



Falling Off a Cliff

Judicial Confirmation Rates Have Nosedived in the Obama Presidency

By Ian Millhiser July 30, 2010

Judicial confirmations slowed to a trickle on the day President Barack Obama took office. Filibusters, anonymous holds, and other obstructionary tactics have become the rule. Uncontroversial nominees wait months for a floor vote, and even district court nominees—low-ranking judges whose confirmations have never been controversial in the past—are routinely filibustered into oblivion. Nominations grind to a halt in many cases even after the Senate Judiciary Committee has unanimously endorsed a nominee.

Such tactics are completely unprecedented, and so are their results. Fewer than 43 percent of President Obama's judicial nominees have so far been confirmed, while past presidents have enjoyed confirmation rates as high as 93 percent. And President Obama's nominees have been confirmed at a much slower rate than those of his predecessor—nearly 87 percent of President George W. Bush's judicial nominees were confirmed.

The data could not be any clearer. As Figure 1 shows, judicial confirmations have fallen off a cliff since President Obama took office.

The Obama administration's judicial nomination rates are exceptionally low

American presidents for more than three decades have enjoyed judicial confirmation rates near or above 80 percent. This pattern persists across both Democratic and Republican

FIGURE 1

Percent of all nominees confirmed



Source: Carter through Clinton comes from data compiled by the Congressional Research Service. Bush II and Obama come from data compiled by the author using Department of Justice and Senate Judiciary Committee information.

administrations, and it includes presidents who presided over a period of unified government (Jimmy Carter), presidents whose party did not at any point control the Senate during their presidency (George Bush I), and presidents who saw the Senate change hands during their presidency (Ronald Reagan, Bill Clinton, and George Bush II).

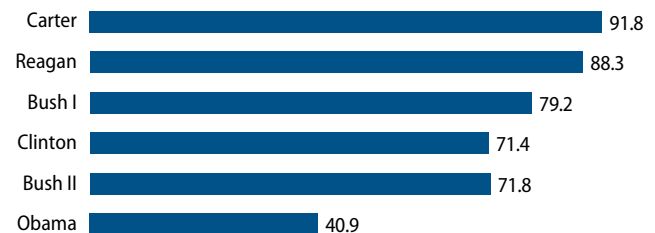
President Obama's 42.8 percent confirmation rate is only slightly more than half of President George H.W. Bush's 79.3 percent, even though President Bush presided over a period of divided government while Obama has thus far enjoyed unified governance.

Indeed, Obama's confirmation rates are even lower than those during the very unusual 107th Congress when President George W. Bush's transition period was cut short, in part because the Supreme Court did not hand down its *Bush v. Gore* decision until mid-December, thus limiting the time he had to plan for judicial confirmations. Congress also changed from Republican to Democratic control partway through the 107th Congress, further delaying routine business as the Senate completed administrative tasks associated with its transition. Nevertheless, fully 52 percent of President Bush's nominees had been confirmed at this point in his presidency—nine percentage points higher than Obama's 42.8 percent confirmation rate.

Figures 2 and 3 break down each president's judicial confirmations to indicate confirmation rates among district (trial) judges and circuit (appellate) judges. Confirmation rates among the circuit judges steadily declined between the Carter and Clinton presidencies, before increasing slightly under President George W. Bush. Yet the confirmation rate for circuit judges was nearly cut in half once President Obama took office.

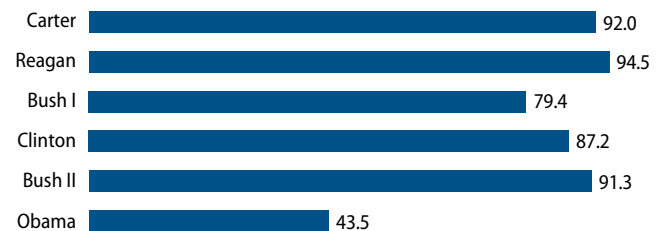
The most telling statistic is the enormous drop in district judge confirmations since President Obama took office. District judges certainly play an important role in America's legal

FIGURE 2
Percent of circuit court nominees confirmed



Source: Carter through Clinton comes from data compiled by the Congressional Research Service. Bush II and Obama come from data compiled by the author using Department of Justice and Senate Judiciary Committee information.

FIGURE 3
Percent of district court nominees confirmed



Source: Carter through Clinton comes from data compiled by the Congressional Research Service. Bush II and Obama come from data compiled by the author using Department of Justice and Senate Judiciary Committee information.

system, but senators have never offered significant resistance to the vast majority of district court nominees. Unlike court of appeals judges, who frequently hand down major opinions on controversial legal issues, district judges spend most of their time handling more routine matters such as trial schedules and sentencing.

Obama's district judge confirmation rates are less than half that of his predecessor, and barely half that of President George H.W. Bush, the president with the next-lowest rate. It is clear that Senate obstruction of Obama's judges is not limited simply to controversial nominees, but has extended like a blanket over historically uncontroversial nominees whose impact on the law is often fairly minimal.

Senate filibusters and holds are stopping nominations like never before

There is a simple explanation for the sudden drop-off in confirmation rates—obstructionists in the Senate are using filibusters and holds at an unprecedented rate. And it is nearly impossible to break the filibusters and holds on Obama's nominees.

Although a supermajority of senators can break a filibuster, once a filibuster is broken Senate rules still permit up to 30 hours of floor debate before taking a vote. Presently, 48 of President Obama's judicial nominees await confirmation. At 30 hours per nominee, the Senate would have to spend 1,440 hours—60 entire days—to act on each of these nominations.

If Majority Leader Harry Reid (D-NV) were to cancel all recesses on August 1 and require the Senate to work 24 hours a day, seven days a week, doing nothing but considering judicial nominees, the last nominee would not be confirmed until well into autumn—and that's assuming that the Senate passed no bills, confirmed no other nominees, and took up no other matters for this entire period!

The picture is even worse when you factor in executive branch nominees. According to the White House, President Obama presently has 240 unconfirmed nominees. Confirming each of these nominees would require a massive 300 days—10 entire months—of 24 hour work days doing nothing but confirmations

It is easy to manipulate the Senate rules to create a crisis. If a minority of senators broadly object to the Senate's entire agenda, then it is literally impossible to confirm more than a fraction of the hundreds of judges, executive branch officials, ambassadors, and other nominees that each president has a responsibility to appoint, even if the Senate shuts down all other legislative business to do so.

If anything, the real surprise is not that President Obama is experiencing unprecedented obstructionism. It's that, given such dysfunctional Senate rules, it has taken so long for such a confirmation crisis to emerge.

Methodology

Post-Carter administration data

President Carter implemented a number of reforms in the late 1970s that limited individual senators' previous role in selecting lower court judges and transferred much of that responsibility to the executive branch. Prior to the Carter administration, senate patronage played a much larger role than it does today in determining who sits on the federal bench. President Reagan dismantled many of these reforms, but he maintained the executive's dominance over the nominations process, especially at the Court of Appeals level.

This paper only examines data from the Carter through Obama administrations, and excludes judicial confirmation data from prior presidencies when the Senate played a larger role in judicial selection.

Data sources

Confirmation rates from the Carter, Reagan, Bush I, and Clinton administrations are taken from a 2007 Congressional Research Service report entitled "[U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses](#)," unless otherwise noted. There is no publicly available CRS report that covers confirmation rates during the entire George W. Bush or Obama administrations, the last two presidents' confirmation rates are calculated using data from the [Department of Justice's Office of Legal Policy](#) and the [Senate Judiciary Committee](#). All percentages reflect the total percent of nominees confirmed during an entire presidency, and do not include Supreme Court nominees, unless otherwise noted.

CORRECTION: An earlier version of this paper erroneously claimed that minority senators can force up to 60 hours of debate on a nomination. Because nominations qualify as "executive business" the Senate rules provide fewer opportunities to delay a confirmation vote than to delay a vote on legislation, and thus this number was not accurate. The author apologizes for his error.