



# Length of Time from Nomination to Confirmation for “Uncontroversial” U.S. Circuit and District Court Nominees: Detailed Analysis

Barry J. McMillion  
Analyst on the Federal Judiciary

September 18, 2012

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R42732

## Summary

In recent years, a recurring subject of debate in the Senate has been the length of time taken for lower court nominations to receive Senate confirmation. During the 111<sup>th</sup> and 112<sup>th</sup> Congresses, this debate has focused, in part, on President Obama’s uncontroversial nominees to U.S. circuit and district court judgeships—and on whether, or to what extent, such nominees have waited longer to receive Senate confirmation than the uncontroversial judicial nominees of other recent Presidents.

To more fully inform this debate, the following report provides a statistical overview, from Presidents Reagan to Obama, of the waiting times from nomination to confirmation of uncontroversial U.S. circuit and district court nominees approved by the Senate from 1981 to September 14, 2012. For the purposes of this report, an uncontroversial judicial nominee is a nominee (1) whose nomination was reported by the Senate Judiciary Committee by voice vote or, if a roll call vote was held, the nomination was unanimously reported favorably by the committee to the full Senate, *and* (2) whose nomination was approved by voice vote when confirmed by the Senate or, if a roll call vote was held, received 5 or fewer nay votes.

Findings in the report include the following:

- Average and median waiting times to confirmation increased steadily with each presidency, from Ronald Reagan’s to Barack Obama’s, for uncontroversial circuit court nominees and almost as steadily for uncontroversial district court nominees.

### **Uncontroversial Circuit Court Nominees**

- For uncontroversial circuit court nominees, the mean and median number of days from nomination to confirmation ranged from a low of 64.5 and 44.0 days, respectively, during the Reagan presidency to a high of 227.3 and 218.0 days, respectively, during the Obama presidency.
- The percentage of uncontroversial circuit court nominees waiting more than 200 days from first nomination to confirmation increased from 5.1% during the Reagan presidency to 63.6% during the Obama presidency.

### **Uncontroversial District Court Nominees**

- For uncontroversial district court nominees, the mean and median number of days from nomination to confirmation ranged from a low of 69.9 and 41.0 days, respectively, during the Reagan presidency to a high of 204.8 and 208.0 days, respectively, during the Obama presidency.
- The percentage of uncontroversial district court nominees waiting more than 200 days from first nomination to confirmation increased from 6.6% during the Reagan presidency to 54.7% during the Obama presidency.

Various political and institutional factors in the Senate might help explain the increase, across presidencies, in the waiting times from nomination to confirmation experienced by uncontroversial U.S. circuit and district court nominees. These include ideological differences between the President and Senators, how quickly the Senate Judiciary Committee holds hearings on and reports a President’s nominees, how often holds are placed on nominations when they

reach the Senate *Executive Calendar*, how readily unanimous consent agreements can be reached to bring nominees up for votes, and the role played by Senators not serving on the Judiciary Committee in vetting judicial nominees.

There are several possible implications for the longer waiting times from nomination to confirmation for uncontroversial U.S. circuit and district court nominees, including an increase in the number of judicial vacancies qualifying as “judicial emergencies,” the reluctance of well-qualified nominees with bipartisan support to undergo a lengthy confirmation process, an increase in partisan or ideological tensions in the Senate, enhanced Senate consideration of nominees who are nominated to positions with lifetime tenure, and a greater opportunity for interest groups and citizens to participate in the confirmation process.

## **Contents**

Introduction.....	1
Methodology Used to Identify Uncontroversial Nominees .....	3
Caveats .....	3
Relationship Between Committee Votes and Floor Votes on Judicial Nominees.....	4
Percentage of Judicial Nominees Meeting Criteria as Being Uncontroversial.....	5
Length of Time from First Nomination to Confirmation.....	6
Uncontroversial U.S. Circuit Court Nominees .....	7
Uncontroversial U.S. District Court Nominees .....	8
Percentage of Nominees Waiting Specified Length of Time from Nomination to Confirmation.....	9
Uncontroversial U.S. Circuit Court Nominees.....	9
Uncontroversial U.S. District Court Nominees .....	10
Factors Influencing the Wait Time from Nomination to Confirmation for Uncontroversial U.S. Circuit and District Court Nominees .....	12
Ideological Differences.....	12
Judiciary Committee Procedures .....	13
Senate Floor Procedures .....	14
Role of Non-Committee Senators.....	15
Potential Implications .....	16

## **Figures**

Figure 1. Percentage of U.S. Circuit and District Court Nominees Meeting Definition of Uncontroversial .....	6
Figure 2. Average and Median Number of Days from First Nomination to Confirmation for Uncontroversial U.S. Circuit and District Court Nominees Approved by the Senate (1981 to 2012) .....	8

## **Tables**

Table 1. Percentage of Uncontroversial Circuit Court Nominees Waiting Specified Period of Time from First Nomination to Confirmation.....	10
Table 2. Percentage of Uncontroversial District Court Nominees Waiting Specified Period of Time from First Nomination to Confirmation.....	11

## **Contacts**

Author Contact Information.....	17
Acknowledgments .....	17

## Introduction

In recent years a subject of continuing interest to Congress has been the length of time taken for lower court nominations to receive Senate confirmation.<sup>1</sup> Most recently, during the 111<sup>th</sup> and 112<sup>th</sup> Congresses, Senate debate on this subject has concerned whether President Obama’s nominees to U.S. circuit or district court judgeships, relative to the judicial nominees of other recent Presidents, have waited longer to receive up-or-down votes by the Senate. Part of this debate, in turn, has focused on the waiting times from nomination to confirmation of President Obama’s uncontroversial judicial nominees who have enjoyed bipartisan support in the Senate. Senators, often along party lines, have expressed differing views concerning how long these nominees have waited for Senate confirmation, or on how their waiting times compared with the times that uncontroversial judicial nominees of other recent Presidents waited to be confirmed.

On the one hand, the chairman of the Senate Judiciary Committee, Senator Patrick J. Leahy of Vermont, has criticized the wait time for President Obama’s uncontroversial judicial nominees as generally being much too long. In March 2010, Senator Leahy stated that the Senate had “wasted weeks and months having to seek time agreements in order to consider nominations that were reported by the Senate Judiciary Committee unanimously and who are then confirmed overwhelmingly by the Senate once they are finally allowed to be considered.”<sup>2</sup> This year, Senator Leahy raised the issue again, arguing that the treatment of President Obama’s nominees “amounted to months of unnecessary delays” for “judicial nominations who should be noncontentious.”<sup>3</sup> He argued that the Senate minority had engaged in “across-the-board stalling of judicial nominees,” which he said had “led to the backlog in confirmations and the months of delays in the consideration of consensus nominees.”<sup>4</sup>

By contrast, Senator Chuck Grassley—the Ranking Member of the Senate Judiciary Committee—has argued that President Obama’s judicial nominees have not been treated differently by the Senate relative to the nominees of President Obama’s predecessors. The Senate, Senator Grassley maintained recently, continues to confirm “consensus district judge nominees” in a manner consistent with past Senate practice.<sup>5</sup> Senator Grassley has also argued that the pace of the Senate’s consideration of President Obama’s judicial nominees, uncontroversial or otherwise, has itself been affected by the pace at which the President has submitted nominations to the Senate, stating that “Republicans have been more than fair to this President and his judicial

---

<sup>1</sup> Specifically, nominations to the U.S. courts of appeals and U.S. district courts. The U.S. district courts are the federal trial courts of general jurisdiction while the U.S. courts of appeals take appeals from U.S. district courts and are also empowered to review the decisions of many administrative agencies.

<sup>2</sup> Sen. Patrick J. Leahy, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, March 2, 2010, p. S.906.

<sup>3</sup> Sen. Patrick J. Leahy, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, July 10, 2012, p. S.4801.

<sup>4</sup> *Ibid.*

<sup>5</sup> See Sen. Chuck Grassley, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, July 10, 2012, p. S4803. Senator Grassley stated that “President [Obama] is not being treated differently than previous Presidents. By any objective measure, this President has been treated fairly and consistent with past Senate practices.” Senator Grassley also argued that the number of judicial nominees confirmed during President Obama’s first term exceeded the number confirmed during President G.W. Bush’s second term (the last time the Senate had also confirmed two Supreme Court nominees) and that the number of judicial nominees confirmed, through July 10, 2012, exceeded the number confirmed in 2008 (when G.W. Bush was President).

nominees, considering the fact that we have so many vacancies that have not had a nominee submitted to the Senate for our consideration.”<sup>6</sup>

This report seeks to inform the current debate by analyzing the time taken by the Senate during recent presidencies to confirm uncontroversial circuit and district court nominees. It is comprised of four sections:

- A first section explains the methodology used to identify what, for purposes of this report, are regarded as “uncontroversial” lower court nominees. The section also shows, from the Reagan presidency to the Obama presidency, the percentage of circuit and district court nominees approved by the Senate and who, according to the methodology used in the report, qualify as uncontroversial.
- A second section calculates the average and median lengths of time from nomination to confirmation for President Obama’s uncontroversial circuit and district court nominees approved by the Senate. These times are compared with the corresponding average and median waiting times to confirmation for the uncontroversial judicial nominees of Presidents Reagan, George H.W. Bush, Bill Clinton, and George W. Bush. The average and median waiting times from nomination to confirmation, the section finds, generally increased from one presidency to the next for uncontroversial circuit and district court nominees.
- A third section analyzes, again for uncontroversial confirmed circuit and district court nominees of Presidents Reagan to Obama, the percentage of nominees who waited specified amounts of time from nomination to Senate confirmation. Shown by presidency are the percentages of uncontroversial judicial nominees who waited, from first nomination to confirmation, (1) fewer than 100 days, (2) from 100 to 199 days, and (3) 200 or more days. This section finds, among other things, that fewer than 1 in 10 of the uncontroversial confirmed lower court nominees of the two earliest Presidents included in the analysis (Reagan and G.H.W. Bush) waited 200 or more days to be confirmed. By contrast, more than half of President Obama’s uncontroversial confirmed judicial nominees (for both circuit and district court judgeships) waited 200 or more days to receive Senate approval.
- A fourth section identifies various institutional and political factors that possibly influenced the increase across the five most recent presidencies in the length of time uncontroversial circuit and district court nominees waited from nomination to confirmation.
- A concluding section identifies several potential implications of longer waiting times from nomination to confirmation for uncontroversial judicial nominees.

---

<sup>6</sup> See Sen. Chuck Grassley, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, September 10, 2012, p. S6037.

## Methodology Used to Identify Uncontroversial Nominees

For purposes of this report, determining whether circuit or district court nominees were “uncontroversial” was based on the level of support they had from Senators of both parties when their nominations were reported by the Senate Judiciary Committee *and* when their nominations were approved by the full Senate. Specifically, the nominees were identified as uncontroversial if (1) their nominations were reported out of the Judiciary Committee favorably either by voice vote or by a unanimous roll call vote, *and* (2) their nominations were approved by the full Senate by voice vote, or if a roll call vote was held, approved with 5 or fewer nay votes.<sup>7</sup>

All of a President’s confirmed uncontroversial nominees are included in the analysis, regardless of whether such nominees were confirmed during his first or, when applicable, second term.

### Caveats

In the handful of instances when a nominee met the criteria described above but for whose nomination the number of days, from nomination to confirmation, exceeded 1,000 days, his or her nomination was excluded from the analysis.<sup>8</sup> These nominations were excluded because, in each case, there was initial controversy surrounding them, prior to committee consideration, involving opposition to the nominees by one or both of their home state Senators. Ultimately, after unusually long wait times that exceeded 1,000 days, the nominees were all confirmed, with the initial controversies surrounding their nominations not captured in the Judiciary Committee’s votes to report or in the final Senate votes to confirm.<sup>9</sup>

Additionally, for purposes of this report, a nominee *was not* considered uncontroversial if a committee roll call vote on his or her nomination included one or more nay votes. By registering formal opposition to the nominee in committee, such votes, for the purposes of this report, were an indication of some level of controversy that, to some degree, might be expected to follow the nominee for the remainder of the Senate confirmation process.

---

<sup>7</sup> It should be noted that the methodology for identifying uncontroversial nominees does not require a unanimous roll call vote when the nominee is approved by the full Senate. Rather, the methodology assumes that, with more Senators voting on the floor than in committee, it is not unreasonable to expect, for many uncontroversial nominations, at least some nominal opposition by at least one Senator when a roll call vote is held.

<sup>8</sup> A total of 5 nominees were excluded from the analysis because their wait time from nomination to confirmation exceeded 1,000 days. These nominees were James C. Dever III (nominated by President G.W. Bush to the E. NC), Richard A. Griffin (G.W. Bush, 6<sup>th</sup> Circuit), Thomas L. Ludington (G.W. Bush, E. MI), David W. McKeague (G.W. Bush, 6<sup>th</sup> Circuit), Susan B. Neilson (G.W. Bush, 6<sup>th</sup> Circuit).

<sup>9</sup> The Griffin, McKeague, and Neilson nominations, identified in the previous footnote, were stalled as a group during, in one scholar’s words, “a long-standing stalemate” that existed over the filling of several appeals court vacancies from Michigan. See Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, “Picking Judges in a Time of Turmoil,” *Judicature*, vol. 90, no.6 (May-June 2007), pp. 270-271. The Ludington nomination was also stalled as a result of the Michigan judgeship stalemate, while the Dever nomination was initially blocked in the Judiciary Committee by one of the nominee’s home state Senators not returning a blue slip. See Mitchell A. Sollenberger, “The Blue Slip: A Theory of Unified and Divided Government, 1979-2009,” *Congress & the Presidency*, vol. 37, no. 2 (2010), pp. 125-156. All five of these nominees, following initial controversy, were considered by the Judiciary Committee (and later confirmed by the Senate) after no longer facing home state Senator opposition.

A nominee on the other hand, *was* for purposes of this report, identified as uncontroversial if approved by the Judiciary Committee in a voice vote in which one or more committee members nonetheless voted nay. The fact that, in such instances, a committee roll call vote was not requested in which to formally record opposition to the nomination, and a voice vote was taken instead, *was*, for purposes of this report, an indicator that little or no controversy was attached to the nominee.<sup>10</sup>

It should be noted that if a nominee is considered “uncontroversial” according to the criteria described above, it does not mean necessarily that there were no concerns voiced by Senators about his or her nomination during the confirmation process. It simply means, however, that these concerns were not expressed as formal nay votes when the Senate Judiciary Committee or full Senate voted on the nomination (and, as discussed above, the Senate approved the nomination in under 1,000 days).

The report focuses exclusively on the length of time that judicial nominees identified as uncontroversial took to receive Senate confirmation. Outside the scope of the report’s analysis, therefore, are the relatively small number of other judicial nominees who, by virtue of being reported out of committee by voice vote or unanimous roll call vote, also could be regarded as uncontroversial, but who were ultimately not confirmed by the Senate.<sup>11</sup> The report as well does not examine another relatively small group of circuit and district court nominees who might be identified as having been uncontroversial while pending in committee, but who nonetheless were not reported by the Senate Judiciary Committee.<sup>12</sup>

Finally, the methodology used in the report to identify uncontroversial nominees is one possible approach for identifying such nominees. Analyses employing different criteria (including the number of nay votes a nominee receives on the floor when confirmed by the Senate) may yield different findings and conclusions.

## **Relationship Between Committee Votes and Floor Votes on Judicial Nominees**

In general, there appears to be a strong relationship between the type of committee vote a nominee received (e.g., voice vote, etc.) and the level of bipartisan support a nominee later received when approved by the full Senate. For example, of President Obama’s 22 confirmed circuit court nominees who were reported out of committee by voice vote or a unanimous roll call vote, 16 (or 72.7%) were confirmed by voice vote or, when a roll call vote was held, received zero nay votes. The remaining 6 nominees were confirmed with 5 or fewer nay votes. In contrast,

---

<sup>10</sup> For the purposes of this report, any “nay” votes recorded for judicial nominees when they were reported out of committee by voice vote were not considered sufficient for classifying the nominees as controversial (which would have the effect of eliminating the nominees from the analysis).

<sup>11</sup> This includes, for example, nominees who were reported by the Senate Judiciary Committee near the end of a President’s final term in office but whose nominations were not acted upon by the full Senate prior to the new President taking office.

<sup>12</sup> Some Republican Senators have asserted that such nominees have not always been acted upon by the Senate Judiciary Committee (thus preventing an up-or-down vote by the full Senate), particularly during the final years of the G.W. Bush presidency. Senator Mitch McConnell, for example, recently argued that in 2008 the Senate failed to process “nominees [who] enjoyed strong home State support, including bipartisan home State support.” Sen. Mitch McConnell, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, July 30, 2012, p. S5648.



of the 8 confirmed Obama circuit court nominees who received at least 1 nay vote when they were reported out of committee (by roll call vote), 5 received at least 20 nay votes when confirmed by the Senate (and another nominee received 16 nay votes).<sup>13</sup> The strong relationship between the type of committee vote a nominee received and the level of bipartisan support a nominee later received when confirmed by the full Senate existed during this period for other presidencies as well.<sup>14</sup>

## **Percentage of Judicial Nominees Meeting Criteria as Being Uncontroversial**

Finally, as **Figure 1** reveals, a majority of each President’s judicial nominees approved by the Senate, met the criteria as being uncontroversial described above. From Presidents Reagan to Obama, the percentage of confirmed U.S. circuit court nominees whose nominations were voted out of committee by voice vote or a unanimous roll call vote *and* whose nominations were approved by the full Senate by voice vote or, if a roll call vote was held, with 5 or fewer nay votes ranged from a high of 97.6% (under G.H.W. Bush) to a low of 68.9% (under G.W. Bush).<sup>15</sup>

The percentage, from Presidents Reagan to Obama, of confirmed district court nominees whose nominations were voted out of committee by voice vote or a unanimous roll call vote *and* whose nominations were approved by the full Senate by voice vote or, if a roll call vote was held, with 5 or fewer nay votes ranged from a high of 100% (under President G.H.W. Bush) to a low of 84.1% (under President Obama).<sup>16</sup>

It should be noted that variation in the percentages of nominees meeting the “uncontroversial” standard described above does *not* necessarily indicate that one President, compared with another, nominated a lower percentage of judicial nominees enjoying bipartisan support in the Senate. Rather, in some instances across the five presidencies, judicial nominees not classified by this report as uncontroversial may have, nonetheless, enjoyed the general support of Senators belonging to both parties—while, however, meeting some opposition by a minority of Senators either in committee or on the Senate floor. For example, in contrast to his predecessors, President Obama’s district court nominees who received more than 5 nay votes at the time of confirmation were often reported out of committee by voice vote or with at least 1 Republican Senator voting to favorably report the nomination to the full Senate. Specifically, of the 20 district court

---

<sup>13</sup> A similar relationship exists for district court nominees. For example, of President Obama’s 114 confirmed district court nominees whose nominations were reported out of committee by voice vote or unanimous roll call vote, 89 (78.1%) were confirmed by voice vote or, when a roll call vote was held, with zero nay votes. Another 17 (14.9%) were confirmed with 5 or fewer nay votes. The remaining 8 (7.0%) were confirmed while receiving, on average, 13 nay votes. In contrast, of the 12 district court nominees whose nomination received at least one nay vote in committee, 10 (83.3%) received at least 25 nay votes when confirmed by the Senate.

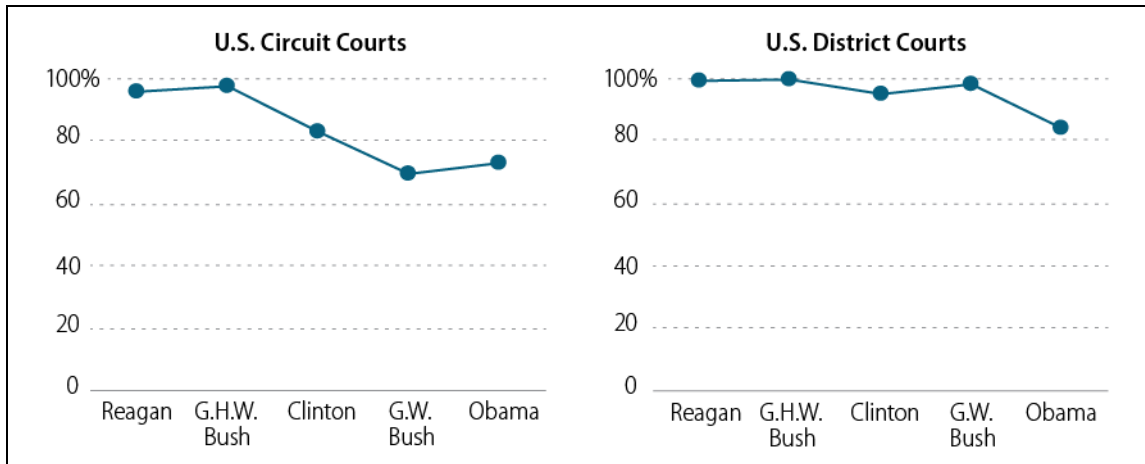
<sup>14</sup> For example, of President G.W. Bush’s 42 circuit court nominees who were reported out of committee by voice vote or unanimous roll call vote, all were confirmed by voice vote or, if a roll call vote was held, with fewer than 5 nay votes. Of President G.W. Bush’s 14 circuit court nominees who received at least one nay vote in committee, 13 (92.9%) received at least 19 nay votes, with 11(78.6%) receiving at least 25 nay votes.

<sup>15</sup> The number of confirmed circuit court nominees broken down by presidency who met or did not meet the criteria of being “uncontroversial” were, respectively, as follows: Reagan (79 and 4); G.H.W. Bush (41 and 1); Clinton (54 and 11); G.W. Bush (42 and 19); and Obama (22 and 8).

<sup>16</sup> The number of confirmed district court nominees broken down by presidency who met or did not meet the criteria of being “uncontroversial” were, respectively, as follows: Reagan (288 and 2); G.H.W. Bush (147 and 0); Clinton (292 and 13); G.W. Bush (256 and 5); and Obama (106 and 20).

nominees receiving more than 5 nay votes at the time of confirmation, 8 (40%) were reported out of committee by voice vote and another 7 (35%) were reported with at least 1 Republican Senator voting to favorably report the nomination.

**Figure 1. Percentage of U.S. Circuit and District Court Nominees Meeting Definition of Uncontroversial**



**Source:** Internal CRS judicial nominations database.

**Notes:** This figure shows, for Presidents Reagan to Obama, the percentage of confirmed U.S. circuit and district court nominees whose nominations (1) were reported out of committee by voice vote or by unanimous roll call vote, and (2) were subsequently confirmed by the Senate by voice vote, or if a roll call vote was held, received 5 or fewer nay votes.

The statistics presented in this report were generated from an internal CRS judicial nominations database. The statistics account only for nominations to U.S. circuit and district court judgeships established by Congress under Article III of the Constitution.<sup>17</sup> The statistics provided in this report include the confirmation of all such nominees that occurred prior to September 14, 2012.<sup>18</sup> The statistics, consequently, do not reflect the entirety of President Obama’s current term, and thus, are subject to change.

## Length of Time from First Nomination to Confirmation

The length of time from first nomination to confirmation is measured as the number of days elapsed from when a President first nominates an individual to a U.S. circuit or district court judgeship to when the Senate approves his or her nomination. For some individual nominees, the number of days elapsed from his or her first nomination to confirmation spans two or more

<sup>17</sup> Consequently, statistics in this report for district court nominations do not include the relatively rare nominations made by the President to territorial district court judgeships, which were established by Congress pursuant to its authority to govern the territories under Article IV of the Constitution.

<sup>18</sup> Thus, the most recent district court nominee included in the analysis is Stephanie M. Rose, confirmed to the Southern District of Iowa on September 10, 2012, while the most recent circuit court nominee included in the analysis is Jacqueline H. Nguyen, confirmed to the Ninth Circuit Court of Appeals on May 7, 2012.

nominations to the same judgeship (e.g., an individual’s nomination is reported out of the Senate Judiciary Committee only to be returned to the President; subsequently, the individual is renominated by the President to the same judgeship, his or her nomination is reported again by the Senate Judiciary Committee, and then confirmed by the Senate).<sup>19</sup>

**Figure 2** tracks, by presidency (from Reagan to Obama), the mean and median number of days from first nomination to confirmation for all circuit and district court nominees approved by the Senate, during the period January 20, 1981, to September 14, 2012, whose nominations were reported favorably out of the Senate Judiciary Committee by voice vote or a unanimous roll call vote and who were confirmed by the Senate by voice vote or, if a roll call vote was held, received 5 or fewer nay votes.<sup>20</sup>

## Uncontroversial U.S. Circuit Court Nominees

**Figure 2** shows that, during the 1981 to 2012 period, the mean and median number of days from nomination to confirmation for uncontroversial circuit court nominees increased from one President to the next. The average number of days from nomination to confirmation for these uncontroversial nominees increased from 64.5 days during the Reagan presidency to 113.1 days during the G.H.W. Bush presidency. The average increased an additional 48.4 days from the G.H.W. Bush presidency to the Clinton presidency (i.e., from 113.1 to 161.5 days). The average for uncontroversial circuit court nominees increased further under President G.W. Bush (to 201.7 days).<sup>21</sup> Finally, under President Obama, uncontroversial circuit court nominees have waited, on average, 227.3 days from nomination to confirmation.

The median number of days from nomination to confirmation represents the middle value of the number of days that elapsed from nomination to confirmation for a particular President’s group of uncontroversial nominees. Because the median is the middle value, it can be interpreted as meaning that, of the total number of a President’s uncontroversial nominees who were approved by the Senate, half were confirmed after a fewer number of days had elapsed than the median number of days, while the other half were confirmed after a greater number of days had elapsed. So, for example, half of President Obama’s uncontroversial circuit court nominees were confirmed by the Senate in under 218 days while, for the other half of his nominees, the number of days elapsing from nomination to confirmation exceeded 218 days.

---

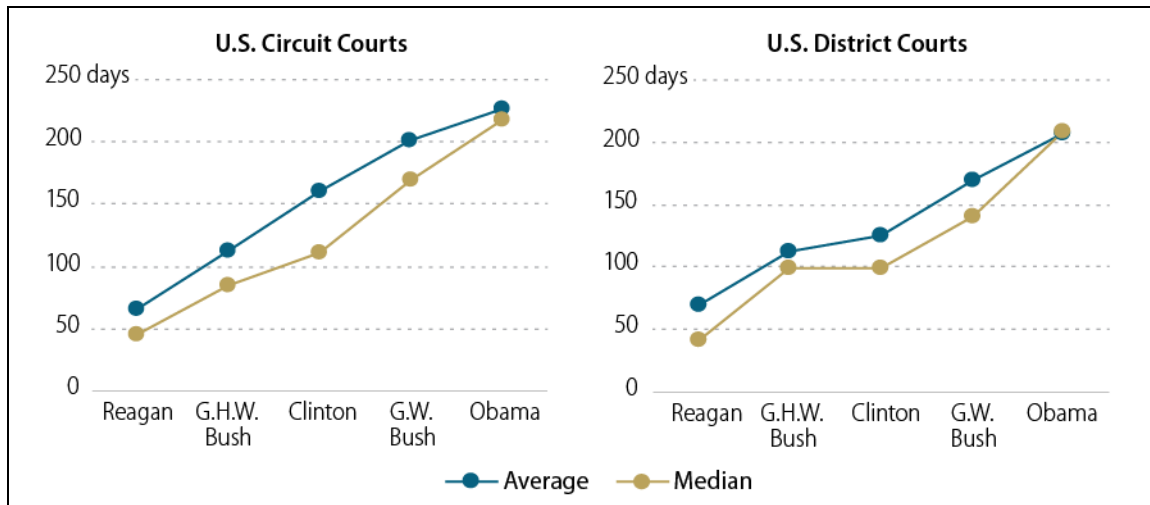
<sup>19</sup> For example, Eric L. Clay was first nominated by President Clinton to the Sixth Circuit Court of Appeals on March 6, 1996. His nomination was initially reported out of the Senate Judiciary Committee on April 26, 1996, during the 104<sup>th</sup> Congress. His nomination was returned to the President on October 4, 1996, and resubmitted on January 7, 1997. After being reported by the Judiciary Committee again on May 22, 1997, Mr. Clay’s second nomination was confirmed on July 31, 1997, during the 105<sup>th</sup> Congress. Consequently, the dates used for calculating the number of days from Mr. Clay’s first nomination to his confirmation were March 6, 1996, and July 31, 1997.

<sup>20</sup> “Mean” indicates the arithmetic mean, or average, while the “median” indicates the middle value for a particular set of numbers. The mean may not always sufficiently reflect the time from nomination to confirmation for many nominees if, among them, there are nominees whose time to confirmation was much longer or shorter than that of the other nominees in the group. By contrast, the median, or middle value for the nominees, is less affected by nominees whose elapsed time from first nomination to confirmation was unusually long or short.

<sup>21</sup> Note that this average includes the nomination of Raymond M. Kethledge to the Sixth Circuit Court of Appeals. The Kethledge nomination took 727 days from nomination to confirmation. His nomination was included in the analysis because he was reported out of the Senate Judiciary Committee by voice vote, later confirmed by voice vote, and the total time from his nomination to confirmation did not exceed 1,000 days. If the Kethledge nomination, however, is removed from the analysis, the average wait time for President G.W. Bush’s uncontroversial circuit court nominees declines to 188.9 days (and the median declines to 168).

**Figure 2** shows that the median number of days from nomination to confirmation steadily increased for the nominees from Presidents Reagan to Obama. The median increased by 41 days from the Reagan to the G.H.W. Bush presidency (i.e., from 44 to 85 days). The median further increased under President Clinton to 109.5 days and again under President G.W. Bush to 169.5 days. The median number of days from nomination to confirmation for President Obama’s uncontroversial circuit court nominees increased 48.5 days to 218 days.

**Figure 2. Average and Median Number of Days from First Nomination to Confirmation for Uncontroversial U.S. Circuit and District Court Nominees Approved by the Senate (1981 to 2012)**



**Source:** Internal CRS judicial nominations database.

**Notes:** This figure shows, from Presidents Reagan to Obama (as of 9/14/12), the average and median number of days from first nomination to confirmation for confirmed U.S. circuit and district court nominees whose nominations were reported favorably out of the Senate Judiciary Committee by voice vote or a unanimous roll call vote.

## Uncontroversial U.S. District Court Nominees

**Figure 2** shows, by presidency, a similar trend in the amount of time uncontroversial district court nominees waited from nomination to confirmation. The mean and median number of days from first nomination to confirmation ranged from a low of 69.9 and 41.0 days, respectively, during the Reagan presidency to a high of 204.8 and 208.0 days, respectively, during the Obama presidency.

The average number of days from nomination to confirmation for uncontroversial district court nominees increased from 69.9 days during the Reagan presidency to 112.6 days during the G.H.W. Bush presidency. The average increased further to 123.2 days during the Clinton presidency, to 167.9 days during the G.W. Bush presidency, and to 204.8 days during the Obama presidency.

As with the average number of days from nomination to confirmation for uncontroversial district court nominees, the median number of days to confirmation also increased from one President to the next (except for one instance when the median was the same for two successive presidencies). The median number of days from nomination to confirmation for uncontroversial district court nominees increased from 41 days to 99 days from the Reagan to the G.H.W. Bush presidency. The

median then remained at 99 days under President Clinton. Following the Clinton presidency, the median number of days to confirmation for uncontroversial district court nominees increased 42 days during the G.W. Bush presidency (from 99 to 141 days) and increased an additional 68 days from the G.W. Bush to Obama presidency (from 141 to 208 days).

As of September 14, 2012, there were 14 district court nominees whose nominations were pending on the Senate *Executive Calendar* and who were reported out of the Senate Judiciary Committee by voice vote or unanimous roll call vote.<sup>22</sup>

## **Percentage of Nominees Waiting Specified Length of Time from Nomination to Confirmation**

As the mean and median trend lines in **Figure 2** suggest, the percentage of uncontroversial judicial nominees waiting at least 200 days from nomination to confirmation has increased in recent years. Tables 1 and 2, presented below, are more precise in revealing this trend. Specifically, they show the percentage of uncontroversial U.S. circuit court nominees from Presidents Reagan to Obama who waited, from first nomination to confirmation, (1) fewer than 100 days, (2) from 100 to 199 days, and (3) 200 or more days. The tables reveal, among other things, an increase, from presidency to presidency in the 1981 to 2012 period, a steady increase in the percentage of uncontroversial circuit and district court nominees who have waited 200 or more days to be confirmed. It reveals, at the same time, a steady decrease (by presidency) in the percentage of uncontroversial judicial nominees waiting less than 100 days to be confirmed.

### **Uncontroversial U.S. Circuit Court Nominees**

Under both Presidents Reagan and G.H.W. Bush, a majority of uncontroversial circuit court nominees waited fewer than 100 days to be confirmed after being nominated—79.7% and 63.4%, respectively. From the Reagan presidency to the G.H.W. Bush presidency, the percentage of uncontroversial circuit court nominees waiting from 100 to 199 days to be confirmed increased approximately 14 percentage points, from 15.2% to 29.3%. By contrast, the percentage of uncontroversial nominees confirmed 200 or more days after being nominated was relatively low under both Presidents Reagan (i.e., 5.1%) and G.H.W. Bush (i.e., 7.3%).

For President Clinton’s uncontroversial circuit court nominees, a plurality (42.6%) continued to wait fewer than 100 days to be confirmed, while more than one-third (35.2%) waited from 100 to 199 days to be confirmed, and 22.2% waited 200 or more days. The percentage of uncontroversial circuit court nominees waiting 200 or more days increased approximately three times from the G.H.W. Bush presidency to the Clinton presidency—from 7.3% to 22.2%.

---

<sup>22</sup> These nominees and the district courts to which they have been nominated are listed in descending order from the longest to shortest period of time that has elapsed from nomination to September 14, 2012: Gonzalo P. Curiel (S. CA, 309 days); Robert J. Shelby (UT, 289 days); Paul W. Grimm (MD, 211 days); Mark E. Walker (N. FL, 211 days); John E. Dowdell (N. OK, 198 days); Terrence G. Berg (E. MI, 142 days); Jesus G. Bernal (C. CA, 142 days); Lorna G. Schofield (S. NY, 142 days); Frank P. Geraci, Jr. (W. NY, 123 days); Fernando M. Olguin (C. CA, 123 days); Matthew W. Brann (M. PA, 120 days); Malachy Edward Mannion (M. PA, 120 days); Thomas M. Durkin (N. IL, 116 days); and Jon S. Tigar (N. CA, 95 days).

**Table 1. Percentage of Uncontroversial Circuit Court Nominees Waiting Specified Period of Time from First Nomination to Confirmation**

President	Percentage		
	Less than 100 days	100 to 199 days	200 or more days
Reagan	79.7	15.2	5.1
G.H.W. Bush	63.4	29.3	7.3
Clinton	42.6	35.2	22.2
G.W. Bush	28.6	35.7	35.7
Obama	0.0	36.4	63.6

**Source:** Internal CRS judicial nominations database.

**Notes:** This table shows, for Presidents Reagan to Obama, the percentage of uncontroversial U.S. circuit court nominees who were confirmed by the Senate within one of three specified periods of time: (1) less than 100 days; (2) 100 to 199 days; (3) 200 or more days.

The same percentage of President G.W. Bush’s uncontroversial circuit court nominees waited 200 or more days to be confirmed after being nominated as waited between 100 to 199 days (i.e., 35.7%), an increase of 15 percentage points from the percentage of uncontroversial nominees (i.e., 22.2%) who waited at least 200 days to be confirmed after being nominated by President Clinton. More than one-quarter, or 28.6%, waited fewer than 100 days from nomination to confirmation, a decrease of 14 percentage points from the percentage of President Clinton’s uncontroversial circuit nominees (i.e., 42.6%) who waited fewer than 100 days from nomination to confirmation.

As of this writing, President Obama has had no uncontroversial circuit court nominees who were approved by the Senate in less than 100 days, making him the only President during this period with no such circuit court nominees. This represents a decline of nearly 29% from the percentage of noncontroversial circuit court nominees approved by the Senate in under 100 days during the G.W. Bush presidency.

President Obama is also the only President during the 1981-2012 period for whom a majority of uncontroversial circuit court nominees (i.e., 63.6%) were approved by the Senate after at least 200 days elapsed from nomination to confirmation. This represents an increase of approximately 28 percentage points from the percentage of uncontroversial circuit court nominees who waited at least 200 days from nomination to confirmation under his predecessor, President G.W. Bush (i.e., 35.7%).

Finally, the percentage of President Obama’s uncontroversial circuit court nominees waiting from 100 to 199 days (36.4%) is slightly higher than the corresponding percentages under Presidents Clinton and G.W. Bush (35.2% and 35.7%, respectively).

## **Uncontroversial U.S. District Court Nominees**

As for uncontroversial district court nominees, **Table 2** shows that a majority waited fewer than 100 days from nomination to confirmation under Presidents Reagan, G.H.W. Bush, and Clinton—81.9%, 51.7%, and 52.4%, respectively. For these three Presidents, the percentage of uncontroversial district court nominees approved by the Senate from 100 to 199 days after being

nominated ranged from a high of 40.1% during the G.H.W. Bush presidency to a low of 11.5% during the Reagan presidency. Finally, less than 10% of President Reagan’s and President G.H.W. Bush’s uncontroversial district court nominees were confirmed 200 or more days after they were first nominated (i.e., 6.6% and 8.2%, respectively) while less than 20% of such nominees confirmed under President Clinton waited 200 or more days (i.e., 16.6%).

The percentage of uncontroversial district court nominees who were approved in under 100 days after being nominated dropped approximately 27 percentage points from the Clinton presidency to the G.W. Bush presidency (from 52.4% to 25.8%). Additionally, the percentage of uncontroversial nominees who waited from 100 to 199 days increased 18 percentage points to 48.8% (which represents the plurality of President G.W. Bush’s uncontroversial district court nominees). Finally, the percentage of uncontroversial district court nominees who waited 200 or more days increased less than 10 percentage points from the Clinton presidency to the G.W. Bush presidency (from 16.8% to 25.4%).

**Table 2. Percentage of Uncontroversial District Court Nominees Waiting Specified Period of Time from First Nomination to Confirmation**

President	Percentage		
	Less than 100 days	100 to 199 days	200 or more days
Reagan	81.9	11.5	6.6
G.H.W. Bush	51.7	40.1	8.2
Clinton	52.4	31.0	16.6
G.W. Bush	25.8	48.8	25.4
Obama	1.9	43.4	54.7

**Source:** Internal CRS judicial nominations database.

**Notes:** This table shows, for Presidents Reagan to Obama, the percentage of uncontroversial U.S. district court nominees who were confirmed by the Senate within one of three specified periods of time: (1) less than 100 days; (2) 100 to 199 days; and (3) 200 or more days.

The percentage of uncontroversial district court nominees approved by the Senate in fewer than 100 days after being nominated has declined almost 24 percentage points from the G.W. Bush presidency to the Obama presidency—from 25.8% to less than 2.0% (i.e., 1.9%). Of the remaining uncontroversial district court nominees approved under President Obama, 43.4% waited from 100 to 199 days from nomination to confirmation, while a majority, 54.7%, waited 200 or more days. This was the only instance during the 1981-2012 period in which a majority of uncontroversial district court nominees waited 200 or more days from nomination to confirmation.

## **Factors Influencing the Wait Time from Nomination to Confirmation for Uncontroversial U.S. Circuit and District Court Nominees**

Across the five most recent presidencies there has been a general increase in the waiting times from nomination to confirmation for uncontroversial U.S. circuit and district court nominees. There are various institutional and political factors that have possibly contributed to this increase—including ideological differences between a President and Senators of the opposite party or between the Senate’s two parties; procedures used by the Judiciary Committee to process a President’s judicial nominees; floor procedures used to dispense with judicial nominations; and the role taken by non-committee Senators in the vetting of judicial nominees.

### **Ideological Differences**

One possible factor contributing to increased waiting times for uncontroversial judicial nominees has been the extent of ideological differences between recent Presidents and Senators of the opposite party. In recent decades, a periodic source of conflict in the Senate has been presidential selection of judicial nominees viewed as ideologically objectionable by many Senators of the opposite party.<sup>23</sup> Further, ideological differences between a President and opposition party Senators might exist on various policy or political issues that are unrelated to the federal judiciary generally, or, more specifically, to filling judicial vacancies. Against this backdrop of ideological conflict, controversial judicial nominees typically have waited the longest to receive final action on their nominations.<sup>24</sup> Such conflict, however, might also have played a part in causing increases in the time that uncontroversial judicial nominees have waited to be confirmed.

In a similar vein, it can be argued, ideological differences between the Senate’s two parties might outweigh political or other incentives for working across the aisle to confirm judicial nominations as promptly as possible.<sup>25</sup> In particular, wait times for uncontroversial judicial nominees to be confirmed might be expected to increase when ideological differences in the Senate prevent the two parties from agreeing on a general timetable or pace at which to schedule floor votes on uncontroversial nominees.

To the degree that ideological differences between the President and the opposition party in the Senate—as well as between the two parties in the Senate—might have generally increased from

---

<sup>23</sup> See, for example, Sheldon Goldman, “Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts,” *University of Richmond Law Review*, vol. 39 (March 2005), p. 871; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Judicial Nominations 2001: Should Ideology Matter?, The Judicial Nomination and Confirmation Process*, hearings, 107<sup>th</sup> Cong., 1<sup>st</sup> sess., June 26, 2001 (Washington, DC: GPO, 2001).

<sup>24</sup> Recent examples of controversial nominees waiting relatively long periods of time from nomination to confirmation include Richard A. Paez (nominated by President Clinton to the Ninth Circuit Court of Appeals and waiting 1,505 days from first nomination to confirmation) and Priscilla R. Owen (nominated by President G.W. Bush to the Fifth Circuit Court of Appeals and waiting 1,477 days from first nomination to confirmation).

<sup>25</sup> See, for example, Keith T. Poole and Howard Rosenthal, *Ideology & Congress* (New Brunswick, NJ: Transaction Publishers, 2009).



1981 to 2012, such increases might help explain successive increases in wait times from nomination to confirmation for uncontroversial judicial nominees.

## **Judiciary Committee Procedures**

Certain institutional factors might be seen as influencing the length of time uncontroversial judicial nominees are processed in the Senate Judiciary Committee.

The point in the nomination process, for example, at which the American Bar Association’s Standing Committee on the Federal Judiciary (ABA) evaluates judicial candidates may be one such factor. The ABA uses a peer-review process to evaluate the professional qualifications of presidential nominees to U.S. circuit and district courts (as well as to other courts).<sup>26</sup>

A President can decide whether to wait for the ABA to complete its evaluation of a nominee prior to sending it to the Senate Judiciary Committee or, as was the practice during the G.W. Bush presidency, he can send it to the Committee prior to the ABA completing its evaluation. If the ABA committee’s role is to evaluate judicial candidates before the President formally nominates them, then the ABA’s evaluation does not add time from the date when a President formally sends a nomination to the Senate and the date of the Senate’s final action on the nomination. If, however, the ABA’s role is to evaluate only after a person has been nominated, then the time taken for that evaluation would add to the total time that the nomination is pending in the Judiciary Committee (and, thus, to the total time from nomination to confirmation).

The increase, consequently, from the Clinton presidency to the G.W. Bush presidency in the mean and median number of days from first nomination to confirmation for uncontroversial judicial nominees, might be regarded as attributable, in part, to the waiting time during the Bush presidency between when the Senate Judiciary Committee received a nomination and subsequently received the ABA’s report on a nominee. Under President Obama, the ABA has resumed its role of evaluating judicial nominees prior to their formal selection by the President.<sup>27</sup>

A second procedural factor at the committee level which may influence the length of time that uncontroversial judicial nominees wait to have their nomination processed by the Judiciary Committee is the extent to which Senators are exercising their rights, under the committee’s rules, to “hold over” scheduled consideration of a nomination until the next meeting of the committee, or for one week, whichever comes later. If Senators, for whatever reason, were exercising this right more frequently in recent Congresses than in the past for uncontroversial judicial nominees,

---

<sup>26</sup> The ABA’s Standing Committee on the Federal Judiciary is not required by law to evaluate judicial candidates but, rather, since 1948 it has been the long-standing practice of the ABA to provide such evaluations of nominees’ professional qualifications to the Senate. The Committee rates each judicial nominee as “Well Qualified,” “Qualified,” or “Not Qualified.” A nominee may receive a single, unanimous rating from the Committee or may, if the Committee’s evaluation of a nominee’s qualifications is not unanimous, receive a majority rating (based on receiving 10 to 13 votes) of the Committee as well as a minority rating. The majority rating, however, is the rating of the Committee. For more information on the Committee, see [http://www.americanbar.org/groups/committees/federal\\_judiciary/resources/ratings\\_for\\_judicial\\_nominees.html](http://www.americanbar.org/groups/committees/federal_judiciary/resources/ratings_for_judicial_nominees.html).

<sup>27</sup> A recent study found that the Obama Administration “brought the committee, and thus the additional 30 to 45 days typically consumed by its investigations, back into the pre-nomination stage.” Russell Wheeler, “Judicial Nominations in the First Fourteen Months of the Obama and Bush Administrations,” *Governance Studies at Brookings*, April 7, 2010, p. 2, at [http://www.brookings.edu/~media/research/files/papers/2010/4/07%20judicial%20nominations%20wheeler/0407\\_judicial\\_nominations\\_wheeler.pdf](http://www.brookings.edu/~media/research/files/papers/2010/4/07%20judicial%20nominations%20wheeler/0407_judicial_nominations_wheeler.pdf).

then this might help explain, in part, the increase across successive presidencies in the wait times from nomination to confirmation for uncontroversial judicial nominees.<sup>28</sup>

The time needed by the Senate Judiciary Committee to process judicial nominees might also be affected by the amount of information on judicial nominees that Senators and committee staff must review prior to deciding whether to report the nomination to the full Senate.<sup>29</sup> The length of time between nomination and committee hearing, for example, might increase if, over the years, there have been substantial increases in the volume of information about nominees typically needing to be reviewed by the committee. If the amount of information reviewed by the committee has increased, generally, under recent Presidents, such increases might help explain, in part, the longer wait times from nomination to confirmation during these same presidencies.

Other factors as well may influence the length of time that uncontroversial judicial nominees remain in committee. These include how promptly home state Senators return positive blue slips for the nominees,<sup>30</sup> how promptly the chair of the committee schedules hearings and committee votes on the nominees, and the extent to which other members of the committee seek to delay such actions under the committee’s rules.

## **Senate Floor Procedures**

Once an uncontroversial nomination is reported out of committee, the time taken until approval by the full Senate might be influenced by political and other factors not present (or minimally so) at the committee level. Significant delays, for example, in filling a judicial vacancy might occur when an uncontroversial judicial nominee, after being placed on the Senate *Executive Calendar*, is blocked for one reason or another from floor consideration by Senators through the use of “holds,” or objections to unanimous consent agreements.<sup>31</sup> The role of such procedural factors in delaying Senate approval of judicial nominees has been the subject of Senate debate in recent Congresses.<sup>32</sup> In recent Congresses, delays have even occurred when an uncontroversial nominee has the home state support of one or two Senators of the opposite party of the President.<sup>33</sup>

---

<sup>28</sup> While such data is not readily obtainable, some scholars have noted the frequency of such requests in recent Congresses. See Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, “Obama’s Judiciary At Midterm,” *Judicature*, vol. 94, no. 6 (May-June 2011), p. 281 (hereafter Goldman, “Obama’s Judiciary at Midterm”).

<sup>29</sup> An increase in the volume of information on nominees might reflect greater access, via the Internet, to nominees’ publications, speeches, and other background or professional information that the committee finds relevant for its deliberations.

<sup>30</sup> See, for example, Sen. Patrick Leahy, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, April 26, 2012, p. S2759. Senator Leahy noted that there were “nominations on which the Senate Judiciary Committee cannot proceed because [some] Republican Senators have not returned blue slips.” See also Sen. Arlen Specter, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, May 9, 2007, p. S5835. Senator Specter, speaking as the ranking minority member on the Judiciary Committee, noted that some of the nominations pending in the committee “are being delayed by home state Senators who have not returned blue slips. It has generally been the practice of the Senate to not proceed without the consent of home state Senators. I have urged these Senators to return these blue slips and allow the process to go forward.”

<sup>31</sup> See CRS Report 98-712, “Holds” in the Senate, by Walter J. Oleszek. See also Thomas E. Mann and Norman J. Ornstein, *It’s Even Worse Than It Looks—How the American Constitutional System Collided With the New Politics of Extremism* (New York, NY: Basic Books, 2012), p. 92. Mann and Ornstein argue that “Senators have increasingly used holds, their ability to block consideration of a nominee indefinitely, as a broader partisan weapon to keep presidents from filling key positions, including many qualified and usually noncontroversial nominees.”

<sup>32</sup> See, for example, Sen. Dick Durbin, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, November 18, 2009, p. S11469, in which Senator Durbin stated: “Under President Bush, over half of his (continued...) ”

Another factor which might delay Senate floor consideration of uncontroversial judicial nominees is the increased emphasis in recent Congresses in having the Senate hold roll call votes on individual nominations (instead of voting, by unanimous consent, to confirm groups of judicial nominees en bloc).<sup>34</sup> This might reflect greater priority of some Senators in recent Congresses to be on the record as to their position on each judicial nomination that receives Senate approval, and to demonstrate that they are opposed to “rubber stamping” a President’s judicial nominees.<sup>35</sup>

## **Role of Non-Committee Senators**

Finally, changes in the role of Senators not serving on the Judiciary Committee—particularly relating to the vetting of judicial nominees (either individually or as a group)—might also be a factor in increased lengths of time that uncontroversial judicial nominees wait from nomination to confirmation. In recent Congresses, for example, some have suggested that, besides the role of the Judiciary Committee or home state Senators in vetting nominees, the Senate as a whole, in its advice and consent role, also needs to carefully review the qualifications of judicial nominees.<sup>36</sup> Some non-committee Senators might also share the position, expressed by a Senator on the Judiciary Committee, that keeping each nominee on the *Executive Calendar* for more than a perfunctory period of time allows the public an opportunity, once a nomination is reported out of committee, to communicate their views about that nomination to the Senate.<sup>37</sup>

---

(...continued)

judicial nominees were confirmed by voice vote or unanimous consent. The Democrats consented to their confirmation without requiring time being spent on a rollcall vote on the Senate floor. The Republicans, by contrast, haven’t agreed to a voice vote or unanimous consent on a single one of President Obama’s judicial nominees.” See also Sen. John Cornyn, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, February 11, 2003, p. S2147. Senator Cornyn, responding to the confirmation delays experienced by some of President G.W. Bush’s judicial nominees, stated “if a nominee is voted out of the Judiciary Committee, then, of course, there ought to be that timely vote by the entire Senate regardless of who is President. Let us not hold to the delays and obstructions of the past as methods for treating judicial nominees in the future.”

<sup>33</sup> Scott M. Matheson, Jr., of Utah, for example, was nominated by President Obama to the Tenth Circuit Court of Appeals on March 3, 2012, reported out of the Senate Judiciary Committee by voice vote on June 10, 2010, and received Senate confirmation by voice vote on December 22, 2010 (for a total of 294 days from nomination to confirmation). Another example is David C. Guaderrama, of Texas, who was nominated by President Obama to the U.S. District Court for the Western District of Texas on September 14, 2011, reported out of the Senate Judiciary Committee by voice vote on December 1, 2011, and received Senate confirmation by voice vote on April 26, 2012 (for a total of 225 days from nomination to confirmation). For a discussion of home state Senators, generally, see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus.

<sup>34</sup> See CRS Report R42556, *Nominations to U.S. Circuit and District Courts by President Obama During the 111<sup>th</sup> and 112<sup>th</sup> Congresses*, by Barry J. McMillion.

<sup>35</sup> See, for example, Sen. Chuck Grassley, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, October 13, 2011, p. S6487. Senator Grassley stated that “the Senate must not place quantity confirmed over quality confirmed. These lifetime appointments are too important to the Federal judiciary and the American people to simply rubber stamp them.”

<sup>36</sup> See Goldman (“Obama’s Judiciary at Midterm”), pp. 268-69. Goldman et al. note that recent delays by the Senate in processing judicial nominees, including the pre-nomination stage, “suggests the expectation of the minority for an unprecedented de facto veto power never contemplated by the Senate’s blue slip policy, nor enjoyed by any minority party caucus in any past exercises of advice and consent in judicial selection history.”

<sup>37</sup> See, for example, Sen. Jeff Sessions, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, March 14, 2012, p. S1643. In these remarks, Senator Sessions maintained that “it does not hurt for a judge to be sitting on the floor for a while. Maybe someone will come forward and say: Let me tell you what that judge did to me or this is what he did wrong or something. Sometimes that happens. So we need a steady process, and we are (continued...)

## Potential Implications

There are several possible consequences to the increase in waiting times from nomination to confirmation for uncontroversial judicial nominees. First, if judicial vacancies are not being filled as quickly as in the past, this may lead to an increase in the number of vacancies qualifying as “judicial emergencies.”<sup>38</sup> Additionally, judicial vacancies that persist for longer periods of time may lead to greater caseloads and workload burdens for sitting federal judges, a greater number of retiring judges taking “senior status” when they step down from full-time service,<sup>39</sup> and delays in trial proceedings which might have adverse affects on litigants.<sup>40</sup>

Second, well-qualified individuals who, if nominated, would enjoy bipartisan support may nonetheless turn down the opportunity to be nominated to a vacant judgeship if longer wait times from nomination to confirmation are viewed as potentially disruptive to one’s career or associated with greater uncertainty in ultimately being confirmed.

Third, longer wait times for uncontroversial nominees might increase partisan tensions between the two parties, leading to conflict that might make it less likely for the parties to agree on a “best practices” approach to processing a President’s uncontroversial judicial nominees.

Finally, not all possible consequences to longer wait times from nomination to confirmation might be viewed as detrimental or negative. According to some perspectives, relatively longer wait times associated with greater scrutiny by the Senate might be appropriate for nominees to positions with lifetime tenure.<sup>41</sup> Additionally, longer wait times might be desirable because they provide interest groups and citizens a greater opportunity to participate in the confirmation process by contacting Senators to express their views on judicial nominees (whether such nominees are uncontroversial or not).

---

(...continued)

moving forward well within the traditions of this Senate.”

<sup>38</sup> A judicial emergency for a circuit court vacancy is defined by the Judicial Conference of the United States as any vacancy in a court of appeals where adjusted case filings per appellate panel are in excess of 700 or any vacancy that is in existence more than 18 months where adjusted filings are between 500 to 700 per panel. For district court vacancies, a judicial emergency exists when a district court has weighted filings in excess of 600 per judgeship; or a vacancy is in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; or any district court with more than one authorized judgeship and only one active judge. A list of vacancies considered “judicial emergencies” by the Judicial Conference is available on the U.S. Courts website at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>.

<sup>39</sup> Beginning at age 65, a judge may retire outright at his or her current salary or take senior status after performing 15 years of active service as an Article III judge. The Administrative Office of the U.S. Courts states that “[s]enior judges, who essentially provide volunteer service to the courts, typically handle about 15 percent of the federal courts’ workload annually.” See <http://www.uscourts.gov/Common/FAQS.aspx>.

<sup>40</sup> See, for example, Andrew Cohen, “In Pennsylvania, the Human Costs of Judicial Confirmation Delays,” *The Atlantic*, September 9, 2012, <http://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862>.

<sup>41</sup> Article III, Section I of the Constitution provides that justices on the Supreme Court and judges on lower courts established by Congress under Article III have what effectively has come to mean life tenure, holding office “during good Behaviour.”

## **Author Contact Information**

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

## **Acknowledgments**

The author thanks Sam Skowronek, CRS Intern and Research Associate, for his assistance with data collection and analysis, and Amber Wilhelm, Graphics Specialist in the Publishing and Editorial Resources Section of CRS, for her work on the figures included in this report.