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## Judicial Confirmations: What Thurmond Rule?

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The specter of the “Thurmond Rule” has reared its head in presidential election years at least since the 1980s, when Senator Strom Thurmond, Republican of South Carolina, chaired the Judiciary Committee.

### What is the “Thurmond Rule”?

Senator Charles Grassley, ranking member of the Judiciary Committee, [said](#) in January that the “historical practice has been for work to slow down a great deal during [presidential election] years. This is, of course, the so-called ‘Thurmond Rule.’ I would note that [Committee] Chairman [Patrick Leahy] has in the past stated: ‘The “Thurmond Rule” is that after July or the nominating conventions no more judges will be confirmed in a Presidential election year unless there is consent.’” Grassley acknowledged that “there are inconsistent statements on both sides regarding the effect or timing of the so called rule” but then quoted statements from 2007 and 2008 by Leahy suggesting that it takes effect in March or April.

The Congressional Research Service’s Denis Rutkus and Kevin Scott [said](#) the rule holds that “at some point in a presidential election year, the Judiciary Committee and the Senate no longer act on judicial nominations — with exceptions sometimes made for nominees who have bipartisan support from Senate committee and party leaders.” The idea reflects the fact that senators not of the president’s party anticipate that, come the next year, a president of their party might be doing the nominating.

### Is it a “rule”?

Rutkus and Scott, however, could not identify any “consistently observed date or point in time” after which the Senate ceased processing district and circuit nominations during the presidential election years from 1980 to 2004.”

In fact, as explained below, confirmations in the four most recent presidential election years, especially for district nominees, have been more robust than most formulations of the Thurmond rule would have predicted. Those experiences,

though, may have little predictive value for 2012. The shifting landscape of judicial nominations and confirmations, as I [described](#) it in January, makes it risky to look to the past to predict how the increasingly contentious confirmation battles will play out in 2012. For one thing, being a “consensus nominee” may have been a ticket to confirmation in earlier years, but it’s difficult even to define the term in 2012, when nominees with little if any opposition still have a hard time getting floor votes. And Republican senators’ objections to the president’s January recess appointments to some executive branch positions may also affect the judicial confirmation process.

Nevertheless, the 2004 Senate—with a 51-member Republican majority—confirmed district judge nominees at about the same rate as the Senate had confirmed district nominees in 2001-03—in the mid-80 percent range.

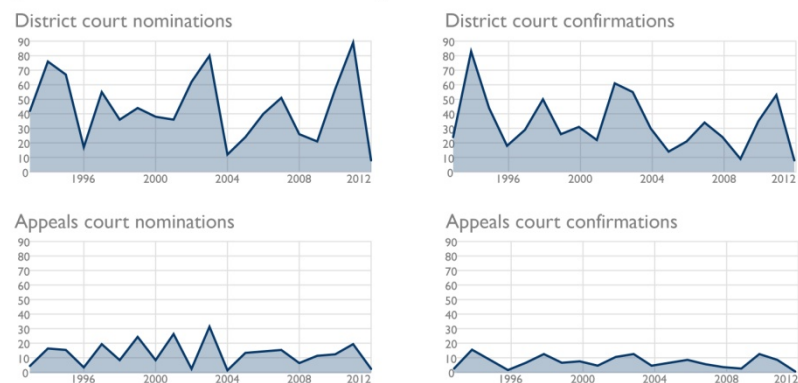
Based on that precedent, it’s tempting to say that the 2012 Senate—with essentially a 53 member Democratic majority—will confirm district judges at at least the same rate as the Senate had confirmed district nominees in 2009-2011—in the mid-70 percent range.

It’s tempting to say it—given the 16 circuit and 63 district vacancies on March 16, 2012—but probably naive to expect it. (On March 16, 2004, there were 16 circuit and 28 district vacancies.)

## Judicial Nominations and Confirmations in Election Years

Nominations and confirmations usually drop off in presidential election years, but the drop offs in the four most recent election years were not inevitable and not necessarily decisive. Here are district court and then court of appeals nominations and confirmations from 1993 through mid-March 2012. (The nomination figures differ from some in my earlier reports.\*).

Judicial nominations and confirmations, 1993 – 2012



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\* Full data can be found at the end of this paper.

\*\*In most of my reports on judicial nominations and confirmations, I count an individual as a single nomination, even if s/he might have been renominated in a subsequent Congress, because my question was how many individuals different presidents got confirmed. Here, I count a renomination in a subsequent Congress as a new nomination because I am asking how the Senate has treated each nomination submitted in different years. Of the 89 district nominations in 2011, for example, 32 had also been nominated in 2010 or 2009.

But how do the confirmation *rates* vary? Judicial confirmation rates in any year — presidential election or not — are a function of nominations pending at the start of the year (if any), nominations submitted during the year, and Senate action on those nominations. The numbers usually vary depending on whether or not the same party controls the White House and Senate.

These graphics show confirmation rates (percentages) for the four presidential election years prior to 2012 (with either divided or unified government) for:

- nominations pending at the start of the year;
- nominations submitted during the year;
- the combined rate; and
- the confirmation rate in the previous three years of the particular presidential term (confirmations in those years divided by nominees submitted in those years).

In 2004, with unified government and a president who was not a lame-duck — the year most analogous to 2012 — the overall district confirmation rate of 88 percent slightly exceeded the 84 percent rate of the previous three years, due mainly to the confirmation of almost all nominees pending on January 1. District nominees in the three election years of divided government did not fare as well, but in two of the three years the rates exceeded 50 percent.

### District Court Confirmation Rates in Presidential Election Years

Year	Confirmations for nominations		Total	Confirmation rate for previous 3 years
	Pending on January 1	Submitted during the year		
1996-Div.	48%	41%	45% (n=18)	86%
2000-Div.	44%	63%	57% (n=31)	81%
2004-Unif.	95%	75%	88% (n=30)	84%
2008-Div.	50%	58%	55% (n=24)	88%

Moreover, district nominees submitted during presidential election years did not necessarily face stiffer headwinds than nominees already pending before the Senate on January 1. In 2000 and 2008, a greater percentage of district nominees submitted *after* January 1 got confirmed than did nominees pending on that day. Election-year confirmations of appellate nominees, though, were much less robust, and the small numbers render the percentages volatile.

### Court of Appeals Confirmation Rates in Presidential Election Years

Year	Confirmations for nominations		Total	Confirmation rate for previous 3 yrs
	Pending on 1/1	Submitted during the year		
1996-Div.	29%	0	18% (n=2)	88%
2000-Div.	41%	11%	31% (n=8)	56%
2004-Unif.	21%	50%	24% (n=5)	59%
2008-Div.	10%	43%	24% (n=4)	55%

## District Judge Confirmations in Presidential Election Years

	1996.	2000	2004	2008
Confirmations pre-July	1	23	23	10
Confirmations July and later	17	8	7	14
Total confirmations	18	31	30	24

One other point, not displayed in the graphics above: in none of the four election years did district judge confirmations stop in July. In two of the years—1996 and 2008—more district confirmations occurred after July than before it.

In fact, in 2004, six—and in 2008, 10—district confirmations came in September and later. (Almost all court of appeals election year confirmations occurred before July.)

Also, more than a few of the election year district confirmations involved nominations submitted during the election year.


	District judge confirmations...	
	<i>during the year</i>	<i>of election year nominees</i>
1996-Div	18	7
2000-Div	31	24
2004-Unif	30	9
2008-Div	24	15

## Conclusion

In brief, nominations and confirmations slowed but did not freeze up in the four most recent presidential election years, even for nominations submitted in those years. Learning more about why that happened would require identifying confirmations strongly backed by the Senate leadership, by senators with special clout, by Judiciary Committee members, by senators on both sides of the aisles, and as results of special deals, such as the June 2008 confirmations of two judges for the Sixth Circuit's court of appeals—one of whom President Clinton had first nominated in 1997.

## Prospects for 2012

Predicting what might happen in 2012 based on what happened in the four previous presidential election years is risky business because the ground continues to shift under the nomination-confirmation landscape. As my recent research showed, the Obama administration has nominated fewer people and nominated them later in the four-year span, and the Senate, although under (nominal)



Democratic control, is confirming district judges at lower rates than in previous years, even as circuit confirmation rates are holding more or less steady.

There is certainly grist for the 2012 district judge confirmation mill. The Obama administration entered 2012 with 35 pending district nominees, more than in any of the four previous presidential election years, when the comparable numbers were 23, 16, 24, and 18. Of the 35 nominations pending on January 1, 2012, the Senate, as of March 16, had confirmed six and, according to news reports, will confirm 12 more by mid-May.

Six circuit nominees were pending on January 1, compared to two, seven, four, and one in the four previous election years. The Senate has confirmed one nomination in 2012 and, according to the same news reports, has agreed to confirm two more by mid-May.

If confirmations stop in mid-May, though, 2012 will see lowest numbers of both district and circuit confirmations than the three most recent presidential election years.

## \*Actual data from graphs on page 2:

### District Court Nominations and Confirmations, 1993-2012

	District	
	Noms	Conf.
1993	42	24
1994	76	83
1995	67	44
<b>1996</b>	<b>17</b>	<b>18</b>
1997	55	29
1998	36	50
1999	44	26
<b>2000</b>	<b>38</b>	<b>31</b>
2001	36	22
2002	62	61
2003	80	55
<b>2004</b>	<b>12</b>	<b>30</b>
2005	24	14
2006	40	21
2007	51	34
<b>2008</b>	<b>26</b>	<b>24</b>
2009	21	9
2010	57	35
2011	89	53
<b>2012</b>	<b>8</b>	<b>6</b>

### Court of Appeals Nominations and Confirmations, 1993-2012

	Noms	Conf.
1993	5	3
1994	17	16
1995	16	9
<b>1996</b>	<b>4</b>	<b>2</b>
1997	20	7
1998	9	13
1999	25	7
<b>2000</b>	<b>9</b>	<b>8</b>
2001	27	5
2002	3	11
2003	32	13
<b>2004</b>	<b>2</b>	<b>5</b>
2005	14	7
2006	15	9
2007	16	6
<b>2008</b>	<b>7</b>	<b>4</b>
2009	12	3
2010	13	13
2011	20	9
<b>2012</b>	<b>3</b>	<b>1</b>



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