



Darren Greenwood – U.S. flag and court house.

Judicial Nominations and Confirmations after Three Years—Where Do Things Stand?

Russell Wheeler

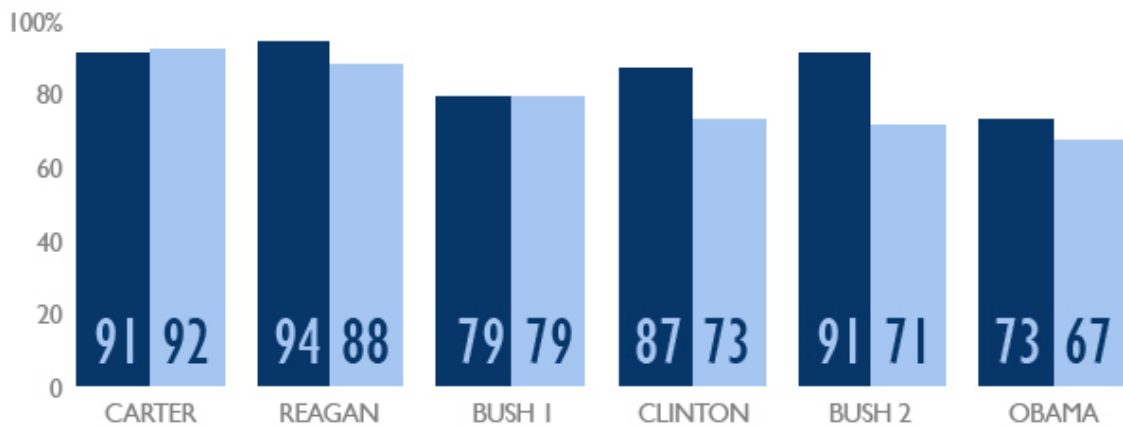
EXECUTIVE SUMMARY

Democrats groused in the Obama administration's first two years about the slow pace of judicial nominations and Senate confirmation.* By the end of the administration's third year:

- the pace of both nominations and confirmations has picked up, but district court vacancies have nevertheless increased noticeably, due partly to the still comparatively low number of nominations and confirmations but also due to an atypically large number of retirements;
- President Obama's appointment of district judges does not match his two predecessors at this point in their administrations, but he is doing better as to circuit judges;
- he has already changed the face of the courts of appeals nationally and as to individual circuits in terms of the ratio of active judges appointed by Democratic and Republican presidents (a less-revealing variable than some think it is); and
- he has continued the demographic diversification of the federal bench, and the decrease in the number of district judges appointed from private practice, a fact that may be linked to lengthening delays between nomination and confirmation.

Overall, from President Jimmy Carter's administration to that of President George W. Bush, confirmation rates for circuit nominees have declined steadily (counting someone who was renominated in the same or different Congresses as a single nominee). District nominees' confirmation rates, though, have hovered around the 90 percent mark (President George H.W. Bush's district judge figures are misleading[†]).

Percent of district (■) and appellate (■) nominations confirmed



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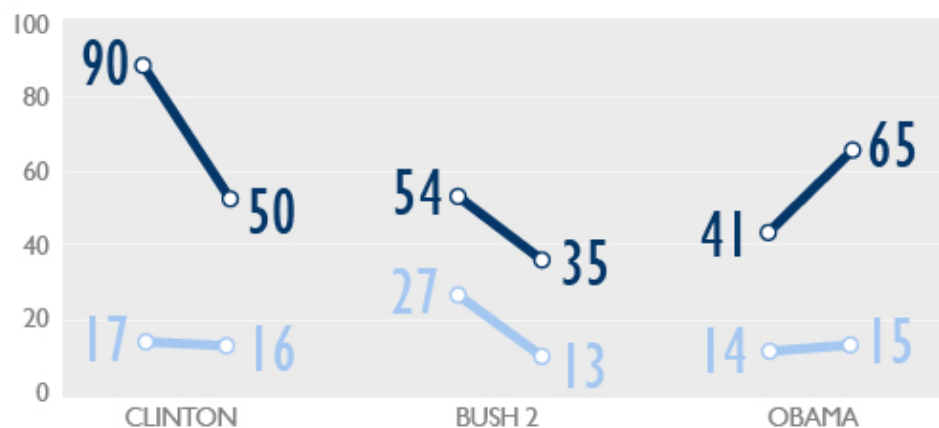
Obama's record after four or eight years may look better than it does now, but maybe not—maybe the factors that have lowered circuit confirmation rates over the past 30-plus years will change district rates as well.

Looking Back Over Three Years of Three Presidents

We can't predict what Obama's record will be at the end of 2012, or 2016, but we can compare his current situation with those of Presidents William Clinton and W. Bush at the end of their first three years in office, looking separately at district and circuit nominations. (Lumping them together sometimes obscures separate stories.)

Vacancies As of December 31, 1995, and 2003, both Clinton and Bush had reduced the number of vacancies they inherited from their predecessors, dramatically as to district courts.

Vacancies for district (■) and appellate (■) judges on Inauguration Day and at the end of three years



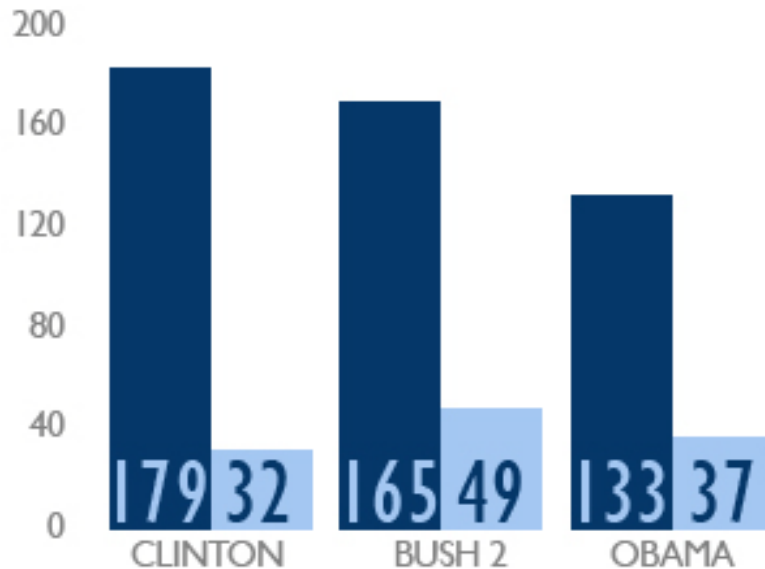
Obama has maintained circuit vacancies basically at the same number he inherited, but district vacancies have increased starkly.

The increase in district vacancies is partly because Obama has made fewer nominations than did Clinton or Bush at this point. But it's also due to factors pretty much out of the administration's control. First, 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. Second, the Senate has confirmed a lower percentage of Obama nominees that it did Clinton and Bush nominees.

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, and had he made more nominations, and gotten more confirmations, the number of vacancies would have decreased.

Number of nominations Obama has seen more district court vacancies, but he has made fewer nominations—32 fewer than Bush at this same point, and 46 fewer than Clinton.

Nominations of district (■) and appellate (■) judges in the first three years



He has made five more circuit nominations than did Clinton at this point but 12 fewer than did Bush, who by now had submitted 49 appellate nominations, bespeaking the Bush administration's aggressive judicial appointments strategy. (The number is 50 if one counts Fourth Circuit Judge Roger Gregory, whom Clinton recess-appointed in late December 2000 and Bush included in his May 9, 2001, initial batch of circuit nominees, after which he was quickly confirmed.)

Pace of nominations Although disappointment among Obama supporters lingers over the pace of nominations, in fact that pace has returned to patterns similar to those of the two prior administrations.

Obama nominations at six-month intervals for district (■) and appellate (■) vacancies



Of Obama's 133 district nominees:

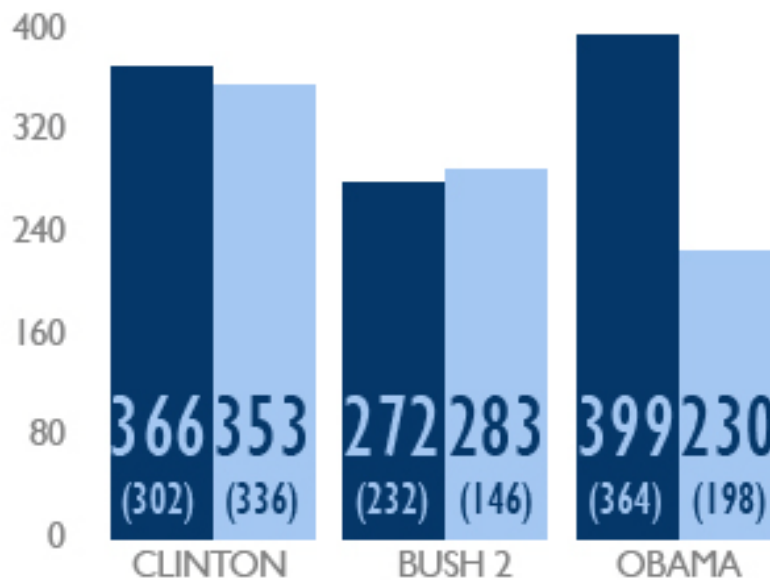
- 21 (16 %) came in his first year,
- 57 (43%) in his second year, and
- 55 (41 %) in his third year.

By comparison, Clinton and Bush submitted 23 and 22 percent of their district nominations in their first years. But all three presidents submitted about the same percentage in their first *two* years—around the 60 percent mark.

Obama's circuit nominees were somewhat more evenly spaced—33 percent the first year, 35 percent in the second year, and 33 percent again in 2011.

Time from vacancy to nomination Just as Obama made fewer district nominees than Clinton or Bush at this point, he's taken longer to make them, in terms both of the average number of days and the median number (the midpoint in the range). Bush's comparatively quick district court nominations—272 days on average versus 366 and 399 for Clinton and Obama—speak again to his well-oiled nomination machinery.

Days from vacancy* to district (■) and appellate (■) nominations.



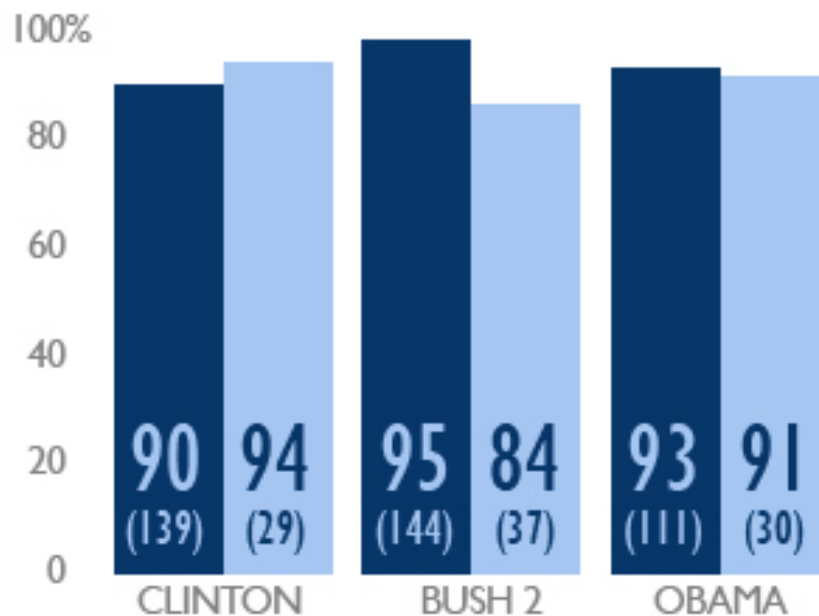
* from date incumbent announced his/her intention to leave active service at some future date, or date vacancy was created if no announcement, or Inauguration day if vacancy was in place on that date. Values plotted are averages; median values shown in parentheses.

As to circuit nominations, Obama has been much quicker than Clinton, but Bush—in terms of *median* days—outpaced both: 146 compared to Clinton's 336 and Obama's 198. (The much higher *average* days for Bush reflect some especially long vacancies in circuits with long-standing circuit nomination battles, especially the Fourth, Sixth, and District of Columbia.)

The greater time for Obama district, compared to circuit, nominations may reflect contentiousness between the administration and blue-slip yielding home-state senators—Republican as well as Democratic—or initial disorganization in the Obama administration's judicial nomination process, or both.[#]

Senate Judiciary Committee hearings With one exception, over 90 percent of each president’s district and circuit nominees got hearings by the end of the third year, once we exclude nominations submitted after August of the third year (which would be less likely to get hearings anyway).

Percent of hearings for district (■) and appellate (■) nominations submitted by August of third year

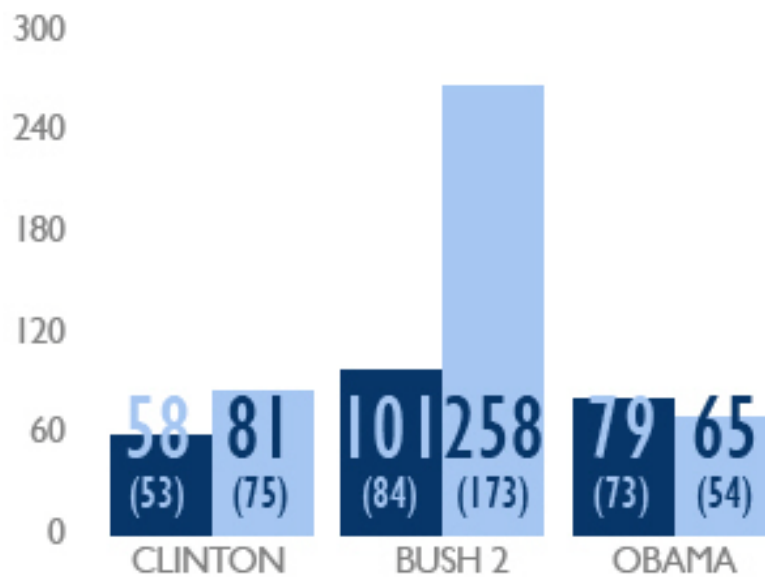


Note: Values plotted are percents; number of hearings shown in parentheses.

The exception to generally high hearing rates is Bush’s circuit nominees—84 percent of pre-September 2003 nominees. Just as the Bush administration was out of the gate in making circuit nominations, Senate Democrats slow-walked many of them once they arrived in the Senate.

Time from nomination to hearings The average and median number of days to get hearings was longer for Bush’s nominees—district and circuit—than it was for either Clinton’s or Obama’s, but that difference, for district judges, is largely an artifact of when the American Bar Association Standing Committee on the Federal Judiciary undertook its investigation of nominees.

Days from nomination to hearings for district (■) and appellate (■) nominees



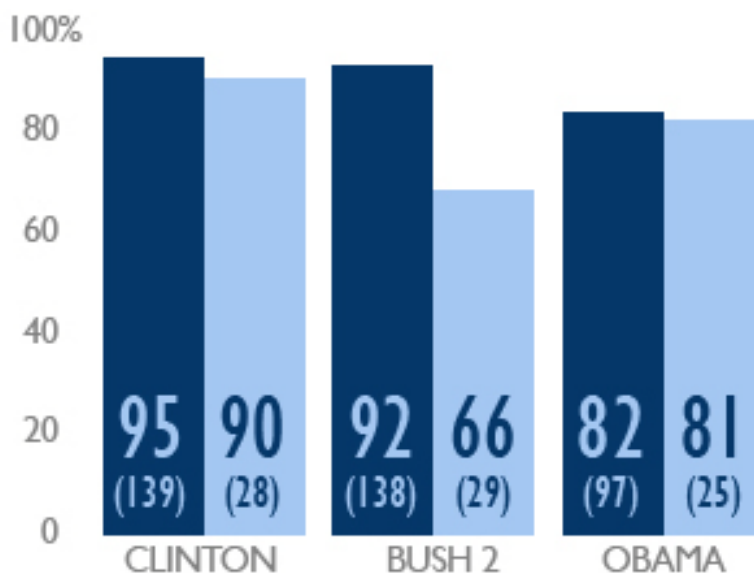
Note: Values plotted are averages; median values shown in parentheses.

Under Obama, as under Clinton, the ABA does its review *prior to* the nomination. Bush moved the ABA out of the pre-nomination stage, so Senate Democrats asked for the review once they’d received the nomination, adding time to the period before any hearings. The 58 days on average for Clinton’s district nominees to get hearings shot up to 101 for Bush and dropped down to 79 for Obama’s district nominees.

Whether the 31 additional days for Obama compared to Clinton reflects Republican foot dragging or more committee business or some combination of both is hard to say. The much longer time for Bush’s circuit nominees to get hearings, though, 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.)

Confirmation rates Even discounting late-third-year nominees, Obama's district court confirmation rate is ten percentage points lower than Bush's and 13 points lower than Clinton's. But he has managed to get a noticeably higher proportion of his circuit nominees confirmed when compared to Bush's nominees.

Confirmations in first three years of district (■) and appellate (■) nominess submitted by July of third year.



Note: Values plotted are percents; number of confirmations shown in parentheses.

An important factor in these comparisons is the Republican base's enthusiasm for many of Bush's circuit nominees, and Democrats' resistance to them as too conservative; the Democratic base has seemed unenthusiastic about most Obama circuit nominees, although a few of those nominees have encountered Republican opposition stiff enough to kill their nominations, just as Senate Democrats killed a higher proportion of Bush nominations.)

Pace of confirmations The pace of confirmations has increased during Obama's three years. The Senate confirmed:

Pace of Obama confirmations for district (■) and appellate (■) nominees



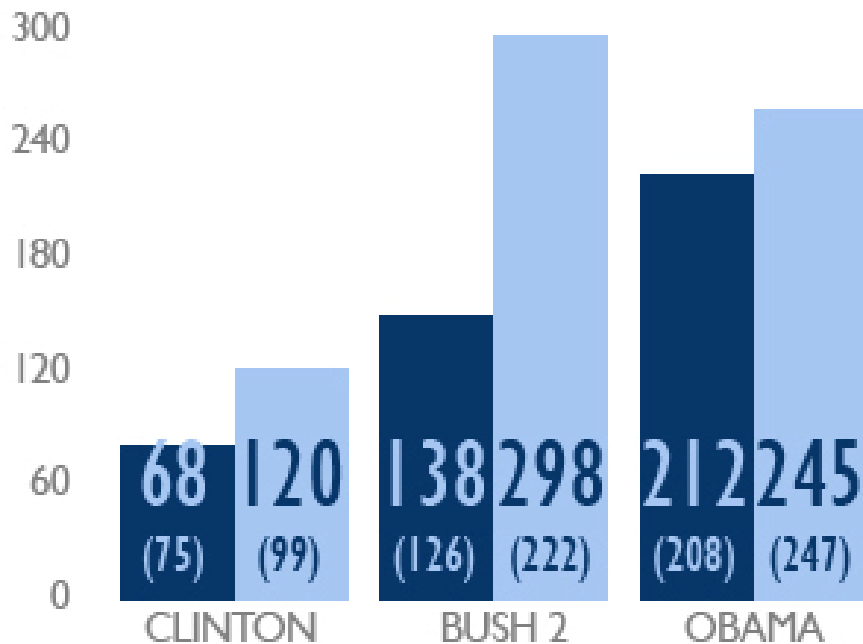
- nine (9 %) of his 97 district judges in his first year;
- 35 (37 %) in his second year; and
- 53 (55 %) in his third year—even as Republicans had a larger Senate minority in that third year.

The quickened pace was less evident as to circuit confirmations—12 percent the first year, 52 percent the second year, and 36 percent the third year.

Time to confirmation By almost all measures the process from nomination to confirmation has gotten progressively longer—by average days or median days. The only dip in the lengthening times is the drop from 298 to 245 average days to confirmation for Obama and Bush circuit nominees. *Median* days, though, have gone up steadily in all categories.

So, even though Obama nominees got hearings more quickly than did Bush nominees, they have waited longer, overall, for confirmation.

Days from nomination to confirmation for district (■) and appellate (■) nominees

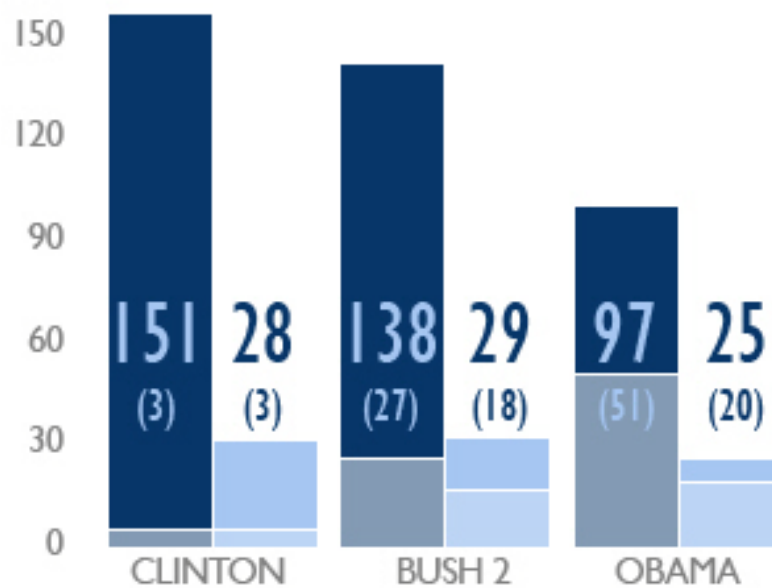


Note: Values plotted are averages; median values shown in parentheses.

The number of confirmations that took 180 days or more tells the story most dramatically.

All confirmations, first three years, and 180-days+ confirmations for district (■) and appellate (■) judges

Lighter shades and values in parentheses indicate confirmations taking 180 days or more.



Three of Clinton's 151 district confirmations took longer than 180 days; 51 of Obama's 97 confirmations took 180 days or longer. Three of Clinton's 28 circuit confirmations were 180 days-plus. Twenty of Obama's 25 circuit confirmations were. (These are all confirmations, not just those pre-August of the third years.)

Changes in composition of courts of appeals Obama’s 25 appellate appointees have changed the composition of the courts in terms of proportion of judges in active service appointed by Republican and Democratic presidents. (Three cautions: (a) not all of a president’s appointees had necessarily been members, especially active members, of his party; (b) the link between appointing president and decisional patterns is strong in some case types but non-existent in others; and (c) any three judge panel may not comprise three active judges of the respective court—it may include senior judges or district judges or judges from other courts sitting by temporary designation.)

That said, when Obama took office 55 percent of active circuit judges had been appointed by Republican presidents, 37 percent by Democratic presidents, and eight percent of the 179 judgeships were vacant. At the end of December 2011, the percent of Republican appointees had dropped from 55 to 48 and the percent of Democratic appointees rose from 37 to 44, with the same eight percent vacancy rate.

Were Obama to fill all 15 vacant seats in 2012 and no more vacancies occurred—both highly unlikely—the proportion of Democratic appointees would rise to 52 percent. While neither will happen, the figures suggest the impact that an Obama second term could have on the courts of appeals.

Whatever might be the importance of the overall percentage of active judges appointed by either party, the change in individual courts of appeals is in some ways more striking.

Changes in the composition of courts of appeals

- Courts with majority of appointments from Republican presidents (asterisk = twice as many Rep. appointees as Dem.)
- Courts with majority of appointments from Democratic presidents
- Courts with even number of appointments from Republican and Democratic presidents

JAN. 20, 2009



DEC. 31, 2011

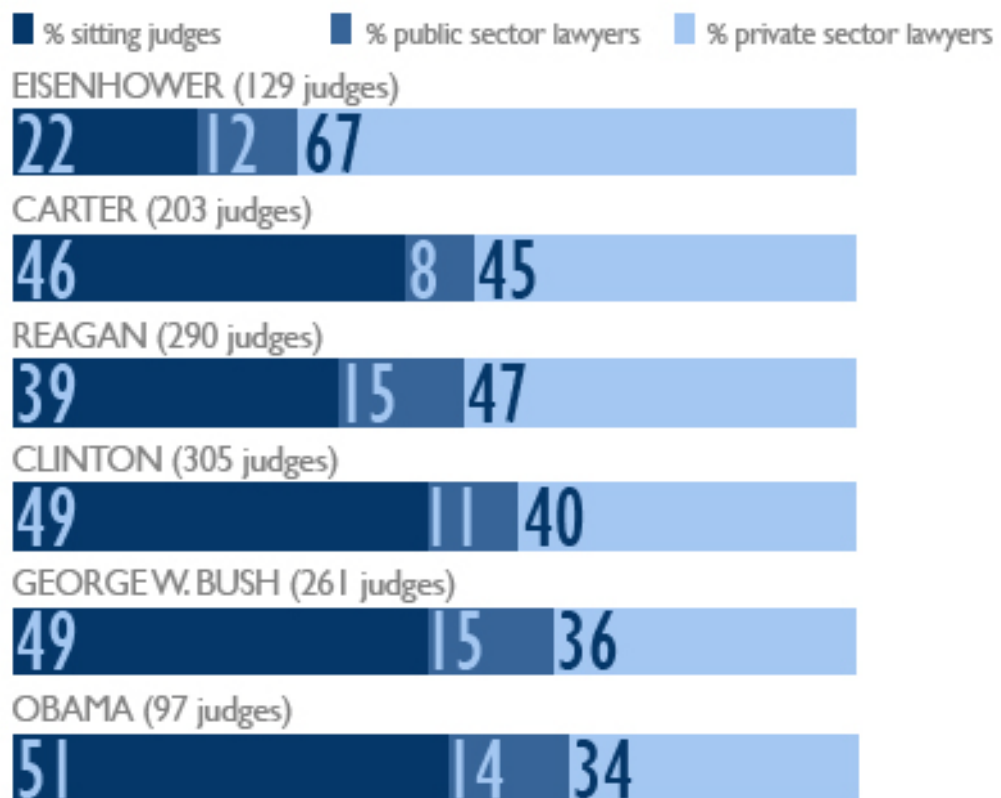


When Obama took office, nine of the 13 courts of appeals had Republican-appointee majorities; six had at least twice as many Republican appointees as Democratic appointees. Courts with Republican appointee majorities have declined from nine to seven, and those with especially strong Republican majorities have gone from six to three.

By contrast, the number of courts with Democratic appointee majorities has gone from two to five. None of those has a super majority, although confirmation of Obama’s pending Fourth circuit nominee would put that court into the category. There is some irony there, given the Fourth Circuit’s long standing reputation as a bastion of conservative jurisprudence.

District judge vocational backgrounds Obama has continued the trend of drawing district judges from among sitting state and federal judges, as seen in the vocational background of Eisenhower’s district appointees and those of every president since Carter.

Backgrounds of district judge appointees, selected administrations



The proportion of judges appointed from among government attorneys (and public defenders) has hovered in the ten to 15 percent range over the last 50 to 60 years, while the proportion of sitting judges has gone steadily up, to the point that almost half of Clinton’s and Bush’s appointees were sitting judges, and over half of Obama’s to date have been sitting judges. Commentators have offered a host of

reasons for this phenomenon, including comparative salaries of sitting judges and practitioners, and improvements in the quality of the state and term-limited federal judicial pools.

Another likely factor, however, is the lengthening time from nomination to confirmation—over a half-year on average and, for many, much longer. That is not a problem for most sitting judges, who can continue to judge while they wait to see what the Senate will do. It is a problem, though, for lawyers to put their practice into limbo because clients shy away from counsel who may not be in for the duration. Some years ago, a lawyer could accept a district court nomination, realizing that confirmation was almost a sure thing and would come quickly. Today, confirmation is less of a sure thing, and the wait for a resolution can go on for many months.

Demographic diversity As many have noted, Obama has also appointed record proportions of non-white males. All of Dwight Eisenhower's district and circuit appointees were white males. For the Kennedy Johnson administration, the figure fell to 93 per cent, for Carter to 66 percent, up to 86 percent under Reagan, 53 percent under Clinton, 66 percent under Bush2, and 38 percent under Obama.

Appointments of Asian-Americans have been especially noticeable. Of the 24 appointments of Asian Americans to federal district and circuit judgeships in total, Obama has made eight—and three Asian-American nominees are awaiting Senate action.

Average age at appointment (circuit judges) Obama has been putting slightly older judges on the courts of appeals. The average age of his appointees is 55.4 years at the time of nomination, versus 51.0 for Bush's appointees and 51.3 for Clinton's.

Looking to 2012

The conventional wisdom is that confirmations will slow down or stop early in 2012, as Republicans anticipate the possibility of a Republican administration, or at least a Republican Senate, starting in 2013.

The two previous administrations tell a different story. In 1996, the Republican-controlled Senate confirmed 18 of Clinton's district nominees (16 in July) and two circuit nominees. In 2004, another Republican-controlled Senate confirmed 30 Bush district nominees (18 in June, and seven after June), and five circuit nominees (three in June). So there's been nothing in the water on the north side of the Capitol—so far at least—to preclude confirmations in an election year.

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Endnotes

* The data for this paper come partly from the Federal Judicial Center's Biographical Directory of Federal Judges at fjc.gov, partly from data posted by the Administrative Office of U.S. courts at uscourt.gov and partly from data I have collected. I welcome any and all corrections. Thanks to Christopher Ingraham of Brookings for the graphics.

+ The Senate confirmed 48 of 52 district nominees in 1989-90. It confirmed 101 of 147 1991-92 nominees; those 147 included some for over 70 district judgeships that Congress created in late 1990. (D. Rutkus and M. Sollenberger, *Judicial Nomination Statistics: U.S. Circuit and District Courts, 1997-2003* at 15 (Congressional Reference Service, February 2004).)

S. Goldman, E. Slotnick, and S. Shavoni. "Obama's Judiciary at Midterm," 94 *Judicature* 262 (2011)