



**Congressional
Research Service**

Informing the legislative debate since 1914

U.S. Circuit and District Court Nominations: Senate Rejections and Committee Votes Other Than to Report Favorably, 1939-2013

Barry J. McMillion

Analyst on the Federal Judiciary

May 29, 2014

Congressional Research Service

7-5700

www.crs.gov

R40470

Summary

Once a nomination to a U.S. circuit court of appeals or district court judgeship is submitted to the Senate by the President, the Senate almost invariably refers it to the Senate Judiciary Committee. If the Judiciary Committee schedules a vote on a nominee, it usually will vote on a motion to report the nomination favorably. However, the committee could also vote on a motion to report without recommendation, to report unfavorably, or to table the nomination. If the committee votes to report—whether favorably, without recommendation, or unfavorably—the nomination moves to the full Senate. By contrast, the nomination remains in committee if the committee votes against reporting, if there is no committee vote on the nomination, or if the committee votes to table the nomination.

Once a nomination is reported to the Senate by the Judiciary Committee, the nomination is listed on the Senate's Executive Calendar, with Senate consideration of the nomination scheduled by the majority leader. On rare occasions, the Senate, when voting on confirmation, has rejected a circuit or district court nomination. In such cases, the nomination is then returned to the President with a resolution of disapproval.

Between 1939 and the adjournment *sine die* of the first session of the 113th Congress on January 3, 2014, 19 U.S. circuit or district court nominations received other than a favorable vote from the full Senate, the Senate Judiciary Committee, or both. These 19 nominations represent less than 1.0% of the total circuit and district court nominations during this period. Among these 19 nominations were 7 circuit court nominations and 12 district court nominations.

This report lists the votes cast by the Judiciary Committee and the full Senate on each of the 19 nominations and identifies senatorial courtesy, ideological disagreement, and concern over nominees' qualifications as among the circumstances that led to committee consideration of actions other than a favorable report (or other than approval by the full Senate).

Beyond the scope of this report are U.S. circuit and district court nominations which were reported out of the Judiciary Committee and on which the Senate failed to invoke cloture.

Senate and Senate Judiciary Committee actions on judicial nominations are discussed more generally in CRS Report R43369, *U.S. Circuit and District Court Nominations During President Obama's First Five Years: Comparative Analysis With Recent Presidents*; and CRS Report R42556, *Nominations to U.S. Circuit and District Courts by President Obama During the 111th and 112th Congresses*.

Contents

Introduction.....	1
Nominations Receiving Unfavorable Senate or Committee Votes: Empirical Summary	3
Chronological Discussion of Nominations Receiving Unfavorable Votes	5
1939-1951	5
1952-1977	6
1978-2013	6
Nominations Receiving Unfavorable Votes During Periods of Unified or Divided Government	8

Tables

Table 1. Number of U.S. Circuit and District Court Nominations Rejected by the Senate or Receiving Final Judiciary Committee Votes Other Than to Report Favorably	4
Table 2. U.S. Circuit and District Court Nominations Receiving Rejection Votes by the Senate or Final Votes by the Senate Judiciary Committee Other Than to Report Favorably	9

Contacts

Author Contact Information.....	13
Acknowledgments	13

Introduction

Although judicial nominations sometimes do not receive Senate confirmation, they historically have been heavily outnumbered by judicial nominations which the Senate has confirmed. For example, according to the most recent CRS data, of the 2,927 nominees to Article III circuit and district court judgeships between the start of the 79th Congress in 1945 and the end of the first session of the 113th Congress on January 3, 2014, only 287 nominees¹ (or approximately 10% of the total number of nominees in this period) failed to be confirmed by the Senate.² Even smaller has been the number of lower court nominations which received unfavorable votes by the Senate Judiciary Committee or rejection votes by the full Senate.

More often than not, when a circuit or district court nominee lacks key Senate support (such as the support of one or both home state Senators), the Judiciary Committee simply has declined to consider or act on the nomination. Neither the Judiciary Committee nor the full Senate is compelled to act on nominations which come before it, and nominations that receive no action are eventually returned to, or withdrawn by, the President. The vast majority of unconfirmed nominees from 1945 through 2013—approximately 90%—failed to receive a committee vote in the Senate Judiciary Committee.³

The procedural route for a circuit or district court nomination is as follows: Once the President has submitted such a nomination to the Senate, it is almost invariably referred to the Judiciary Committee.⁴ The committee may then hold a hearing on the nomination. After the hearing, the committee has several options: (1) it may report the nomination to the Senate favorably, unfavorably, or without recommendation; (2) it may vote against reporting the nomination;⁵ or (3)

¹ Note that the number of nominees not receiving Senate confirmation, 287, includes some circuit and district court nominees of President Obama whose nominations are currently pending before the Senate. Some or all of these nominees might be approved by the Senate by the end of his presidency.

² Even during the past forty years, when judicial nominations might have become a more contentious issue for Congress, a relatively high percentage of circuit and district court nominees have been confirmed by the Senate. For example, from 1977 through 2008 (i.e., the start of the Carter presidency to the end of the G.W. Bush presidency), 1,513 of 1,734 such nominees (or 87%) have been confirmed.

³ The statistics reported in the preceding two paragraphs for the 1945 to 2013 period were calculated using the internal CRS judicial nominations database. For comparable information on judicial nominations from 1939 to 1944, consult the relevant volumes of the *Journal of the Executive Proceedings of the Senate*.

⁴ “Senate Rule XXXI provides that nominations shall be referred to appropriate committees ‘unless otherwise ordered.’ Most nominations are referred, although a Senate standing order provides that some nominations to specified positions will not be referred unless requested by a Senator.” CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki (hereafter cited as Rybicki, *Senate Consideration of Presidential Nominations*). Note that, at present, the Senate standing order discussed in the report cited above does not apply to nominations to U.S. circuit or district court judgeships.

⁵ The committee does this when it fails to adopt a motion to report. The Legislative Information System (LIS) Nominations database, accessible at <http://www.congress.gov/nomis/>, has used various phrases to record the action step of the Senate Judiciary Committee in voting against reporting a judicial nomination to the Senate. See, for example, in the LIS Nominations database, the record in the 107th Congress for committee action on the nomination of Charles W. Pickering, Sr., nominated by President G.W. Bush to the U.S. Court of Appeals for the Fifth Circuit, noting that the committee “Failed to adopt motions to report favorably, without recommendation, and unfavorably.” See also, the LIS record in the 102nd Congress for committee action on the nomination of Kenneth L. Ryskamp, nominated by President G.H.W. Bush to the U.S. Court of Appeals for the Eleventh Circuit, noting that the committee “Failed to approve for reporting.”

it may choose to take no action at all.⁶ Typically, if the committee votes on a nomination, it votes to report favorably; however, in a very small number of cases, the committee has voted against reporting a nomination, or has voted to report the nomination either unfavorably or without recommendation. If a majority of the committee agrees to any one of the motions to report, the nomination moves to the full Senate. Note that, in the event of a tie vote, the nomination fails to be reported by the committee. Additionally, the nomination remains in committee if the committee votes against reporting, if there is no committee vote on the nomination, or if the committee votes to table the nomination.

Once a lower court nomination is reported to the full Senate by the Judiciary Committee, the nomination is listed on the Senate's Executive Calendar, with Senate consideration of the nomination scheduled by the majority leader.⁷ If the Senate, when voting on whether to confirm, rejects the nomination (as has happened on rare occasions), it is returned to the President with a resolution of disapproval. If a judicial nomination does not receive a Senate vote, the nomination ultimately will either be withdrawn by the President or returned to the President by the Secretary of the Senate upon a Senate adjournment or recess of more than 30 days.⁸

This report identifies, from the 76th Congress (1939-1941)⁹ through the first session of the 113th Congress (January 3, 2014),¹⁰ 19 U.S. circuit court or district court nominations that received other than a favorable vote from the Senate, the Senate Judiciary Committee, or both. Among these 19 nominations were 18 (or all but one of the nominations) on which the Judiciary Committee voted other than to report favorably.¹¹ The only nomination that did not receive a vote other than to report favorably was that of Ronnie L. White to the District Court for the Eastern District of Missouri. The White nomination, as **Table 2** shows, was reported favorably by the Judiciary Committee, only to be rejected by the full Senate.¹²

Table 1, below, summarizes the final committee and floor dispositions of these 19 nominations. Each row indicates a possible committee outcome (*report favorably*, *report without recommendation*, *report unfavorably*, and *fail to report*), and each column indicates a possible floor outcome (*confirmed*, *rejected*, *returned*, and *withdrawn*). Each cell provides the total number of circuit and district court nominations receiving the final committee and floor actions as

⁶ See Rybicki, *Senate Consideration of Presidential Nominations* (under heading "Reporting").

⁷ Prior to a final vote on the nomination, the Senate can recommit the nomination to the Judiciary Committee. In addition, debate on the nomination is subject to cloture. Rybicki, *Senate Consideration of Presidential Nominations* (under heading "Consideration and Disposition"). Such procedural actions, however, are beyond the scope of this report.

⁸ The Senate may, by unanimous consent, hold nominations over recesses of more than 30 days. Senators may exempt from unanimous consent one or more pending nominations, and have only rarely insisted on the return of all pending nominations. Rybicki, *Senate Consideration of Presidential Nominations* (under heading "Nominations Returned to the President").

⁹ The 76th Congress was the earliest in which Judiciary Committee votes could be found in the *Congressional Record* or the *Senate Committee on the Judiciary Legislative and Executive Calendar*.

¹⁰ The first session of the 113th Congress adjourned *sine die* on January 3, 2014.

¹¹ One of the 18 on which the committee voted other than to report favorably was subsequently (in a second vote a month later) reported favorably by the committee. See, in **Table 2**, the district court nomination of Robert F. Collins (E. LA, Carter nominee), which the Judiciary Committee on April 14, 1978, failed to report favorably by a 5-5 tie vote, but which the committee subsequently voted 13-1 to report favorably on May 16, 1978.

¹² Ronnie L. White, a nominee of President Clinton, was subsequently renominated to the same court by President Obama on November 7, 2013.

indicated by the corresponding row and column. Totals for final committee and floor dispositions are found in the last column and row, respectively.

Table 2 lists the nominations to the circuit courts of appeals (7 in all) and district courts (12 in all) in separate sections. Within the two sections, nominations are arranged chronologically. From left to right, columns one, two, and three identify the Congress, nominee, and court of each nominee. Columns four through seven provide the Judiciary Committee vote on each nomination, stating the type of vote, vote breakdown, and date on which the vote occurred. Column eight provides information concerning the final disposition of the nomination in the Senate.

Beyond the scope of this report are U.S. circuit and district court nominations which were reported out of the Judiciary Committee and on which the Senate failed to invoke cloture. For the purposes of this report, such nominations are not considered up-or-down Senate votes to reject a nomination.¹³

Nominations Receiving Unfavorable Senate or Committee Votes: Empirical Summary

Table 1 indicates that all seven circuit court nominations accounted for in the table received a committee vote other than to report favorably. Of the seven nominations, the Senate Judiciary Committee failed to adopt motions to report five, resulting in the return of four nominations to the President and the withdrawal of one. The remaining two nominations were reported without recommendation; one was confirmed¹⁴ and one was returned to the President.¹⁵ During the 1939-2013 period, no circuit court nominations were rejected by a vote of the full Senate.

Additionally, **Table 1** indicates that, of the 12 district court nominations accounted for in the table, four were never reported out of the Judiciary Committee;¹⁶ one of the four nominations was returned, and three were withdrawn by the President.¹⁷

Two district court nominations were reported to the Senate favorably. One, who was confirmed, had initially failed in a Judiciary Committee vote to have his nomination reported (only to have the committee decide, in a later vote, to report the nomination).¹⁸ The other, although reported

¹³ For example, the nomination of Henry W. Saad to the Sixth Circuit Court of Appeals is not included in **Tables 1** or **2**. Mr. Saad's nomination was ordered to be reported favorably by the committee on June 17, 2004. The full Senate failed to invoke cloture on his nomination by a vote of 52-46 on July 22, 2004. The nomination was subsequently returned to President G.W. Bush on December 8, 2004. For a list of judicial nominations on which cloture attempted, see CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development*, by Richard S. Beth.

¹⁴ See, in **Table 2**, the nomination of Daniel A. Manion to the Seventh Circuit by President Reagan.

¹⁵ See, in **Table 2**, the nomination of Susan W. Liebeler to the Federal Circuit by President Reagan.

¹⁶ This number includes the nomination of William B. Poff. Poff, a nominee of President Gerald Ford, had his nomination tabled by the Senate Judiciary Committee.

¹⁷ See, in **Table 2**, the nominations of Nathan R. Margold (DC, Truman nominee); Charles B. Winberry, Jr. (E. NC, Carter nominee); Jefferson B. Sessions (S. AL, Reagan nominee); and William B. Poff (W. VA, Ford nominee).

¹⁸ See, in **Table 2**, the nomination of Robert F. Collins (E. LA, Carter nominee).

favorably by the Judiciary Committee, was rejected by the full Senate.¹⁹ Five district court nominations were reported to the Senate unfavorably (all five were rejected by the Senate).²⁰

Table 1. Number of U.S. Circuit and District Court Nominations Rejected by the Senate or Receiving Final Judiciary Committee Votes Other Than to Report Favorably

76th Through First Session of the 113th Congress (January 3, 1939 – January 3, 2014)

Final Action by Senate Judiciary Committee	Outcome of Nomination on Senate Floor								Total	
	Confirmed		Rejected		Returned		Withdrawn			
Report Favorably	1	1 district ^a	1	1 district ^b	—		—		2	2 district
Report Without Recommendation	2	1 circuit	—		1	1 circuit	—		3	2 circuit
		1 district	—			—	1 district			
Report Unfavorably	—		5	5 district	—		—		5	5 district
Fail to Report	—		—		5	4 circuit ^c	4	1 circuit	9	5 circuit
	—		—			1 district		3 district ^d		4 district
All Committee Actions	3	1 circuit	6	—	6	5 circuit	4	1 circuit	19	7 circuit
		2 district		6 district		1 district		3 district		12 district

Source: Internal CRS judicial nominations database.

Notes: This table indicates the final committee action on each nomination in question. In most cases, the Senate Judiciary Committee considered more than one motion. For example, in the 107th Congress, the Senate Judiciary Committee considered three motions with respect to the nomination of Priscilla R. Owen: motions to report favorably, report without recommendation, and report unfavorably. In each vote, the motion lost 9-10. As a result, the committee failed to report Owen’s nomination and her nomination was returned. In this table, Owen is counted in the cell “Fail to Report/Returned” cell. Detailed information identifying each nomination can be located in **Table 2**.

- a. The nomination accounted for in this cell, that of Robert F. Collins (E. LA), although ultimately reported favorably by the Judiciary Committee, had previously failed to be reported when an earlier committee motion to report favorably lost on a tie vote.
- b. The nominee accounted for in this cell, Ronne L. White, has subsequently been renominated by President Obama to the same court. Mr. White was renominated on November 7, 2013.
- c. This cell includes the nomination of Charles W. Pickering, Sr. to the Fifth Circuit, who later received a recess nomination from President G.W. Bush on January 16, 2004. This cell also includes the nomination of Priscilla R. Owen to the Fifth Circuit, who was later renominated by President G.W. Bush and confirmed by the Senate on May 25, 2005.
- d. This includes the district court nomination of William B. Poff, which was tabled by the Senate Judiciary Committee in a 9-0 vote.

One nomination to a district court, which is the most recent listed in **Table 2**, was reported to the Senate without recommendation; that nomination was confirmed by the Senate.²¹ Note that, as of

¹⁹ See, in **Table 2**, the nomination of Ronnie L. White (E. MO, Clinton nominee).

²⁰ See, in **Table 2**, the nominations of Floyd H. Roberts (W. VA, FDR nominee); Carroll O. Switzer (S. IA, Truman nominee); M. Neil Andrews (N. GA, Truman nominee), Cornelius J. Harrington (N. IL, Truman nominee); and Joseph Drucker (N. IL, Truman nominee).

²¹ See, in **Table 2**, the nomination of J. Leon Holmes (E. AR, G.W. Bush nominee).

this writing, this is the only nomination listed in **Table 2** in which a vote on a motion to report unfavorably or without recommendation was not first preceded by a vote to report favorably.

Chronological Discussion of Nominations Receiving Unfavorable Votes

1939-1951

Table 2 reveals that, from 1939 through 1951, one circuit and six district court nominees received votes from the Senate Judiciary Committee other than to report favorably.²² In all but one of these seven cases,²³ the committee declined to report favorably after home state Senators, in opposing the nominations, invoked “senatorial courtesy.”²⁴ Floyd H. Roberts, nominated to be U.S. district court judge for the Western District of Virginia, was the first judicial nominee reported unfavorably by the committee and rejected by the Senate within the 1939-2013 time period. The committee adversely reported Roberts in 1939 on the grounds that his nomination was “personally offensive” to the two Virginia Senators.²⁵ The Senate, in turn, rejected the Roberts nomination by a 9-72 vote. In another case, in 1943, the Judiciary Committee failed, in a 9-9 tie vote, to report the Fifth Circuit Court nomination of James V. Allred, a former Texas governor, after Texas’s junior Senator invoked senatorial courtesy. In doing so, the Senator reportedly notified the committee that “this nomination is obnoxious to me.”²⁶

²² See, in **Table 2**, the circuit court nomination of James V. Allred (Fifth Circuit, FDR nominee) and the district court nominations of Floyd H. Roberts, Nathan R. Margold, M. Neil Andrews, Carroll O. Switzer, Joseph Drucker, and Cornelius J. Harrington (all previously cited).

²³ In one case, a scholar writes that (rather than due to a Senator’s invocation of senatorial courtesy) the nomination in 1945 of Nathan R. Margold to the U.S. District Court for the District of Columbia, “went nowhere because of opposition from the Democratic National Committee.” Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), p. 56 (hereafter cited as Goldman, *Picking Federal Judges*). Goldman’s account of the unsuccessful Margold nomination is drawn from papers cited from the Franklin D. Roosevelt and Harry S. Truman presidential libraries. See *Ibid.*, note 74, p. 375 (reference to Roosevelt library papers), and note 40, p. 379 (reference to Truman library papers).

²⁴ The *American Congressional Dictionary* defines senatorial courtesy as “[t]he Senate’s practice of declining to confirm a presidential nominee for an office in the state of a senator of the president’s party unless that senator approves. Sometimes called ‘the courtesy of the Senate,’ the practice is a customary one and not always adhered to. A Senator sometimes invokes the custom by declaring that the nominee is personally obnoxious or personally objectionable to him.” See Walter Kravitz, *Congressional Quarterly’s American Congressional Dictionary* (Washington: CQ Press, 2001), p. 231.

²⁵ National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 76th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, Hearings on Nomination of Floyd H. Roberts (1939), p. 84.

²⁶ “Senate Committee May Vote Today on Allred Nomination,” *Washington Post*, March 22, 1943, p. 13. The Allred nomination also was opposed by Louisiana’s two Democratic Senators on state representation grounds. At hearings on the nomination, Sen. John Holmes Overton of Louisiana argued that the appointment of a Texan to a judgeship on the Fifth Circuit previously occupied by a Louisianan would give Texas two seats on the circuit and Louisiana none. This, the Senator argued, was a violation of the “implied, accustomed, and essential right of the State of Louisiana to representation on the bench of the Circuit Court of Appeals of the Fifth Circuit, of which circuit Louisiana is a component part.” Objections of Senator Overton in U.S. Congress, Senate Judiciary, *Nomination of James V. Allred for Judgeship of the Circuit Court of Appeals for the Fifth Circuit*, 78th Cong., 1st sess., March 2, 1943 (Washington: GPO, 1943), pp. 2-13 (specifically, p. 2 for quote). See also De Vore, “Committee’s 9-to-9 Split Blocks Allred,” *Washington Post*, March 23, 1943, p. 1. See also National Archives and Records Administration, Record Group 46, Records of the (continued...)

Additionally, in 1950 and 1951, four district court nominations faced opposition from home state Senators invoking senatorial courtesy. The opposing Senators stated that that the nominations to district judgeships in their states were “personally obnoxious” due to the manner in which they were handled by the Truman Administration. The Senators, in each case, had submitted the names of their preferred judicial nominees to the Administration. The President, however, without consulting with the home state Senators, proceeded to submit the names of other nominees—not of the Senators’ choosing—to the Senate for consideration.²⁷ One of the Senators, in objecting to the two judicial nominations in his state, noted it was not the nominees themselves but rather “the manner and method of their selection that made them personally obnoxious.”²⁸ All four nominations were reported adversely and rejected by voice vote in the Senate.

1952-1977

From 1952 through 1977, as **Table 2** shows, there were no instances in which the Senate Judiciary Committee voted against reporting a circuit or district court nomination or voted to report such a nomination without recommendation or unfavorably.²⁹ In 1976, however, one nomination, that of William B. Poff, to the U.S. District Court for the Western District of Virginia, was laid on the table by a 9-0 vote of the Senate Judiciary Committee reportedly due to senatorial courtesy.³⁰

1978-2013

Since 1978, six circuit and five district court nominees have received votes from the Senate Judiciary Committee other than to report favorably. Two of these nominees (one circuit and one district) were ultimately reported without recommendation and confirmed by the Senate in relatively close roll call votes.³¹

(...continued)

U.S. Senate, 78th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, James V. Allred, Blue Slip (1943).

²⁷ See the objections of Sen. Richard B. Russell of Georgia to the nomination of M. Neil Andrews to the Northern District of Georgia in *Congressional Record*, 81st Cong., 2nd sess., August 9, 1950, pp. 12104-12106; of Sen. Guy M. Gillette of Iowa to the nomination of Carroll V. Switzer to the Southern District of Iowa in U.S. Congress, Senate Judiciary, *Nomination Carroll O. Switzer, of Iowa, to be United States District Judge for the Southern District of Iowa*, 81st Cong., 2nd sess., April 25, 1950 (Washington: GPO, 1943), p. 15; of Sen. Paul H. Douglas of Illinois on the district court nominations of Cornelius J. Harrington and Joseph Drucker in *Congressional Record*, 82nd Cong., 1st sess., October 9, 1951, pp. 12838-12840.

²⁸ See specifically remarks made by Senator Douglas of Illinois in *Congressional Record*, 82nd Cong., 1st sess., October 9, 1951, p. 12839.

²⁹ For most of this period, the chairman of the Judiciary Committee was Senator James O. Eastland of Mississippi (who served as chair from 1956 to 1978).

³⁰ Bob Rankin, “‘Senatorial Courtesy’ Derails Ford Judgeship Nomination,” *Congressional Quarterly Weekly Report*, vol. 34, May 8, 1976, pp. 1123-1125. See also Goldman, *Picking Federal Judges*, p. 210.

³¹ A previous motion to report favorably on the nomination of Daniel A. Manion to the Seventh Circuit Court of Appeals (a Reagan nominee) failed to carry before the nomination was reported to the Senate without recommendation. Manion was ultimately confirmed by a 48-46 vote on June 26, 1986. The nomination of J. Leon Holmes to the Eastern District of Arkansas (a George W. Bush nominee) was reported to the Senate without recommendation. Holmes was later confirmed by a 51-46 vote on July 6, 2004.

One district court nominee was ultimately confirmed by a voice vote after his nomination was reported favorably out of the Senate Judiciary Committee. The successful motion to report favorably occurred, though, after a prior motion to report the nomination favorably failed to gain committee approval.³²

One circuit and two district court nominations were ultimately withdrawn by the nominating President.³³

The four remaining circuit court nominations were returned to the President. The Senate Judiciary Committee failed to report all but one of these nominees to the full Senate.³⁴ One nominee subsequently received a recess appointment while another was renominated and confirmed by the Senate during a later Congress.³⁵

Finally, during the 106th Congress, one district court nomination, that of Ronnie L. White to the Eastern District of Missouri, was reported favorably by the Judiciary Committee but rejected on the floor of the Senate by a 45-54 vote.³⁶

Senators' objections to these 11 nominations since 1978 rested largely on the perceived ideological orientation of judicial nominees, the professional qualifications of the nominees, or both.³⁷ For example, Daniel Manion, nominated in 1986 by President Reagan to the Seventh Circuit Court of Appeals, was criticized for lacking "the record of distinction and achievement that was expected of appointees to the courts of appeals,"³⁸ while his supporters "argued that opposition to his nomination was based on his conservative views and his activities with his father,"³⁹ who had co-founded the John Birch Society.

Likewise, in 2002, objections to President George W. Bush's nomination of Priscilla R. Owen to the Fifth Circuit Court of Appeals appeared primarily concerned with her ideological orientation. In Senate Judiciary Committee debate preceding a vote on her nomination, Democratic members of the committee, it was reported, characterized the nominee "as a judicial 'activist' whose opinions were colored by strong anti-abortion and pro-business views, while Republicans defended her as a fair-minded jurist who was given a top rating by the American Bar Association but ran afoul of liberal interest groups."⁴⁰ While Owen's two nominations during the 107th

³² See, in **Table 2**, the nomination of Robert F. Collins, a Carter nominee.

³³ President Carter withdrew the nomination of district court nominee Charles B. Winberry, Jr. (E. NC) five months after the Senate Judiciary Committee failed to report the nomination favorably. President Reagan withdrew the nominations of circuit court nominee Bernard H. Siegan (Ninth Circuit) and district court nominee Jefferson B. Sessions (S. AL) approximately two months after motions to report favorably and report without recommendation failed.

³⁴ See, in **Table 2**, the nominations of Susan W. Liebler (Ninth Circuit, Reagan nominee), Kenneth L. Ryskamp (Eleventh Circuit, G.H.W. Bush nominee), Charles W. Pickering, Sr. (G.W. Bush nominee), and Priscilla R. Owen (Fifth Circuit, G.W. Bush nominee). Of these nominations, only that of Susan W. Liebler was reported out of committee. Her nomination was reported without recommendation.

³⁵ Charles W. Pickering, Sr., received a recess appointment from President G.W. Bush on January 16, 2004. Priscilla R. Owen was renominated by President G.W. Bush on February 14, 2005, and confirmed by the Senate on May 25, 2005.

³⁶ As noted in **Table 1**, Ronnie L. White has subsequently been renominated to the same court by President Obama.

³⁷ See, e.g., Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2005), ch. 4.

³⁸ Goldman, *Picking Federal Judges*, p. 310.

³⁹ *Ibid.*

⁴⁰ Helen Dewar, "Senate Panel Rejects Bush Court Nominee," *Washington Post*, September 6, 2002, pp. A1 & A8. In (continued...)

Congress were returned to the President, she was renominated during the next two Congresses (the 108th and 109th), and ultimately was confirmed by the Senate on May 25, 2005.

The most recent nomination listed in **Table 2**, that of J. Leon Holmes to the U.S. District Court for the Eastern District of Arkansas, was also opposed by some Senators on ideological grounds. Mr. Holmes had been nominated by President G.W. Bush and had the support of both of Arkansas's Democratic Senators. Concern by opponents of the nomination cited the nominee's past "comments about abortion, women's rights and other topics,"⁴¹ while those who supported his nomination emphasized that his comments were made "20-plus years ago"⁴² and that regardless of his personal views, the nominee would "abide by the rule of law."⁴³ Mr. Holmes's nomination was ultimately confirmed by the Senate on July 6, 2004, by a vote of 51-46.

Nominations Receiving Unfavorable Votes During Periods of Unified or Divided Government

Unlike the nominations listed in **Table 2** that were considered between 1939 and 1951 (all of which occurred during periods of unified party government),⁴⁴ consideration of nominations listed in **Table 2** from 1976 through 2013 occurred primarily during periods of divided government.⁴⁵ This was the case for 9 of 12 of the nominations during this period that received other than favorable votes by the Judiciary Committee or the full Senate. In particular, all six circuit court nominees in question were nominated by a Republican President (three by Reagan, one by George H.W. Bush, and two by George W. Bush) while Democrats held a majority in the Senate.

Of the six district court nominations during this period receiving other than favorable votes in the Judiciary Committee or the full Senate, three (one Ford nominee, one Reagan nominee, and one Clinton nominee) received such votes during periods of divided government.

Note, however, that of the 3 nominations (1 circuit and 2 district) that were confirmed during the 1976 to 2013 period (i.e., the Manion, Collins, and Holmes nominations), all were approved by the Senate during periods of unified government. In other words, in each of those three cases, the same party controlled the presidency as well as held the majority in the Senate.

(...continued)

three successive 9-10 votes (with all Democratic members voting against the nominee, and all Republicans supporting her), the committee failed to adopt motions to report the nomination to the Senate floor. See **Table 2**.

⁴¹ Charles Babington, "Senate Confirms Controversial Nominee to Federal Court, *Washington Post*, July 7, 2004, p. A4.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The term "unified party government" refers to a situation in which the presidency and both chambers of Congress are held by the same party. During the consideration of these nominations (at various times during the 1939 to 1951 period), the presidency and both chambers of Congress were controlled by Democrats.

⁴⁵ The term "divided government" generally refers to a situation in which one party holds the presidency and the other party holds one or both chambers of Congress. In this instance, the term refers to a specific case of divided government in which one political party has control of the presidency and the other political party has control of the Senate.

Table 2. U.S. Circuit and District Court Nominations Receiving Rejection Votes by the Senate or Final Votes by the Senate Judiciary Committee Other Than to Report Favorably

76th through the first session of the 113th Congress (January 3, 1939 – January 3, 2014)

Congress	Nominee	Circuit/ District	Votes and Dates of Judiciary Committee Motions ^a				Outcome of Nomination ^b
			Table	Report Favorably	Report Without Recommendation	Report Unfavorably	
Nominations to the Circuit Courts of Appeals							
78 th	Allred, James V.	Fifth	—	9-9, 03/22/43 ^c	—	—	Returned, 07/08/43
99 th	Manion, Daniel A.	Seventh	—	9-9, 05/08/86 ^d	11-6, 05/08/86 ^d	—	Confirmed (48-46), 06/26/86
100 th	Liebeler, Susan W.	Federal	—	6-7, 02/23/88 ^e	8-5, 02/23/88 ^e	—	Returned, 10/22/88
100 th	Siegan, Bernard H.	Ninth	—	6-8, 07/14/88 ^f	7-7, 07/14/88 ^f	—	Withdrawn, 09/16/88
102 nd	Ryskamp, Kenneth L.	Eleventh	—	6-8, 04/11/91 ^g	7-7, 04/11/91 ^g	—	Returned, 08/02/91
107 th	Pickering, Charles W., Sr.	Fifth	—	9-10, 03/14/02 ^h	9-10, 03/14/02 ^h	9-10, 03/14/02 ^h	Returned, 11/20/02
107 th	Owen, Priscilla R.	Fifth	—	9-10, 09/05/02 ⁱ	9-10, 09/05/02 ⁱ	9-10, 09/05/02 ⁱ	Returned, 11/20/02
Nominations to the District Courts							
76 th	Roberts, Floyd H.	W.VA	—	3-14, 02/01/39 ⁱ	—	14-3, 02/01/39 ⁱ	Rejected (9-72), 02/06/39
79 th	Margold, Nathan R.	DC	—	6-6, 07/30/45 ^k	—	—	Returned, 08/01/45
81 st	Switzer, Carroll O.	S.IA	—	0-10, 07/31/50 ^l	—	10-0, 07/31/50 ^l	Rejected (voice vote), 08/09/50
81 st	Andrews, M. Neil	N.GA	—	1-9, 07/31/50 ^m	—	9-1, 07/31/50 ^m	Rejected (voice vote), 08/09/50
82 nd	Harrington, Cornelius J.	N.IL	—	2-6, 09/17/51 ⁿ	—	3-5, 09/17/51 ⁿ 10/08/51 ^o	Rejected (voice vote), 10/09/51
82 nd	Drucker, Joseph	N.IL	—	2-6, 09/17/51 ⁿ	—	3-4, 09/17/51 ⁿ 10/08/51 ^o	Rejected (voice vote), 10/09/51
94 th	Poff, William B.	W.VA	9-0, 05/05/76 ^p	—	—	—	Withdrawn, 06/07/76
95 th	Collins, Robert F.	E.LA	—	5-5, 04/14/78 ^q 13-1, 05/16/78 ^q	—	—	Confirmed (voice vote), 05/17/78

Congress	Nominee	Circuit/ District	Votes and Dates of Judiciary Committee Motions ^a				Outcome of Nomination ^b
			Table	Report Favorably	Report Without Recommendation	Report Unfavorably	
96 th	Winberry, Charles B., Jr.	E.NC	—	6-8, 03/04/80 ^r	—	—	Withdrawn, 08/06/80
99 th	Sessions, Jefferson B.	S.AL	—	8-10, 06/05/86 ^s	9-9, 06/05/86 ^s	—	Withdrawn, 07/31/86
106 th	White, Ronnie L.	E.MO	—	12-6, 07/22/99 ^t	—	—	Rejected (45-54), 10/05/99 ^r
108 th	Holmes, J. Leon	E.AR	—	—	10-9, 05/01/03 ^u	—	Confirmed (51-46), 07/06/04

Source: CRS Judicial Nominations Database.

- a. Motions to gain approval in Senate committees require a majority vote in favor and thus fail if there is a tie vote.
- b. Charles W. Pickering, Sr., subsequently received a recess nomination from President G.W. Bush on January 16, 2004. Priscilla R. Owen was renominated by President G.W. Bush and confirmed by the Senate on May 25, 2005. Ronne L. White was renominated to the same court by President Obama on November 7, 2013.
- c. *Legislative and Executive Calendar*, Committee on the Judiciary, 78th Cong., 1st sess., p. 5.
- d. Eric Effron, "Setback for Manion," *The National Law Journal*, May 19, 1986, p. 2.
- e. Christopher Ladd and Terence Moran, "Nominees Liebler, Siegan Still Have Long Way to Go," *Legal Times*, February 29, 1988, p. 4.
- f. Linda Greenhouse, "Panel Rejects Court Nominee, Ending Bitter Battle," *The New York Times*, July 15, 1988, p. A12.
- g. Neil A. Lewis, "Committee Rejects Bush Nominee to Key Appellate Court in South," *The New York Times*, Apr. 12, 1991, p. A1.
- h. Jennifer A. Dlouhy, "Democrats Defeat Pickering on Party-Line Vote," *CQ Daily Monitor*, Mar. 15, 2002, p. 1. Pickering was renominated in the 108th Congress, and received a recess appointment to the Fifth Circuit Court of Appeals on January 16, 2004.
- i. Jennifer A. Dlouhy, "Republicans Vow Revenge as Owen Nomination is Defeated," *CQ Daily Monitor*, Sept. 9, 2002, p. 8. Owen was renominated in the 108th and 109th Congresses, and was confirmed on May 25, 2005.
- j. *Congressional Record*, 80th Cong., 1st sess., July 1, 1947, p. 7990.
- k. Local Section, "Judge Margold Dies at 48; Funeral Will Be Held Today," *Washington Post*, December 17, 1947, p. B2.
- l. The *Legislative and Executive Calendar* notes that Chairman Pat McCarran reported Andrews out of committee adversely. CRS assumes that the final committee vote was for a motion to report unfavorably. For information concerning the committee vote, see "4 Truman Choices Rejected Sharply In Senate Rebuffs," *The New York Times*, Aug. 10, 1950, p. 1.
- m. Ibid.
- n. "Senate Unit Blocks Truman on Judgeships," *Washington Post*, Sept. 18, 1951, p. 12.
- o. The *Legislative and Executive Calendar* notes that on Sept. 17, 1951, motions to report favorably for the Drucker and Harrington nominations were defeated and that motions to report unfavorably were also defeated; however, on October 8, 1951, the calendar notes that the committee disapproved the nominations of Harrington and Drucker but then reported both nominations out on the same day. The October 8 vote, although not stated in the calendar, tends to suggest that the committee considered a second motion to report unfavorably. See *Legislative and Executive Calendar*, Committee on the Judiciary, 82nd Cong., 1st sess., p. 553. News accounts

suggest that the Senate rejected the nominations of Drucker and Harrington to prevent President Truman from granting them recess appointments. See “Two Truman Choices Are Rejected: Senate Supports Douglas in Dispute Over Judgeships,” *Washington Post*, October 10, 1951, p. 10.

- p. *Legislative and Executive Calendar*, Committee on the Judiciary, 94th Cong., 2nd sess., p. 247. *Congressional Quarterly*, *Inside Congress*, “‘Senatorial Courtesy’ Derails Ford Judgeship Nomination,” *Congressional Quarterly*, May 8, 1976, p. 1124.
- q. *Legislative and Executive Calendar*, Committee on the Judiciary, 95th Cong., 2nd sess., p. 212.
- r. *Legislative and Executive Calendar*, Committee on the Judiciary, 96th Cong., 1st sess., p. 206.
- s. “Heflin Votes Crucial in Defeat of Denton-Backed Judicial Nomination,” *The Associated Press*, June 6, 1986.
- t. Sean Scully, “Senate Rejects Clinton Bench Nominee; Black Missouri Judge Had Opposed Death Penalty; Democrats Charge Racism,” *The Washington Times*, October 6, 1999, p. A6.
- u. *Congressional Record*, daily edition, vol. 149, May 1, 2003, p. D436.

Author Contact Information

Barry J. McMillion
Analyst on the Federal Judiciary
bmcmillion@crs.loc.gov, 7-6025

Acknowledgments

Earlier versions of this report were prepared by former CRS analysts Mitchel A. Sollenberger, Kevin M. Scott, and D. Steven Rutkus.