

# CRS Report for Congress

## Nomination and Confirmation of Lower Federal Court Judges in Presidential Election Years

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## Summary

This report seeks to shed light on whether Senate processing of lower court nominations, particularly to the courts of appeals, has tended over recent decades to slow down in presidential election years. The report begins by reviewing recent debate, and historical events dating back to 1980, concerning whether the Senate and its Judiciary Committee customarily observe a practice referred to as the “Thurmond rule.” Next, the report provides narratives on each presidential election year from 1980 to 2004, reviewing Senate and committee actions taken on court of appeals and district court nominations in each of the years. The report then compares these years quantitatively, examining the number and percent of nominations processed and the last dates of committee and Senate action taken. Findings include the following:

- Senators of both parties at different times have spoken of their expectations of a drop-off in processing of judicial nominations occurring earlier in presidential election years than in other years. However, there is no written Senate or Judiciary Committee rule — nor was any bipartisan agreement reached during the 1980-2004 period — concerning judicial nominations in presidential election years.
- The Senate has, on average, confirmed fewer court of appeals nominees in presidential election years than in any other year of a presidential term between 1977 and 2007.
- In the presidential election years from 1980 to 2004, there was no consistently observed date after which the Judiciary Committee or Senate ceased processing lower court nominations; however, in the three most recent completed presidential election years, the Senate confirmed its last court of appeals nominee in July or earlier, while in the four preceding presidential election years, the Senate confirmed its final court of appeals nominee in October or later.
- On average, fewer court of appeals nominations received hearings, were reported, and were confirmed in the three most recent completed presidential election years (1996, 2000, and 2004) than in the four preceding presidential election years (1980, 1984, 1988, and 1992).
- From 1980 to 2004, the Senate confirmed, on average, more nominations (and a greater percentage of pending nominations) in years when the Senate majority was of the President’s party than years in which partisan control of the presidency and the Senate was divided.

The report also outlines relevant considerations for Senators in deciding whether to seek to speed or slow the judicial confirmation process in a presidential election year. These considerations include the public policy views of the incumbent President (and his successor), patronage considerations for Senators of both political parties, the appearance of a partisan judicial confirmation process, and whether a slowdown might greatly affect the judicial vacancy rate.

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# Nomination and Confirmation of Lower Federal Court Judges in Presidential Election Years

## Introduction

A continuing point of contention in the second session of the 110<sup>th</sup> Congress has been the pace at which the Senate should consider judicial nominations, particularly those to the courts of appeals, in a presidential election year. Some Senators, along party lines, have differed as to whether, thus far in the 110<sup>th</sup> Congress, a sufficient number of court of appeals nominees have been confirmed, or are on track to be confirmed.<sup>1</sup> As of July 31, 2008, the Senate had confirmed 10 court of appeals nominations in the 110<sup>th</sup> Congress, with 4 of those confirmations coming in the second session.<sup>2</sup>

President Bush has repeatedly claimed that the Senate has failed to hold hearings, report, and provide confirmation votes for his court of appeals nominees at a pace that he views as acceptable,<sup>3</sup> and several Senators have argued that previous Presidents fared better as their terms came to an end.<sup>4</sup> Other Senators, however, in defense of the Senate's recent performance in considering judicial nominations, have asserted that the Senate's consideration of nominees to the courts of appeals

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<sup>1</sup> See, for instance, the contrasting views on this question in the floor remarks of the Senate minority leader on June 5, 2008, and of the chairman of the Senate Judiciary Committee on June 10, 2008. Sen. Mitch McConnell, "Judicial Nominations," *Congressional Record*, daily edition, vol. 154 (June 5, 2008), p. S5128; and Sen. Patrick J. Leahy, "Nomination of Mark Steven Davis to be United States District Judge for the Eastern District of Virginia," *Congressional Record*, daily edition, vol. 154 (June 10, 2008), pp. S5413-S5416.

<sup>2</sup> For periodically updated information on the number of pending and confirmed nominees to the U.S. courts of appeals and the district courts, see CRS Report RL33953, *Nominations to Article III Lower Courts by President George W. Bush During the 110th Congress*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

<sup>3</sup> U.S. President (G.W. Bush), "Remarks on Nominations Awaiting Senate Confirmation," *Weekly Compilation of Presidential Documents*, vol. 44 (Feb. 7, 2008), pp. 160-162; U.S. President (G.W. Bush), "President's Radio Address," *Weekly Compilation of Presidential Documents*, vol. 44 (Feb. 9, 2008), pp. 176-177; and U.S. President (G.W. Bush), "Remarks at the Federalist Society's 25<sup>th</sup> Annual Gala Dinner," *Weekly Compilation of Presidential Documents*, vol. 43 (Nov. 15, 2007), pp. 1507-1510.

<sup>4</sup> Sen. Arlen Specter, "Justice Delayed," *Wall Street Journal*, Feb. 1, 2008, p. A14; Sen. Orrin G. Hatch, "The Confirmation Process," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Apr. 1, 2008), pp. S2263-S2265; and Sen. Mitch McConnell, "Nominations," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (July 17, 2008), pp. S6909-S6910.

traditionally slows in presidential election years, and that the Senate, in the 110<sup>th</sup> Congress, has more than kept pace with the judicial confirmation performance of the Senate in other recent Congresses.<sup>5</sup>

The ranking minority member of the Senate Judiciary Committee, Senator Arlen Specter of Pennsylvania, has faulted the Senate majority for declining to allow committee consideration of several court of appeals nominees who, he maintains, are highly qualified and deserve to be confirmed. “The reason they have not been approved,” Senator Specter contended, “is that there is an interest in holding open these vacancies in the event there is a President of the other party to fill them with the Democrats.”<sup>6</sup> Senator Patrick J. Leahy of Vermont, chairman of the Judiciary Committee (to which circuit court of appeals and district court nominations are referred), has rejected minority criticisms of the committee’s handling of President Bush’s judicial nominations. “I have always said,” Senator Leahy stated on the Senate floor, “that we would treat this President’s nominees more fairly than Republicans treated President Clinton’s. And we have.”<sup>7</sup>

This report seeks to inform the current debate by analyzing how the Senate processed court of appeals and district court nominations in presidential election years dating back to 1980. In so doing, the report addresses the question of whether the Senate would be in keeping with past experience if, at some point in the current session of this Congress, it deliberately slowed down, or stopped altogether, its consideration of pending lower court nominations in anticipation of the November 4, 2008, presidential election. It also seeks, among other things, to determine whether Members of the Senate have had a shared understanding or expectation that there will be a decline in Senate action on judicial nominations in presidential election years, at what point in presidential election years such declines in Senate activity on lower court nominations have tended to occur, and whether a smaller number of lower court nominations are typically processed in a presidential election year than in other years of a presidential term.

The report begins its inquiry with an overview of recent Senate debate on whether the Senate and its Judiciary Committee customarily observe a practice

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<sup>5</sup> Sen. Patrick J. Leahy, “Judicial Nominations,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Mar. 3, 2008), pp. S1460-S1462; and Sen. Harry Reid, “Confirmation of Judges,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Apr. 10, 2008), pp. S2829-S2830.

<sup>6</sup> Sen. Arlen Specter, “Confirmation Process,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (July 17, 2008), pp. S6897.

<sup>7</sup> Sen. Patrick J. Leahy, “Nomination of Glenn T. Suddaby to be United States District Judge,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (July 22, 2008), p. S7084. On an earlier occasion, Senator Leahy, in a floor statement, remarked, “There seems to be no steps we could take to satisfy Republicans on nominations, because they are using it as a partisan issue to rev up their partisan political base.” Sen. Patrick J. Leahy, “Nomination of Mark Steven Davis to be United States District Judge for the Eastern District of Virginia,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (June 10, 2008), p. S5416.

referred to by some as the “Thurmond rule.”<sup>8</sup> Next, to provide historical perspective, the report provides separate narratives on each presidential election year from 1980 to 2004, reviewing the actions taken on lower court nominations in each of these years. The report then compares each of these presidential election years quantitatively, examining in each year the number and percent of judicial nominations processed as well as the last dates of committee and Senate action taken on the nominations.

Thereafter, the report compares the number of judicial nominations processed by the Judiciary Committee and the Senate in each of the presidential election years from 1980 to 2004 with the other years of the presidential terms in question. A final section reviews a range of reasons for Senators to oppose, or to favor, a slowdown in processing judicial nominations in presidential election years. It concludes by noting possible options for the Senate, during the remainder of the 110<sup>th</sup> Congress, that, if undertaken, might alleviate partisan controversy concerning the processing of judicial nominations in a presidential election year. The report, in most sections, focuses primarily on Senate consideration of court of appeals nominations, and to a lesser extent on district court nominations, reflecting the fact that, in the 110<sup>th</sup> and other recent Congresses, controversies over the judicial confirmation process usually, if not always, have involved court of appeals nominations.

Various findings can be drawn from the report’s aforementioned sections, among them the following:

- Senators of both parties, some closely associated with the judicial confirmation process, have, at different times, spoken of their expectations of a drop-off in Senate processing of lower court nominations occurring earlier in presidential election years than in other years. Usually, if not always, they have done so when they were not members of the President’s political party.
- There is no written Senate or Judiciary Committee rule concerning judicial nominations in a presidential election year. Nor, during the 1980-2004 period, was an apparent consensus or bipartisan agreement ever reached in the Senate regarding how many judicial nominations should be processed in a presidential election year or how late in the year they should be processed.
- In the presidential election years from 1980 to 2004, there was no consistently observed date, or point in time, after which the Senate Judiciary Committee or the Senate ceased processing lower court nominations.
- The last seven presidential election years have varied considerably in terms of number of lower court nominations that received hearings, were reported, and were confirmed by the Senate.

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<sup>8</sup> As is discussed in greater detail later in this report, most Senators who have cited the Thurmond rule have characterized it as an established practice according to which, at some point in a presidential election year, the Judiciary Committee and the Senate no longer act on judicial nominations — with exceptions sometimes made for nominees who have bipartisan support from Senate committee and party leaders.

- The 1996 presidential election year and subsequent presidential election years (2000 and 2004) have seen fewer court of appeals nominees processed, on average, than the presidential election years from 1980 to 1992.
- Fewer judicial nominations tended to be processed when the presidency and the Senate were controlled by different political parties than when they were under unified partisan control.
- Since 1980, fewer nominees to the courts of appeals, on average, have been reported by the Judiciary Committee and confirmed by the Senate in presidential election years than in other years of a presidential term.
- Of the four years of a presidential term, the presidential election year, on average, has been the second-least productive in terms of number of district court nominations processed by the Senate (the first year of the term being the least productive).

## **Whether the Senate Customarily Observes the “Thurmond Rule”**

Senators have expressed differing views as to whether a drop-off in Senate processing of lower federal court nominations occurs, or should occur, in presidential election years. Some have asserted that, in these years, the Senate Judiciary Committee and the Senate customarily slow down the processing of judicial nominations at earlier points, and confirm fewer nominations, than in other years. Others Senators, however, have rejected the notion that such slowdowns are customary or appropriate, pointing to past presidential election years in which the Judiciary Committee and Senate processed relatively large numbers of judicial nominations, some relatively late in the year.

### **Recent Debate over Thurmond Rule**

Thus far in the 110<sup>th</sup> Congress, the debate in the Senate has revolved largely around the question whether the Senate and its Judiciary Committee customarily observe a practice referred to by some as the “Thurmond rule,” named after the late Senator, and former Judiciary Committee chairman, Strom Thurmond of South Carolina. Those who claim the Thurmond rule exists allege that its origins can be traced to events that occurred in 1980, when Senator Edward M. Kennedy of Massachusetts chaired the Judiciary Committee and Senator Thurmond was the ranking minority member on the committee. Adherents of a Thurmond rule have sometimes differed as to precisely when in the year it takes effect; nevertheless, almost all Senators who have cited it have described it as an established practice according to which, at some point in a presidential election year, the Judiciary Committee and the Senate no longer act on judicial nominations — with exceptions sometimes made for nominees who have bipartisan support from Senate committee and party leaders.

The Senator who most frequently has asserted the existence of a Thurmond rule has been the current chairman of the Judiciary Committee, Patrick J. Leahy. In



December 2006, just before assuming the chairmanship of the committee, Senator Leahy told a law school audience

The Thurmond Rule, in memory of Strom Thurmond — he put this in when the Republicans were in the minority — which said in a presidential election year after Spring no judges would go through except by the consent of both the Republican and Democratic leader.... I want to be bi-partisan. We will institute the Thurmond Rule.<sup>9</sup>

Subsequently, in a March 3, 2008, Senate floor statement, Senator Leahy referred to the “history of the Thurmond Rule, by which Republicans, then [in 1980] in the minority, insisted that judicial vacancies in the last year of a President’s term remain vacant in order to be filled with the nominations of the next President.”<sup>10</sup> Again, four days later, in another floor statement, Senator Leahy recalled that

...when President Reagan was running for President and Senator Thurmond, then in the Republican minority as ranking member of the Judiciary Committee, instituted a policy to stall President Carter’s nominations. That policy, known as the “Thurmond Rule,” was put in when the Republicans were in the minority. It is a rule that we still follow, and it will take effect very soon here.<sup>11</sup>

Subsequently, at a June 12, 2008, meeting of the Judiciary Committee, Senator Leahy indicated that the Thurmond rule he had enunciated earlier was now in effect:

We are now way past the time of a Thurmond rule named after Senator Thurmond when he was in the minority, and I’m trying to respect that. We are still putting judges through. But I must note this point — further judges will be moved only by a consent of the two leaders of the Senate and the two leaders of the committee.<sup>12</sup>

Senator Harry Reid, the Senate majority leader, has expressed agreement with Senator Leahy about the existence of a Thurmond rule. In April 10, 2008, floor remarks, Senator Reid said, “In a Presidential election year, it is always very tough for judges. That is the way it has been for a long time, and that is why we have the Thurmond rule and other such rules.”<sup>13</sup> In similar floor remarks five days later,

<sup>9</sup> Sen. Patrick J. Leahy, remarks in question-and-answer session, at Georgetown [University] Law Forum, following speech entitled, “Ensuring Liberty and Security Through Checks and Balances: A Fresh Start for the Senate Judiciary Committee in the New 110<sup>th</sup> Congress,” Dec. 13, 2006, at [<http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=246>], accessed June 17, 2008.

<sup>10</sup> Sen. Patrick J. Leahy, “Judicial Nominations,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Mar. 3, 2008), p. S1462.

<sup>11</sup> Sen. Patrick J. Leahy, “Judicial Nominations,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Mar. 7, 2008), p. S1731.

<sup>12</sup> Sen. Patrick J. Leahy, Senate Judiciary Committee webcast of June 12, 2008, executive business meeting, at [<http://judiciary.senate.gov/webcast/judiciary06122008-1000.ram>], accessed July 25, 2008.

<sup>13</sup> Sen. Harry Reid, “Confirmation of Judges,” remarks in the Senate, *Congressional Record*, (continued...)

Senator Reid stated, “you know, there is a Thurmond doctrine that says: After June, we will have to take a real close look at judges in a Presidential election year.”<sup>14</sup>

Various minority Senators, however, have disputed the assertion by some majority Senators that there is an established Judiciary Committee or Senate practice known as the Thurmond rule. In an April 1, 2008, floor statement, Senator Orrin G. Hatch, a former chairman of the Judiciary Committee (1995-2001 and 2003-2005), declared, “We have already heard about the so-called Thurmond rule, supposedly justifying grinding the confirmation process to a halt in this Presidential election year. The Thurmond rule neither is a rule nor can it be attributed to the late Senator Strom Thurmond...”<sup>15</sup> Expressing similar sentiments, Senator Jeff Sessions, in April 16, 2008, floor remarks, stated,

I would say there has been talk about invoking the so-called Thurmond Rule. The Thurmond Rule could sort of be, if you want it to be, an excuse for slow-walking nominees and not approving the nominees who ought to be approved just because there is a Presidential election on the horizon. Majority Leader Harry Reid mentioned last night that the so called rule would be invoked in June. Senator Leahy has mentioned before he would invoke it in the second half of this year. Let me say this about the Thurmond Rule. It is a myth. It does not exist. There is no reason for stopping the confirmation of judicial nominees in the second half of a year in which there is a Presidential election.<sup>16</sup>

A similar view was expressed earlier, at the start of the 110<sup>th</sup> Congress in January 2007, by Senator Specter, ranking minority member on the Judiciary Committee (who served as committee chair in the 109<sup>th</sup> Congress). In a Senate floor statement, Senator Specter alluded to “what has been called the ‘Thurmond Rule.’” Some, he said, “have suggested that this so-called rule holds that the Senate should dramatically curtail confirmations after the spring of a presidential election year. Review of the historical record suggests that this rule is more myth than reality.”<sup>17</sup>

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<sup>13</sup> (...continued)

daily edition, vol. 154 (Apr. 10, 2008), p. S2829. Senator Reid, however, indicated that it was not his intention to use his understanding of the Thurmond rule to prevent Senate consideration of judicial nominations that had recently been approved by the Senate Judiciary Committee. He said that he had “indicated to the Republican leader that we are going to try to move these nominations along. We are trying to keep up with the average that has gone on in years past without a lot of political bickering.” Ibid.

<sup>14</sup> Sen. Harry Reid, “Highway Technical Corrections Act of 2007 — Motion to Proceed,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Apr. 15, 2008), p. S3012.

<sup>15</sup> Sen. Orrin G. Hatch, “The Confirmation Process,” *Congressional Record*, daily edition, vol. 154 (Apr. 1, 2008), p. S2264.

<sup>16</sup> Sen. Jeff Sessions, “Judicial Confirmations,” *Congressional Record*, daily edition, vol. 154 (Apr. 16, 2008), p. S3041.

<sup>17</sup> Sen. Arlen Specter, “Judicial Nominations,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (Jan. 4, 2007), p. S27. “The fact of the matter,” Senator Specter continued, “is that the Senate has regularly confirmed judges in presidential election years.”

(continued...)

More recently, in a July 17, 2008 floor statement Senator Specter rejected the idea of applying a Thurmond rule to judicial nominations, no matter which party was in control of the Senate or of the White House. “There is no Thurmond rule for Democrats when Republicans are in control and there is a Democratic President, and there is no Thurmond rule when the situation is reversed,” Senator Specter said.<sup>18</sup>

## Events Cited as Origin of Thurmond Rule

The debate over whether there is, or has ever been, such a “rule” appears to arise from different meanings attached to events involving Senator Thurmond in 1980. At that year’s Republican Party national convention, held in Detroit on July 14-17, Senator Thurmond reportedly said that, at his suggestion, the party’s presidential nominee, Ronald Reagan, had agreed to urge Senate Republicans to block all presidential nominations by President Jimmy Carter until after the November 4 elections.<sup>19</sup> One account, without directly quoting Senator Thurmond, reported him as having said that by withholding their consent, Senators could “prevent appointments that would continue beyond Jimmy Carter’s term, should he be defeated in the general election.”<sup>20</sup> At this time, Senator Thurmond was the ranking minority member on the Judiciary Committee, to which all circuit and district court nominations were referred. The blocking of appointments urged by Senator Thurmond presumably extended to these judicial nominations.

In the weeks immediately thereafter, however, the Judiciary Committee processed district and circuit court nominations, although not all that were referred to the committee. This processing occurred without Senator Thurmond, during this time or during the rest of the year, repeating his earlier call for a blocking of President Carter’s appointments. As described below, in a more detailed narrative of judicial nominations activity in the Senate during 1980, the Judiciary Committee continued to hold hearings on and report judicial nominations during August and September, although the committee reported only one circuit court nomination during this period. The Senate, in turn, in September confirmed 12 judicial nominations (11 district court, 1 circuit court). Following the November 4 presidential election, in which the Republican challenger, Ronald Reagan, defeated Democratic incumbent Jimmy Carter, the Judiciary Committee and Senate acted on one more judicial

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<sup>17</sup> (...continued)

He noted that in the election year of 1980, “when it is asserted Senator Thurmond inaugurated the so-called rule,” the Senate, after September 1, confirmed 11 district court nominees and 2 circuit court nominees. *Ibid.*, pp. S27-S28.

<sup>18</sup> Sen. Arlen Specter, “Confirmation Process,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (July 17, 2008), p. S6897.

<sup>19</sup> Senator Thurmond, one account reported, “said he told Reagan that he should contact Minority Leader Howard H. Baker Jr. (R.-Tenn.) and all other Republican members of the Senate in an attempt to withhold Senate confirmation of appointments [until after the Nov. 4 election]. ‘He said he would be glad to do that,’ Thurmond said.” “Reagan May Seek to Bar New Carter Nominations,” *Washington Post*, July 17, 1980, p. A15. See also, “GOP Senators Urged to Stall Appointments,” *Los Angeles Times*, July 17, 1980, p. A19.

<sup>20</sup> “Campaign: GOP,” *National Journal*, vol. 12, July 26, 1980, p. 1248.

nomination. Without opposition from Senator Thurmond or other minority committee members, the Judiciary Committee voted 12-0 to report President Carter's nomination of Stephen G. Breyer to the U.S. Court of Appeals for the First Circuit,<sup>21</sup> a nomination that the Senate subsequently confirmed, by a vote of 80-10, in December, a week before the Senate adjourned *sine die*.<sup>22</sup>

Earlier, in mid-September 1980, the news media had reported conflict between the Democratic majority and Republican minority in the Senate Judiciary Committee over the pace at which judicial nominations were being processed. A press account of the committee's September 10 meeting reported that Senator Thurmond's move to block a vote on 13 judicial nominations was perceived by "some Democrats ... as a Republican plot to delay all judgeship nominations in the hopes that Ronald Reagan will be elected president and can fill the posts with good Republicans."<sup>23</sup> However, a week later, on September 17, the committee approved motions, to which no objections were heard, to report 10 of the judicial nominations (all district court nominations) to the Senate. Six other judicial nominations that were also on the committee's agenda on September 17 were not reported. Following the votes to report, Senator Thurmond stated that he intended to exercise his privilege, under the committee's rules, of "carrying over" to a later committee meeting a vote on three other judicial nominees who had "just had a hearing." Senator Thurmond prefaced that statement with the following remarks:

Now, Mr. Chairman, I want to say at this juncture, let me make the point, that the Minority has tried to be more than fair in considering all of the nominees that have appeared before this committee. I would remind you it is just about six weeks before the election, and I want to say that for a year and a half before the last election, there was no action taken on judges when we had a Republican President. But, anyway, last week it was necessary for me to lay over all 13 judicial nominees because our investigation had not been entirely completed on some of them. Today I will again exercise the privilege and request that the three that have just had a hearing ... be held over."<sup>24</sup>

For more than 15 years after the 1980 events just described, debates over judicial nominations in the Senate took place without Senators ever referring to a Thurmond rule by name. At various points in that time period, however, majority

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<sup>21</sup> One news story reported that in "exchange for Republican support for Breyer," the chairman of the Judiciary Committee, Senator Kennedy, "agreed not to push 17 other Carter judicial nominations pending in the committee." "Breyer Nomination Stalled," *Congressional Quarterly Weekly Report*, vol. 38, Nov. 29, 1980, p. 3443. Breyer, at the time of his nomination, was the chief majority counsel of the Senate Judiciary Committee.

<sup>22</sup> See *Congressional Quarterly Almanac, 1980*, vol. 34 (Washington: Congressional Quarterly Inc., 1981), pp. 16A-17A.

<sup>23</sup> Richard L. Lyons, "On Capitol Hill," *Washington Post*, Sept. 11, 1980, p. A8.

<sup>24</sup> "Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session No. XIV, September 17, 1980," Miller Associates Reporting Service, p. 4. (Copy in archival records of the Senate Judiciary Committee.)

Senators recalled the 1980 events, critically characterizing Senator Thurmond's role in 1980 as aimed at "shutting down" the judicial confirmation process.<sup>25</sup>

The first actual public mentions by Senators of the Thurmond rule as such appear to have been made in 1997. At a February 12, 1997 press conference, Senator Leahy alluded to a Thurmond rule while noting the lack of progress on President Clinton's nominations to the courts of appeals during 1996, a presidential election year.<sup>26</sup> The phrase "Thurmond rule" first appeared in the *Congressional Record* two months later, in a floor statement by Senator Leahy, expressing frustration with the pace of Senate consideration of judicial nominations at the beginning of President Clinton's second term.<sup>27</sup>

## Emergence of Thurmond Rule as an Issue

The Thurmond rule first emerged as a major point of contention between Senate Democrats and Republicans in 2004. In a Senate floor statement in July 2004, Senator Leahy, then the ranking minority member on the Judiciary Committee, maintained that the majority in the Senate was, at that point, "intent on violating the 'Thurmond Rule' and the spirit of cooperation reached earlier this year" on processing President George W. Bush's judicial nominations. The "Thurmond rule," Senator Leahy said,

... dates back at least to July 1980 when the Reagan campaign urged Senate Republicans to block President Carter's judicial nominees. Over time, Senator Thurmond and Republican leaders refined their use and practices under the rule to prevent the consideration of lifetime judicial appointments in the last year of

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<sup>25</sup> For example, in 1992, Senator Howard Metzenbaum of Ohio, in an exchange with Senator Thurmond at a Senate Judiciary Committee meeting, called the latter "the leader in shutting down entirely the question of judicial nominees in 1980." "Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session, Sept. 12, 1992," Miller Reporting Co. Inc., p. 12. (Copy in archival records of the Senate Judiciary Committee.) In 1996, at a Judiciary Committee meeting, Senator Joseph R. Biden Jr. of Delaware, reportedly said that Senator Thurmond in 1980 "decided that Carter was going to lose and that Reagan would win, so he announced there would be no more judges and shut the whole process down in June." "Hatch Puts Judges on Hold, Unleashing Dem Anger," *National Journal's CongressDaily*, Sept. 20, 1996, at [<http://www.lexisnexis.com>], accessed July 22, 2008. See subsequent sections of this report for more detailed discussion of the Senate's processing of judicial nominations in the presidential election years of 1992 and 1996.

<sup>26</sup> Senator Leahy reported said, "I understand under the Strom Thurmond rule that started years ago, that ... in a presidential election year, you tend to slow down on confirming judges appointed by the president. But this goes a little bit beyond." Sen. Patrick J. Leahy, news briefing, Feb. 12, 1997, FDCH Political Transcripts.

<sup>27</sup> "We have followed, in the past," Senator Leahy said, the so-called Thurmond rule of stalling a President's appointments to the judiciary in about the last few months of their term in office. I have never seen the stall start in the first few hours of a President's 4-year term." Sen. Patrick Leahy, "The Crisis In Our Federal Judiciary," remarks in the Senate, *Congressional Record*, daily edition, vol. 143, Apr. 17, 1997, p. S3391.

a Presidency unless [unless the nominees under consideration were] consensus nominees.”<sup>28</sup>

At about the same time, however, Senator Hatch, then chairman of the Judiciary Committee, rejected the notion that a Thurmond rule existed. In Senate floor remarks, he stated,

We have heard from the other side about the mythical ‘Thurmond rule’ and all kinds of other suggestions that judges should not be confirmed from here on, this late in a Presidential election year. I remember way back when, cases where we confirmed judges, Democratic nominees, Carter nominees, even after President Reagan had won the election. In fact, one of them [Stephen Breyer] is sitting on the Supreme Court of the United States of America.<sup>29</sup>

Senator Hatch had also dismissed the Thurmond rule a month earlier. During a Judiciary Committee business meeting, Senator Hatch referred to the “so-called Thurmond Rule,” while expressing hope that the committee would report several of President Bush’s circuit court nominations.<sup>30</sup>

Amid this debate in 2004, an analysis of the Thurmond rule by a Capitol Hill newspaper referred to it as a “new concept [that] has crept into the back-and-forth between Republicans and Democrats — or at least a long-dormant one [that] has been dusted off.... “ The article, based on contacts made with some Senators and senior Senate staff, reported that “even some of the most skillful senators aren’t quite sure whether the Thurmond Rule is really a rule at all. Some call it a ‘precedent.’ Others term it a ‘general understanding.’ Some have never even heard of it.”<sup>31</sup> Sources for the article cited different points in time at which, according to their view of the rule, the Senate would stop processing judicial nominations: on July 1, or at the beginning of the first national political party convention that summer, or during the last few months of a President’s term in office.

One of the Senators interviewed for the article was Senator Kennedy, a longtime member of the Judiciary Committee and former chairman (1979-1981). The article reported that Senator Kennedy said that, at the point the Thurmond rule went into effect during a presidential election year, “‘for all intents and purposes, we’d leave it,’ meaning not confirm any more judges. ‘That having been said,’ he added, ‘there

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<sup>28</sup> Sen. Patrick J. Leahy, “Nomination of Henry W. Saad to be United States Circuit Judge for the Sixth Circuit,” remarks in the Senate, *Congressional Record*, daily edition, vol. 150 (July 22, 2004), p. S8588.

<sup>29</sup> Sen. Orrin G. Hatch, “The Nomination of William Gerry Myers III to be a U.S. Circuit Judge for the Ninth Circuit,” remarks in the Senate, *Congressional Record*, daily edition, vol. 150 (July 19, 2004), pp. S8406-S8412.

<sup>30</sup> “Statement of Chairman Orrin G. Hatch before the United State Senate Committee on the Judiciary,” June 3, 2004, at [[http://judiciary.senate.gov/member\\_statement.cfm?id=1211&wit\\_id=51](http://judiciary.senate.gov/member_statement.cfm?id=1211&wit_id=51)], accessed June 18, 2008.

<sup>31</sup> Geoff Earle, “Senators Spar over ‘Thurmond Rule,’” *The Hill*, vol. 11, July 21, 2004, p. 4.

has always been sort of an effort to try and work through some sort of accommodation at different times.”<sup>32</sup>

The article (without identifying any Republican Senator by name) reported that Republicans, as well Democrats, “acknowledge there is a Thurmond Rule, or at least a precedent dating back to the days when Thurmond chaired the Judiciary Committee.”<sup>33</sup> However, the article also indicated that, in 2004, with Republican President George W. Bush then in office, invocation of a Thurmond rule to slow down processing of judicial nominations would be more to the advantage of Senate Democrats than to Senate Republicans. “By invoking the Thurmond Rule,” the article said, “Democrats may be able to attach legitimacy to their ongoing campaign against some [of] President Bush’s controversial nominees in a chamber that reveres history and precedent.”<sup>34</sup>

### **Slowdowns Cited as Traditional, Without Reference to Thurmond Rule**

Sometimes, in recent decades, Senators, without referring to a Thurmond rule for support, have maintained that it is traditional Senate practice to slow down, or stop altogether, the processing of judicial nominations in presidential election years. For example, in a Senate floor statement in September 1980, Senator Mark Hatfield of Oregon, spoke (although he did so disapprovingly) of “what may have been a tradition in this body in years past of holding up nominations per se in an election year.”<sup>35</sup>

Subsequently, in March 2000, during Senate floor consideration of two Clinton court of appeals nominations, Senator Robert C. Smith of New Hampshire, a member of the Senate’s Republican majority, questioned a contention allegedly made in floor remarks by two Democratic Senators — specifically, “that there does not seem to be much of a history of blocking nominees and that it is not good for the constitutional process.”<sup>36</sup> Senator Smith indicated he had a contrary view:

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid. The article, however, singled out only one unnamed Republican staff member, and no Republican Senators, as attesting to this rule or traditional practice. Specifically, the article cited “one senior Republican aide [who] said the tradition was a general understanding that there would be no floor votes on controversial nominees, rather than an understanding that there would be no action on nominees at all.” Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Sen. Mark Hatfield, “Executive Session,” remarks in the Senate, *Congressional Record*, vol. 126, part 21 (Sept. 29, 1980), p. 27758. A fuller discussion of the context of Senator Hatfield’s remarks, made on behalf of a three-member Republican panel that had reviewed President Jimmy Carter’s judicial and executive branch nominations then before the Senate, is provided below, in the section that discusses Senate processing of judicial nominations in 1980.

<sup>36</sup> Sen. Robert C. Smith, “Nomination of Richard S. Paez and Marsha L. Berzon — Continued,” remarks in the Senate, *Congressional Record*, daily edition, vol. 146 (Mar. 7, (continued...))

There is thinking among some that we should not start down this path of blocking a judicial nominee whom we do not think is a good nominee for the court because it may come back to haunt us at some point when and if a Republican should be elected to the Presidency.

Let me say, with all due respect to my colleagues, I am not starting down any new path. The tradition of the Senate is one of blocking judicial nominees in the final year of an administration.<sup>37</sup>

Other Senators, also without referring to a Thurmond rule, have characterized Senate practice in a presidential election year not as one of blocking judicial nominations but of slowing down the confirmation process. In July 2000, for instance, the chairman of the Senate Judiciary Committee, Senator Hatch disagreed with assertions of some minority Senators that the Senate in 2000 had not confirmed a sufficient number of court of appeals nominations. Senator Hatch maintained that the Senate's record in considering circuit nominees up to that point in the session compared favorably with the record of the Senate in prior presidential election years. He added, however, that in "presidential election years, the confirmation of appellate court nominees historically has slowed."<sup>38</sup> A few weeks later, Senator Hatch was reported as saying (without, however, being quoted directly) that "in every election year, a point is reached when the Senate simply ceases anyway to move judicial nominees, deciding to leave filling vacancies up to the next president."<sup>39</sup>

## **Senate Processing of Nominations in Presidential Election Years, 1980-2004**

To some degree, debate concerning judicial nominations during presidential election years dates back to 1948.<sup>40</sup> In that presidential election year, a scholar noted,

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<sup>36</sup> (...continued)  
2000), p. S1211.

<sup>37</sup> Ibid.

<sup>38</sup> "Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session, July 20, 2000," Miller Associates Reporting Service, pp. 6-7. (Copy in archival records of Senate Judiciary Committee.)

<sup>39</sup> Lee Davidson, "Hatch Says Lee Appointment May Doom Judiciary Choices," *Deseret* [Salt Lake City] *News*, Aug. 4, 2000, p. A7. A fuller discussion of the context of Senator Hatch's remarks, both those made at the July 20, 2000 meeting of the Judiciary Committee (cited in preceding footnote), and those reported on Aug. 4, 2000, is provided below, in the section that discusses Senate processing of judicial nominations in 2000.

<sup>40</sup> An additional controversy that has occasionally marked presidential election years is the creation of new judgeships and the timing of appointments to those new positions. Members of Congress, in debate over judgeship legislation, have sparred with one another and with the President over whether the incumbent President or only his successor would be able to fill the judgeships. See, e.g., Warren Weaver, Jr., "Judgeships Ban Decried By G.O.P.," *New York Times*, Aug. 10, 1960, p. 18 ("Attorney General William P. Rogers termed 'most regrettable' the apparent decision by Senator Lyndon B. Johnson of Texas, the majority (continued...)



“with Republicans anticipating the recapture of the White House, confirmations ground to a virtual halt: only two lifetime federal district court nominees and one appeals court nominee were confirmed.”<sup>41</sup> Commentators have also called attention to perceived slowdowns in the consideration of judicial nominees in 1960<sup>42</sup> and 1976.<sup>43</sup> In 1960, the Senate confirmed two court of appeals and nine district court nominees while returning the nominations of four district court nominees when the Senate adjourned *sine die* on September 1, 1960.<sup>44</sup> In 1976, the Senate confirmed five court of appeals nominees (the last on September 17, 1976) and 26 district court

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<sup>40</sup> (...continued)

leader, to oppose any increase in the Federal judiciary before Congress adjourns, about Labor Day.”); and Lesley Oelsner, “Burger Accuses Congress of Lag on Court Reform,” *New York Times*, Feb. 16, 1976, p. 1 (“The Chief Justice also suggested, without elaboration, that because of Presidential election year politics Congress was failing to act on one particular court problem — the need for dozens of additional judges.”)

<sup>41</sup> Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven: Yale University Press, 1997), p. 81. (Hereafter cited as Goldman, *Picking Federal Judges*.) Goldman’s assessment of 1948 may not be correct; the only district court judges confirmed in 1948 were to district courts in the Canal Zone and the Virgin Islands, both of which were territorial courts with limited-term appointments. The Senate returned five other district court nominations in 1948, including one nomination to the district court in Alaska, which, at the time, was a limited-term appointment. The Senate actually confirmed two (not one) court of appeals nominations, but one of the confirmations was for a judge who already served on the court and was confirmed to the position of “chief justice” of the Court of Appeals for the District of Columbia. (At the time, that court, like the U.S. Supreme Court, designated its members as “justices” and had a separate position for chief justice.) Those two nominations were President Truman’s only two nominations to the courts of appeals in 1948.

<sup>42</sup> See, e.g., “Random Notes in Washington: Spoils Preserved for the Victor,” *New York Times*, Sept. 26, 1960, p. 24, which reported the failure of various judicial and executive branch nominations to be confirmed before the Congress’s final adjournment. In an election year, the article commented, the “party controlling the Congress, when it bears a different name, hesitates to confirm the Presidential nominations. There seems to be hope always that the Administration and appointive power will change.” See also Abner J. Mikva, “Bench Games: Election Year or Not, the U.S. Senate Too Often Blocks Judicial Nominees for Partisan Or Petty Reasons,” *Legal Times*, Feb. 28, 2000, p. 70.

<sup>43</sup> One scholar, for instance, described the presidential election year of 1976 as one in which “Democrats, in control of the Senate, would be reluctant to confirm judgeships until after the election,” ultimately declining to confirm 10 of Republican President Gerald R. Ford’s district and appeals court nominations. Goldman, *Picking Federal Judges*, p. 205. At the final adjournment of the 94<sup>th</sup> Congress on Oct. 1, 1976, according to one news analysis, “about a dozen lifetime or 15-year federal judgeships were blocked from confirmation — some on substantive grounds, others because they were received late.” Senate Democrats, according to this analysis, had held up some nominations “because they didn’t like the policies or politics of the nominees, or wanted to prevent President Ford — who might not be here next year — from making appointments that possibly could be made by Democrat Jimmy Carter if he wins the presidency on Nov. 2.” Spencer Rich, “Ford Nominations to Long-Term Posts Die in Congress,” *Washington Post*, Oct. 3, 1976, p. 8.

<sup>44</sup> Two nominees, one each to a court of appeals and a district court, were also confirmed on Sept. 1, 1960; an additional district court nomination was confirmed on Aug. 27, 1960.

nominees (the last on September 23, 1976) and returned two court of appeals and eight district court nominees upon adjourning *sine die* on October 1, 1976.<sup>45</sup>

Although 1948, 1960, and 1976 are occasionally held up as examples of the Senate slowing consideration of judicial nominees in presidential election years, events that took place in 1980 appear to be the earliest points of reference for current debate on this subject. Accordingly, the following narratives of Senate consideration of judicial nominees in specific presidential election years start with 1980 and end with 2004.

## 1980

In a retrospective look at the second session of the 96<sup>th</sup> Congress, the 1980 *Congressional Quarterly Almanac* reported that Senate Republicans, “hoping to keep as many appointments as possible open for President-elect Reagan, managed to defer action on many presidential nominees at the end of the second session of the Ninety-sixth Congress.” These, the *Almanac* said, included “17 prospective federal judges ... left unconfirmed by the Senate.”<sup>46</sup> From a different perspective, however, the Senate, and its Judiciary Committee, could be viewed as having approved the bulk of President Carter’s lower court nominations pending in the second session. In the course of doing so, the committee processed some lower court nominations in late September, shortly before the Senate recessed for the month of October in anticipation of the presidential election on November 4. It also acted on one court of appeals nomination as late as December, after the Senate reconvened for a “lame duck” session.

The Senate convened for the start of the second session of the Ninety-sixth Congress on January 3, 1980, and adjourned *sine die* on December 16, 1980. At the start of the session, 16 district court nominations and 4 circuit court nominations were pending (having been carried over from the first session). Subsequently, during the second session, the Senate received 51 more district court and 10 more circuit court nominations. Of the 67 district court nominations pending during the second session, the Senate confirmed 53 while returning 12 at the end of the session.<sup>47</sup> Of the 14 circuit court nominations pending during the second session, the Senate confirmed 10 and, at session’s end, returned 4.

During the second session, the Judiciary Committee continued to hold hearings or report district and circuit nominations during the months of June,<sup>48</sup> July, August

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<sup>45</sup> President Ford also withdrew the district court nomination of William Poff on June 7, 1976.

<sup>46</sup> *Congressional Quarterly Almanac, 96<sup>th</sup> Congress, 2<sup>nd</sup> Session* (Washington, DC: Congressional Quarterly Inc., 1981), p. 15-A.

<sup>47</sup> The other two of the 67 district court nominations were withdrawn by President Carter — the first in August, the second in September.

<sup>48</sup> The Judiciary Committee was particularly active in June. The committee held confirmation hearings on both district court and circuit court nominations on June 4 and 9, (continued...)

and September. Committee actions on lower court nominations occurring in closest proximity to presidential election day (November 4) were hearings on September 22 (on one district court nomination) and 23 (on two district court nominations) and committee votes to report on September 17 (on 10 district court nominations) and 24 (on one district court nomination). The last committee actions on circuit court nominations prior to the presidential election were an August 25 vote to report one nomination and a September 15 hearing on another nomination. The last votes by the full Senate on lower court nominations prior to the November 4 elections were votes on September 11 to confirm one circuit court nomination, on September 26 to confirm one district court nomination, and September 29 to confirm 10 district court nominations. On October 2, the Senate recessed until November 12.

Earlier in the session, news media reports had raised the possibility of Senate Republicans blocking some or all lower court nominations then pending in the Senate. During the Republican Party convention in July, news accounts reported that Senator Thurmond had asked the party's presidential nominee, Ronald Reagan, to ask Republican members of the Senate to block all presidential nominations to federal posts until after the November 4 election. Reagan, according to one account quoting Senator Thurmond, "said he would be glad to do that."<sup>49</sup> In the weeks immediately thereafter, however, the Senate Judiciary Committee, without concerted opposition from Republican committee members, voted to report favorably a district court nomination (on July 30) and a circuit court nomination (on August 25), and both of these nominations, soon thereafter, were confirmed by the Senate by unanimous consent (the district nomination on August 19, the circuit nomination on September 11).

In mid-September, a press account reported that a "campaign" by Senate Republicans was underway to impede confirmation of 13 of President Carter's lower court nominations as well as of pending nominations to a wide range of appointive positions in the executive branch.<sup>50</sup> The purpose, the press account said, was to

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<sup>48</sup> (...continued)

as well as on district court nominations alone on June 10 and 19. In addition, at a June 17 meeting, the committee recommended confirmation of 11 nominations — six to district court judgeships, four to the circuit courts (including the nomination of Ruth Bader Ginsburg to the U.S. Court of Appeals for the D.C. Circuit), and one to the U.S. Court of Customs and Patent Appeals. On June 24, the committee voted again on judicial nominations, this time to report favorably eight district court nominations.

<sup>49</sup> "GOP Senators Urged to Stall Appointments," *Los Angeles Times*, July 17, 1980, p. A19.

<sup>50</sup> Specifically, it was reported, Senate Republicans had "begun an organized campaign to use various parliamentary stratagems, from committee boycotts to filibusters, to 'slow down or completely stop' Presidential appointments that could outlast the Carter Administration. The action was taken last month by the 41-member Senate Republican Caucus, which appointed a three-member committee to sift 155 Presidential nominations and weed out those whose terms would overlap that of a new President. The primary targets include 13 judicial nominees, as well as nominees to vacancies on the Nuclear Regulatory Commission, the National Labor Relations Board, the Securities and Exchange Commission, the Equal Employment Opportunity Commission and the Legal Services Corporation, among other agencies. Not affected are nominations to advisory boards and those who serve at the (continued...)

reserve these appointments for presidential candidate Ronald Reagan, in the event he were to win the November election. The account was published a few days after a September 10 Judiciary Committee meeting at which 13 lower court nominations (1 circuit, 12 district) had been placed on the agenda for a vote by the committee's chairman, Senator Kennedy. The committee's ranking minority member, Senator Thurmond, asserted that minority committee members had not had sufficient time to complete an investigation of 6 of the 13 nominees. As a result, he said, he insisted, in keeping with committee procedure that allowed any member the right to delay a vote until the next committee meeting, that the committee's vote on all 13 nominations be postponed.<sup>51</sup>

A press account of the committee's September 10 meeting reported that Senator Thurmond's move to block a vote on the 13 judicial nominations was perceived by "some Democrats ... as a Republican plot to delay all judgeship nominations in the hopes that Ronald Reagan will be elected president and can fill the posts with good Republicans."<sup>52</sup> A week later, however, the committee on September 17 approved motions, to which no objections were heard, to report 10 of the judicial nominations (all district court nominations) to the Senate. Six other judicial nominations that also were on the committee's agenda on September 17 were not reported. These included three nominations (one circuit court, two district court), which were before the committee in executive session for the first time. Senator Thurmond, on behalf of the minority, asked that these three nominations be held over until the next meeting of the committee.<sup>53</sup>

The other three nominations not reported (one circuit court, two district court) on September 17 were among the 13 nominations carried over from the September 10 meeting. Senator Thurmond stated that, regarding these three nominees, the committee's minority members had "some questions of substance" that would "have to be discussed," but added that he did "not mean to imply that any questions cannot be resolved or that all of these gentlemen will not be outstanding federal judges. We are, however, at this time prepared to fully and extensively discuss these candidates if you wish to go into detail."<sup>54</sup> In reply, the chairman of the committee, Senator Kennedy, stated that it was his preference to proceed with the other legislative matters on the committee's agenda, with the "hope to be able to work with the

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<sup>50</sup> (...continued)

pleasure of the President without any fixed term." Martin Tolchin, "Republicans Fight Carter Nominees," *New York Times*, Sept. 14, 1980, p. 31.

<sup>51</sup> Edward L. Lyons, "On Capitol Hill," *Washington Post*, Sept. 11, 1980, p. A8.

<sup>52</sup> *Ibid.*

<sup>53</sup> "Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session No. XIV, Sept. 17, 1980," Miller Associates Reporting Service. (Copy in archival records of the Senate Judiciary Committee.)

<sup>54</sup> "Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session No. XIV, Sept. 17, 1980," Miller Associates Reporting Service, pp. 6-7. (Copy in archival records of the Senate Judiciary Committee.)

Minority to see if we cannot gain their approval [on the judicial nominations] at a subsequent time.”<sup>55</sup>

All 10 district court nominations approved by the Judiciary Committee on September 17 were considered and confirmed en bloc by the Senate on September 29. In floor remarks on September 29, Senator Mark Hatfield of Oregon noted that, a few months earlier, he was one of the three Senators appointed by the Senate minority leader to a committee within the Republican Conference tasked with screening the qualifications of President Carter’s nominations (“not just judicial appointments but all nominations”<sup>56</sup>). The three-member committee, he said, had “gone over all the nominations that have been sent up here for many posts besides the judiciary.”<sup>57</sup> In anticipation of the Senate confirming the 10 judicial nominations, Senator Hatfield stated,

I think today is again strong evidence that we want to try to minimize what may have been a tradition in this body in years past of holding up nominations per se in an election year because our commitment is that all the functions of Government must perform to their utmost capacity and efficiency. If there is a failure to confirm, it is going to impinge upon that ability to perform in a judicial district or in an administrative post. We are not going to try to frustrate that ability because we want to facilitate that highest performance of duties and responsibilities of government.<sup>58</sup>

The final weeks of the second session, following the November 4 election, witnessed an unusually late consideration by the Senate Judiciary Committee and the Senate of a circuit court nomination. The nomination was transmitted to the Senate by a “lame-duck” President, who had just lost his bid for reelection, and was the only lower court nomination made by President Carter in the second session after September. The nominee was Stephen G. Breyer of Massachusetts, then the chief majority counsel for the Senate Judiciary Committee. The nomination (to the First Circuit Court of Appeals) was received in the Senate on November 13, received a Judiciary Committee hearing on November 17, was reported by the committee on December 2, and was confirmed by the Senate on December 9, just one week before the Senate adjourned *sine die* on December 16. Although its expedited treatment

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<sup>55</sup> “Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session No. XIV, Sept. 17, 1980,” Miller Associates Reporting Service, p. 7. (Copy in archival records of Senate Judiciary Committee.) During the remainder of the second session of the 96th Congress, there was no further Judiciary Committee action on the six judicial nominations held over at the September 17 meeting. After this meeting, the committee voted to report two more lower court nominations before the Senate’s *sine die* adjournment on Dec. 16: it voted on September 24 to report one other district court nomination (one not among the six carried over on September 17), and it voted, on December 2, to report a circuit court nomination. Both of these nominations were confirmed.

<sup>56</sup> Sen. Mark Hatfield, “Executive Session,” *Congressional Record*, vol. 126, part 21 (Sept. 29, 1980), p. 27758.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

generated some controversy, the Breyer nomination enjoyed the wholehearted support of the committee's ranking minority member, Senator Thurmond, as well as of other minority members of the committee, which approved the nomination by a 12-0 vote. The nomination ultimately was confirmed by the Senate by a vote of 80-10.<sup>59</sup>

## 1984

During this year, the lower court appointment process was marked by a notable statutory event — the creation of new circuit and district court judgeships in early July — and by President Ronald Reagan, in August and September, sending nominations to the Senate to fill these new positions. In August, September, and October, committee hearings were held and committee and Senate votes were cast on lower court nominations (including nominations to the new judgeships) before the Senate adjourned *sine die* in October.

The Senate convened for the start of the second session of the Ninety-eighth Congress on January 23, 1984, and adjourned *sine die* on October 12, 1984. At the start of the session, no circuit or district court nominations were pending as the Senate, at the end of the first session of the Congress, had returned the one district court nomination and two circuit court nominations then pending.<sup>60</sup> Subsequently, during the second session, the Senate received 14 circuit court nominations (one resubmission and 13 new nominations) and 46 district court nominations (one resubmission and 45 new nominations). Of the 14 circuit nominations pending during the second session, the Senate confirmed 10, while returning 3 to the President at session's end.<sup>61</sup> Of the 46 district court nominations pending during the second session, the Senate confirmed 33 while returning 13 to the President.

On June 29, 1984, the Senate and House adjourned until July 23. (During the adjournment, the Republican Party held its National Convention, on July 14-17.) Up to the June 29 adjournment, the Senate, during the second session, had received 5 circuit court nominations, confirming 4, and had received 26 district court nominations, confirming 21. The month of June was marked by hearings, committee votes, and Senate votes on both circuit and district court nominations.<sup>62</sup>

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<sup>59</sup> That same day, the Senate had previously invoked cloture on the Breyer nomination by a 68-28 vote.

<sup>60</sup> One of the circuit court nominations returned at the end of the first session of the 98<sup>th</sup> Congress, that of Sherman E. Unger to the Court of Appeals for the Federal Circuit, was not resubmitted to the Senate in the second session.

<sup>61</sup> The other unconfirmed nomination was withdrawn by the President in early September.

<sup>62</sup> Prior to the Senate's June 29 adjournment, district court nominations received a Judiciary Committee hearing as late as June 26, a committee vote as late as June 14, and a Senate confirmation vote as late as June 15. The last circuit nomination to be acted on prior to June 29 received a hearing on June 13, a committee vote on June 14, and a Senate confirmation vote on June 15.

On June 29, before adjourning, the Senate and House both approved the conference report on H.R. 5174, the Bankruptcy Amendments and Federal Judgeship Act of 1984. The act, which President Reagan signed into law on July 10, authorized, among other things, the creation of 24 new circuit court judgeships and 61 new district court judgeships.<sup>63</sup> The act, however, provided that no more than 11 of the circuit court judgeships, and no more than 29 of the district court judgeships, could be filled prior to January 21, 1985 — the day immediately after the inauguration of the President elected in November 1984. A July 29, 1984 news report stated that, in “passing the judgeship bill, Democrats and Republicans agreed that only a portion of the new appointments would be made before next January’s presidential inauguration — a compromise to allow for the possibility of a change in administration in November.”<sup>64</sup>

On August 1, the Senate received six circuit court nominations, all to new positions, with President Reagan described by one news report as “acting quickly to fill some of the judgeships created last month by Congress.”<sup>65</sup> Subsequently, between September 6 and October 5, the Senate received 3 more circuit and 20 more district court nominations from the President. During the remainder of August, the Judiciary Committee held two days of hearings on circuit court nominations and on another day voted to report four district court nominations. In September the committee held hearings on four days (on two occasions, for both circuit and district court nominations, once for only circuit nominations, and once for only district nominations). The Judiciary Committee on four occasions — August 9, September 20, September 28, and October 3 — voted to report out circuit nominations, district nominations, or both. The Senate voted to confirm a circuit court nomination on August 9, a district court nomination on September 2, three district court nominations on September 17, six district and five circuit court nominations on October 4, and two circuit court nominations on October 11. The last two confirmations occurred one day before the Senate adjourned *sine die* on October 12.

Among the 3 circuit court nominations and 13 district court nominations returned to the President at the end of the Congress were 1 circuit nomination and 4 district nominations received by the Senate on October 5, less than a week before adjournment.

## 1988

During this year, debate arose over the pace with which judicial nominations were being processed in the Senate Judiciary Committee and the Senate as a whole. Some committee minority members claimed the majority was deliberately slowing the confirmation process. Committee majority members defended the committee’s

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<sup>63</sup> P.L. 98-353, 98 Stat. 333.

<sup>64</sup> Philip Smith, “Va. Prosecutor Eyed for Judgeship,” *Washington Post*, July 29, 1984, p. B3.

<sup>65</sup> Linda Greenhouse, “Reagan Names 6 to Federal Appeals Court,” *New York Times*, Aug. 2, 1984, p. A1. Four of the six nominees were confirmed before the Senate’s *sine die* adjournment on October 12, 1984.

performance, saying it was acting briskly on noncontroversial nominees, while taking more time to examine nominees with potential problems. Amid the debate, the Judiciary Committee and the full Senate processed lower court nominations as late as October — with 17 unconfirmed judicial nominations, however, returned to the President at the Senate’s final adjournment.

The Senate convened for the start of the second session of the 100<sup>th</sup> Congress on January 25, 1988 and adjourned *sine die* on October 14, 1988. During the previous three Congresses, the lower court appointment process had operated with Republican control of the Senate and the White House. In the 100<sup>th</sup> Congress, however, President Reagan sent his judicial nominations to the Senate, and its Judiciary Committee, with the Democrats in the majority.

At the start of the second session, 9 circuit and 19 district court nominations were pending, all having been carried over from the first session.<sup>66</sup> Subsequently, during the second session, the Senate received 7 more circuit and 26 more district court nominations. Of the 16 circuit court nominations pending during the second session, the Senate confirmed 7, while returning 7 at session’s end. (The other two unconfirmed circuit nominations were withdrawn by the President during the session.) Of the 45 district court nominations pending during the second session, the Senate confirmed 33, while returning 9 to the President. The other three unconfirmed district court nominations were withdrawn by the President during the session.

By June 1, 1988, during the second session, the Senate had confirmed 5 circuit and 19 district court nominations, while 6 other circuit nominations and 17 other district court nominations were pending. Earlier in the session, according to one news account, Senators of the majority party had “promised to move quickly on all Reagan nominees, despite the temptation to stall during an election year.”<sup>67</sup> By June, however, a partisan debate had arisen in the Judiciary Committee over the pace with which judicial nominations were being processed within the committee. The committee’s ranking member, Senator Thurmond, reportedly characterized that pace as “agonizingly slow.”<sup>68</sup> Another minority committee member, Senator Orrin G. Hatch, also referring to the processing of judicial nominations, was quoted in the

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<sup>66</sup> At the start of the second session, a Supreme Court nomination — that of Anthony M. Kennedy to be an Associate Justice — also was pending. The Senate Judiciary Committee had already, in December 1987, held confirmation hearings on Judge Kennedy, and it favorably reported his nomination, by a 14-0 vote, on Jan. 27, 1988. A week later, on Feb. 3, the Senate confirmed the nomination by a 97-0 roll call vote. This, it should be noted, was the only Supreme Court nomination pending in the Senate during a presidential election year in the 1980-2004 time period.

<sup>67</sup> “Politics and Judgeships,” *Los Angeles Times*, April 29, 1988, part 2, p. 6.

<sup>68</sup> Ruth Marcus, “Judiciary’s ‘Slow Pace’ Ignites Clash; Thurmond’s Charges Provoke Leahy,” *Washington Post*, June 6, 1988, p. A13. In May, the Judiciary Committee had considered district court nominations on three occasions (voting to report two such nominations on May 12, holding hearings on four nominations on May 16, and voting to report two nominations on May 24), without, however, considering any circuit court nominations during the month.



press as saying, “This last year has been absolutely excruciating.”<sup>69</sup> In response to these criticisms, a majority member of the committee, Senator Patrick J. Leahy, it was reported, asserted that delays by the Department of Justice in providing information had “severely retarded the processing of” some judicial candidates, and suggested that the committee, when under Republican leadership, might have abdicated its constitutional responsibilities by “rubber-stamping nominees.”<sup>70</sup>

Senator Leahy’s assertions, it was reported, were contained in a 10-page letter responding to complaints that Senator Thurmond had made the previous month about the committee’s processing of judicial nominations. The letter concluded with what the news report said was an “implicit attack” on Senator Thurmond’s handling of nominations as committee chairman when Republicans controlled the Senate.<sup>71</sup> While nominees for judgeships, Senator Leahy’s letter said,

... may well have gained the impression, from examining some of the past practices of this committee, that ... the advice and consent process was a simple formality in which the Senate rubber-stamped the president’s choice ... it is not in any sense “unfair” to them that the committee now approaches its constitutional responsibilities with greater seriousness and deliberation.<sup>72</sup>

In response, Senator Thurmond stated, “I very much appreciate Sen. Leahy compiling responses to my questions, although the reply, which took three weeks to compile, forced the cancellation of one nomination hearing.” The “lengthy reply” by Senator Leahy, Senator Thurmond added, “much like the other tactics employed by Democrats on the committee, seems to do little more than ensure some judicial nominees will not get an up or down vote as promised last year” by the committee’s chair, Senator Biden.<sup>73</sup>

Against this backdrop, the Judiciary Committee held hearings or voted on lower court nominations during June, July, August, and October (but not in September), meeting for these purposes two to four times a month.<sup>74</sup> Committee actions on lower

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<sup>69</sup> Steven V. Roberts, “Washington Talk: The Senate; Election-Year Ritual Snags Appointment Process,” *New York Times*, June 24, 1988, p. A13.

<sup>70</sup> Ruth Marcus, “Leahy Fires Back at Thurmond; Justice Dept. Delays Blamed for Slow Progress on Nominees,” *Washington Post*, June 14, 1988, p. A21. (Hereafter cited as Marcus, “Leahy Fires Back.”) Senator Leahy, at this point, was the Democratic member in charge of committee consideration of judicial nominations, in the absence of committee Chairman Joseph R. Biden Jr. of Delaware, who was on medical leave and would not return to chair the committee until September. See “Sen. Biden Back on Job After Brain Operation in Feb.,” *Los Angeles Times*, Sept. 7, 1988, part 1, p. 2.

<sup>71</sup> Marcus, “Leahy Fires Back.”

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> The two most active of these four months in terms of nominations activity were June and August. In June, the committee held three days of hearings on district court nominations, on June 13, 22, and 29, and one day of hearings on a district court and a circuit court (continued...)

court nominations occurring in closest proximity to presidential election day (November 8), were hearings on October 4 (on one circuit court and three district court nominations) and committee votes to report on October 5 (two circuit court and nine district court nominations).<sup>75</sup> On one day each in July, August, and October (but not in June or September), the Senate voted to confirm district court nominations (seven in all), without, however, confirming any circuit court nominations. Then, in its last vote on lower court nominations during the second session, the Senate on October 14 confirmed two circuit and nine district court nominations.<sup>76</sup> Almost six months had passed since the Senate's last previous confirmation of a circuit court nomination, on April 19.

In early October, just before the Judiciary Committee voted to report the above-noted 11 lower court nominations to the Senate, a press story reported that a compromise had been reached between Democrats and Republicans on the Judiciary Committee. The compromise, it was reported, would “allow about a dozen stalled judicial nominations to come up for confirmation votes,”<sup>77</sup> with the committee clearing about half of the 22 judicial nominees before the committee and blocking further action on the other half. The news report quoted the committee's chairman, Senator Biden, as saying that the judicial nominees who would not be allowed to proceed had either “clear, substantive problems” with qualifications or backgrounds or were in “intractable situations” with Senators from the nominees' home states.<sup>78</sup>

## 1992

The second session of the 102<sup>nd</sup> Congress is particularly notable in the context of judicial nominations for two things: first, the Senate *confirmed* more nominees, 11, to the courts of appeals that year than in any other presidential election year in United States history; second, at its *sine die* adjournment, the Senate also *returned* more court of appeals nominations to the President, 10, than at the end of any other Congress until the 106<sup>th</sup> Congress (1999-2000).

The Senate convened for the start of the second session of the 102<sup>nd</sup> Congress on January 3, 1992, and adjourned *sine die* on October 8, 1992. At the start of the session, there were 7 circuit court and 36 district court nominees pending; during the

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<sup>74</sup> (...continued)

nomination, on June 21. In August, prior to the Republican Party's national convention on Aug. 20-23, the committee voted to report two district court nominations on Aug. 3, held hearings on three district court and one circuit court nomination on Aug. 9, held hearings on one circuit court and one territorial district court nomination on Aug. 10, and also on Aug. 10 voted to report one circuit court and one district court nomination.

<sup>75</sup> The nine district court nominations reported by the committee included one to the territorial district court for the Northern Mariana Islands.

<sup>76</sup> The nine district court nominations confirmed by the Senate included one to the territorial district court for the Northern Mariana Islands.

<sup>77</sup> Susan F. Rasky, “Congress Deadlocks Again on Revising Clean Air Act,” *New York Times*, Oct. 5, 1988, p. B6.

<sup>78</sup> *Ibid.*

session, the President nominated an additional 11 individuals to the circuit courts and 59 individuals to the district courts. All told, there were 21 circuit court and 95 district court nominees pending at some point during the second session of the 102<sup>nd</sup> Congress. Of those nominees, 11 circuit court nominees and 53 district court nominees were confirmed during that session; 10 circuit and 42 district court nominees were returned to the President at the end of the 102<sup>nd</sup> Congress.

During the second session of the 102<sup>nd</sup> Congress, the Senate held hearings on district court nominees every month from January to September; court of appeals nominees received hearings in every month from February to September. The Judiciary Committee held its last judicial nominations hearing for the year, for one court of appeals and five district court nominees, on September 24. The Judiciary Committee reported at least one district court nominee every month between February and October. The committee reported at least one circuit court nominee in February, April, May, June, August, September, and October, reporting three circuit nominees in May, and two each in June and August. At its last business meeting of the year, on October 2, 1992, the Judiciary Committee reported five district court and one circuit court nominee, all of whom were confirmed on October 8, the day the Senate adjourned *sine die*. One circuit court nominee, Timothy K. Lewis, was nominated on September 17, 1992, and confirmed by the Senate 21 days later, on October 8, 1992.

During most of the second session of the 102<sup>nd</sup> Congress, the pace of Senate consideration of judicial nominations did not generate much controversy in the Senate Judiciary Committee, on the floor of the Senate, or subsequently on the campaign trail. This prompted one campaign observer to note that “about 100 of 828 federal judgeships are waiting to be filled, but three debates yielded not a single comment about how George Bush, Bill Clinton or Ross Perot would use such appointments to affect a generation of justice.”<sup>79</sup> While the Senate was in its traditional August recess, news reports quoted Judiciary Committee staffers as saying that the pace of confirmations generated “very little criticism from either the Justice Department or the White House.”<sup>80</sup> Soon afterwards, however, a news account reported that Democrats, who had the Senate majority, began, upon their return from the August recess, “to delay confirming some of President Bush’s nominees for major judgeships to preserve the vacancies for Gov. Bill Clinton if he is elected President.”<sup>81</sup>

As the presidential election neared, two significant clashes over judicial nominations occurred in the Senate. The first involved the confirmation of Edward Carnes of Alabama to the Eleventh Circuit Court of Appeals. News reports indicate that the controversy over the Carnes nomination spread to other nominations; when “four anonymous senators” placed holds on the Carnes nomination in late June, the

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<sup>79</sup> Richard Carelli, “Campaign Largely Ignored President’s Power to Shape Judiciary,” *Associated Press*, Oct. 28, 1992.

<sup>80</sup> Matthew Breilis, “Bush Pace Faulted on Judges; Chances of Filling Vacancies This Year Seen Slipping Away,” *Boston Globe*, Aug. 16, 1992, p. 29.

<sup>81</sup> Neil A. Lewis, “Waiting for Clinton, Democrats Hold Up Court Confirmations,” *New York Times*, Sept. 1, 1992, p. A1.

nomination of Sonia Sotomayor to a district judgeship in New York was “delayed more than three weeks by Senate Republicans, apparently in retaliation for the attempt to block Carnes.”<sup>82</sup> Sotomayor, whose nomination was reported by the Senate Judiciary Committee on June 11, was confirmed by the full Senate by unanimous consent on August 11. The Senate voted 66-30 to invoke cloture on the Carnes nomination, and 62-36 to confirm Carnes on September 9. The second controversy involved Frank Keating of Oklahoma, who had been nominated to the Tenth Circuit Court of Appeals. The Judiciary Committee held a hearing on the Keating nomination on July 22, at which time several witnesses criticized his record as general counsel at the Department of Housing and Urban Development (HUD). According to news reports, the Judiciary Committee chairman, Senator Joseph Biden, “expressed more concern over inconsistencies in Keating’s record handling housing discrimination complaints than in what he was alleged to have said in meetings with housing advocates.”<sup>83</sup> The Judiciary Committee did not vote on the Keating nomination, and it was returned to the President at the end of the 102<sup>nd</sup> Congress.

Against this backdrop, the Senators in attendance at the Judiciary Committee’s September 12 business meeting sparred over the pace of judicial confirmations, with majority Senators faulting the Bush Administration for failing to submit nominees in a timely manner. Senator Joseph Biden, chairman of the Judiciary Committee, used the Tenth Circuit to illustrate his complaint:

...the one we are talking about, Mr. Keating here — there was a vacancy for a total of 15 months before this committee was in a position to act on Mr. Keating because the Administration, A, hadn’t even come up with Mr. Keating’s name for 11 months, and after they came up with his name they held him up for four more months in an investigation. So it is 15 months before the Committee could even act on Mr. Keating and then he became a controversial nominee, rightly or wrongly.<sup>84</sup>

Minority Senators claimed that the Judiciary Committee was not processing the nominations it did have, as the following exchange between Senator Howard Metzenbaum, Democrat of Ohio, and Senator Thurmond, suggests:

SENATOR METZENBAUM. Mr. Chairman, it is with some difficulty that I address myself to this point, but my good friend from South Carolina was the leader in shutting down entirely the question of judicial nominees in 1980.

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<sup>82</sup> M.P. McQueen, “Senate Delays Hispanic Nomination,” *Newsday*, Jul. 4, 1992, p. 10.

<sup>83</sup> Bill McAllister, “Nominee for Judgeship Defends Rights Record: Advocacy Groups’ Criticisms Denied,” *Washington Post*, July 23, 1992. According to the same news report, Keating was accused of saying that his job as HUD general counsel was to protect “good Christian landlords.” Ibid.

<sup>84</sup> “Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session, Sept. 12, 1992,” Miller Reporting Co. Inc., p. 12. (Copy in archival records of the Senate Judiciary Committee.)

SENATOR THURMOND. Seventeen judges, but before this Committee now are over 50.<sup>85</sup>

At the September 17 meeting, the Judiciary Committee reported three district court and one circuit court nominee; it reported one more district court nominee on September 23 and five more district court and one circuit court nominee on October 2. All 11 of these nominations were confirmed before the Senate adjourned *sine die* on October 8, 1992.

## 1996

From the standpoint of Senate processing of circuit court nominations, 1996 is notable among the presidential election years in the 1980-2004 period in several respects:

- In 1996, fewer circuit court nominations were confirmed (two), than in any other year from 1980 to 2004.
- The two confirmations occurred on January 2, 1996, the last day of the first session of the 104<sup>th</sup> Congress, the latest first session confirmations of lower court nominations in the 1980-2004 period.
- During the second session of the 104<sup>th</sup> Congress, which began and ended in 1996, no circuit court nominations were confirmed, making this the only session of a Congress in the 1980-2004 period in which the Senate did not confirm a circuit court nominee.
- The Senate Judiciary Committee's last vote to report a circuit court nomination to the Senate in 1996 occurred on June 27, the earliest date in a second session of Congress for the committee's last report of a circuit nomination in the 1980-2004 period.

Of the 38 district court nominations pending in 1996, during the second session of the 104<sup>th</sup> Congress, 17 were confirmed, 1 was withdrawn by the President, and 20 were returned to the President at the final adjournment of the Congress.

The Senate convened for the start of the second session of the 104<sup>th</sup> Congress on January 3, 1996 and adjourned *sine die* on October 3, 1996. At the start of the session, five circuit court nominations were pending, having been carried over from

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<sup>85</sup> *Ibid.*, p. 13. Senator Thurmond, in this exchange, did not dispute the suggestion that he might have used his role as ranking minority member of the Judiciary Committee to prevent the confirmation of some lower court nominations in 1980. His terse reply to Senator Metzenbaum, however, contrasted the number of judicial nominations not confirmed in 1980 (17), with the number then before the Judiciary Committee in 1992 (over 50 — of which 10 court of appeals and 42 district court nominations would soon be returned to the President). He appeared to be conveying the message that if there were any slowdown in processing of judicial nominations in 1980, it was not, in his view, comparable to the slowdown in Judiciary Committee processing of President George H.W. Bush's nominations in 1992.

the first session.<sup>86</sup> Subsequently, during the second session, the Senate received four more circuit court nominations. Of the nine circuit court nominations pending during the second session, none was confirmed: one was withdrawn by the President (in May), and the other eight were returned at the end of the session. This, as already mentioned, was the only session of a Congress in the 1980-2004 time period in which the Senate did not confirm a circuit court nominee.<sup>87</sup>

During the second session, the Judiciary Committee held one hearing or voted to report on one circuit court nomination each month from February through July. The committee's last meeting on which it voted favorably on a circuit court nomination was, as mentioned above, on June 27. Subsequently, the committee held its last hearing on a circuit court nomination on July 31. In all, the committee, during the second session, voted to report three circuit nominations to the Senate (on April 25, May 20, and June 27), and one other circuit nomination, reported earlier in the first session, was also pending throughout the second session. While all four nominations, pursuant to Senate rules, were (after being reported) placed on the Senate's Executive Calendar, none was scheduled for Senate floor consideration. These four circuit nominations, and the four other circuit nominations pending in the Senate which had not been reported by the Judiciary Committee, were returned to the President upon the Senate's *sine die* adjournment on October 3.

For the first six months of 1996, the pattern of Senate processing of district court nominations closely resembled that for circuit court nominations during the same period. On January 2, the last day of the first session of the 104<sup>th</sup> Congress, the Senate confirmed one district court nomination. The next day, at the start of the second session of the Congress, 21 district nominations were pending. Over the next six months, the Senate Judiciary Committee met on eight different occasions to hold hearings on or report out 19 district court nominations. However, during the same period, no district court nominations received Senate confirmation. The absence of Senate confirmations of lower court judges prompted one press report on June 20 to note that "the Senate has confirmed only three judges this year, compared with more than 50 last year."<sup>88</sup> Another press report commented that for "the first six months of this year, political and parochial fighting among senators had prevented confirmation of a single federal judge."<sup>89</sup>

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<sup>86</sup> During the first session of the 104<sup>th</sup> Congress, the Senate had confirmed 11 circuit court nominations. Two of these, as already discussed, were confirmed on Jan. 2, 1996, the final day of the first session.

<sup>87</sup> The last previous regular session of a Congress in which the Senate did not confirm a circuit court nominee was the first session of the Eighty-third Congress in 1953.

<sup>88</sup> Catherine M. Brennan, "Fourth Circuit Among Courts Facing 'Judicial Emergency'; Long-Term Vacancies on Federal Bench Are Creating Extra Burdens on Overstressed System; Political Posturing Only Adds to the Problem," *Daily Record* [Baltimore, MD], June 20, 1996, p. 9. The article was evidently referring to the 2 circuit court nominations and 1 district court nomination confirmed by the Senate on Jan. 2, 1996, and to the 9 circuit court and 44 district court nominations confirmed by the Senate in 1995.

<sup>89</sup> Roger K. Lowe, "Senate Compromise May Allow Confirmation of Federal Judges," *Columbus [Ohio] Dispatch*, July 14, 1996, p. 3B.

In July and August, the situation changed. Following reports of an agreement between the new Senate majority leader and the Senate minority leader to begin steadily processing judicial nominations,<sup>90</sup> the Senate on 12 different days, starting on July 10 and ending on August 2, confirmed 17 district court (but, as already discussed, no circuit court) nominations. After the August recess, however, no more district court nominations were confirmed. The last actions in the Senate on lower court nominations for the year occurred at the committee level, with the Judiciary Committee reporting a district court nomination on September 19 and holding a hearing on another district court nomination on September 24.

At the Senate's *sine die* adjournment on October 3, 20 district court nominations were returned to the President, including 3 which had been reported by the Judiciary Committee. A press account on the Senate's adjournment noted that the 17 judicial confirmations during the second session of the Congress (all of district court nominees) were "fewer than [had] been approved in any election year going back to 1976." The Senate, the account added, was "still at odds over a backlog of Clinton administration judicial nominees that has irked Democrats for months."<sup>91</sup>

## 2000

The Senate convened for the start of the second session of the 106<sup>th</sup> Congress on January 24, 2000, and adjourned *sine die* on December 15, 2000. At the start of the session, 17 circuit court and 18 district court nominations were pending, all having been carried over from the first session. Subsequently, during the second session, the Senate received 9 more circuit and 38 more district court nominations. Of the 26 circuit nominations pending during the second session, the Senate confirmed 8, while returning 17 to the President at the end of the session.<sup>92</sup> Of the 56 district court nominations pending during the second session, the Senate confirmed 31, while returning 24 at session's end.<sup>93</sup>

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<sup>90</sup> Prior to the Senate votes on July 10 to confirm two district court nominations, Senator Tom Daschle, the Democratic minority leader, reportedly said that "he and [Senate Majority Leader Trent] Lott have been trying to find a way to take action on as many as possible of the 23 judicial nominations that have been endorsed by the Senate Judiciary Committee." Ibid.

<sup>91</sup> Marcy Gordon, "Senate Still Facing Decisions on Clinton Judgeship Nominations," Associated Press, Oct. 3, 1996, at [<http://www.lexis.com>], accessed Apr. 25, 2008. In this news story, Senator Tom Daschle of South Dakota, the Senate Democratic leader, faulted the Senate Republican majority for refusing to act on more of President Clinton's judicial nominations, reportedly asserting, "This miserable record will probably be the legacy of the 104<sup>th</sup> Congress." However, the chairman of the Judiciary Committee, Senator Orrin G. Hatch of Utah, was quoted as insisting that "any objective observer, considering the record rather than the rhetoric, would conclude that this Congress has moved President Clinton's judicial nominations in a fair and responsible manner." Ibid.

<sup>92</sup> The other unconfirmed circuit nomination was withdrawn by the President during the session.

<sup>93</sup> The other unconfirmed district court nomination was withdrawn by the President during the session.

During 2000, the Judiciary Committee held hearings on, or voted to report, lower court nominations each month from February to July. The committee held its last such hearing, on four district court nominations, on July 25, and cast its last vote on July 27 (voting to report favorably the four district court nominations on which hearings were held two days earlier). The committee, for the year, held its last hearing on a circuit court nomination on June 16, and cast its last vote on a circuit nomination on July 20 (the same nomination on which the June 16 hearing was held.)

At its July 20 meeting, the Judiciary Committee's chairman and its ranking minority member disagreed on whether the committee, until that point, had acted on a sufficient number of judicial nominations, and on whether more needed to be done. The committee's Republican chairman, Senator Orrin G. Hatch of Utah, detailed the volume of committee and Senate activity on judicial nominations up to that point in the session. This activity, he maintained, compared favorably with that recorded in the Senate in the most recent prior presidential election years:

The Federal judiciary is at virtually full employment because the Senate has appropriately carried out its advice and consent duties. So far this year, the Judiciary Committee has held 7 hearings for 30 judicial nominees. In addition, we intend to hold a hearing next week for several more nominees. So far this year, we have confirmed 30 nominees, including 7 nominees for the U.S. courts of appeals. Today, we have on the agenda four additional district court nominees and one additional circuit court nominee.

With seven court of appeals nominees already confirmed this year, and [an] additional appeals court nominee likely to be voted out of this committee, it is clear that the Senate and the Judiciary Committee have acted fairly with regard to appeals court nominees. In presidential election years, the confirmation of appellate court nominees historically has slowed.<sup>94</sup>

Referring to the three previous presidential election years, Senator Hatch noted that the Senate had confirmed seven circuit court nominees in 1988, 11 circuit nominees in 1992, and, in Senator Hatch's word, "zero" circuit nominees in 1996. "In all likelihood, our action with respect to Judge Rawlinson [the circuit nominee to be approved by the committee later that day] will mean that no less than eight appeals court nominees will be confirmed in this election year. As history shows, we are right on track with regard to circuit nominees."<sup>95</sup>

A different perspective on the committee's activity was put forward by its ranking minority member, Senator Patrick J. Leahy of Vermont. The Senator questioned the notion, which he maintained was subscribed to by Senator Hatch, that "it is getting too late to do much of anything more on judges...."<sup>96</sup> Senator Leahy pointed to the year 1992, the end of Republican George H. W. Bush's presidency,

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<sup>94</sup> "Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session, July 20, 2000," Miller Reporting Co. Inc., pp. 6-7. (Copy in archival records of the Senate Judiciary Committee.)

<sup>95</sup> *Ibid.*, p. 7.

<sup>96</sup> *Ibid.*, p. 10.



when the Senate majority party was Democratic, as a better standard for the current Judiciary Committee to follow in acting on judicial nominations.

That year [1992], we confirmed 11 court of appeals nominees. Sixty-six nominees were confirmed overall. We held hearings that year in July; we held two in August. We had a hearing in September. Even though the Thurmond rule would normally cut it off, to help out a Republican President the Democrats held hearings in September. We had a lot more hearings than you have been willing to do here.

In fact, we had a hearing on September 24<sup>th</sup> — we were right up against the election, and that included a court of appeals nominee, and then we went ahead and confirmed them all. We were confirming them right up almost to the last week we were in session.<sup>97</sup>

On July 21, the Senate confirmed the circuit court nomination, as well as four district court nominations, approved by the Judiciary Committee the day before. Subsequently, before the end of the end of the Congress in December, the Senate voted on lower court nominations on only one more occasion, on October 3, when it confirmed four district court nominations.<sup>98</sup>

After the committee and Senate votes in July, the prospects for further Senate activity on judicial nominations were put in doubt in early August, as the result of a recess appointment that President Clinton made to the Department of Justice. On August 3, the President appointed Bill Lann Lee to be assistant attorney general for the Department of Justice's Civil Rights Division.<sup>99</sup> In doing so, the President was exercising his constitutional authority, during a congressional recess, to make temporary "recess appointments" to positions that otherwise would require Senate confirmation. Lee's nomination, however, it was reported, "was among five vigorously opposed by a group of [Senate] Republicans who indicated they might retaliate against recess appointments by blocking all judicial nominees for the rest of Clinton's term, which ends Jan. 20."<sup>100</sup> In another news story, Senator Hatch, chairman of the Judiciary Committee, was (without being quoted directly) reported as saying that the recess appointment of Lee might "doom all other judiciary nominees" for the rest of the Clinton presidency.<sup>101</sup> The story added,

Hatch noted that in every election year, a point is reached when the Senate simply ceases anyway to move judicial nominees, deciding to leave filling vacancies up to the next president. On Thursday, Hatch said the new recess appointment "upsets party leaders, who are fed up with this." So, he said, the

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<sup>97</sup> Ibid.

<sup>98</sup> The Senate voted on four nominations which had been reported by the Judiciary Committee on July 27.

<sup>99</sup> Sonya Ross, "President Bypasses Congress, Gives Rights Aide Recess Appointment," *Associated Press*, Aug. 3, 2000.

<sup>100</sup> Ibid.

<sup>101</sup> Lee Davidson, "Hatch Says Lee Appointment May Doom Judiciary Choices," *Deseret [Salt Lake City] News*, Aug. 4, 2000, p. A7.

point of moving none except the most essential of nominees may now have been reached.<sup>102</sup>

After the Senate's return from its August recess, majority Senator James Inhofe of Oklahoma put a hold on all judicial nominations for the rest of the session. Senator Inhofe said his hold was in response to recess appointments made by President Clinton during the Senate's August recess (including the recess appointment of Bill Lann Lee).<sup>103</sup> Soon thereafter, however, the hold was lifted on four of the nominations, specifically the four district court nominations that the Judiciary Committee reported to the Senate on July 27,<sup>104</sup> and on October 3 the Senate confirmed the four nominees (three by voice vote en bloc and the fourth by a 95-0 roll call vote).

The Senate recessed on November 2, shortly before the national elections on November 8. The Senate reconvened on November 14, with 17 circuit court and 24 nominations pending in the Judiciary Committee. During the remainder of the 106<sup>th</sup> Congress, which adjourned on December 15, there was no further Judiciary Committee or Senate floor activity on judicial nominations.

## 2004

The 2004 presidential election year was characterized by repeated exchange between the President and the Senate over the topic of judicial nominations. President Bush and leaders of the Republican majority in the Senate blamed Senate Democrats for preventing confirmation votes on several nominees whose nominations had been reported by the Senate Judiciary Committee.<sup>105</sup> Minority Senators responded that President Bush's nominees were too politically extreme to merit Senate confirmation.<sup>106</sup> In 2004, President Bush made two recess appointments

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<sup>102</sup> Ibid.

<sup>103</sup> Jim Abrams, "Senator Renews Threat to Block Nominations," *Associated Press*, Sept. 11, 2000. Senator Inhofe, this story reported, said that President Clinton, in making the August 2000 recess appointments, had broken an agreement he had made with Senate Republicans not to make recess appointments without first consulting them. He called the appointments "just an arrogant defiance of the Senate's prerogative of advice and consent." Ibid. See also "U.S. Senator James Inhofe (R-OK) Holds News Conference Regarding the EPA," FDCH Political Transcripts, Oct. 6, 2000, in which Senator Inhofe discussed his hold on President Clinton's judicial nominations.

<sup>104</sup> Audrey Hudson, "Hill GOP Rips Legislative 'Roadblocks'; Democrats Maneuver to Press Agenda," *Washington Times*, Sept. 20, 2000, p. A4.

<sup>105</sup> See, e.g., Sen. John Cornyn, "Democratic Leadership's Obstruction," remarks in the Senate, *Congressional Record*, daily edition, vol. 150 (Apr. 1, 2004), pp. S3525-S3526. ("But unfortunately, as appears to be a growing trend and one where our Democratic colleagues continue to dig in their heels, the answer to every entreaty we might offer, every suggestion we have in terms of creating jobs, in terms of putting people on the bench to decide cases that go unheard because judges are not being confirmed to these posts, we continue to get a consistent response on behalf of our Democratic colleagues of 'no.'")

<sup>106</sup> See, e.g., Sen. Patrick J. Leahy, "Nomination of Gary L. Sharpe to be United States (continued...)

to the courts of appeals. Also in 2004, the Senate failed to invoke cloture on the nominations of four individuals to the courts of appeals; one cloture vote occurred on July 20, and the other three votes on July 22. These votes came on the heels of the Senate not invoking cloture on six other court of appeals nominees during the first session of the 108<sup>th</sup> Congress in 2003.

The Senate convened for the start of the second session of the 108<sup>th</sup> Congress on January 20, 2004 and adjourned *sine die* on December 8. At the start of the second session, there were 18 pending circuit court nominations (including the nomination of Claude Allen of Virginia, which had been returned at the end of the first session but was resubmitted on January 20) and 27 pending district court nominations. During the second session, the President submitted two additional nominations to the courts of appeals (as well as nominations to make permanent the recess appointments of Charles W. Pickering, Sr. of Mississippi and William H. Pryor, Jr. of Alabama) and 12 additional nominations to the district courts. Of the 20 circuit court nominations pending at some point during the second session of the 108<sup>th</sup> Congress, the Senate confirmed 5, and 15 were returned to the President at the end of the session. Of the 39 district court nominations pending at some point during the second session of the 108<sup>th</sup> Congress, the Senate confirmed 30, 8 were returned at the end of the session, and one nomination was withdrawn by the President.

On January 16, 2004, President Bush recess-appointed Charles W. Pickering Sr. to a seat on the Fifth Circuit Court of Appeals. Because the recess appointment was made before the second session started, it lapsed when the Senate adjourned *sine die* on December 8. On February 20, President Bush recess-appointed William H. Pryor, Jr., to the Eleventh Circuit, a recess appointment that would expire at the end of the first session of the 109<sup>th</sup> Congress without Senate confirmation. Neither Pickering nor Pryor was confirmed in the 108<sup>th</sup> Congress, though Pryor was confirmed in 2005, in the first session of the 109<sup>th</sup> Congress.

The recess appointments of Pryor and Pickering prompted Minority Leader Tom Daschle to threaten to block all judicial nominees, saying “we will not be able to move on the confirmation of judges until we are given the assurance that they will not recess-appoint future judges, especially judges who have been rejected by the Senate.”<sup>107</sup> One majority Senator responded by asserting that the recess appointments were necessary; he maintained that “the only reason the President had to use the power that is very clearly conferred upon him in the U.S. Constitution is because of this unprecedented obstruction by the Democratic minority in the Senate, which

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<sup>106</sup> (...continued)

District Judge,” remarks in the Senate, *Congressional Record*, daily edition, vol. 150 (Jan. 28, 2004), pp. S304-S307. (“With respect to his extreme judicial nominations, President George W. Bush is the most divisive President in American history. Through these nominees, President Bush is dividing the American people and undermining the fairness and independence of the Federal judiciary on which all Americans depend.”)

<sup>107</sup> Quoted in Thomas Ferraro, “Daschle to Block Nominees,” *Philadelphia Inquirer*, Mar. 31, 2004, p. A2.

denied these two highly qualified nominees, Charles Pickering, now Judge Pickering of the Fifth Circuit Court of Appeals, and Judge Bill Pryor, an up-or-down vote.”<sup>108</sup>

The standoff over the recess appointments and the prospect of additional recess appointments meant that, while the Senate Judiciary Committee held hearings on appeals nominees in each month from January to April, with seven appeals nominees receiving hearings between January 22 and April 27, and seven court of appeals nominees being reported between March 4 and April 29, the Senate did not confirm any court of appeals nominees until May 20. At that time, news reports indicated that minority Senators had agreed to allow the confirmation of 25 judicial nominees — 20 to the district courts and 5 to the courts of appeals — as long as President Bush promised not to make any additional recess appointments to the federal judiciary in 2004.<sup>109</sup> The Senate confirmed two nominees to the courts of appeals on May 20, three more on June 28, and no other court of appeals nominees were confirmed in the second session of the 108<sup>th</sup> Congress. The Senate did, as noted above, fail to invoke cloture on four additional court of appeals nominees during 2004; those votes occurred in July (one on July 20; three on July 22). In addition to the hearings on court of appeals nominees held before May, the Senate Judiciary Committee also held hearings on June 16 (for two nominees to the courts of appeals), September 8, and November 16. The Judiciary Committee voted to report appeals nominees on June 17, July 20 (two nominees), and October 4.

Nominations to the district courts appear to not have been subjected to the same delay as court of appeals nominees in the disagreement over President Bush’s recess appointments. The Judiciary Committee, by May 1, had held hearings on 14 nominees and reported 20 nominees (10 of whom were reported on March 4, 2004). The full Senate confirmed one district judge each in January and February, two in March, one more in May, and 18 in June. Thereafter, the Senate confirmed one district judge in July, three in September, and three in November, after the presidential election. Eight district court nominees, two of whom had received hearings (and none of whom were reported to the full Senate) were returned to the President upon the *sine die* adjournment of the 108<sup>th</sup> Congress on December 8.

## Comparative Analysis of Presidential Election Years

In the preceding section, the pace of Senate consideration of judicial nominations was discussed in narrative form for each presidential election year during the 1980-2004 period. The narratives, however, did not compare those years with one another, with regard to the number of nominees considered and the final dates of action. To arrive at comparisons of this sort, the following sections examine

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<sup>108</sup> Sen. John Cornyn, “Misstatements About the Bush Administration,” *Congressional Record*, daily edition, vol. 150 (Mar. 26, 2004), pp. S3203-S3205.

<sup>109</sup> Charles Hurt, “Deal Clears Way for 25 Judicial Nominees,” *Washington Times*, May 19, 2004, p. A3.

data on various aspects of the judicial confirmation process in the Senate, using tables to illustrate the findings. Specifically, the data presented below indicate:

- *A decline in number of nominations processed in most recent presidential election years:* The processing of court of appeals nominations, in terms of average number of hearings held, nominations reported, and nominees confirmed, was lower in the 1996, 2000, and 2004 presidential election years than in the 1980, 1984, 1988, and 1992 presidential election years.
- *More nominees confirmed in years of unified partisan control:* In presidential election years from 1980 to 2004, more court of appeals nominees (and a greater percentage of pending court of appeals nominees) were confirmed, on average, in years where the Senate majority and the President were of the same political party than when not.
- *Nominations confirmed at earlier points in most recent presidential election years:* In 1980, 1984, 1988, and 1992, the Senate confirmed its last court of appeals nominee of the session in October or later. In 1996, 2000, and 2004, the last court of appeals nominee confirmed in presidential election years happened in July or earlier.

## **Number and Percent of Judicial Nominations Processed in Presidential Election Years**

**Table 1** presents data on the number of nominations pending, receiving hearings, reported, and confirmed in each presidential election year between 1980 and 2004. These data indicate, among other things, a sharp decrease in the average number of court of appeals nominees confirmed by the Senate in recent presidential election years. Specifically, the average number of court of appeals nominees confirmed in the three most recently completed presidential election years (1996, 2000, and 2004) was less than half of the corresponding average for the four presidential elections before that time (1980, 1984, 1988, and 1992). On average, the Senate confirmed 9.5 court of appeals nominees in the presidential election years from 1980 to 1992. In 1980, 1984, 1988, and 1992, there were 65 total nominations to the courts of appeals pending; the Senate confirmed 38 nominees, or 58.5%, in those presidential election years. The average has fallen to 4.3 confirmed court of appeals nominees over the last three presidential election years. In 1996, 2000, and 2004, there were a total of 55 nominations to the courts of appeals pending; the Senate confirmed 13 nominees, or 23.6%, in those presidential election years.

**Table 1. Nominations to the U.S. Courts of Appeals in Presidential Election Years, 1980-July 31, 2008**

Year	New	Previously Pending <sup>a</sup>	Total	Received Hearings	Reported	Confirmed	% Confirmed
1980	10	4	14	12	10	10	71.4%
1984	13	1	14	12	11	10	71.4%
1988	7	9	16	7	9	7	43.8%
1992	14	7	21	12	11	11	52.4%
1996 <sup>b</sup>	4	5	9	4	3	0	0.0%
2000	9	17	26	5	3	8	30.8%
2004	2	18	20	11	11	5	25.0%
2008 <sup>c</sup>	4	14	18	4	4	4	—

**Source:** CRS Judicial Nominations Database, based on data from the *Journal of the Executive Proceedings of the Senate*, various years. In cases where a nominee was nominated more than once in a given year, more than one hearing was held on a nominee in a given year, or where a nominee was reported more than once in a given year, only the first nomination/hearing/report is included in **Table 1**.

**Notes:**

- a. Includes nominations held over from the previous session of a Congress and those returned at the end of the previous session of Congress but resubmitted by the President during the session of Congress that coincided with the presidential election year.
- b. The data are for the second session of the 104<sup>th</sup> Congress, which began on January 3, 1996. The Senate confirmed two nominees to courts of appeals on January 2, 1996, at the end of the first session of the 104<sup>th</sup> Congress.
- c. Through July 31, 2008. 2008 data are not included in historical average calculations.

Another trend in **Table 1** can be illustrated by comparing years of unified and divided partisan control of the presidency and the Senate. Those averages are presented in **Table 2**.

The data presented in **Table 2** indicate that the Senate has, in presidential election years, confirmed fewer court of appeals nominees when controlled by a party opposite that of the President. In presidential election years where there was unified partisan control of the Senate and the presidency (1980, 1984, 2004), the Senate confirmed an average of 8.3 nominees to the courts of appeals. In those years, the Senate confirmed 25 of 48, or 52.1%, of pending nominees. In presidential election years where there was divided partisan control of the Senate and the presidency (1988, 1992, 1996, 2000), the Senate confirmed an average of 6.5 nominees to the courts of appeals. In those years, the Senate confirmed 26 of 72, or 36.1%, of pending nominees.

**Table 2. Average Number of Court of Appeals Nominations Acted on in Presidential Election Years of Divided and Unified Party Control of Senate and Presidency, 1980-2004**

Party Control	Total Nominations	Nominations Receiving Hearings	Nominations Reported	Nominations Confirmed	% Confirmed
Unified <sup>a</sup>	16.0	11.7	10.7	8.3	52.1%
Divided <sup>b</sup>	18.0	7.0	6.5	6.5	36.1%

**Source:** CRS Judicial Nominations Database, based on data from the *Journal of the Executive Proceedings of the Senate*, various years. In cases where a nominee was nominated more than once in a given year, more than one hearing was held on a nominee in a given year, or where a nominee was reported more than once in a given year, only the first nomination/hearing/report is included in **Table 2**. Cell entries are arithmetical means.

a. Includes 1980, 1984, and 2004.

b. Includes 1988, 1992, 1996, and 2000.

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

As the narratives above demonstrated, the dates on which the Senate Judiciary Committee and the full Senate last considered court of appeals nominees have varied widely since 1980. **Table 3** presents, for each presidential election year between 1980 and 2004, the last dates on which the Senate received a court of appeals nomination, the Judiciary Committee held a hearing or reported such a nomination, or the Senate voted on confirmation of such a nomination.

**Table 3. Last Dates of Court of Appeals Nominations, Hearings, Committee Reports, and Confirmations, Presidential Election Years 1980-2004**

Cong.	Party <sup>a</sup>		Year	Last Nomination	Last Hearing	Last Report	Last Confirmation	Adjourn <i>Sine Die</i>
	Pres.	Sen. Maj.						
96 <sup>th</sup>	D	D	1980	11/13/1980	11/17/1980	12/2/1980	12/16/1980	12/16/1980
98 <sup>th</sup>	R	R	1984	10/5/1984	9/26/1984	9/28/1984	10/4/1984	10/12/1984
100 <sup>th</sup>	R	D	1988	9/16/1988	10/4/1988	10/5/1988	10/14/1988	10/22/1988
102 <sup>nd</sup>	R	D	1992	9/17/1992	9/24/1992	10/2/1992	10/8/1992	10/9/1992
104 <sup>th</sup>	D	R	1996	4/18/1996	7/31/1996	6/27/1996	— <sup>b</sup>	10/4/1996
106 <sup>th</sup>	D	R	2000	10/26/2000	6/16/2000	7/20/2000	7/21/2000	12/15/2000
108 <sup>th</sup>	R	R	2004	5/10/2004	11/16/2004	10/4/2004	6/24/2004 <sup>c</sup>	12/8/2004

**Source:** CRS Judicial Nominations Database

a. D=Democratic; R=Republican.

b. The Senate confirmed two court of appeals nominees on January 2, 1996, the final day of the first session of the 104<sup>th</sup> Congress.

c. The Senate failed to invoke cloture on one court of appeals nominee on July 20, 2004, and three court of appeals nominees on July 22, 2004.

The data in **Table 3** offer insight into the Senate's ability to move nominees forward in presidential election years, particularly after July of presidential election

years.<sup>110</sup> In most presidential election years since 1980, the Senate Judiciary Committee, as **Table 3** shows, has continued its consideration of court of appeals nominees past July. In 1980, 1984, 1988, 1992, and 2004, the Senate Judiciary Committee held hearings for at least one court of appeals nominee after July 31 and reported at least one nominee after that date as well. In 1996 and 2004, however, the Judiciary Committee did not act on court of appeals nominees after July 31. In 1996, the Judiciary Committee's last hearing for a court of appeals nominee was on July 31; its last report of a court of appeals nominee was on June 27. In 2000, the last hearing date for a court of appeals nominee was June 16; its last report of a court of appeals nominee was on July 20.

The full Senate has also confirmed its final court of appeals nominee earlier in the last three presidential election years than in the previous four presidential election years. A relatively early end to confirmations of court of appeals nominees occurred in 2004, even though the Senate and the presidency were under the control of the same party. In 1980, Judge Stephen Breyer was confirmed to the First Circuit on December 16; in 1984, 1988, and 1992, the Senate confirmed court of appeals nominees in October of each year, in each case within several days of the Senate's adjournment *sine die*. In the past three presidential election years, however, the Senate has not confirmed court of appeals nominees after July. In 1996, the Senate confirmed no court of appeals nominees in the second session of the 104<sup>th</sup> Congress; its last confirmations were on January 2, 1996, the final day of the *first* session. In 2000, the last confirmation of a court of appeals nominee occurred on July 21. In 2004, the last confirmation occurred on June 24; although four nominees were considered in late July, the Senate rejected attempts to invoke cloture on those nominees.<sup>111</sup>

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<sup>110</sup> The end of July might serve as a useful demarcation point for two reasons. First, the Senate traditionally takes an August recess, and the end of July comes close to marking the end of the legislative work period before that recess in most years. Second, the end of July falls near the time of the presidential conventions. From 1980 to 1992, one party's convention was held in July, with the other party's national convention held in August; from 1996 to 2008, both conventions were held in August or September (the 2000 Republican National Convention started on July 31). Among other things, **Table 3** reveals, for each presidential election year from 1980 to 2004, whether lower court nominations received hearings, committee votes, or Senate floor votes after July.

<sup>111</sup> The patterns illustrated in **Tables 2** and **3** above may operate in conjunction with one another. In particular, in 1980, 1984, and 2004, the Judiciary Committee's reporting of nominees after July 31 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.



## Presidential Election Years Compared with Other Years of a Presidential Term

This section presents, for each of the four years of a presidential term, data on the number of vacancies to be filled, nominations pending, nominations receiving hearings, reports of nominations, and Senate confirmations. These data may help illustrate if, and to what degree, presidential election years represent declines in Senate consideration of nominees relative to other years of the presidential term. The following findings can be derived from the data below:

- *Court of appeals nominees*: In presidential election years between 1977 and 2007, the Senate, on average, held hearings on fewer court of appeals nominees than in the second and third years of the presidential terms and, on average, reported and confirmed fewer nominations than in any other year of the presidential terms.
- *District court nominees*: In presidential election years between 1977 and 2007, the Senate, on average, held hearings on fewer district court nominees and reported and confirmed fewer nominations than in the second and the third years (but not the first year) of the presidential terms.
- *Days in session*: The Senate has, on average, been in session fewer days in presidential election years between 1977 and 2007 than in other years of a presidential term (with this possibly a factor in the Senate's generally reduced consideration of judicial nominees in presidential election years relative to other years of a presidential term).

### Senate Consideration of Court of Appeals Nominees

For nominees to the circuit courts of appeals, presidential election years (the fourth year of each term) have, on average, seen fewer hearings held than any year except the first year of a presidential term, and have had fewer nominees reported and confirmed than any other year in a President's term. **Table 4** reports the average number of nominees pending, and the number of nominees who received a hearing, were reported by the Senate Judiciary Committee, and were confirmed by the Senate in each year of a four-year presidential term between 1977 and 2007.<sup>112</sup>

Specifically, the data shown in **Table 4** indicate that, on average, the Senate has had an average of 17.1 nominees pending at some point during presidential election

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<sup>112</sup> The significant expansion of the federal judiciary in 1978 offers a useful demarcation when deciding which years to compare. In 1978, Congress enacted legislation that increased the size of the appellate bench to 132 from 97 judgeships; subsequent legislation in 1982, 1984, and 1990 brought the size of the appellate bench to 179 at the end of 2007. Given these expansions of the judiciary, data from before 1977 (the first year of the presidential term in which the above expansion was enacted) may not be easily compared with data after 1977.

years. On average, 9.0 of those nominees received hearings in presidential election years, 8.3 were reported to the full Senate by the Judiciary Committee, and 7.3 were confirmed by the Senate in presidential election years.<sup>113</sup> The average number of confirmed nominees in presidential election years, 7.3, is 62% of the average number confirmed in the third year of a presidential term (11.8). Put differently, between 1977 and 2007, the Senate has confirmed, on average, 38% fewer court of appeals nominees in presidential election years than in the year preceding presidential elections.

**Table 4. Average Number of Court of Appeals Vacancies, Nominations Pending, Hearings, Committee Reports, and Confirmed Nominees to the Courts of Appeals by Year of Presidential Term, 1977-2007**

Year of Presidential Term	Vacancies <sup>a</sup>	Nominations			
		Pending	Receiving Hearings	Reported	Confirmed
First	15.9	14.9	8.1	9.0	8.5
Second	15.1	16.4	12.4	11.4	11.3
Third	18.5	21.3	13.8	13.4	11.8
Fourth	14.8	17.1	9.0	8.3	7.3

**Source:** Court of appeals vacancies data (1981-2007) derived from vacancies list of Administrative Office of the U.S. Courts, [<http://www.uscourts.gov/judicialvac.html>]. Vacancy data for 1977-1980 derived from Lower Federal Court Confirmation Database, available at [<http://www.binghamton.edu/cdp/lfccd.htm>]. All other data derived from CRS Judicial Nominations Database, based on data from the *Journal of the Executive Proceedings of the Senate*, various years. In cases where a nominee was nominated more than once in a given year, more than one hearing was held on a nominee in a given year, or where a nominee was reported more than once in a given year, only the first nomination/hearing/report is included in **Table 4**. Cell entries are arithmetical means.

a. Number of vacancies as of January 1 of each year.

The decline observed in presidential election years appears to be confined to presidential, rather than all, national elections. In the second year of presidential terms between 1977 and 2007, during which there are elections for all Members of the House of Representatives and one-third of Senators, the Senate held, on average, 12.4 hearings for court of appeals nominees, reported an average of 11.4, and confirmed an average of 11.3 nominees to the courts of appeals. In terms of number of nominees receiving hearings, number of nominations reported, and number of confirmations, the second year of each presidential term has been, on average, the second most productive of each four-year presidential term between 1977 and 2007. The most productive year of each term was the third year.

<sup>113</sup> One apparent anomaly is that more nominations to the courts of appeals were reported by the Senate in the first year of presidential terms than received hearings; this apparent discrepancy may be due to nominees who received hearings in the first term of two-term presidencies, only to be reported in the second term of a two-term President.

## Senate Consideration of District Court Nominees

As the data in **Table 5** indicate, many of the same patterns as those observed in court of appeals nominees, though with less pronounced year-to-year variation, occurred in Senate consideration of district court nominees. On average, the Senate held hearings on 38.3 district court nominees, reported 36.3 district court nominees, and confirmed 35.7 district court nominees in presidential election years between 1977 and 2007. While these averages are lower than those in either the second or third years of each presidential term, the Senate processed more district court nominees in presidential election years than in the first years of presidential terms between 1977 and 2007.

This pattern differs from that of court of appeals nominees, of whom the Senate generally processed more nominees in the first year of a presidential term than in the fourth year of a presidential term.<sup>114</sup> Between 1977 and 2007, the Senate, in presidential election years, confirmed 77% of the number of district court judges confirmed in the third year of a presidential term. Put differently, the decline in the number of nominees confirmed from the third to the fourth year of a presidential term was 23%. This decline is smaller than the comparable decline for court of appeals nominees (for which there was a 38% decline in number of confirmed nominees from the third to fourth years of presidential terms).

**Table 5. Average Number of District Court Nominations Pending, Hearings, Committee Reports, and Confirmed by Year of Presidential Term, 1977-2007**

Year of Presidential Term	Vacancies <sup>a</sup>	Nominations			
		Pending	Receiving Hearings	Reported	Confirmed
First	48.8	38.0	27.9	28.5	26.8
Second	47.4	53.6	44.6	44.0	43.6
Third	59.6	66.5	46.6	47.0	46.1
Fourth	47.0	55.1	38.3	36.3	35.7

**Source:** District court vacancies data (1981-2007) derived from vacancies list of Administrative Office of the U.S. Courts, [<http://www.uscourts.gov/judicialvac.html>]. Vacancy data for 1977-1980 derived from Lower Federal Court Confirmation Database, available at [<http://www.binghamton.edu/cdp/lfccd.htm>]. All other data derived from CRS Judicial Nominations Database, based on data from the *Journal of the Executive Proceedings of the Senate*, various years. In cases where a nominee was nominated more than once in a given year, more than one hearing was held on a nominee in a given year, or where a nominee was reported more than once in a given year, only the first nomination/hearing/report is included in **Table 5**. Cell entries are arithmetical means.

a. Number of vacancies as of January 1 each year.

<sup>114</sup> The Senate has, on average, held more hearings for court of appeals nominees in presidential election years (9.0) than in the first year of presidential terms (8.1), but the Senate reported (9.0 in first years; 8.3 in presidential election years) and confirmed (8.5 in first years; 7.3 in presidential election years) more nominees to the courts of appeals in first years of presidential terms than in presidential election years.

## Possible Explanations for the Differences Between Presidential Election Years and Other Years

Various factors might come into play to influence a decline in Senate processing of judicial nominations in presidential election years. Two institutional factors especially might have a bearing in this regard. One is the lesser amount of Senate time that typically is available for consideration of judicial nominations in presidential election years relative to other years. A second is the possible inclination on the part of Senators whose party is not in control of the White House to seek, during presidential election years, to slow down the number of judicial nominations confirmed during the year. This slowdown would preserve available judicial vacancies for the candidate they support in the upcoming presidential election.

**Table 6** provides the average number of days in session for each year of a presidential term between 1977 and 2007.

**Table 6. Average Number of Days Senate Was in Session, by Year of Presidential Term, 1977-2007**

Year of Presidential Term	Average Number of Days Senate Was in Session
First	161
Second	145
Third	172
Fourth	138

**Source:** CRS analysis of *Senate Calendar of Business*, various editions. Though presidential terms and dates of congressional sessions do not perfectly match, the “first year” of a presidential term is equated with the first session of the overlapping odd-numbered Congress, the “second year of a presidential term is equated with the second session of the overlapping odd-numbered Congress, and so on.

As the data in **Table 6** indicate, the Senate has, on average, been in session for fewer days in presidential election years than the other years of a presidential term. In those years, the Senate typically recesses for presidential nominating conventions (or the conventions are held during the customary congressional August recess) and Congress typically adjourns earlier in presidential election years than in those years (the first and third years of a presidential term) when there are no national elections. In the second and fourth years of a presidential term, the Senate typically adjourns for a period of time (or adjourns *sine die*) in October to allow for campaigning in anticipation of the November elections. In 1984, 1988, 1992, and 1996 election years, the Senate adjourned *sine die* in October. In 1980 and 2004, the Senate adjourned in October for the elections and returned following the presidential election for lame-

duck sessions. In 2000, the Senate remained in session until November 2 and returned on December 5 for a lame-duck session.<sup>115</sup>

Another possible source of the judicial nominee slowdown in presidential election years might be a desire on the part of some Senators to preserve available vacancies on the courts of appeals (and, to some degree, on the district courts) for the candidate they support in the upcoming presidential election. The use of this tactic may be more common in years when the Senate majority is controlled by a party other than the President's. As noted earlier, debate has occasionally referenced presidential election years before 1980 as years in which the Senate slowed its consideration of judicial nominations in presidential election years. In the three years mentioned — 1948, 1960, and 1976 — different political parties controlled the Senate majority and the presidency.

While these examples suggest that one party's Senators may seek to hold open judicial vacancies for their party's presidential candidates, the historical record for other election years is not always clear in indicating that such a tactic has been employed. In 1988 and 1992, when the Democrats had a majority in the Senate and were considering nominations made by Republican Presidents, the Senate returned, respectively, two and ten court of appeals nominations to the President at the end of each session. Yet the Senate in these two years also confirmed 7 and 11 nominations to the courts of appeals, respectively. The 11 court of appeals nominations confirmed in 1992 are the most ever confirmed by the Senate in a presidential election year. In both of these years, there were differences of opinion, along party lines, as to whether the Democratic majority in the Senate was seeking to slow down the judicial confirmation process.

Slowdowns, it should be noted, also may occur in presidential election years when the President's party has a majority in the Senate. The year 1980, as discussed above, was marked by controversy over whether, as some Senate Democrats alleged, the Republican minority in the Senate was seeking to block confirmation of President Carter's lower court nominations. In 2004, with a Republican majority in the Senate and a Republican President, but with Senate Democrats unified in opposition to several of the President's court of appeals nominees, the Senate confirmed only five of 19 pending nominations (26.3%) to the courts of appeals, the second-lowest confirmation percentage for any presidential election year in the 1980-2004 period.

While Senators not of the President's party may, if they are so inclined, seek to slow consideration of judicial nominations in a presidential election year, Senators of the same party as the President, may, in turn, seek to speed up Senate

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<sup>115</sup> The general pattern of adjourning in September or October, and occasionally returning for a lame-duck session, also occurs in midterm election years. In 1978, 1986, 1990, and 1998, the Senate adjourned *sine die* before congressional elections; in 1982, 1994, and 2006, the Senate returned for lame-duck sessions after the congressional elections. In 2002, the Senate remained in session until November 22, at which point it adjourned *sine die*. Such a pattern does not arise in odd-numbered years, when there are no regular congressional or presidential elections. Between 1977 and 2007, the earliest in the year that the first session of any Congress adjourned was November 13, in 1997.

consideration of pending judicial nominations, as any presidential election may bring about a change in the party of the President or in the Senate majority, or both.

## Whether to Oppose or Favor a Slowdown in Senate Processing of Judicial Nominations

In a presidential election year, should the Senate act on fewer lower court nominations than it does in other years, or stop processing them earlier? In addressing this question, Senators might wish to take various considerations into account. One is that, in a presidential election year, the number of lower court nominations confirmed by the Senate will affect the number of opportunities to make nominations that will be available later for the person elected President in November. Another consideration is that the extent to which judicial nominations are confirmed during the year will affect the federal judiciary's vacancy rate, i.e., whether the percent of unfilled federal judgeship positions increases, decreases, or stays about the same.

The following paragraphs first review a range of considerations that might support taking a position *against* a slowdown in, and an earlier end to, processing of judicial nominations in a presidential election year; then discussed are considerations that might support taking a position in *favor* of slowing down the judicial confirmation process.

### Reasons for Opposing a Slowdown

For some Senators, one or more of the following considerations might be regarded as sufficient reason to oppose a slowdown in Senate processing of judicial nominations in a presidential election year.

**Acting on Nominations Seen as Inherent in Senate's Advice and Consent Role.** Some Senators might be inclined to regard their "advice and consent" responsibility under the Appointments Clause of the Constitution as obligating them to consider a President's judicial nominations whenever possible. From this point of view, it would not be responsible for Senators, because of the arrival of a presidential election year, to deliberately avoid voting on judicial nominations, or to not consider judicial nominations, despite the availability of time to do this in the Senate's schedule. According to such an argument, the imminent arrival of a presidential election, which might or might not bring about a change in presidential administration, does not provide sufficient justification for the Senate to set aside its role in the confirmation process. The Senate should still, according to this argument, conduct its business according to its normal patterns.

**Policy Concerns for Senators Generally Supportive of a President's Judicial Nominations.** Some Senators, if they have generally been supportive of the President's judicial nominations in the past, might in be favor of processing as many lower court nominations as possible, and as late in a presidential election year as possible. These Senators, from a public policy standpoint, might regard the incumbent President's judicial nominees as more suitable for appointment than the

kind of judicial nominees whom they anticipate the other major party's presidential candidate might select, if he or she were elected in November. Hence, from their standpoint, it would be preferable to fill as many vacant judgeships as possible with the President's nominees, rather than leave open the possibility of the judgeships being filled later by the other party's presidential candidate. This concern might be particularly pronounced at the end of a two-term presidency, as there may be uncertainty as to what criteria a new President, of either party, might use to select judicial nominees.

**Patronage Concerns for Senators of the President's Party.** Senators of the President's party might also consider patronage as an incentive to fill judgeships in a presidential election year. By custom, Senators who are of the President's party usually play a much more influential role in the selection of judicial nominees from their home states than Senators of the opposition party. To the extent that home state Senators of the President's party play a decisive role in the selection of judicial nominees (which, historically, has typically been the case in the selection of district court nominees), the judicial positions affected are often regarded as a form of senatorial patronage. When judicial vacancies present such patronage opportunities to Senators in a presidential election year, the opportunities may encourage Senators to oppose a slowdown in judicial confirmations in their state. Instead, they are likely to want the vacant judgeships to be filled with nominees whom they played a major role in selecting.

**A Slowdown in Processing Nominations Increases the Judicial Vacancy Rate.** Another consideration which might incline a Senator to oppose a decline in the processing of judicial nominations is that the slowdown would increase the federal judiciary's vacancy rate. The vacancy rate, which affects the ability of the judiciary to conduct its business, is directly affected by an increase or decrease in the rate of Senate consideration of judicial nominees. A growth in the vacancy rate could impair the ability of the judiciary to hear and decide cases in a timely manner.

The impact of slowing or stopping Senate consideration of judicial nominations in a presidential election year can be magnified if the election leads to a change in presidential administration. New Presidents often take several months after their inauguration to begin making judicial nominations. President Clinton made his first nominations to the lower federal courts on August 6, 1993, nearly seven months after taking office; the first confirmation occurred on September 30, 1993, nearly one year after the last confirmations of President George H.W. Bush's nominees, on October 8, 1992.<sup>116</sup> In the interim, the number of vacancies on the lower federal courts (district courts and courts of appeals) rose to 127 (15.6%) from 101 (12.4%), out of 811 permanent authorized judgeships.<sup>117</sup> President George W. Bush made his first

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<sup>116</sup> The Senate confirmed one circuit court and five district court nominees on Oct. 8, 1992; it confirmed one circuit court and three district court nominees on Sept. 30, 1993. In the interim, the President nominated (on June 22, 1993) and the Senate confirmed (on Aug. 3, 1993) Ruth Bader Ginsburg to a vacancy on the U.S. Supreme Court.

<sup>117</sup> For number of authorized judgeships, see [[http://www.uscourts.gov/history/all\\_authorized\\_judgeships.pdf](http://www.uscourts.gov/history/all_authorized_judgeships.pdf)]. Total is derived by adding number of permanent district (continued...)

nominations to the federal courts on May 9, 2001, nearly four months after taking office; the first confirmation occurred on July 20, 2001, more than nine months after the last district court nominee of President Clinton was confirmed and almost one year after the last court of appeals nominee of President Clinton was confirmed by the Senate.<sup>118</sup> From October 2000 to July 2001, the number of vacancies on the lower federal courts (district courts and courts of appeals) rose to 109 (13.1%) from 63 (7.6%) of 830 permanent authorized judgeships.<sup>119</sup>

**A Slowdown Makes the Judicial Confirmation Process Appear More Partisan.** A slowdown in the judicial confirmation process during a presidential election year, it can be argued, might make the process appear more partisan in nature if its underlying motivation is clearly to reserve judicial nomination opportunities for the presidential candidate of a party other than the President's. Also, a slowdown in such cases arguably increases the degree to which judicial appointments are regarded as political appointments.

Another related consideration is the possibility that partisan conflict in the Senate over a slowdown in processing judicial nominations in a presidential election year might serve to carry acrimony and contentiousness between the two political parties into the next presidency. In recent years, some Senators have stated the view that much of the contentiousness of the contemporary judicial confirmation process is the result of each political party having a sense of grievance against the other. From the Reagan through the Clinton presidencies, Senators of the President's party, it has been asserted, felt aggrieved when Senators of the other party blocked judicial nominations from being confirmed in the final years of each presidency.<sup>120</sup> This sense

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<sup>117</sup> (...continued)

court judgeships (632) and number of court of appeals judgeships (179). Vacancy data derived from [<http://www.uscourts.gov/vacancies/archives.cfm>].

<sup>118</sup> The Senate confirmed two district court and one circuit court nominee on July 21, 2000. The circuit court nominee, Roger Gregory, had been first nominated and then recess-appointed by President Clinton, then nominated again by President George W. Bush. The last court of appeals nominee confirmed in the 106<sup>th</sup> Congress was confirmed on July 21, 2000; the Senate confirmed four district court nominees on Oct. 3, 2000.

<sup>119</sup> For number of authorized judgeships, see [[http://www.uscourts.gov/history/all\\_authorized\\_judgeships.pdf](http://www.uscourts.gov/history/all_authorized_judgeships.pdf)]. Total is derived by adding number of permanent district court judgeships (651) and number of court of appeals judgeships (179). Vacancy data derived from [<http://www.uscourts.gov/vacancies/archives.cfm>].

<sup>120</sup> "As I have said on the Senate floor, this is a problem that has been going on for the past two decades. In the last two years of President Reagan's administration, there was a slowdown when Democrats were in charge of the Senate. The slowdown continued during the term of President Bush, the 41<sup>st</sup> President. Then, Republicans retaliated during the term of President Clinton by slowing down the process. We have had very major disputes — I would even call them bitter disputes. Notwithstanding the disrepute of the word 'bitter,' sometimes it is applicable, and I think it is certainly applicable to the filibusters of 2005. During that confrontation between the parties, filibusters were used repeatedly by Democrats. Republicans retaliated in kind with the threat of a so-called nuclear or constitutional option." Sen. Arlen Specter, "Judicial Confirmations," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Apr. 16, 2008), p. S3042. See also Sheldon (continued...)



of grievance, it has further been asserted, inclined them to feel justified, when the other party won the presidency, to oppose the new President's judicial nominations, as they felt the other party had when it did not control the White House.<sup>121</sup> To the extent that a Senator would be concerned about such political grievances in the Senate carrying over from one presidency into the next, this would be another consideration against a slowdown in judicial appointments during a presidential election year.

**A Slowdown in Presidential Election Years Is Not a Strictly Observed Practice.** While the data presented above indicate that, on average, the Senate confirms fewer court of appeals nominees in presidential election years, it has not always been the case that, relative to other years, fewer lower court nominations are processed in presidential election years. In President Reagan's first term (1981-1984), President George H.W. Bush's term (1989-1992), and President Clinton's second term (1997-2000), the fourth year of the term was the second-most productive year of the term (as measured by number of court of appeals nominees confirmed). Nor, the above research found, did the last confirmations of judicial nominations in the presidential election years from 1980 to 2004 always take place at a relatively early date — such as by early June or by July 4. In three of the years (1984, 1988, and 1992) the Senate confirmed court of appeals nominations as late as October, and in a fourth year (2000) as late as mid-December. The Senate during these years, in other words, found time even late in the second session of the Congress for nominations to be considered and confirmed. In sum, there is not a uniformly observed Senate practice to slow down, or end earlier, Senate confirmation of lower court nominations (including those to court of appeals judgeships) during presidential election years. These facts would be another consideration that a Senator might cite in opposition to slowing down the processing of judicial nominations in such years.

## Reasons for Favoring a Slowdown

For some Senators, however, other considerations might be reason to favor, or not oppose, a slowdown in Senate processing of judicial nominations in a presidential election year. Some of the considerations, discussed below, relate only to Senators whose party does not control the White House — and would rest on a hope for change of party control of the presidency as a result of the election. Other considerations, having less to do with change in presidential administration (or of the party in control of the White House) might be of consequence to some Senators regardless of their party.

**Desire to Reserve Judicial Appointments for Election Winner.** A consideration for some Senators might be a personal belief that, as a general principle, opportunities to make judicial appointments arising after a certain point in a presidential election year should be reserved for the person elected President in

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<sup>120</sup> (...continued)

Goldman, "Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts," *University of Richmond Law Review*, vol. 39, March 2005, pp. 871-908.

<sup>121</sup> *Ibid.*

November.<sup>122</sup> After a certain time in a presidential election year, these Senators might believe the President would no longer have a mandate to fill vacant judgeships, and that the Senate would no longer have a responsibility to confirm the President's judicial nominations. Rather, after that point, the responsibility of the Senate to give its attention to judicial nominations could temporarily be put "on hold," in anticipation of the presidential election. Thereafter, judicial nominations would be seen as having less legitimacy to the extent that they were regarded as among the last acts of a departing administration. Senators holding to this view, of course, might differ as to the precise point in a presidential election year after which judicial appointments should be reserved for the next President-elect.

**Policy Concerns about a President's Judicial Nominations.** In recent decades, the judicial confirmation process in the Senate periodically has been marked by conflict, with support for and opposition to the President's judicial nominees generally forming along party lines. Often in these conflicts, opposition to judicial nominees has largely been based on Senators' reservations about the policy or ideological orientations of nominees under consideration. In situations such as these, some Senators might be reluctant to confirm judicial nominees believed to have views of the Constitution, or of the role of the courts, incompatible with their own views. Senators especially might be reluctant to confirm nominees in a presidential election year if they believed that their party's presidential candidate, if elected, were likely to make judicial nominee selections more compatible with their policy preferences. Senators with these concerns, in anticipation of the presidential election, also might consider it desirable, at some point in the election year, to stop confirming judicial nominees in order to minimize the extent to which the federal judiciary would be filled with appointees of the President at the time of his leaving office.

**Patronage Considerations of Opposition Party Senators.** As discussed above, Senators of the President's party customarily play a primary role in recommending candidates for the President to nominate to federal district court judgeships in their states. They also play a lesser, but often significant, role in recommending candidates for federal court of appeals judgeships associated with their states.<sup>123</sup> Such appointments are often regarded as a form of senatorial patronage, given the role of home state Senators in nominee selection. Patronage of this sort, however, typically is available only to Senators of the same party as the President, and it reverts to opposition party Senators only after their party has regained the White House. For opposition party Senators, the possibility of gaining such patronage — provided their party's candidate is elected President — could be a consideration in favor of an election-year slowdown in Senate processing of judicial nominations in their states.

**If Judicial Vacancy Rate Is Relatively Low.** As discussed above, a Senate slowdown in the processing of judicial nominations could increase the federal

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<sup>122</sup> A Senator's belief in this principle could be a consideration in favor of a slowdown of Senate action on judicial nominations during the election year, whether or not the Senator were of the President's party.

<sup>123</sup> CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus.

judiciary's vacancy rate. This would occur, for instance, if, during a slowdown period, the number of judges leaving the bench were not matched by the number of judicial nominees confirmed by the Senate. To the extent that judicial vacancies impair the ability of the judiciary to hear and decide cases in a timely manner, a slowdown in Senate activity to fill judicial vacancies, it could be argued, contributes to that impairment. A counter-argument, however, is that a temporary slowdown in Senate processing of judicial nominations will not be harmful if it occurs at a time when the existing judicial vacancy rate is relatively low. In this vein, the chairman of the Senate Judiciary Committee in 2000 viewed the vacancy rate of federal lower court judgeships at that time as virtually synonymous with "full employment" in the federal judiciary.<sup>124</sup> (At the time, the combined vacancy rate for the courts of appeals and district courts was 7.1%.)<sup>125</sup> From such a perspective, concerns about increasing the judicial vacancy rate would not rule out a Senate slowdown in processing judicial nominations as long as the rate were at an acceptably low level.

Other judicial vacancy considerations also might be relevant to a decision by a Senator in favor of a slowdown in the processing of judicial nominations in a presidential election year. One would be whether the Senate, in the years and months immediately preceding a contemplated slowdown, had significantly reduced the judicial vacancy rate. If so, that record would put a temporary slowdown in a broader context, showing it to be a brief period in a longer time frame in which Senate confirmations of judicial nominees had significantly reduced the judicial vacancy rate. Another consideration is a comparison of the judicial vacancy rate at the time of a contemplated slowdown with vacancy rates existing at corresponding times in earlier Congresses. A Senator arguably might be more inclined to favor a slowdown if the existing judicial vacancy rate were comparable to or less than those of earlier Congresses when the judicial vacancy rates then in place were not viewed as problematic.

**Competing Priorities and Limited Time in a Presidential Election Year.** Advising and consenting to a President's judicial nominations, it has been

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<sup>124</sup> See July 20, 2000, statement of Sen. Orrin G. Hatch, quoted earlier in this report, that the federal judiciary "is at virtually full employment because the Senate has appropriately carried out its advice and consent duties." Sen. Orrin G. Hatch, quoted in Transcript of Proceedings, United States Senate, Committee on the Judiciary, Executive Session, July 20, 2000," Miller Reporting Co. Inc., pp. 6-7. (Copy in archival records of the Senate Judiciary Committee.) See also July 25, 2000, floor statement by Senator Hatch, in which he stated, "The claim that there is a vacancy crisis in the federal courts is simply wrong. Using the Clinton Administration's own standard, the federal judiciary currently is at virtual full employment." Sen. Orrin G. Hatch, "Judicial Nominations," remarks in the Senate, *Congressional Record*, daily edition, vol. 146 (July 25, 2000), p. S7519.

<sup>125</sup> The separate vacancy rates for the two court categories were 11.7% for the courts of appeals (21 vacancies of 179 judgeships) and 5.9% for the district courts (39 vacancies of 661 judgeships). See [<http://www.uscourts.gov/vacancies/07012000/summary.htm>], for vacancy data, and [[http://www.uscourts.gov/history/all\\_authorized\\_judgeships.pdf](http://www.uscourts.gov/history/all_authorized_judgeships.pdf)], for judgeship data, both accessed Aug. 5, 2008.

argued, is among the Senate’s most important constitutional responsibilities.<sup>126</sup> Yet the Senate, of course, also exercises many other important responsibilities. All of these, including judicial nominations, compete for time that typically is more limited in a presidential election year than in other years. In a presidential election year, the Senate customarily is in session fewer days, a circumstance caused in part by being in recess during the political parties’ national conventions and during a campaign period of several weeks immediately prior to the November elections. If it reconvenes for a brief “lame duck” session after the November elections, the unfinished business before the Senate usually does not include the consideration of judicial nominations. In short, the limited time available to the Senate, and the range of official responsibilities and issues that compete for the Senate’s time, might be a consideration for some Senators in favor of devoting less time to the consideration of judicial nominations in a presidential election year than in other years.

### **Number of Judicial Nominations Processed Prior to a Slowdown.**

In deciding whether to favor, or not oppose, a judicial nominations slowdown at some point in a presidential election year, some Senators might be concerned with the number of judicial nominations the Senate had considered prior to that point. Some Senators might not oppose a slowdown in the processing of judicial nominations if they felt that the Senate, already at that point in the Congress, had processed enough judicial nominations. For guidance on that question, they might, for example, compare the number of judicial nominations confirmed thus far in the Congress with numbers confirmed in other recent Congresses. If the number compared favorably with those of other recent Congresses, it might be a consideration for some Senators not to oppose a slowdown.<sup>127</sup>

## **Concluding Observations**

In the 110<sup>th</sup> Congress, Senators have differed as to whether a sufficient number of judicial nominations, particularly nominations to the courts of appeals, have been confirmed or are on track to be confirmed before the end of the second session of the

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<sup>126</sup> This responsibility involves assessing the qualifications of persons to hold lifetime appointments in the third branch of the federal government which is independent of Congress and the President. “The power to name those who occupy the offices of government is the power to shape how and by whom the nation is governed. The division of so critical a power between the president and the Senate all but invites a struggle for primacy between the occupants of the first and second branches and their respective political parties....” Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America’s Judicial System* (Ann Arbor: University of Michigan Press, 2006), p. 172.

<sup>127</sup> Alternately, as discussed earlier, Senators might look at the judicial vacancy rate at that point in the Congress to decide whether, in their view, the Senate had already, in that Congress, confirmed a sufficient number of judicial nominations. To this end, they could consider whether the judicial vacancy rate had been reduced during the Congress, and whether, at that point, it was at an acceptably low level. An affirmative answer, especially if to both of these questions, could be a consideration for a Senator to favor, or not oppose, a slowdown in Senate processing of judicial nominations.

Congress. As of July 31, 2008, the Senate had confirmed 10 court of appeals nominations in the 110<sup>th</sup> Congress, with four of those nominations confirmed in the second session.<sup>128</sup> Some Senate Democrats have asserted that, in a presidential election year, the Senate customarily slows the processing of judicial nominations at an earlier point than in other years. In support of such an assertion, some have cited what has been called the “Thurmond rule,” a precedent they maintain dates back to events in 1980 and which they say has, since 1980, shaped how the Senate and the Senate Judiciary Committee have processed judicial nominations in presidential election years. Conversely, some Senate Republicans have rejected the existence of a Thurmond rule in the Senate and the interpretations of events in 1980 that are the basis for Democrats invoking the rule.

In addressing the above issue, it is important to keep in mind that there is no written Senate or Senate Judiciary Committee rule concerning judicial nominations in a presidential election year. No bipartisan agreement has ever been reached, or any Judiciary Committee or Senate vote taken, regarding a Thurmond rule or the practices for which it is said to stand. On the other hand, it is also important to note that Senators of both parties have, on different occasions over the past few decades, characterized Senate processing of judicial nominations as slower during presidential election years. Usually, if not always, Senators making these characterizations have done so when they were of the opposite party to the President’s. In addition, the data analyzed above, for the 1980-2004 period, demonstrate that Senate consideration of court of appeals nominees in the most recent presidential election years has resulted in fewer confirmations, and earlier final dates of Judiciary Committee and Senate action, than in the earlier presidential election years.

In a preceding section, this report provided chronological narratives of Senate Judiciary Committee and Senate actions taken on court of appeals and district court nominations in each presidential election year from 1980 to 2004. In most of these presidential election years, a fairly similar dynamic appeared to take place in the Judiciary Committee and in the Senate over the issue of whether to slow down the judicial confirmation process: Senators of the President’s party supported processing as many judicial nominations as possible in the year, and as late in the year as possible, and they looked for examples of earlier presidential election years when relatively large numbers of nominations were processed or when nominations were processed relatively late in the year. On the other hand, Senators of the opposition party cited other presidential election years when relatively few nominations were processed, or when the processing of nominations stopped relatively early in the year, to put a slowdown in the current Congress in a more favorable perspective. Examples of presidential election years, in other words, could be found helpful to either party, with or without reference to the Thurmond rule. The impression that such a dynamic has often infused the judicial confirmation process prompted one Senator recently to comment in a floor statement, “We ought to try to move, I suggest, away from

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<sup>128</sup> For a periodically updated listing of nominations by President George W. Bush to the U.S. courts of appeals and district courts during the 110<sup>th</sup> Congress, and Senate actions taken on those nominations, see CRS Report RL33953, *Nominations to Article III Lower Courts by President George W. Bush During the 110<sup>th</sup> Congress*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

positions where we articulate a view when it suits our purpose and then articulate a different view later.”<sup>129</sup>

The debate over the pace of Senate confirmations also regularly takes on a pattern of Senators of the President’s party (and the President himself) blaming opposition party Senators for obstructing nominees viewed as qualified and deserving of Senate confirmation. In this debate, opposition party Senators often contend that the President’s choices are controversial nominees selected to further the President’s policy agenda and are not the best qualified nominations the President could make.

One component of the debate over Senate consideration of judicial nominations in a presidential election year (and of Senate consideration of judicial nominations more generally) is whether or not the increasing controversy over judicial nominations constitutes a policy “problem” for the Senate. Observers and scholars have pointed to the involvement of interest groups and the increasingly partisan nature of judicial nominations as a reason for concern, not only for the Senate, but for the ability of the judiciary to fulfill its role adjudicating controversies between litigants.<sup>130</sup> One indicator of this controversy is the increasing time-to-confirmation for those nominees who secure Senate confirmation.<sup>131</sup> At the same time, however, the vacancy rate for the federal judiciary has actually fallen over the course of the current presidential administration. On January 4, 2001, of 849 judgeships on the Article III lower courts (district courts, courts of appeals, and Court of International Trade), 80, or 9.4%, were vacant; on August 1, 2008, of 871 judgeships, 41, or 4.7%, were vacant.<sup>132</sup>

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<sup>129</sup> Sen. Arlen Specter, “Nominations of Paul G. Gardephe to be United States District Judge for the Southern District of New York and Kiyoo A. Matsumoto to be United States District Judge for the Eastern District of New York,” remarks in the Senate, *Congressional Record*, daily edition, (vol 154) July 17, 2008, p. S6893.

<sup>130</sup> See, e.g., Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford, CA: Stanford University Press, 2005); Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2005); Sheldon Goldman, “Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts,” *University of Richmond Law Review*, vol. 39, March 2005, pp. 871-908; Stephen B. Burbank, “Politics, Privilege & Power: The Senate’s Role in the Appointment of Federal Judges,” *Judicature*, vol. 86, July-August 2002, pp. 24-27; and Elliot E. Slotnick, “A Historical Perspective on Federal Judicial Selection,” *Judicature*, vol. 86, July-August 2002, pp. 13-16.

<sup>131</sup> As of August 4, 2008, the average time to confirmation for President George W. Bush’s court of appeals nominees was 350 days, 47% greater than the average time to confirmation for President Clinton’s court of appeals nominees (238 days). For data on time to confirmation for court of appeals and district court nominees, see CRS Report RL33953, *Nominations to Article III Lower Courts by President George W. Bush During the 110th Congress*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

<sup>132</sup> For 2001 vacancy data, see [<http://www.uscourts.gov/vacancies/01042001/summary.html>]. Judgeship data for 2001 are from [<http://www.uscourts.gov/history/tablek.pdf>]. For 2008 vacancy and judgeship data, see [[http://www.uscourts.gov/cfapps/webnovada/CF\\_FB\\_301/archived/summary08\\_01\\_08.html](http://www.uscourts.gov/cfapps/webnovada/CF_FB_301/archived/summary08_01_08.html)].

Despite the falling vacancy rate, the current controversy over judicial nominations might still give the Senate a cause for concern. Because the Senate meets for fewer days in election years than in non-election years, the Senate may be concerned that the controversy over judicial nominations occupies an inordinate amount of the Senate's time. The Senate may also be concerned that acrimony over the judicial nomination process might spill over into other issues the Senate is considering and into the next Congress. Such acerbity might lead potential federal judgeship nominees to view the confirmation process as too time-consuming and unpleasant, thus discouraging qualified individuals from allowing themselves to be considered.

Should the Senate seek to confirm judicial nominees more promptly and later in presidential election years, one obstacle to overcome (or avoid) would be partisan conflict over the nominees. To that end, some Senators in the 110<sup>th</sup> Congress have indicated that the Senate is more likely to move forward late in presidential election years with what they view as "consensus" nominees. Some Senators have suggested that a nominee could be considered as a consensus choice if he or she has the support of both home state Senators.<sup>133</sup> Others, however, have stressed that, in addition to having the support of home state Senators, it is necessary, in order to be confirmed, that a nominee not be "controversial" — but rather have the support of the leaders of both parties in the Senate as well as of the chairman and the ranking minority member of the Judiciary Committee.<sup>134</sup>

While there may be disagreement as to which nominees are "consensus" nominees, the support of both home-state Senators (particularly if the Senators are of the opposition party) is an important indicator of the President's willingness to work with individual Senators when making nominations.<sup>135</sup> Also, those nominations

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<sup>133</sup> One Senator, for example, referring to Robert J. Conrad, Jr., of North Carolina, a nominee to the Fourth Circuit Court of Appeals, said "He was nominated for a judicial emergency. He has the support of both his home Senators, received a unanimous ABA rating of 'well qualified,' 'the highest rating you can get. He is a consensus nominee. The Senate unanimously confirmed him for his current district judge seat, and the ABA, then, ranked him unanimously 'well qualified.' The whole ABA 15-member committee voted him the highest rating, unanimously." Sen. Jeff Sessions, "Judicial Confirmations," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (Apr. 16, 2008), p. S3041.

<sup>134</sup> According to news reports, an aide to Senator Patrick J. Leahy, chairman of the Judiciary Committee, indicated that a judicial nomination, to be considered a consensus nomination, needed to be approved by the Senate majority leader, the Senate minority leader, and the chairman and ranking minority member of the Judiciary Committee. Al Kamen, "Judicial Vacancies Leave GOP With Empty Feeling," *Washington Post*, July 6, 2007, p. A13. See also Senator Leahy's more recent floor remarks, on June 10, 2008, commending President Bush, in certain instances, "for withdrawing controversial nominees and working toward consensus nominees." Sen. Patrick J. Leahy, "Nomination of Mark Steven Davis to be United States District Judge for the Eastern District of Virginia," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (June 10, 2008), p. S5417.

<sup>135</sup> In the 110<sup>th</sup> Congress, it has been noted, "the onus is on the Administration, if it hopes to see its nominee confirmed, not only to consult with the home state Senator but also, through a process of consultation, to select a nominee who is acceptable to both the  
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which have the support of both home-state Senators arguably would be much more likely to be considered by the Judiciary Committee and the full Senate in a presidential election year than if they lacked such support.<sup>136</sup> However, as already suggested, such support might not be sufficient to allow the nomination to be considered in committee or on the Senate floor, if the nomination lacks the bipartisan support of both the chair and ranking minority member of the Judiciary Committee and of both the Senate majority and the Senate minority leader.

Two other considerations may ultimately serve to limit the number of judicial nominations that can be considered after a certain point in presidential election years. First, as noted above, legislative time is more limited in a presidential election year. As noted in **Table 6** above, the Senate has, over at least the last 30 years, been in session for fewer days in presidential election years than the other years of a President's term, in part due to the time taken for the national conventions and campaigning in advance of the elections. Judicial nominations, therefore, compete with other legislative priorities for the attention of the Senators, the Judiciary Committee, and the full Senate.

Second, the confirmation process, with all its steps, can be time-consuming. If nominations are made relatively late in the year, there might not be time for the Senate to proceed through the steps necessary to hold confirmation votes on nominees.<sup>137</sup> Nominations typically require a background check by the Federal Bureau of Investigation, completion of a Judiciary Committee questionnaire by the nominee, and American Bar Association review. All of these steps typically, if not always, occur before a nominee receives a hearing by the Judiciary Committee — which then may report the nomination to the Senate, where the majority leader may

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<sup>135</sup> (...continued)

Administration and the home state Senator.” CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus (quotation under heading, “Consultation Between the President and Home State Senators in the Current Environment”).

<sup>136</sup> For example, speaking in support of the confirmation of G. Steven Agee to the Fourth Circuit Court of Appeals, Senator Richard J. Durbin of Illinois said, “he is a consensus nominee. Both Senators Warner and Webb support him. Of the 11 appellate court nominees pending before the Senate, only six can claim the same home State Senator support. That is one of the reasons some of them have been delayed. If we work more toward bipartisan consensus, more nominations would be approved.” Sen. Richard J. Durbin, “Nomination of Michael G. McGinn To Be United States Marshal for the District of Minnesota, Ralph E. Martinez To Be A Member of the Foreign Claims Settlement Commission of the United States, and G. Steven Agee To Be United States Judge for the Fourth Circuit — Continued,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (May 20, 2008), pp. S4440-S4441.

<sup>137</sup> Of President George W. Bush's lower court nominees, the shortest time-to-confirmation for a district court judge was 56 days (L. Scott Coogler, Northern District of Alabama, nominated Mar. 27, 2003, confirmed May 22, 2003). The shortest time-to-confirmation for a court of appeals nominee was 63 days (Bobby Shepherd of Arkansas, Eighth Circuit Court of Appeals, nominated May 18, 2006, confirmed July 20, 2006).



schedule it for floor consideration.<sup>138</sup> For some nominations, the time requirements of the pre-hearing process might not leave enough time for the Senate to consider the nominee on the floor prior to the November election. Thus, some judicial vacancies might have to wait to be filled by whoever is elected President in November.

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<sup>138</sup> For a discussion of the pre-nomination process, see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus, pp. 40-41. Typically, but not always, the FBI background check occurs prior to nomination. To take one example of the timing of this process, the nomination of Helene N. White of Michigan, to the Sixth Circuit Court of Appeals, was made on April 15, 2008. From that point, one Senator has noted, “[h]er questionnaire was not received until April 25. The FBI investigation was not begun until April 25. The ABA report cannot be completed until May 19 at the earliest. After Judge White’s hearing, which is scheduled hastily for May 7, the committee typically leaves the record open for 1 week, which would close the record on May 14. If there are questions for the record, Judge White would have 1 week to answer those questions, which would bring us to May 21. If the nomination is held over for a week, that would put us into June. Assuming the nomination is not held over for a week, that leaves only 2 days before May 23 for the committee to review her answers, schedule and hold a committee vote, and for the full Senate to vote on her nomination. No circuit court nominee has had hearings prior to their ABA report being received. The ABA report is not expected until at least May 19.” Sen. Arlen Specter, “Nomination Process,” remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (May 6, 2008), pp. S3753-S3754.