



# Confirmation of U.S. Circuit and District Court Nominations in Presidential Election Years

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## Summary

In 2012, a presidential election year, an ongoing subject of debate in the Senate has been how many U.S. circuit and district court nominations should be confirmed by year's end, and how late in the year the Senate should continue to confirm them. Senators have disagreed as to what guidance, if any, previous presidential election years provide to the Senate regarding these questions. They have differed specifically on whether slowing down, or stopping, the processing of judicial nominations at a certain point during this session of Congress, or after a certain number of nominees have been confirmed, would be in keeping with the Senate's experience in past presidential election years.

This report seeks to help inform the debate, by analyzing the number and timing of circuit court and district court nominations confirmed by the Senate in presidential election years from 1980 to 2008. The report compares the processing of judicial nominations during these years, using various quantitative measures, while relating its findings to the Senate's processing of judicial nominations in 2012, as of June 30.

Findings in the report include the following:

- The greatest and smallest numbers of circuit court nominees confirmed during a presidential election year in the 1980 to 2008 period were 11 and 2, compared with 5 confirmed thus far in 2012. Annual percentages of nominees confirmed ranged from 71.4% to 18.2%, compared with 41.7% confirmed in 2012, as of June 30.
- The greatest and smallest numbers of district court nominees confirmed in the 1980 to 2008 election years were 55 and 18, compared with 24 confirmed in 2012, as of June 30. Annual percentages of nominees confirmed ranged from 77.9% to 46.2%—the latter identical to 46.2% confirmed in 2012, as of June 30.
- Of 57 circuit court nominees confirmed during presidential election years from 1980 to 2008, most were confirmed in February (14.0%), May (15.8%), June (21.1%), and October (14.0%).
- Of 280 district court nominees confirmed during presidential election years from 1980 to 2008, most were confirmed in February (11.8%), May (15.7%), June (20.0%), and September (11.4%).
- In the four most recent presidential election years, 1996 to 2008, Senate confirmation of circuit court nominees almost completely stopped after June 30, with 18 of 19 (94.7%) confirmed in the first six months of the year. In contrast, during presidential election years from 1980 to 1992, approximately 42% of circuit court nominees were confirmed post-June.
- In contrast, in the four most recent presidential election years, 1996 to 2008, a greater percentage of district court nominees were confirmed in the second half of the year (45.7%) than were confirmed after June 30 in the four previous election years of 1980 to 1992 (35.4%).
- During the presidential election years from 1980 to 1992, the Senate confirmed circuit court nominees as late as October (in three of the years) and December (in the fourth year). By contrast, in the four more recent election years, 1996 to

2008, the Senate did not confirm a circuit nominee after July. In seven of the eight election years, the last district court nominee was confirmed in September or later.

- During the 1980 to 2008 presidential election years, the Senate annually confirmed an average of five circuit court nominees by the end of June, the same number as confirmed by the Senate in 2012, as of June 30.
- The Senate confirmed an average of 21 district court nominees by the end of June during the 1980 to 2008 presidential election years, compared with 24 confirmed by the Senate in 2012, as of June 30.
- Circuit court judgeship vacancy rates declined between January 1 and December 31 in six of eight presidential election years from 1980 to 2008. District judgeship vacancy rates declined in four of the election years. During certain election years, Senate confirmation rates appeared related to the rise or fall in judicial vacancy rates.

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# Introduction

## Background

In recent decades, a quadrennial subject of contention in the Senate has been its processing of U.S. circuit and district court nominations in presidential election years. Senators, for example, have differed, usually along party lines, over whether, or to what extent, it is customary during presidential election years for the Senate to slow down the pace at which it confirms judicial nominations. They have disagreed on whether Senate processing of judicial nominations customarily drops off, or stops altogether, at some predetermined point, in anticipation of remaining judicial vacancies being filled by the next elected President.<sup>1</sup>

Some Senators have said they expected Senate processing of lower court nominations to drop off and then to end earlier in presidential election years than in other years. Such expectations, they asserted, were supported by past Senate practice, and by an informal Senate understanding, sometimes called the “Thurmond Rule.” In keeping with this understanding, the Senate, after a certain point in a presidential election year, would generally no longer act on judicial nominations, or act only on uncontroversial consensus nominees supported by the Senate leaders of both parties.<sup>2</sup>

Other Senators, however, have disputed that the Senate customarily slows down the process of confirming judicial nominations in presidential election years, or that Senators have a shared understanding about how late in a presidential election year judicial nominations should be processed. They have pointed to presidential election years in which relatively large numbers of judicial nominations have been confirmed or in which such confirmations occurred relatively late in the year.<sup>3</sup>

Early in 2012, attention in the Senate again turned to judicial nominations in presidential election years—with questions raised about the relevance of past Senate practice for the number and timing of judicial nominations to be confirmed in 2012. In a January 26, 2012, statement, Senator Charles Grassley of Iowa, ranking Member on the Senate Judiciary Committee, noted that the committee in 2011 had approved “a significant number of judicial and executive nominees.” He added, however, that relevant to the outlook for Senate action on nominations in 2012 was a “circumstance that changes this year”—namely, “that this is a presidential election year. The historical practice has been for work to slow down a great deal during such years.”<sup>4</sup>

Subsequently, in a February 7, 2012, floor statement,<sup>5</sup> Senator Patrick J. Leahy of Vermont, chairman of the Senate Judiciary Committee, expressed concern that portrayals of past Senate

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<sup>1</sup> See generally CRS Report RL34615, *Nomination and Confirmation of Lower Federal Court Judges in Presidential Election Years*, by Denis Steven Rutkus.

<sup>2</sup> *Ibid.*, under heading “Whether the Senate Customarily Observes the ‘Thurmond Rule.’”

<sup>3</sup> *Ibid.*

<sup>4</sup> Sen. Charles Grassley, “Recess Appointments at Judiciary Executive Business Meeting,” prepared statement for immediate release, January 26, 2012, at <http://www.grassley.senate.gov>.

<sup>5</sup> Sen. Patrick J. Leahy, “Judicial Nominations,” remarks in the Senate, *Congressional Record*, daily edition, vol. 158, February 7, 2012, p. S362.

practices in presidential election years might be used by the other party in the Senate to justify blocking further confirmations of judicial nominations. “It is troubling,” Senator Leahy said, “to hear Senate Republicans already talking about how they plan to resort to the Thurmond Rule to shut down all judicial confirmations for the rest of the year.” In contrast to such a possibility, Senator Leahy pointed to the 2004 and 2008 presidential election years, during which, he maintained, the Senate confirmed numerous judicial nominations well into both years.<sup>6</sup> Similar concerns were expressed three months later by Senate Majority Whip Richard J. Durbin of Illinois. In a May 7, 2012, floor statement, he said that presidential election year politics were delaying Senate consideration of judicial nominations.

All we know is that in a political campaign year, politics rule, and in this situation many Republicans are holding up perfectly fine nominees approved by Democrats and Republicans in committee for no other reason but the hope that they can win back the White House in November and fill the nominees with their favorites.<sup>7</sup>

This view was challenged two days later, at a May 9, 2012, hearing on judicial nominations, by Senator Mike Lee of Utah (a member of the Judiciary Committee’s minority). Senator Lee rebutted the notion that the Senate minority, out of presidential election year considerations, was delaying Senate actions on judicial nominations. “So far this year,” he said, the Senate was “well above historical standards,” with Senate confirmations “almost double the normal pace” for a presidential election year.<sup>8</sup> Similarly, on June 6, 2012, during floor debate on a district court nomination, Senator Grassley, declared, “We continue to confirm the President’s nominees at a very brisk pace.” The Senate was doing so, he added, “in a presidential election year—typically a time when judicial nominations are limited to consensus nominees. Yet here we are considering a controversial nomination.”<sup>9</sup>

A week later, however, press accounts reported that Senate Republican Leader Mitch McConnell of Kentucky had decided to oppose further Senate floor votes on all circuit court nominations (consensus or otherwise) until after the November 2012 presidential election.<sup>10</sup> One of the accounts reported that, while the “blockade” on circuit court nominations would go into effect immediately, “district court nominees will likely continue to be confirmed until at least early September.” The account said that, in support of the decision, the Senate minority would invoke the “Thurmond Rule,” a doctrine interpreted, according to the account, to hold that “within six

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<sup>6</sup> Senate Democrats, according to Senator Leahy, “continued to work to reduce judicial vacancies by considering and confirming President [George W.] Bush’s judicial nominations late into the presidential election years of 2004 and 2008, reducing the vacancy rates in those years to their lowest levels in decades.” *Ibid.*

<sup>7</sup> Sen. Richard J. Durbin, “Executive Session,” remarks in the Senate, *Congressional Record*, daily edition, vol. 158, May 7, 2012, p. S2910.

<sup>8</sup> More specifically, Senator Lee said, “The average number of confirmations by May 9 for a presidential election year is 11. We have already confirmed 21 judges this year. That’s almost double the normal pace.” Sen. Mike Lee, “Lee Defends Record on Judicial Nominations,” press release and transcript of Senator’s remarks at nominations hearing, May 9, 2012, at <http://www.lee.senate.gov>.

<sup>9</sup> Sen. Charles Grassley, “Nomination of Jeffrey J. Helmick to be U.S. District Judge for the Northern District of Ohio,” remarks in the Senate, *Congressional Record*, daily edition, vol. 158, June 6, 2012, p. S3770.

<sup>10</sup> John Stanton, “GOP Begins Judge Blockade,” *Roll Call*, June 14, 2012, at <http://www.rollcall.com>; Sean Lenggell, “Senate GOP Signals Halt on Circuit Judge Nominees; Democrats Decry Move as Obstructionism,” *The Washington Times*, June 15, 2012, p. A2.

months of a presidential election, the opposition party can, and typically does, refuse to allow votes” on circuit court nominations.<sup>11</sup>

The decision of Republican Leader McConnell, according to the account, was “welcomed by GOP colleagues.” Among them, Senator John Cornyn of Texas, a member of the Senate Judiciary Committee and chair of the National Republican Senatorial Committee, reportedly said of the decision, “I think this is about the time. This is traditionally when the curtain comes down on circuit court judges.”<sup>12</sup>

On June 14, 2012, Chairman Leahy, in a prepared statement, criticized the Republican leadership decision to oppose further Senate votes on circuit court nominations during the remainder of 2012. Senator Leahy said, in part,

I have yet to hear any good reason why we should not continue to vote on well-qualified, consensus nominees, just as we did up until September of the last two presidential election years. I have yet to hear a good explanation as to why we cannot work to solve the problem of high vacancies for the American people. I will continue to work with the Senate leadership to try to confirm as many of President Obama’s qualified judicial nominees as possible to fill the many judicial vacancies that burden our courts and the American people across the country.<sup>13</sup>

In subsequent floor remarks, on June 26, 2012, Senator Leahy inserted into the *Congressional Record* a June 20 letter from the president of the American Bar Association addressed to Senate Majority Leader Harry Reid of Nevada and Senate Republican Leader McConnell. The letter urged the Senate leaders to schedule floor votes on three pending circuit court nominees “before July.” (The letter also urged Senate confirmation votes, “on a weekly basis thereafter,” for district court nominees “who have strong bipartisan support.”)<sup>14</sup> Underlying the ABA’s desire for prompt confirmations, the letter indicated, was its “concern for the longstanding number of judicial vacancies” and its positive assessment of the three circuit nominees.<sup>15</sup>

The ABA letter noted that “recent news stories” about Senate processing of judicial nominations had alluded to the Thurmond Rule, casting it “as a precedent under which the Senate, after a specified date in a presidential election year, ceases to vote on nominees to the federal circuit courts of appeals.” The ABA, the letter said, had taken “no position on what invocation of the ‘Thurmond Rule’ actually means or whether it represents wise policy.”<sup>16</sup> It noted that “there has been no consistently observed date at which this has occurred during the presidential election

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<sup>11</sup> John Stanton, “GOP Begins Judge Blockade,” *Roll Call*, June 14, 2012, at <http://www.rollcall.com>.

<sup>12</sup> *Ibid.*

<sup>13</sup> Sen. Patrick J. Leahy, “Comment of Senator Patrick Leahy on Republican Opposition to Consensus Nominees,” June 14, 2012, at <http://www.leahy.senate.gov>.

<sup>14</sup> William T. (Bill) Robinson III, president, American Bar Association, letter to Sen. Harry Reid, Senate Majority Leader, and Sen. Mitch McConnell, Senate Republican Leader, June 20, 2012, at Sen. Patrick J. Leahy, “Nomination of Robin S. Rosenbaum to be United States District Judge for the Southern District of Florida,” remarks in the Senate, *Congressional Record*, daily edition, vol. 158, June 26, 2012, p. S4607.

<sup>15</sup> *Ibid.* The letter described the three as uncontroversial “consensus nominees” who had received “overwhelming approval from the Senate Judiciary Committee” and been rated unanimously as “well-qualified” by the ABA’s Standing Committee on the Federal Judiciary.

<sup>16</sup> *Ibid.* While hesitant to define or evaluate the Thurmond Rule, the ABA letter to the Senators said, “As you know the ‘Thurmond Rule’ is neither a rule nor a clearly defined event.”

years from 1980 to 2008.”<sup>17</sup> However, in the past three election years of 2000, 2004, and 2008, the letter also noted, the last circuit court confirmations occurred either in June or July. As a result, the letter continued:

In deference to these historical cut-off dates and because of our conviction that the Senate has a continuing constitutional duty to act with due diligence to reduce the dangerously high vacancy rate that is adversely affecting our federal judiciary, we exhort you to schedule votes on these three outstanding circuit court nominees this month.<sup>18</sup>

In his floor speech, Senator Leahy praised the nominees mentioned in the ABA letter, as well as another circuit nominee reported out of the Judiciary Committee, as highly qualified, uncontroversial consensus nominees. A decision by the Senate’s minority party to block votes “on superbly qualified circuit court nominees with strong bipartisan support,” Senator Leahy said, “is a new and damaging application of the Thurmond Rule.”<sup>19</sup>

On June 26, 2012, the same day that Senator Leahy introduced the ABA letter into the *Record*, Senator Grassley released a letter that he and Senate Republican Leader McConnell had written in response to the ABA president. The letter criticized the ABA for “urging, for the first time, confirmation of particular circuit court nominations despite the existence” of the Thurmond Rule. The letter continued:

By any objective measure—overall circuit court vacancy rate, vacancies on the respective circuit courts, or judicial emergency designation—our appellate courts are doing at least as well, and in most respects much better, now than when our Democratic colleagues invoked the Rule both times during the last administration. Given this exceptionally fair treatment of President Obama’s judicial nominees, it is curious that your organization would chose now to urge the Senate not to follow its practice of suspending the processing of circuit court nominations in the months preceding a presidential election. This unprecedented action raises questions about the American Bar Association’s objectivity and neutrality.<sup>20</sup>

The McConnell/Grassley letter also drew attention to certain circuit courts where, either in June 2004 or in June 2008, according to the letter, vacancies were at a crisis level. The letter said that, although “well qualified” nominees of President George W. Bush had been pending for these judicial vacancies (some for a year or more), the Senate’s majority, then of the other party, refused to process their nominations, in anticipation of the November presidential election.<sup>21</sup>

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Sen. Patrick J. Leahy, “Nomination of Robin S. Rosenbaum to be United States District Judge for the Southern District of Florida,” remarks in the Senate, *Congressional Record*, daily edition, vol. 158, June 26, 2012, p. S4607. The three circuit court nominations that the ABA letter said deserved prompt Senate floor votes had all been ordered reported out of the Senate Judiciary Committee by voice vote. The fourth circuit nominee, who Senator Leahy also said deserved a Senate confirmation vote, had her nomination reported out of committee following a party-line roll call vote.

<sup>20</sup> Sen. Mitch McConnell, Senate Republican Leader, and Sen. Chuck Grassley, Senate Judiciary Committee Ranking Member, letter to William T. (Bill) Robinson III, president, American Bar Association, June 25, 2012, at <http://www.grassley.senate.gov>.

<sup>21</sup> Ibid.

## Description of Report's Following Sections

Senators, recent debate has shown, have differed on how many U.S. circuit and district court nominations the Senate should confirm in 2012 and how late in the year it should continue to confirm them. They have disagreed as to what guidance, if any, previous presidential election years provide to the Senate regarding these questions. Further, they have differed specifically on whether slowing down, or stopping, the processing of judicial nominations at a certain point during this session of Congress, or after a certain number of nominees have been confirmed, would be in keeping with the Senate's experience in past presidential election years.

This report seeks to help inform the above debate, by analyzing the number and timing of circuit court and district court nominations confirmed by the Senate in presidential election years dating back to 1980.<sup>22</sup> The report compares the processing of judicial nominations during these years, using various quantitative measures, while relating its findings to the Senate's processing of judicial nominations in 2012 through the month of June.<sup>23</sup>

In successive sections, the report analyzes the following, for presidential election years from 1980 to 2008:

- the number and percentage of circuit and district court nominees confirmed by the Senate in each election year;
- the percentage of confirmed lower court nominees who were approved by the Senate during each month across the eight election years;
- the extent to which Senate confirmations of judicial nominees tended to drop off in the second half of election years;
- the last dates on which the Senate Judiciary Committee and the Senate considered or acted on judicial nominations in each election year;
- the average cumulative number of judicial nominees confirmed by the Senate at the end of nine successive months (February through October); and
- the extent to which judgeship vacancy rates in the circuit and district courts have risen or fallen in each election year.

In a short concluding section, the report identifies various questions that the Senate might address if it regards the processing of judicial nominations in past election years as an important guide for influencing its actions in 2012.

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<sup>22</sup> The year 1980, a CRS report in 2008 noted, has usually been the earliest point of reference for Senators in recent years when debating whether Senate processing of lower court nominations in presidential election years is guided by an understanding or practice called the Thurmond Rule. CRS Report RL34615, *Nomination and Confirmation of Lower Federal Court Judges in Presidential Election Years*, by Denis Steven Rutkus, under heading "Senate Processing of Nominations in Presidential Election Years, 1980-2004."

<sup>23</sup> Throughout this report, data analysis of Senate confirmations of judicial nominations in 2012 is current through June 30, unless a more recent cut-off date is specified.

## Number and Percentage of Nominees Confirmed in Presidential Election Years

As shown by **Table 1**, the number of circuit and district court nominees confirmed during presidential election years varied during the 1980 to 2008 period, ranging from 2 to 11 and 18 to 55, respectively. During these eight election years, the most circuit court nominees were confirmed in 1992 (11), 1980 (10), and 1984 (10). The years with the fewest confirmed circuit court nominees were 1996 (2) and 2008 (4). On average, roughly 7 circuit court nominees were confirmed per presidential election year from 1980 to 2008; the median number of circuit court nominees confirmed was 7.5. As for circuit court nominees in 2012, 5 of 12 pending election-year nominees, or 41.7%, have been confirmed as of June 30.

**Table 1. Number and Percentage of U.S. Circuit and District Court Nominees Confirmed in Presidential Election Years 1980-2012**

(As of June 30, 2012)

Year	U.S. Circuit Courts			U.S. District Courts		
	Nominees <sup>a</sup>	Confirmed	Percentage	Nominees	Confirmed	Percentage
1980	14	10	71.4	68	53	77.9
1984	14	10	71.4	46	33	71.7
1988	16	7	43.8	47	34	72.3
1992	21	11	52.4	98	55	56.1
1996	11	2 <sup>b</sup>	18.2	39	18 <sup>c</sup>	46.2
2000	26	8	30.8	56	31	55.4
2004	20	5	25.0	41	32	78.0
2008	17	4	23.5	44	24	54.5
2012 (as of 6/30/12)	12	5	41.7	52	24	46.2

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

**Notes:** This table shows the number of circuit and district court nominees with nominations pending during presidential election years from 1980 to 2012 (as of June 30, 2012) and the percentage of these nominees who were confirmed. District court data include nominees to territorial district courts.

- This column includes nominees whose nominations (1) were held over from the first session of a Congress, (2) were returned at the end of that session but resubmitted by the President during the second session (i.e., the session coinciding with the presidential election year), (3) were confirmed in the beginning of a presidential election year on one of the last days of a first session of Congress, or (4) were new to the election year. This column does not include nominees whose nominations were returned to the President in January prior to the start of the second session of a Congress and not resubmitted thereafter.
- Two circuit court nominees counted in this cell received Senate confirmation on January 2, 1996, a day before the end of the first session of the 104<sup>th</sup> Congress. Subsequently, during the second session of the 104<sup>th</sup> Congress, which began on January 3, 1996, and adjourned sine die on October 4, 1996, no circuit court nominees were confirmed.
- Counted here is one district court nominee who was confirmed on January 2, 1996, a day before the end of the first session of the 104<sup>th</sup> Congress.

**Table 1** also shows that the *percentage* of circuit court nominees confirmed was lower in each of the four most recent presidential years than it was in any of the four preceding ones. Of the total nominees during presidential election years, the percentage confirmed during the 1996 to 2008 period ranged from a low of 22.2% in 1996 to a high of 30.8% in 2000. By comparison, the lowest percentage of circuit court nominees confirmed in the presidential election years 1980 to 1992 was 43.8% in 1988 (with the highest percentage of nominees confirmed, 71.4%, occurring in both 1980 and 1984). A similar disparity is found between the *overall* percentage of circuit court nominees confirmed during the four most recent presidential election years (1996-2008) versus the four earlier years (1980-1992). From 1996 to 2008, the Senate confirmed 19 of 72 pending circuit court nominees, or 26.4%, compared with 38 of 65 nominees confirmed, or 58.5%, in the four preceding presidential election years.

As for district court nominees, the presidential election years from 1980 to 2008 with the greatest numbers of confirmed nominees were 1992 (55) and 1980 (53). As with circuit court nominees, the years with the fewest confirmed district court nominees were also 1996 (18) and 2008 (24). From 1980 to 2008, an average of 35 district court nominees were confirmed per presidential election year; the median number of district court nominees confirmed was 32.5. In 2012, as of June 30, 24 of 52 pending election-year district court nominees, or 46.2%, have been confirmed.

**Table 1** reveals that across the four most recent presidential election years, 1996 to 2008, the Senate confirmed fewer district court nominees overall (105) than across the four preceding presidential election years, 1980 to 1992 (175). This disparity can be seen, in part, as a function of the Senate having received fewer district court nominations during the last four election years (173) than in the four preceding ones (259).

Finally, in every presidential election year from 1980 to 2008, **Table 1** shows, the Senate confirmed a higher percentage of district court nominees pending during the year than it did circuit court nominees. These differences, while only slightly higher in three of the first four presidential election years, were greater in the four most recent presidential election years. Thus, the table shows, in 1996 the Senate confirmed 46.2% of district court nominees, compared with 22.2% of court of appeals nominees confirmed; in 2000, 55.4%, compared with 30.8%; in 2004, 78.0%, compared with 25.0%; and in 2008, 64.9%, compared with 23.5%.

## Percentage of Nominees Confirmed, by Month of Presidential Election Years

**Figure 1** provides a measure of how Senate processing of judicial nominations during the presidential election years of 1980 to 2008 varied from month to month. The figure does so by showing the percentage of confirmed circuit and district court nominees approved by the Senate during each month across the eight election years.

**Figure 1** shows similar trend lines in the percentage of circuit and district nominees confirmed in particular months. After starting with low percentages (i.e., below 5%) of confirmations in January, the trend lines for both circuit and district court nominees rose together in certain months, peaking three times (in February, June, and October), while falling, again in tandem, in other months (March, July, and November).

Specifically, of the 57 circuit court nominees confirmed during presidential election years from 1980 to 2008, most were confirmed in February (14.0%), May (15.8%), June (21.1%), and October (14.0%). Of the 280 district court nominees confirmed during the same eight presidential election years, most were confirmed in February (11.8%), May (15.7%), June (20.0%), September (11.4%), and October (10.0%).<sup>24</sup>

In a few cases, however, the percentage of circuit court nominees confirmed in a particular month differed notably from the percentage of district court nominees confirmed. The largest such difference occurred during July, a month that accounted for 10.0% of all confirmed district court nominees from 1980 to 2008, in contrast to 1.8% of all confirmed circuit court nominees during the same period. (The drop-off, from June to July, in the percentage of nominees confirmed was much greater for circuit court nominees—21.1% in June, down to 1.8% in July—than for district court nominees—20.0% in June, down to 10.0% in July.) The second-largest difference occurred in September. During the 1980 to 2008 presidential election years, September accounted for 11.4% of all confirmed district court nominees, compared with 5.3% of all confirmed circuit court nominees.<sup>25</sup>

The current election year of 2012 is not represented in **Figure 1**. In 2012, two circuit court nominees have been confirmed in May and one circuit court nominee confirmed each in February, April, and June. The greatest numbers of district court nominees in 2012, as of June 30, have been confirmed in March (nine nominees) and May (four). Unlike any of the previous election years dating back to 1980, 2012 has had at least one district court nominee confirmed each month from January through June.<sup>26</sup>

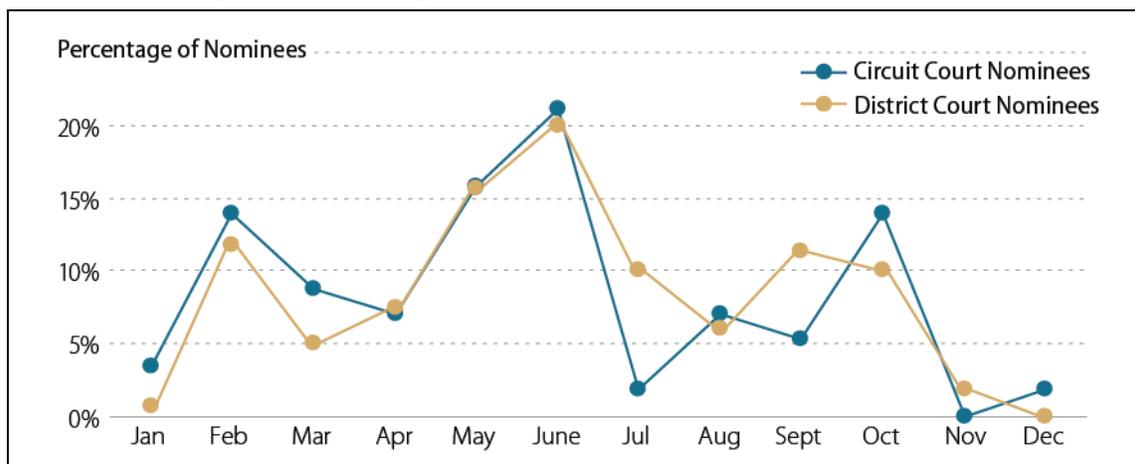
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<sup>24</sup> Source: Internal CRS judicial nominations database. Altogether, over one-third of both confirmed circuit court nominees (36.9%) and district court nominees (35.7%) during the 1980 to 2008 presidential election years were approved in either May or June.

<sup>25</sup> For circuit court nominees during the 1980-2008 presidential election years, only one nominee, in 1980, received Senate confirmation *after* the presidential election. The nominee was Stephen G. Breyer, whose nomination to the U.S. Court of Appeals for the First Circuit, was confirmed by the Senate on December 9, 1980, one week before the Senate adjourned sine die.

<sup>26</sup> In 1984 and 1992, at least one district court nominee was confirmed in each month from February through June (but not January). In 2004, at least one district court nominee was confirmed in each of the first six months except in April.

**Figure 1. Percentage of Confirmed Circuit and District Court Nominees Approved by Month During Presidential Election Years, 1980-2008**



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

**Notes:** This figure shows, across presidential election years from 1980 to 2008, the percentage of confirmed circuit and district court nominees who were approved during a particular month of the year. Percentages for district court nominees include nominees to territorial district courts.

## Post-June Drop in Confirmations in 1980 to 1992 and in 1996 to 2008 Election Years

A question of recurring interest to Congress is whether, or to what extent, Senate confirmations of judicial nominations tend to drop off in the second half of presidential election years. CRS research has found that, during the 1980 to 2008 presidential election years, the Senate usually, but not always, confirmed fewer circuit and district court nominees in the second half of the year than in the first half.<sup>27</sup> Overall, during the 1980 to 2008 presidential election years, 70.2% of confirmed circuit court nominees and 60.7% of confirmed district court nominees were approved during the first six months of the year. However, within the 1980 to 2008 time frame, CRS also found notable differences, between the first four election years (1980 to 1992) and the last four election years (1996 to 2008), in the extent to which confirmations dropped off after June. These differences can be seen in **Figure 2**, below.

Specifically, **Figure 2** shows, first for the 1980 to 1992 presidential election years, and then again for the 1996 to 2008 election years, the percentages of confirmed circuit and district court nominees who were approved by the Senate from January to June versus from July to December.<sup>28</sup>

<sup>27</sup> In three exceptional instances during the 1980-2008 period, more nominations were confirmed in the second half of a presidential election year than in the first half: In 1984, when the Senate confirmed 6 circuit court nominees after June 30, compared with 4 confirmed in the six months prior; in 1992, when the Senate again confirmed 6 circuit nominees after June 30, compared with 5 in the prior months; and in 2008, when it confirmed 14 district court nominees after June 30, compared with 10 earlier in the year.

<sup>28</sup> During the 1980-2008 period, the total number of circuit court nominees confirmed in the first four presidential election years (38) was double the number of circuit nominees confirmed in the last four election years (19). A (continued...)

The figure reveals that Senate confirmation of circuit court nominees all but stopped after June 30 during the more recent presidential election years of 1996 to 2008. Of the 38 circuit court nominees confirmed in the 1980 to 1992 election years, 57.9% were approved by the Senate between January and June, while 42.1% were approved between July and December. In contrast, from 1996 to 2008, nearly all confirmed circuit court nominees (18 of 19, or 94.7%) were approved during the first six months of the year.<sup>29</sup> This distinction did not hold for district court nominees. During the more recent presidential election years (1996 to 2008), a greater percentage of district court nominees were confirmed in the second half of the year (45.7%) than were approved post-June during the 1980 to 1992 presidential election years (35.4%).<sup>30</sup>

**Figure 2** thus shows that during recent presidential election years, Senate confirmation of district court nominees has been less “front-loaded” (i.e., tending less to occur between January and June) than was the case in the 1980 to 1992 election years. Instead, the percentage of post-June confirmations for the 1996 to 2008 election years as a whole, while still less than 50%, was higher than the confirmation percentage for district court nominations approved during the second half of the year during the 1980 to 1996 election years. As part of this trend, some months in the second half of the year during the more recent presidential election years witnessed a notable number of district court confirmations. In July 1996, for instance, the Senate confirmed 16 district court nominees; it confirmed 10 district court nominees in September 2008 (after confirming 4 the previous July); and it confirmed 4 district nominees in July 2000 and in October 2000. Also, the Senate confirmed five district court nominees in November 2004 (although this was the sole instance, during any of the 1980 to 2008 presidential election years, of district court nominees being confirmed in a “lame-duck” congressional session).<sup>31</sup>

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(...continued)

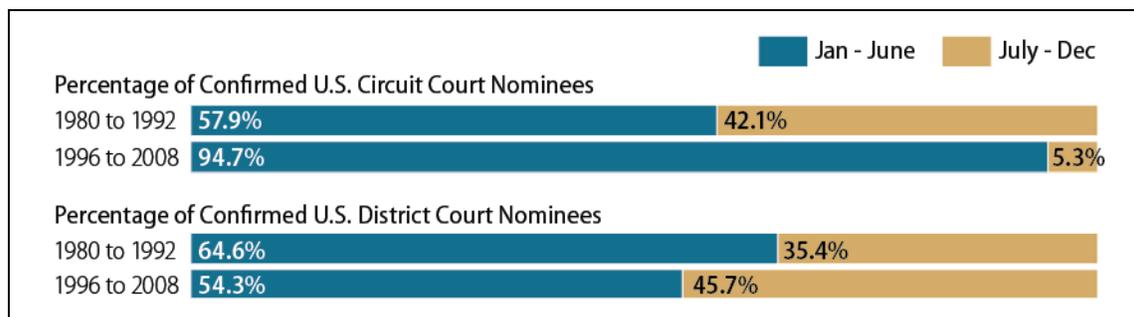
somewhat similar pattern is discernable with district court confirmations: The number of district court nominees confirmed in the first four presidential election years (175) was 67% greater than the number confirmed in the last four election years (105).

<sup>29</sup> The single post-June confirmation of a circuit nominee to occur during the 1996 to 2008 presidential election years was that of Johnnie B. Rawlinson, who was confirmed in July 2000.

<sup>30</sup> Of the 175 confirmed district court nominees from 1980 to 1992, 64.6% were approved between January and June, while 35.4% were approved after June 30. Of the 105 confirmed district court nominees from 1996 to 2008, however, 54.3% were approved between January and June, and 45.7% were approved after June 30.

<sup>31</sup> The Senate confirmed all five nominations by voice vote on November 21, 2004. The confirmations were of three Article III district court nominations (received by the Senate in June or July 2004) and two territorial district court nominations (received by the Senate in November 2003 and February 2004, respectively).

**Figure 2. Percentage of Confirmed Circuit and District Court Nominees Approved by the Senate from January to June and from July to December During Two Periods, 1980-1992 and 1996-2008**



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

**Notes:** This figure shows the percentage of confirmed circuit and district court nominees who were approved by the Senate from January to June and from July to December during presidential election years from 1980 to 2008. The percentages are reported for two periods, 1980 to 1992 and 1996 to 2008. Percentages for district court nominees include nominees to territorial district courts.

At the current point in 2012, it remains to be seen whether, or to what extent, Senate confirmations of lower court nominations will drop off in the second half of the year. These questions, of course, are for the Senate to decide how to resolve. It might be noted, however, that efforts to block further confirmations of circuit court nominations, if successful, would result in 2012 closely following the pattern of the 1996 to 2008 presidential election years. (As discussed above, the Senate during the second halves of those years confirmed a total of one nomination.) On the other hand, continued confirmations of district court nominations during the remainder of 2012 also would follow the general pattern of the 1996 to 2008 presidential election years. (As discussed above, 45.7% of nominees with nominations pending during those years were confirmed after June.) By contrast, if 2012 followed the confirmation patterns of the earlier presidential years of 1980 to 1992, the Senate would continue to confirm circuit as well as district court nominees during the second half of the year.

## Last Dates of Committee or Senate Action on Nominations in Presidential Election Years

The dates on which the Senate Judiciary Committee and the full Senate last considered circuit court and district court nominees have varied widely in recent presidential election years. **Table 2** presents, for each of the eight presidential election years from 1980 to 2008, the last dates on which the Senate received a circuit court nomination, the Judiciary Committee held a hearing or reported such a nomination, and the Senate voted on confirmation of such a nomination. **Table 3** provides similar last-date information for district court nominations during the eight presidential election years.

**Table 2** reveals that, in six of the eight presidential election years from 1980 to 2008, at least one circuit court nomination was submitted by the President to the Senate during the second half of the year, after June 30. In the two other years, 1996 and 2004, the President's final circuit court nomination was submitted to the Senate during the first half of the year (on April 18 and May 10, respectively).

**Table 2. Last Dates of U.S. Circuit Court Nominations, Hearings, Committee Reports, and Confirmations, Presidential Election Years 1980-2008**

Year	Last Nomination	Last Hearing	Last Report	Last Confirmation	Sine Die Adjournment
1980	11/13/1980	11/17/1980	12/1/1980	12/9/1980	12/16/1980
1984	10/5/1984	9/26/1984	9/28/1984	10/4/1984	10/12/1984
1988	9/16/1988	10/4/1988	10/5/1988	10/14/1988	10/22/1988
1992	9/17/1992	9/24/1992	10/2/1992	10/8/1992	10/9/1992
1996	4/18/1996	7/31/1996	6/27/1996	1/2/1996 <sup>a</sup>	10/4/1996
2000	10/26/2000	6/16/2000	7/20/2000	7/21/2000	12/15/2000
2004	5/10/2004	11/16/2004	10/4/2004	6/24/2004 <sup>b</sup>	12/8/2004
2008	9/26/2008	5/7/2008	6/12/2008	6/24/2008	1/3/2009

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

**Notes:** This table shows the last dates of circuit court nominations, hearings, committee reports, and confirmations during presidential election years from 1980 to 2008.

- a. The Senate confirmed two circuit court nominees on January 2, 1996, a day before the end of the first session of the 104<sup>th</sup> Congress. No circuit court nominations were confirmed subsequently in 1996 during the second session of the 104<sup>th</sup> Congress.
- b. The Senate failed to invoke cloture on one circuit court nominee on July 20, 2004 and three circuit court nominees on July 22, 2004.

As the table also shows, it has not been uncommon for the Senate Judiciary Committee to continue its consideration of a President's circuit court nominees during the second half of the year. Specifically, in seven of the eight election years from 1980 to 2008, the Senate Judiciary Committee held hearings for at least one circuit court nominee after June 30 or reported at least one nominee after that date. In 2008, however, the Judiciary Committee did not act on circuit court nominees, either by holding a hearing or reporting a nomination to the full Senate, after June 30; the last hearing date for a circuit court nominee was on May 7, and the last report of a circuit court nomination was on June 12.

The full Senate has confirmed its final circuit court nominee earlier in the year during the four most recent completed presidential election years (1996 to 2008) than during the four previous ones (1980 to 1992). In 1980, Stephen G. Breyer was confirmed to the U.S. Court of Appeals for the First Circuit on December 9. In 1984, 1988, and 1992, the Senate confirmed circuit court nominees in October of each year (in each case within several days of the Senate's adjournment sine die).

In the four most recent completed presidential election years, however, the Senate has not confirmed circuit court nominees after July. The Senate confirmed no circuit court nominees in 1996 during the second session of the 104<sup>th</sup> Congress; its last confirmations were on January 2, 1996, a day before the end of the first session. In 2000, the last confirmation of a circuit court nominee occurred on July 21. In both 2004 and 2008, the final confirmation of a circuit court nominee occurred on the same date, June 24. (In late July 2004, however, the Senate did consider, without voting on, the nominations of four circuit court nominees, while rejecting attempts to invoke cloture on the nominations.)

**Table 3** presents the dates on which the Senate Judiciary Committee and the full Senate last considered district court nominations in the 1980 to 2008 presidential election years. The table

shows, for each of the election years during this period, the last dates on which the Senate received a district court nomination, the Judiciary Committee held a hearing or reported such a nomination, and the Senate voted on confirmation of such a nomination.

**Table 3. Last Dates of U.S. District Court Nominations, Hearings, Committee Reports, and Confirmations, Presidential Election Years, 1980-2008**

Year	Last Nomination	Last Hearing	Last Report	Last Confirmation	Sine Die Adjournment
1980	9/17/1980	9/23/1980	9/24/1980	9/29/1980	12/16/1980
1984	10/5/1984	10/2/1984	10/3/1984	10/11/1984	10/12/1984
1988	8/3/1988	10/4/1988	10/5/1988	10/14/1988	10/22/1988
1992	10/2/1992	9/24/1992	10/2/1992	10/8/1992	10/9/1992
1996	9/5/1996	9/24/1996	9/19/1996	8/2/1996	10/4/1996
2000	10/3/2000	7/25/2000	7/27/2000	10/3/2000	12/15/2000
2004	9/15/2004	11/16/2004	10/4/2004	11/21/2004	12/8/2004
2008	9/9/2008	9/23/2008	9/25/2008	9/26/2008	1/3/2009

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

**Notes:** This table shows the last dates of district court nominations, hearings, committee reports, and confirmations during presidential election years from 1980 to 2008.

District court nominations, **Table 3** shows, were submitted by the President to the Senate during the second half of the year (i.e., after June 30) in each of the eight presidential election years from 1980 to 2008. The table also shows that the Senate Judiciary Committee continued its consideration of district court nominations beyond June 30, by holding a hearing on a nomination or reporting a nomination, in each of the eight years. Additionally, in most years, committee action on district court nominations occurred well after the traditional August recess. In seven of the eight years, the Senate Judiciary Committee held a committee hearing on a district court nomination or reported such a nomination after August 31.<sup>32</sup>

**Table 3** further reveals that, in the presidential election years from 1980 to 2008, the last confirmations of district court nominees occurred typically well into the fall. In seven of the eight election years, the last district court nominee was confirmed in September or later (with the Senate in one year, 2004, confirming a district court nominee in November, after a presidential election). The one election year in which the Senate did not confirm a district court nominee in September or later was 1996, when the last confirmation occurred on August 2.

During the 1980 to 2008 presidential election years, the last confirmation dates of district court nominees—occurring in September or later in seven of the eight years—are in contrast to the last dates of circuit court confirmations during the four most recent election years (1996 to 2008). During these years, as previously discussed, no circuit court nominees were confirmed after July.

<sup>32</sup> As with circuit court nominees, the Judiciary Committee's reporting of district court nominees after June 30 might have occurred, in some cases, because the committee was considering "consensus" nominees, or, in other cases, because the committee majority, as members of the President's party, might have been willing to report out the President's nominees, whether or not they had bipartisan support.

## Cumulative Confirmation Totals over Successive Months in Presidential Election Years

At any given time during a presidential election year, Senators might wish to compare the number of judicial nominations confirmed thus far in the year with the number of nominations confirmed at the same point in past election years. They also might wish to know how any increases in the number of judicial confirmations during the rest of the year would compare with total nominations confirmed at corresponding points in past election years. Such comparisons would be one way to measure to what extent the Senate was “keeping pace” with its processing of judicial nominations in past election years, as well as to project how many more confirmations, if any, would be needed by the end of the year to match total confirmation numbers in past years.

**Figure 3** shows, across the 1980 to 2008 presidential election years, the average number of circuit and district court nominees confirmed by the Senate as of the end of each of nine months, February through October. In the figure, for example, the data points for March reflect the average number of confirmations that occurred from January to the end of March in the 1980 to 2008 presidential election year period.

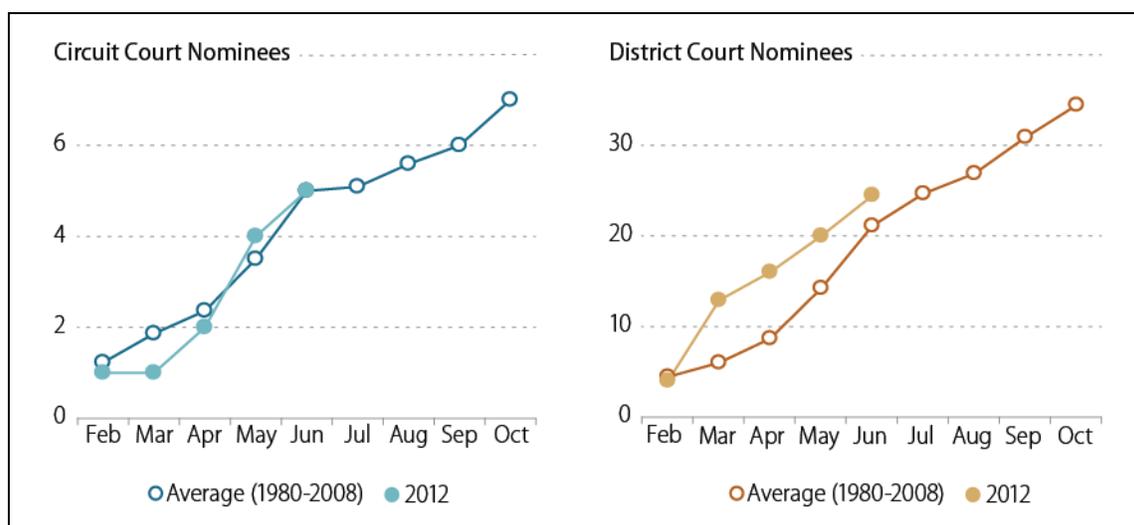
The figure shows comparable, although only partial, monthly interval data for 2012; specifically, the cumulative number of circuit and district court nominees confirmed as of the end of each month, from February through June. The figure, thus, allows for the nominee confirmation totals as of any of five monthly points in time in 2012 to be compared with the average number of total nominees confirmed as of the same points over the previous eight presidential election years.

For circuit court nominees, **Figure 3** shows that, during the 1980 to 2008 election years, an average of 1.2 nominees were confirmed by the end of February. At the end of each succeeding month, the average number of circuit court nominees confirmed by that point in the year increased—for instance, from an average of 1.9 nominees confirmed by the end of March to 2.4 nominees confirmed by the end of April, or from an average of 3.5 nominees confirmed by the end of May to 5 nominees confirmed by the end of June. By the end of September, **Figure 3** indicates, the average number of circuit nominees confirmed had increased to six, and by the end of October, to seven.<sup>33</sup>

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<sup>33</sup> **Figure 3** excludes confirmation numbers and averages for the months of November and December because, over the eight election years in question, relatively few nominations (i.e., a total of two circuit and five district court nominations) were confirmed in these months. As a result, the average number of nominations confirmed as of the end of November, and at the end of December, would be shown, if included in the figure, to be only marginally greater than the average number confirmed as of the end of October.

**Figure 3. Average Number of Circuit and District Court Nominees Confirmed as of End of Nine Successive Months, 1980-2008, Compared with Number Confirmed as of End of Five Successive Months, 2012**



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

**Notes:** This figure shows the average number of circuit and district court nominees confirmed as of the end of nine successive months (February through October) from 1980 to 2008. It also shows the number of circuit and district court nominees as of the end of five successive months in 2012 (February through June). Calculations of averages for district court nominees included confirmations of nominees to territorial district courts.

The figure also shows the average number of district court nominees confirmed by the Senate as of the end of nine successive months across the 1980 to 2008 presidential election years. It shows, for instance, that, during these election years, an average of 4.4 nominees were confirmed by the end of February. At the end of each succeeding month, the average number of district court nominees confirmed at that point in the year increased. By the end of September, **Figure 3** indicates, the average number of district court nominees had increased to 30.9, and by the end of October, to 34.4.

Additionally, the figure indicates that, for both circuit and district court nominees, the biggest monthly increase in average number of nominees confirmed occurred in June. From the end of May to the end of June, during the 1980 to 2008 presidential election years, the average number of circuit court nominees confirmed increased by 1.5, from of 3.5 to 5.<sup>34</sup> During the same monthly interval, the average number of district court nominees increased by 7.0, from 14.2 to 21.2.

**Figure 3**, it should be emphasized, shows the average month-to-month cumulative growth in the number of judicial confirmations across eight presidential election years. While the eight-year averages show, for both circuit and district court nominees, a successive, unbroken increase, month by month, in total confirmation numbers, this is not always the case for particular election years, where a succession of months did not always entail a steady increase in the number of nominations confirmed. Rather, in a number of instances during presidential election years from

<sup>34</sup> This is consistent with the findings discussed earlier in this report, in the section discussing percentage of nominees confirmed by month of presidential election years.

1980 to 2008, the Senate declined to confirm a circuit court nomination over a succession of several months prior to November.<sup>35</sup>

Further, during all four of the most recent completed presidential election years (1996 to 2008), no confirmations of circuit court nominations occurred during the three successive months of August to October.<sup>36</sup> Hence, a figure tracking the average number of confirmed circuit court nominations over successive months in the 1996 to 2008 presidential election years would not reveal (as does the 1980 to 2008 monthly cumulative average) a steady increase until the end of October in the average number of circuit court nominees confirmed annually. Rather, the average cumulative growth in number of circuit court nominations confirmed across the four presidential election years would be shown to have stopped as of the end of July.

Additionally, **Figure 3** may be used to compare the number of judicial nominations confirmed in 2012, as of June 30, with the average number confirmed at the same point in past presidential election years. The figure shows, for example, that the average number of circuit court nominees confirmed by the end of June during the presidential election years of 1980 to 2008 was five, the same number of circuit nominees that the Senate in 2012 confirmed by the end of June. During the 1980 to 2008 election years, the average number of district court nominees confirmed by the end of June was 21, compared with 24 that the Senate in 2012 confirmed by the end of June. Hence, through June 2012, the Senate has kept pace with the average number of circuit nominees confirmed through June over the past eight presidential election years, while it is slightly ahead of the average pace with which the Senate, through June during the same election years, confirmed district court nominees.

As **Figure 3** shows, the Senate, through October 2012, would need to confirm two more circuit court nominations (for an annual total of seven confirmations), to match the average number of circuit court nominations confirmed in the presidential election years from 1980 to 2008. In addition to the 24 district court nominations confirmed as of June 30, 2012, the Senate through October 2012 would need to confirm 10 more (for a total of 34) to match the average number of district court nominations confirmed through October in the previous eight election years.

Finally, **Figure 3** does not mean that President Obama has been more successful than his recent predecessors in having his circuit and district court nominees approved by the Senate. Rather, from Presidents Reagan to Obama, President Obama, as of July 10, 2012, is tied with President Clinton in having the fewest circuit court nominees approved during a first term (30), and he also has the second-lowest percentage of circuit court nominees approved (71.4%). As for district court nominees, President Obama thus far has had, among the five most recent Presidents (Reagan to Obama), during a first term, the fewest nominees confirmed (122) and the second-lowest percentage confirmed (78.7%).<sup>37</sup>

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<sup>35</sup> For example, in 1988, there were no confirmations of circuit court nominations for five successive months (from May through September); during 1996, for nine months (February through October); during 2000, for three months (August through October); during 2004, for four months (July through October); and during 2008, for four months (July through October).

<sup>36</sup> Moreover, for three of the four years (1996, 2000, and 2008), no circuit confirmations occurred over four successive months (July through October).

<sup>37</sup> Source: Internal CRS judicial nominations database. For additional analysis comparing the processing of judicial nominations under President Obama with that of his recent predecessors, 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.

## Vacancy Rates in Circuit and District Courts at Start and End of Presidential Election Years

Concerns periodically are raised in the Senate when vacancy rates in the U.S. circuit and district courts reach relatively high levels.<sup>38</sup> Discussions in the Senate raising such concerns often seek to gauge the extent to which the pace of Senate processing of judicial nominations may be among the factors causing increases or decreases in judicial vacancy rates.<sup>39</sup> In presidential election years, a slow-down in the pace at which the Senate processes judicial nominations especially can have repercussions for judicial vacancy rates if the number of confirmations during the year fails to keep up with the occurrence of new judicial vacancies.

### Vacancy Rates Increased in Some Years, Declined in Others

The data in **Table 4** show the extent to which judgeship vacancy rates in the U.S. circuit and district courts have risen or fallen over the eight most recent completed presidential election years. Specifically, the table shows the judicial vacancy rates of the circuit courts and district courts, respectively, on January 1 and December 31, for each presidential election year from 1980 to 2008. The data in the table yield mixed findings. In some years, judicial vacancy rates increased—sometimes marginally, other times more substantially—from the start to the end of the year. In other years, however, the vacancy rates decreased—in some cases marginally, but in other cases more substantially.<sup>40</sup>

**Table 4** shows, for instance, that the circuit court vacancy rate in six of the presidential election years—1980, 1988, 1992, 2000, 2004, and 2008—was lower on December 31 than it had been the preceding January 1. Specifically, in 1980, the vacancy rate declined substantially (relative to the declines in the other five years), from 9.1% on January 1 to 3.8% on December 31. In the other five years, the vacancy rate declines were more marginal, falling less than two percentage points in each instance. (Among these five years, the largest percentage decline occurred in 2004, when the vacancy rate on January 1 was 10.1% and 8.4% on December 31.) The table, by contrast, reveals that the circuit court vacancy rate *increased* in the presidential election years of 1984 and 1996. In both cases, the increase was relatively substantial, from 2.8% to 14.9% in 1984, and from 7.3% to 12.3% in 1996.

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<sup>38</sup> There is not universal agreement as to what, in the circuit or district courts, constitutes a “high,” “historically high,” or “relatively high” judicial vacancy rate. In recent decades, however, it has not been uncommon for Members of Congress or persons speaking for the federal judiciary to express concerns over judgeship vacancies when circuit or district court vacancy rates approached or exceeded 10%, or when the rates remained at these levels for extended periods.

<sup>39</sup> A CRS report in July 2011 that examined rises and falls in circuit and district court vacancy rates from 1977 to 2011 noted that, during the 111<sup>th</sup> Congress, Senators, “along party lines, differed over whom to blame” for escalating vacancy rates, and over “whether these levels were primarily due to delays by the President in making judicial nominations or to delays by the Senate in confirming them.” CRS Report R41942, *Vacancies on Article III District and Circuit Courts, 1977-2011: Data, Causes, and Implications*, by Denis Steven Rutkus, pp. 3-4.

<sup>40</sup> For purposes of this report, an increase or decrease in a judicial vacancy rate of less than two percentage points over a year’s time is regarded as marginal.

**Table 4. Vacancy Rates for U.S. Circuit and District Court Judgeships at Start and End of Presidential Election Years 1980-2012**

Year	Circuit Courts		District Courts <sup>a</sup>	
	Vacancy rate on Jan. 1	...on Dec. 31	Vacancy rate on Jan. 1	...on Dec. 31
1980	9.1% <sup>b</sup>	3.8%	11.9% <sup>b</sup>	5.5%
1984	2.8%	14.9% <sup>c</sup>	3.3%	13.1% <sup>c</sup>
1988	6.0%	5.4%	5.6%	3.9%
1992	11.7% <sup>d</sup>	10.1%	16.1% <sup>d</sup>	14.4%
1996	7.3%	12.3%	5.6%	9.8%
2000	15.1%	14.0%	7.1%	8.3%
2004	10.1%	8.4%	4.6%	3.5%
2008	7.8%	6.7%	5.2%	6.0%
2012	8.4%	TBD <sup>e</sup>	10.0%	TBD <sup>f</sup>

**Source:** Compiled by CRS from the Federal Judicial Center's *Biographical Directory of Federal Judges*, <http://www.fjc.gov/history/home.nsf/page/judges.html>; internal CRS judicial nominations database; and Administrative Office of the United States Courts' *Archive of Judicial Vacancies*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx>.

**Notes:** This table shows the vacancy rates for circuit and district court judgeships on January 1 and December 31 for each presidential election year from 1980 to 2008, as well as these rates on January 1 for the presidential election year of 2012.

- a. Vacancy rates for district courts in this table account only for vacant judgeships in the Article III district courts, and not for vacancies in the territorial district courts.
- b. Influenced in part by the 1978 omnibus judgeship act, enacted on October 20, 1978, which authorized the creation of 117 new district court judgeship and 35 new circuit court judgeships.
- c. Influenced in part by federal judgeship legislation enacted on July 10, 1984, which authorized 61 new district court judgeships and 24 new circuit court judgeships.
- d. Influenced in part by the Federal Judgeship Act of 1990, enacted on December 1, 1990, which authorized 74 new district court judgeships and 11 new circuit court judgeships.
- e. As of June 30, 2012, the circuit court vacancy rate was 6.7%.
- f. As of June 30, 2012, the district court vacancy rate was 8.9%.

**Table 4** further reveals that the U.S. district court vacancy rate declined in four of the eight most recent completed presidential election years, while it increased in the other four years. Specifically, as had the circuit court vacancy rate in 1980, the district court vacancy rate in 1980 declined substantially, from 11.9% on January 1 to 5.5% on December 31. In three other years—1988, 1992, and 2004—the vacancy rate declines were more marginal, falling less than two percentage points in each instance. The table, by contrast, reveals that the district court vacancy rate *increased* in four other presidential election years—in 1984, 1996, 2000, and 2008. In two of these years, the increases were relatively substantial—from 3.3% to 13.1% in 1984, and from 5.6% to 9.8% in 1996—and more marginal in the other two years—from 7.1% to 8.3% in 2000, and from 5.2% to 6.0% in 2008.

The circuit and district court vacancy rates that will exist at the end of 2012 remain to be seen. As of January 1, 2012, the circuit court vacancy rate was 8.4%, and the district court vacancy rate was 10.0%. As of June 30, 2012, the circuit court vacancy rate had declined to 6.7% (the same as

it was on December 31, 2008), while the district court vacancy rate decreased to 8.9% (though it was still higher than the end-of-year vacancy rate of any presidential election year since 1996).

## **Effect of Election Year Confirmations on Judicial Vacancy Rates**

A key, though not the sole, factor affecting judicial vacancy rates over any given length of time will be whether Senate confirmations of judicial nominations during that time keep up with, or fall behind, the creation of new judicial vacancies.<sup>41</sup>

During certain presidential election years in the 1980 to 2008 period, Senate confirmation rates appeared related to the rise or fall in judicial vacancy rates over the course of the year. Illustrative of this point was 1980, in which the circuit and district court vacancy rates as of January 1 were both more than cut in half by December 31 (with the circuit rate falling from 9.1% to 3.8% and the district rate from 11.9% to 5.5%). The declines in vacancy rates were in large part the result of the Senate's confirming a relatively high percentage, 71.4%, of the circuit court nominees with nominations pending that year (10 of 14) and a relatively high percentage, 77.9%, of the pending district court nominees (53 of 68).

The year 1996, by contrast, was illustrative of a low rate of confirmations contributing to an increase in judicial vacancies. As **Table 4** above shows, the circuit court vacancy rate of 7.3% on January 1 increased to 12.3% by December 31; over the same period, the district court vacancy rate increased from 5.6% to 9.8%. Contributing to these vacancy rate increases were the relatively low rates at which the Senate that year confirmed pending judicial nominations—specifically, confirming 18.2% (2 of 11) of President Clinton's circuit court nominees and 46.2% (18 of 39) of his district court nominees. These were, for both circuit and district court nominees, the lowest annual confirmation rates by the Senate across all presidential election years from 1980 to 2008.

During the 1980 to 2008 period, however, a relatively high confirmation rate in a presidential election year was not always accompanied by a decrease in judicial vacancies. In 1984, for instance, the circuit court vacancy rate of 2.8% on January 1 had, by December 31, increased more than five-fold to 14.9%, while the district court vacancy rate, over the year, had increased almost four-fold, from 3.3% to 13.1%. Both rate increases occurred despite the Senate's having confirmed a relatively high percentage of nominees with nominations pending that year (71.4% of circuit court nominees and 71.7% of district court nominees). The rate increases largely resulted from the enactment on July 10, 1984, of federal judgeship legislation, which authorized 24 new circuit judgeships and 61 new district judgeships. The effective date establishing the new judgeships arguably left little time in the rest of 1984 for nominations to these judgeships to be made by the President and even less time for their consideration by the Senate.

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<sup>41</sup> A CRS study in July 2011, which examined episodes of "historically high" vacancy rates in the lower federal courts, identified the pace of Senate confirmations as among the primary factors contributing to judicial vacancy rate increases. "The two principal apparent factors," the report said, "were the relative slowness in the pace of presidential nominations and delays by the Senate in confirming nominations." A third, though lesser, factor, the report added, "was the departure of a relatively large number of judges from office when the Senate was not in session and therefore unable to receive judicial nominations from the President or to act on judicial nominations it had already received." In some instances, the report also noted, judicial vacancy rates were significantly increased when Congress enacted, as it did in 1984 and 1990, judgeship legislation that created scores of new circuit or district court judgeships. CRS Report RL34615, *Nomination and Confirmation of Lower Federal Court Judges in Presidential Election Years*, by Denis Steven Rutkus, p. 36.

Notably, a relatively low confirmation rate was not always, during the 1980 to 2008 presidential election years, accompanied by an increase in judicial vacancies. Illustrative of this point was the year 2008, which began, on January 1, with the circuit court vacancy rate at 7.8%. During the rest of 2008, the Senate confirmed 23.5% (or 4 of 17) of pending circuit nominees, the second-lowest circuit confirmation percentage during the 1980 to 2008 period, and yet the circuit court vacancy rate, by year's end, had decreased somewhat, to 6.7%. In two other years as well, 2000 and 2004, the circuit court vacancy rate, from January 1 to December 31, dropped somewhat, despite the Senate's having confirmed relatively low percentages of the circuit court nominees whose nominations were pending in those years.<sup>42</sup>

## Conclusion

To provide historical context for the Senate as it processes judicial nominations during the rest of 2012, this report has analyzed the number and timing of U.S. circuit court and district court nominations confirmed by the Senate in presidential election years dating back to 1980. The report, however, has not addressed, or suggested ways to resolve, a sensitive policy question—namely, to what extent should past practice or “custom” from previous presidential election years guide the Senate's processing of judicial nominations during the current election year?

If the Senate determines that the processing of judicial nominations in past election years is an important point of reference for influencing its actions in 2012, that determination might raise its own specific set of issues. These might include, Which previous election years or periods of time are most relevant for the Senate to consider in acting on judicial nominations? Does it matter whether, during these earlier years, the majority party in the Senate was the same as that of the President—with the past practices in processing judicial nominations more or less important depending on whether the Senate and the President were of the same political party? Do previous election years support treating circuit court nominees differently from district court nominees, in terms of how late the Senate acts on such nominations?

Of course, the Senate might determine that other considerations are also relevant in deciding how many circuit or district court nominees to confirm in any given presidential election year, or how late in the year to confirm them. Such considerations might include the number of judgeships that are currently vacant, whether that number is relatively high or low compared with judicial vacancy numbers in previous election years, and how many of those vacancies have been classified by the federal judiciary as “judicial emergencies.”<sup>43</sup> Another relevant consideration

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<sup>42</sup> While the Senate confirmed 30.8% (8 of 26) of pending circuit court nominees over the course of 2000, the circuit court vacancy rate that year fell from 15.1% on January 1 to 14.0% on December 31. During 2004, while the Senate confirmed 25.0% (5 of 20) of pending circuit court nominees, the circuit court vacancy rate fell from 10.1% on January 1 to 8.4% on December 31.

<sup>43</sup> The Judicial Conference of the United States defines a judicial emergency for the circuit courts as any circuit court vacancy where adjusted case filings per appellate panel are in excess of 700 or any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel. For the district courts, a judicial emergency is defined as any district court vacancy where weighted filings are in excess of 600 per judgeship, any vacancy in existence more than 18 months where weighted filings are between 430 and 600 per judgeship, or any 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>.

might be the number and percentage of an incumbent President's judicial nominations that have been confirmed thus far in his presidency, and how those figures compare with those of his recent predecessors at a similar point in their presidencies. A third consideration might be whether a nominee has bipartisan home state Senator support, with at least one of the home state Senators returning a positive blue slip for a nominee being of the opposite party from the President's. The weight accorded these considerations, as well as others, might affect whether the Senate adheres to, modifies, or departs from the customs and patterns established in prior presidential election years.

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