



Obama's Judicial Appointments in a Time of Extraordinary Obstruction

Sheldon Goldman, University of Massachusetts Amherst

Sara M. Schiavoni, John Carroll University

Elliot E. Slotnick, The Ohio State University

How well has President Obama done at nominating new federal judges and shepherding them to confirmation? We look at the record for district court and general courts of appeal during Obama's first term, including the 111th Congress of 2009-10 when Democrats held large majorities and the 112th Congress of 2011-12 when the Democratic edge in the Senate fell far below the sixty votes needed to break a filibuster. We did interviews with key players and interest groups to track the nomination process, and we analyze publicly available statistics on nominees and newly confirmed judges. Our findings underline the obstacles hindering Obama's efforts to appoint new federal judges – yet we also find that the district and appeals court judges Obama has managed to seat are unusually socially diverse.

A Minefield of Delay and Obstruction

The Obama administration got off to a halting start in vetting and proposing nominees, until White House personnel changes made the process of evaluating candidates and forwarding presidential nominations more efficient. But the Senate became much more of a bottleneck after the 2010 elections increased the Republican ranks from 41 to 55.

- Breaking tradition, many Senators, especially Republicans, refuse to suggest nominees from their state or let nominations to proceed in the Judiciary Committee or Senate floor.
- Obama nominees have to fill out much more lengthy questionnaires, and judicial nominees who self-report their youthful drug indiscretions are now held to be disqualified if they used marijuana at any time after passing the bar examination or used any other illegal substance after the age of 18.
- Several extremely conservative, recently elected Tea Party Senators insist that they be allowed to review nominees before they are allowed to go forward, taking advantage of the Senate custom that any single Senator can hold up a nomination.

An index we have developed to measure obstruction and delay shows, that the hurdles have reached unprecedented levels under Obama, especially hindering the progress of nominees to district courts who used to advance smoothly unless usual problems surfaced. During his first term in office, Republican President George W. Bush had 168 confirmed federal district judges out of 198 nominations, an 87.5% success rate. But President Obama has had 141 confirmations from 205 nominations, a 68.6% success rate. Obama's rate of success for appeals court nominees exceeded Bush's, but Obama nominated fewer candidates, so he ended up with 27 seated compared to W. Bush's first term total of 34. This is indicative of considerable trouble for Obama, because Bush faced a Democratic-controlled Senate for two of his first four years in office, whereas Obama has enjoyed Democratic Senate majorities – just not majorities high enough to break judicial filibusters once the Republicans started using them routinely.

The Obama District Judges Entering the Federal Pipeline

Our look at the characteristics of confirmed district judges starts with the observation that 57 are what we call "traditional" white male appointees, while 84 are nontraditional appointees, adding together women, ethnic minorities, and openly gay white males.

- A majority of Obama's nontraditional appointees came from state courts or the U.S. Magistrate's office, whereas the traditional white male appointees were more likely to come from private law practices

(about half the time). One-fifth of nontraditional appointees, compared to one-third of the white males, had no prior experience as a judge or prosecutor.

- Obama's nontraditional district judges average three years younger than the traditional white male district judges.
- Three-quarters of the traditional Obama appointees got the highest rating from the American Bar Association, compared to just over half of the nontraditional appointees.
- Only five Obama district court appointees are identified Republicans, all of them white men.

Obama Compared to His Predecessors

Equally interesting is how all 141 Obama first-term district court judges and all 27 appeals court appointees compare to appointees confirmed under his presidential predecessors.

- Obama's appointees are historically diverse. Nearly 60% of the district appointees and 70% of the appeals court judges are from nontraditional backgrounds. Obama appointed to district judgeships the highest proportions ever proportions of women, Hispanic Americans and Asian Americans. He did the same for the appeals courts, where he also reached a historic high for African American appointments.
- About 70% of Obama's district judges and two-thirds of his appeals court appointees have a net worth above one million dollars, breaking previous records. Relatively low judicial salaries make it hard for people with modest resources to aspire to federal judgeships.
- Obama's first-term cohort of district court appointments is, on overall average, two years older than the comparable George Bush Sr. cohort and a half-year older than the first-term W. Bush cohort. Obama's appeals court cohort averages four years older than W. Bush's.
- Five district appointments were identified Republicans, but none of Obama's appeals court appointments were so identified – making him the first president since Ronald Reagan to appoint no appeals judge from the opposite party. However, only one in three Obama appeals court appointees has any record of party activism, the lowest level on record.

Read more in Shedlon Goldman, Elliot Slotnick, and Sara Schiavoni, "Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism." *Judicature* 97, no. 1 (2013): 7-48.