



Tracking Obstruction and Delay in U.S. Senate Confirmations of Judges to the Federal Courts

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Back in 2002, backlogs and long delays in the Senate confirmation of federal judges nominated by presidents so alarmed then Chief Justice William Rehnquist that he called upon the President and Congress to “work together to fix the underlying problems that have bogged down the nomination and confirmation process for so many years.” The confirmation process has not gotten any faster or smoother since then and, indeed, in 2013 President Obama faces the prospect of outright refusal of filibustering Senators to allow votes on nominees to fill three vacancies on the Washington DC Court of Appeals.

Who is responsible for so much obstruction and delay? Republicans and Democrats point at each other, and each party cites stories and numbers to support its claims. To offer a more comprehensive and objective picture, I have developed an Index of Obstruction and Delay and used it to track trends under all presidents since Jimmy Carter in the late 1970s.

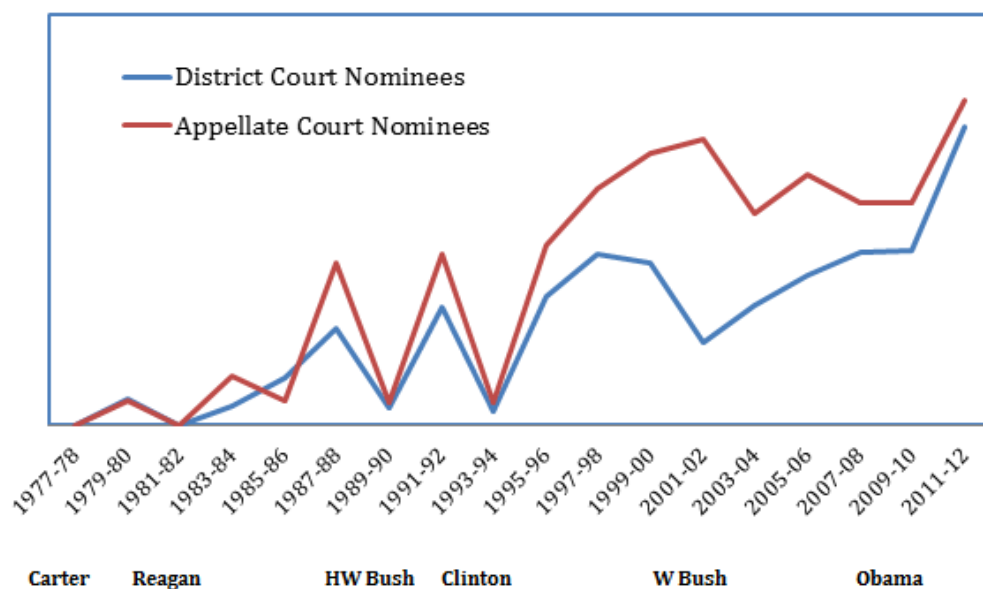
How the Index Works

Individual Congresses hold sessions over two years – for instance, the 95th Congress was in session during 1977 and 1978, the first two years of Jimmy Carter’s presidency, and the 111th Congress held office in 2009 and 2010, during the first two years of Barack Obama’s presidency. For each two-year Congress, my index measures obstruction and delay in combination. “Obstruction” occurs when no action is taken to either confirm or deny a presidential nomination, and “delay” occurs when it takes more than 180 days from the date of nomination to a confirmation vote. I track only nominations to basic district courts and to federal appellate courts other than the DC Court of Appeals. The Index equals the number of nominees who remain unconfirmed at the end of the Congress plus the number for whom the confirmation process took in excess of 180 days, with the total divided by the total number of nominees the president submitted to that two-year Congress. The Index ranges from 0.0000 – indicating a complete absence of any obstruction or delay – to 1.0000 – indicating full obstruction and delay. In order to make sure there was sufficient time for the Senate to act, I set aside nominations made after July 1 of the second session of each Congress.

Dissecting Trends in Senate Handling of Judicial Nominees

With such a measuring tool, it is easy to track trends over many Congresses dealing with nominations from both Democratic and Republican presidents, as the following figure reveals.

Senate Obstruction and Delay of Judicial Nominees, 1977 to 2012



From my Index and the historical record, some straightforward findings are quickly apparent:

- Relatively more Senate foot dragging happens on nominees to federal judgeships in the second half of four-year presidential terms, just before another presidential election.
- No matter which party controlled the presidency or the Senate, not much obstruction and delay happened before President Ronald Reagan's last two years in 1987-88.
- Partisan obstruction and delay in the confirmation of lower court judges gained steam when Senate Democrats objected to several Reagan nominees, and ramped up during the presidencies of Republican George H.W. Bush and (especially) Democrat Bill Clinton and Republican George W. Bush. Under the latter, minority Democrats filibustered.
- After Obama took office in 2009, the Republican Senate minority not only obstructed nominees they found ideologically extreme, but routinely delayed or blocked all votes.

My Index confirms that that minority obstruction and delay has, in fact, reached unprecedented levels under President Obama. But the practice did not start with his presidency.

What will happen next remains uncertain. Will a Senate majority at some point abolish the minority's right to filibuster judicial nominees? That question could come to a head soon, as the Senate considers Obama nominees for the critical DC Court of Appeals, traditionally a weigh station to the Supreme Court. This battle may determine whether current tactics continue.

Read more in Sheldon Goldman, "Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay." *Judicature* 86 (March/April 2003): 251-258.