancies in their first two years, appellate vacancies have increased slightly under Obama. Obama got his appellate nominations to the Senate on average 87 days faster than Clinton, dating from the date of the vacancy or its announcement, or Inauguration Day for vacancies occurring before then. Bush however substantially outdid both, taking only 146 days on average to get appellate nominees to the Senate.

Court of Appeals Nominations, 1993-94, 2001-02, 2009-10

	Vac's on Inaug Day	Nominations	Av. days, vac. to nom	Confirmations	Vac's on Senate adjournment
Clinton	17	22	340	19	16
Bush	27	31*	146	16	25
Obama	13	25	253	16	16

* I count Roger Gregory of the Fourth Circuit's Court of Appeals as a Clinton nominee/appointee (as does the Federal Judicial Center). Gregory began his service with Clinton's December 2000 recess appointment, making him the first African American to serve on that court. With the support of both Virginia senators, Bush nominated him in May 2001, and the Senate promptly confirmed him. This sequence is apparently unique in U.S. federal judicial history.

District court nominations were a somewhat different picture, as the next table shows. Clinton and Bush were able to reduce substantially the number of vacancies by the end of two years. Although Obama inherited fewer vacancies than either Clinton or Bush, vacancies increased in his two years. That is due partly to a lower overall confirmation rate (more on that later) and partly to fewer Obama nominations. The table, in fact, overstates Obama district court nomination activity: 13 of his 78 nominees were submitted in November or December of 2010, with no hope of confirmation in 2010. (Neither Clinton nor Bush submitted any nominees after October.)

District Court Nominations, 1993-94, 2001-02, 2009-10

	Vac's on Inaug Day	Nominations	Av. days, vac. to nom	Confirmations	Vac's on Senate adjournment
Clinton	90	118	341	107	52
Bush	54	98	290	83	35
Obama	41	78	351	44	76

The shorter time period for the Bush administration to make district nominations (290 days on average versus 341 and 351 for Clinton and Obama) may reflect Bush's eliminating pre-nomination candidate evaluations by the American Bar Association's Standing Committee on the Federal Judiciary. The rapid pace of Bush appellate nominations—146 days on average—probably reflects the administration's commitment to reshape legal policy through aggressive appellate appointment policies.

Hearings

A greater percentage of Clinton's and Obama's nominees received hearings than did Bush's, but Bush district nominees did much better than his circuit nominees. Excluding nominees in November and December of 2010, 83 percent of Obama's circuit nominees and 92 percent of his district nominees received hearings (versus 61 percent and 85 percent of Bush's).

Hearings for Court of Appeals Nominees

	Nominees	Hearings (% of nominees)	Av. days, nomination to hearing
Clinton	22	20 (91 %)	79
Bush	31	19 (61 %)	240
Obama	25	20 (80 %) * (see note)	64

* 83 percent if excluding a December 2010 nominee

Hearings for District Court Nominees

	Nominees	Hearings (% of nominees)	Av. days, nomination to hearing
Clinton	118	110 (93 %)	59
Bush	98	83 (85 %)	98
Obama	78	60 (77 %) * (see note)	62

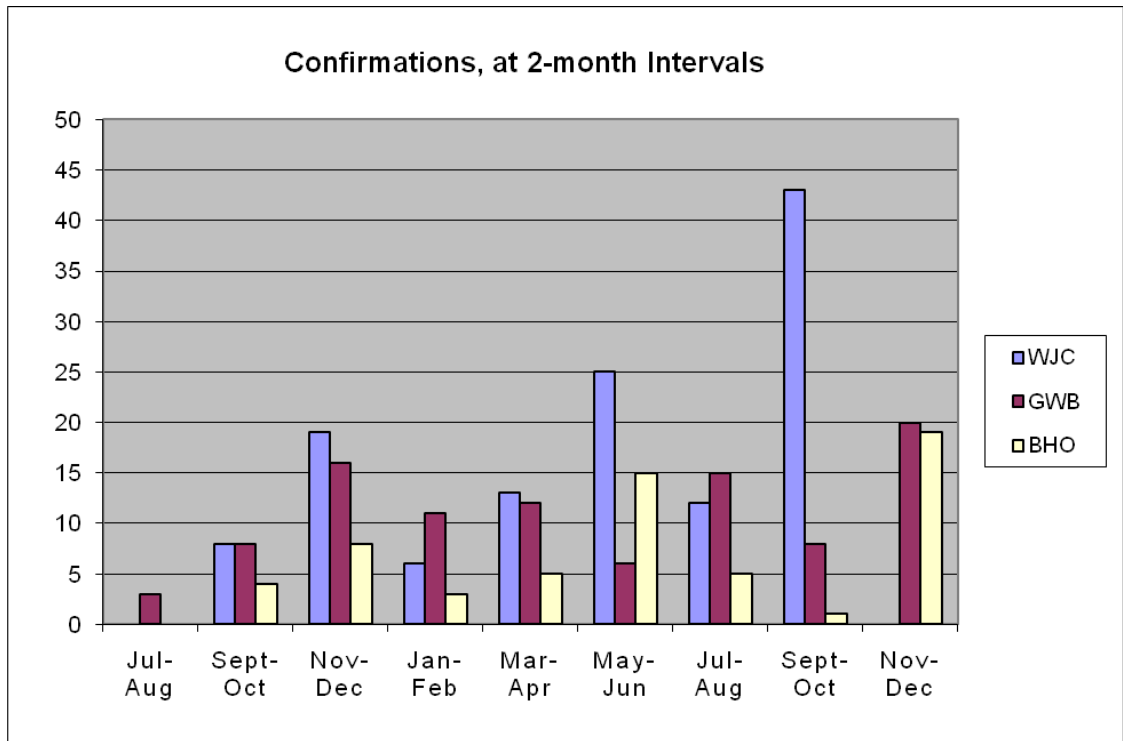
* 92 percent if excluding 13 November and December nominees

Time from nomination to hearing shows similar differences. The roughly 40 additional days on average it took Bush district nominees to get hearings is explained mainly by the Senate Judiciary Committee's wait for the ABA Standing Committee's review of submitted nominees that, under Clinton and Obama, the committee conducted prior to the nomination.

ABA review, though, hardly explains the much longer wait for hearings for Bush appellate nominees—240 days on average. That, and the comparatively lower percentage of circuit nominees to whom the Senate Judiciary Committee granted hearings (61 percent versus 91 percent for Clinton and 83 percent for Obama nominees) is likely due to the same reason that prompted the Bush administration's rapid submission of appellate nominees—the perceived importance of the courts of appeal in shaping legal policy.

Confirmations

The chart gives a birds-eye view of confirmation patterns during the first two years of the three administrations, in two-month intervals starting in July-August 1993, 2001, 2009. Obama, partly because of fewer nominees, had fewer confirmations in any two-month period than either Clinton or Bush but one (May-June 2010).



The table below shows that the Senate confirmed the same number of Obama's circuit nominees as Bush's—16—although not as many as Clinton's. And looking only at nominations submitted before July 1 of the second year—before the midterm election season kicks into higher gear—the confirmation rates for Clinton and Obama circuit nominees compared to Bush's are even greater.

Court of Appeals Confirmations

	Nominees	Confirmed (percent of nominees)	Nominees by 6/30 of 2 nd year	Confirmed (percent of nominees)
Clinton	22	19 (86 %)	17	17 (100 %)
Bush	31	16 (52 %)	31	16 (52 %)
Obama	25	16 (64 %) * (see note)	21	16 (76 %)

* 67 percent if the December nominee is excluded

The most noteworthy aspect of the 111th Senate confirmation record, however, may be the lower rate of district judge confirmations. The table and chart in the previous section show that four Senates over the last 18 years have had district judge confirmation rates in the 70 percent range or lower—but not in the first two years of either the Clinton or the Bush administrations (or, for that matter, the first two years of the Carter, Reagan, or H.W. Bush administrations). Whether the district court confirmation rate will be higher in the 112th and subsequent Congresses will determine whether, for the entire Obama administration, district judge confirmations continue the fairly robust rates of previous administrations.

District Nominee Confirmations

	Nominees	Confirmed (percent of nominees)	Nominees by 6/30 of 2 nd year	Confirmed (percent of nominees)
Clinton	118	107 (91 %)	80	78 (98 %)
Bush	98	83 (85 %)	74	72 (97 %)
Obama	78	44 (56 %) * (see note)	55	43 (78 %)

* 67 percent if the 13 November and December nominees are excluded

That Obama got even the district confirmations he did, moreover, was due to the lame duck session. Confirmations don't stop on July 1 of election years, even if they become more difficult. 47 of Clinton's 107 district confirmations came in August through October 1994.

The 2002 107th lame duck Democratic Senate, with a switch in party control looming, confirmed 17 Bush district nominees. The 2010 111th lame duck Senate confirmed 14 Obama district nominees. But different things were going on. The lame duck 107th was mainly cleaning out relatively recent Bush nominations. The 17 Bush appointees it confirmed had waited on average 149 days for Senate action; only three had been nominated before June 2002. By contrast, Obama's 14 lame duck district confirmations represented a deal to clean up mostly long-standing, non-controversial nominees. They waited on average 257 days for confirmation, and only one had been nominated after June 2010.

(The 107th and 111th lame ducks also confirmed a handful of circuit nominees, but in both cases, they had been pending for some time—three Bush nominees with average days since nomination of 481, and five Obama nominees with an average of 321 days since nomination.)

Times from nomination to confirmation for all appointees are shown in the next table. Even though Obama's nominees got hearings much quicker than did Bush's, those nominees who got confirmed waited longer than did Bush appointees.

Average days from nomination to confirmation doubled for Bush circuit appointees compared to Clinton's (from 103 average days to 236) and almost doubled

for Bush district appointees (from Clinton’s 76 days to Bush’s 139). Average days for Obama appointees were greater than for Bush’s, as were the percentages of appointees who waited over 180 days for a Senate vote—none for Clinton circuit appointees, but over two-thirds of Bush circuit appointees and 80 percent of Obama circuit appointees. The wait for district appointees has also grown, but at a lesser pace.

Average Days, Nomination to Confirmation, District and Appellate Appointees

	<u>Courts of appeal</u>		<u>District courts</u>	
	Av. days, nom to conf	Number (and percent) 180 days plus	Av. days, nom to conf	Number (and percent) 180 days plus
Clinton	103	0	76	1 (1 percent)
Bush	236	11 (69 percent)	139	10 (12 percent)
Obama	260	13 (81 percent)	175	16 (36 percent)

The lower, and slower, confirmation rate for Obama district nominees is not due to defeats on the Senate floor but—in what is by now a well-told tale—to the opposition’s use of Senate rules. Those rules permit even one Senator to object—or threaten to object—to the majority leader’s request for unanimous consent to proceed to a floor vote on a nomination. Proceeding to a floor vote without unanimous consent requires 60 votes to invoke cloture and then up to 30 hours of debate in a Senate with a lot of other pressing business. The threat of an objection has been enough, at least recently, to stall nominations.

Republican opposition to Obama district court nominees seems, except for a few instances, rooted in causes other than controversy over the nominees’ qualifications. Those nominees for whom the minority permitted a floor vote—even those who waited long periods for the vote—were for the most confirmed unanimously or with only a handful of negative votes. (An oft-cited example, including by the Chief Justice, is Kimberly Mueller, a U.S. magistrate judge nominated in March 2010 to the Eastern District of California, which in 2009 was first in the nation in weighted filings per judgeship. Ranked “unanimously well qualified” by the ABA’s Standing Committee on the Federal Judiciary, she received a hearing on April 16, was reported out of committee on May 6 and then waited until December 16, when the lame duck Senate confirmed her on a voice vote, 281 days after her nomination.)

Impact on the Courts of Appeal

Obama, unlike Clinton or Bush in their first two years, effected modest changes in the composition of the courts of appeal as measured by the party of the president who appointed the courts’ active-service judges. That variable can be instructive as to the

decisional tendencies of federal judges, keeping in mind however that not all appointees are even nominal members of the president's political party and that differences in voting behavior of Democratic and Republican appointees are relatively narrow save for a few hot-button policy areas. Also, the three-judge panels through which each court of appeals does almost all its work may not mirror the party-of-appointing-president balance among the court's active judges, due to the randomness of the draw and the inclusion on many panels of judges in senior status and district or circuit judges assigned temporarily from other courts.

Although knowing who appointed a court's judges hardly ensures a precise prediction of that court's decisions, it can be instructive. A president's ability to affect the composition of any particular court depends on who leaves full-time judging, thus creating an appointment opportunity, and whether presidents can get appointees confirmed. Clinton, over eight years, appointed 66 circuit judges and increased the proportion of Democratic appointees on the courts of appeal from 21 percent to 42 percent. President Bush's 60 appointees increased the proportion of Republican appointees from that same 42 percent to 56 percent. Clinton had more success mainly because of the greater proportion of non-Democratic-appointee vacancies he was able to fill (including four new seats created in December 1990 that H.W. Bush was unable to fill).

What about each of the 13 individual courts of appeal, all of whom had Republican-appointee majorities in January 1993? The next table shows the impact of Clinton, Bush, and Obama after their first two years and, for Clinton and Bush, after their full terms as well. "SRAM" denotes courts in which Republican appointees had a strong majority, defined here as at least twice as many such appointees as Democratic appointees. "WRAM" denotes "weak Republican appointee majority;" "E" denotes an even split, and "WDAM" and "SDAM" are the counterparts to the Republican appointee weak and strong majorities. The final row (HYP) is a hypothetical, indicating the breakdown if Obama were able to fill all current vacancies (and no more vacancies were to occur).

Clinton, for example, in eight years, shifted three courts from Republican-appointee majorities to Democratic-appointee majorities. Bush, in his eight years, reduced the courts with Democratic-appointee majorities from three to two. In their first two years, however, there were no shifts in court majorities, although Bush was able to increase the number of courts with strong Republican-appointee majorities.

In 2009-10, however, Obama reduced the courts with Republican-appointee majorities from nine to seven and increased the courts with Democratic appointee majorities from two to four. In particular, the court of appeals for the Fourth Circuit, long dominated by Republican appointees, was a confirmation battleground throughout the Clinton and Bush administrations. The Senate rejected five of Clinton's ten nominees to that court and seven of Bush's 11 nominees. In January 2009, it had five Republican appointees, five Democratic appointees, and five vacancies. It now has the same five Republican appointees, but nine Democratic appointees and one vacancy. The Senate confirmed all four Obama nominees to the

court, filling one vacancy that dated from 1994 and another from 2000. If Obama can fill the remaining vacancy in the next Congress, the court would have a strong Democratic appointee majority.

But, once again the caveats: measuring courts by the number of appointees of either political party (and especially differentiating between “strong” and “weak” majorities of such appointees) requires a healthy skepticism about how much the exercise tells us about likely decisional outputs.

Changes in Party-of-Appointing President Balance on the Thirteen Courts of Appeal after Two (and Eight) Years

	SRAM	WRAM	EVEN	WDAM	SDAM
CLINTON					
1/93	11	2			
	<i>all but 6th & 9th</i>				
12/94	11	2			
	<i>all but 6th & 9th</i>				
BUSH					
1/01	3	5	2	1	2
	<i>1st, 4th, 7th</i>	<i>5th, 8th, 11th, DC, Fed</i>	<i>3rd, 10th</i>	<i>6th</i>	<i>2nd, 9th</i>
12/02	6	2	2	1	2
	<i>1st, 4th, 5th, 7th, 8th, Fed</i>	<i>10th, 11th</i>	<i>3rd, 11th, DC</i>	<i>6th</i>	<i>2nd, 9th</i>
OBAMA					
1/09	7	2	2	2	
	<i>5th, 6th, 7th, 8th, 10th, DC, Fed</i>	<i>1st, 11th</i>	<i>3rd, 4th</i>	<i>2nd, 9th</i>	
12/10	5	2	2	4	
	<i>5th, 6th, 7th, 8th, DC</i>	<i>10th, 11th</i>	<i>1st, Fed</i>	<i>2nd, 3rd, 4th, 9th</i>	
HYP	1	5	1	5	1
	<i>8th</i>	<i>5th, 6th, 7th, 10th, DC</i>	<i>1st</i>	<i>2nd, 3rd, 9th, 11th, Fed</i>	<i>4th</i>

Appointee Backgrounds

Obama’s appointees—as to race and gender, and vocational backgrounds—differ from those of Clinton and Bush in their first two years, as seen in the following tables. Because of the small numbers, especially of appellate appointees, read the percentages with caution. (Had the Senate, for example, confirmed Ninth Circuit

nominee Goodwin Liu, it would have doubled the proportion of Asian-American male circuit appointees.

Race and gender

Proportionately, Obama has appointed far fewer white males to both the courts of appeal (25 percent) and the district courts (30 percent) than did Clinton or Bush in their first two years. (Over eight years, 52 percent of Clinton’s appellate appointees were white males, as were 52 percent of his district appointees. Bush’s figures were 64 percent and 67 percent respectively. *)

Readers can find their own points of interest in the table, but one striking figure is Obama’s appointments of Asian-Americans, who, in January 2009, comprised less than one percent of active federal judges, and now comprise 1.6 percent (from seven to thirteen).

Gender, Race, and Ethnic Variations among Clinton, Bush, and Obama Appointees

	Courts of Appeal			District Courts		
	Clinton (19)	Bush (16)	Obama (16)	Clinton. (107)	Bush (83)	Obama (44)
White males	47 %	63 %	25 %	41 %	69 %	30 %
White females	26 %	25 %	25 %	24 %	18 %	30 %
African American	16 %	13 %	31 %	25 %	11 %	25 %
Hispanic	11 %		12 %	8 %	2 %	4 %
Asian American			6 %	1 %		11 %

* Percents may not total 100 due to rounding

As to vocational backgrounds, Obama has continued the fairly steady trend over the last 60 years of drawing fewer district judges from the private practice of law — 34 percent versus 46 percent and 45 percent in Clinton’s and Bush’s first two years. (Over eight years, Clinton and Bush appointed even fewer district appointees from private practice — 39 percent and 34 percent — than in their first two years,** which may auger even fewer private practice appointees over Obama’s four, or eight, years in office.) Obama also appointed proportionately many more U.S. magistrate judges to the district bench than did Clinton or Bush in their first two years, or, for that

* See the Appendices in Wheeler, *The Changing Face of the Federal Judiciary* (August 2009) available at http://www.brookings.edu/~media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf.

** See Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 *Judicature* 140 (2010), available at http://www.brookings.edu/~media/Files/rc/articles/2010/02_district_judges_wheeler/02_district_judges_wheeler.pdf.

matter, over their entire presidencies.

Vocational Background Variations among Clinton, Bush, and Obama Appointees

	Courts of Appeal			District Courts		
	Clinton (19)	Bush (16)	Obama (16)	Clinton. (107)	Bush (83)	Obama (44)
District Judge	32 %	44 %	56 %			
State judge	32 %	13 %	25 %	32 %	33 %	30 %
Mag. Judge	5 %			10 %	10 %	23 %
Bank Judge				1 %	2 %	0 %
Public attys.	5 %	12 %	6 %	10 %	9 %	12 %
Other (viz., prof.)	11 %	13 %	6 %	2 %	2 %	2 %
Private practice	16 %	19 %	6 %	46 %	45 %	34 %

* Percents may not total 100 due to rounding

Impact of Vetting Committees

Some senators at least since the Carter administration have used committees to vet potential district court nominees that senators might submit to the White House. In the Bush administration, the number of such committees was around ten. In the early days of the 111th Senate, the number grew to 21, all created by Democrats except the Ohio committee, created jointly by Democrat Sherrod Brown and Republican George Voinovich. Supporters of such committees argue that, if properly constituted, they may help increase the diversity of the federal bench and ease some of the contentiousness in the nomination and confirmation process. The committees vary considerably in their size, pronounced bi-partisanship, and transparency.**

The table below compares Obama's district nominees from states where legislators said they used such committees in 2009-10 with the other nominees. Several caveats are in order: Demographic and background differences between the two sets of nominees may be due to long-standing recruitment patterns in the states rather than the committees. And one cannot assume that a nominee in a committee state was necessarily endorsed by a committee. (For one example, in 2009 Oregon Senator Ron Wyden apparently received from his committee a list of five white males. He sent that list to the White House but not before he added a male Hispanic judge to

*** For more information on the committees, at least as of June 2010, see a joint publication of the Governance Institute and the Institute for the Advancement of the American Legal System (University of Denver), Options for Federal Judicial Screening Committees, available at http://www.brookings.edu/~media/Files/rc/papers/2010/0702_federal_judicial_wheeler/0702_federal_judicial_wheeler.pdf.

it. In July 2010, the administration nominated one person from the committee list and the judge whom Wyden had added.)

Comparing Obama District Nominees from Vetting Committee States and Other States

	<u>Committee states</u>	<u>Other states</u>
Vacancies-Jan. 2009 through Dec 2010	72	47
Nominees (and percent of vacancies)	48 (67 %)	30 (64 %)
Nominations within 8 months of vacancy	12 (25 %)	6 (20 %)
Average days from vacancy to nomination	354	347
White males (and percent of nominees)	15 (31 %)	14 (47 %)
White women	13 (27 %)	7 (23 %)
African American	10 (21 %)	7 (23 %)
Hispanic	4 (8 %)	2 (7 %)
Asian American	6 (12 %)	0
Average ABA rating*	3.23	3.31
State or federal judge	27 (56 %)	14 (47 %)
US or state gov't.	5 (10 %)	3 (10 %)
Private practice	15 (31 %)	13 (43 %)
Professor	1 (2 %)	0
Confirmations	25 (52 %)	19 (63 %)
Confir. for nom's submitted by June 30	24 (71 % of 34)	19 (91 % of 21)
Average days from nom. to conf.	178	168

* 4 (Unanimously Well Qualified); 3 (WQ/Q mix); 2 (Unan. Qual.); 1 (Q/Not Qual. mix)

Based on these figures, nominees from states where legislators used committees differ little from other nominees. Nomination figures are roughly equal. Committee state nominees had proportionately fewer white males because committee state nominees had much greater representation of Asian Americans (most from California and Hawaii). Average ABA ratings are about the same, although that of committee state nominees is slightly lower. And committee state nominees haven't fared well in getting confirmed.

Again, though, keep in mind the caveats about the limitations of these data—and the fact that the most important variable, judicial competence, is not measured in the table.

What to Look For in the 112th Congress

Obama, unlike Clinton has not lost his Senate majority, although it is six-members smaller. Unlike Bush, he is not anticipating the end of a Senate controlled by the other party.

Some questions worth watching in the 112th Congress include:

- How many, if any, of the 34 district nominees and 9 circuit nominees returned to the White House at the end of the 111th Congress will Obama renominate in the 112th?

Seven percent of Clinton's district nominees over his eight years were renominations, as were 14 percent of Bush's. For the most part, these were individuals nominated late in one Congress, resubmitted promptly in the next and confirmed.

Renominations were more common for court of appeals candidates—14 percent of Clinton's over eight years and 26 percent of Bush's; in the 109th Senate, 2005-06, almost half of his 28 nominees had been nominated in previous Senates—five of the 28 had been nominated in both the 107th and 108th Senates. Unlike district renominations, circuit renominations are more likely to reflect White House-Senate battles over the courts of appeal.

If these patterns hold true, one might expect Obama to renominate most candidates submitted late in the 111th Congress. The more interesting question is whether he will renominate two circuit nominees whom he submitted in early 2010 (Goodwin Liu for the Ninth Circuit and Robert Chatigny for the Second) and three district nominees whom he submitted in late 2009 or early 2010 (Edward Chen, Northern California, Louis Butler, Western Wisconsin, and John McConnell, Rhode Island). Republicans refused to include these five in the lame duck session confirmations of nominees reported out of committee prior to November. Renominating them in the face of Republican charges that they are seriously unacceptable will run counter to Obama's stated desire to seek areas where he can try to accommodate Republicans. Not renominating them will amp up the chorus in the Democratic base charging him with disinterest in changing the face of the federal judiciary.

- Will Democrats succeed in their stated pledge to change Senate rules to make filibusters and attendant procedural roadblocks harder to invoke, or will they have second thoughts if prospects grow for a Republican Senate take over in 2013? Or is it possible that both parties will realize that the judicial confirmation process has gotten so out of hand that it is in their collective self-interest to do something about ?
- Given the power of individual senators to obstruct confirmations, will an increase in Republican senators have much of an impact on the confirmation process, except that there will be six more who may be inclined to obstruct?

- Alternatively, will the new Republican senators—especially those propelled into office by the Tea Party—make a difference greater than their mere numbers? Although Senate conventions have been seriously strained, what nominations that have been approved (in the 111th Congress and earlier) have reflected an understanding on the part of senators not of the president’s party that presidents by and large should be able to appoint judges who are at least nominal members of their party or at least share the president’s general outlook on the role of the judiciary. All-out challenges to that understanding have been restrained by those senators’ realization that some day a president of their party will occupy the White House and expect the same deference.

Perhaps the Tea Party challenge to business as usual in Washington will suck this understanding into its sights.

- Alternatively, to the degree Republicans have used opposition to judicial nominees as a tactic to delay Senate work on other parts of the Obama agenda, will they be less inclined to stall business if the business at hand is GOP House-passed legislation?
- Will the district judge vetting committees have a life in the 112th Senate, at least in those committee states where a Republican has replaced a Democratic senator (Illinois, Pennsylvania, Wisconsin) or a replaced a Republican who apparently worked with a committee (Florida and Ohio) or replaced House members in a few states where they had created committees (Alabama and Georgia)?

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