

Partisanship, Norms, and Federal Judicial Appointments

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ABSTRACT

Nominations to the U.S. Supreme Court have sometimes been contentious, but nominations to seats on the lower federal courts were once routinely confirmed with little controversy. That is no longer the case. For nearly a quarter century, nominations to the federal circuit courts have been hotly contested. The result has been an extended period of Senate obstruction in which presidents of both parties have found it difficult to place judges on the federal circuit courts. The Senate has recently responded to this persistent gridlock by modifying its own institutional rules to facilitate a more streamlined, majoritarian confirmation process. This has not, however, solved the problem of Senate obstruction of circuit-court nominees during periods of divided government. In an era of heightened ideological conflicts, partisans might be tempted to take advantage of moments of unified control of the Senate and the White House to go further than streamlining confirmations to expanding the number of available judicial seats to fill. Rather than moving into a new era of routine judicial confirmations, the long period of confirmation gridlock could give way to escalating efforts at court-packing.

The politics of federal judicial appointments is as heated and as high-profile now as it has ever been in American history. For an important segment of both political parties, the federal courts have become a critical policymaking institution, and as a result both parties have been pushed to treat judicial appointments as an important political battleground.¹ It is worth pausing to assess descriptively just how difficult it has become to place judges on the federal bench in the current age of party polarization and how the White House and the Senate have responded to the gridlock by seeking to ease the possibility of judicial appointments on a simple majority basis. In an era of heightened ideological conflict, partisans might be tempted to go further and take extraordinary measures to construct a politically pliable judiciary, a risky step in a climate of close partisan competition.

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1. MARK SILVERSTEIN, JUDICIOUS CHOICES (2d ed. 2007); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT 1–6 (2005).

Political scientists have long argued that courts are inevitably political institutions.² They decide important questions of public policy, and they are constituted by political means. Federal judges might sit one step removed from electoral politics, but that is not enough to place them outside of politics. Voters, interest groups, and elected officials have not always been deeply motivated to focus their attention and energy on the courts, but courts have periodically taken the center stage of American politics.³

The courts are the third branch of government laid out in the U.S. Constitution. While individual judges are made independent from the elected branches of government, the judiciary as a whole is largely made dependent on the goodwill of the legislature and the executive.⁴ The courts have been a political prize to be won and a lagging indicator of political success.⁵ Through that political influence, the effective constitutional rules of the political system itself are ultimately responsive to political currents. As Jack Balkin has noted, a party that can win the “constitutional trifecta” and control all three branches of government has enormous opportunities to reshape the political landscape.⁶ On the other hand, political coalitions that cannot win control of all three branches can find their policy ambitions frustrated by the many veto points in the American system.

Political parties can most directly shape the federal judiciary by placing judges on the bench. They can do that through the familiar process of selecting like-minded judges to fill vacancies, but they can also do that through the less-familiar process of increasing the number of vacancies to be filled by expanding the bench. The American political parties have periodically sought to create a friendly federal judiciary by creating more judgeships. As Justin Crowe has detailed, partisan and policy calculations have rarely been absent from congressional decision making on whether to expand or reorganize the federal courts.⁷ President Franklin Roosevelt’s ill-fated proposal for “judicial reorganization,” or less euphemistically “Court-packing,” like the Federalist Party’s lame-duck

2. See, e.g., Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 295–301 (1963); Keith E. Whittington, R. Daniel Kelemen, & Gregory A. Caldeira, *Introduction*, in OXFORD HANDBOOK OF LAW AND POLITICS 1–7 (Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira eds., 2010).

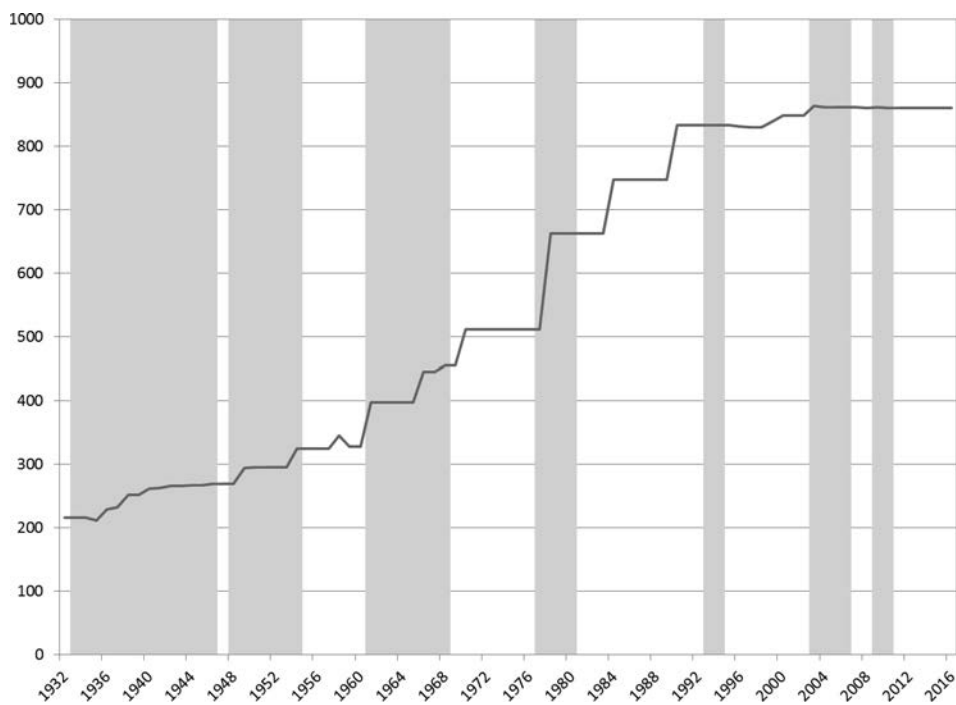
3. DONALD GRIER STEPHENSON, JR., *CAMPAIGNS AND THE COURTS* 3–15 (1999).

4. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 357–60 (1999).

5. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–286 (1957).

6. Jack M. Balkin, *Bush v. Gore and the Boundary between Law and Politics*, 110 YALE L. J. 1407, 1455 (2001).

7. JUSTIN CROWE, *BUILDING THE JUDICIARY* 2–17 (2012). See also, John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996); Gary Zuk, Gerard S. Gryski, & Deborah J. Barrow, *Partisan Transformation of the Federal Judiciary, 1869-1992*, 21 AM POL. RES. 439 (1993).

FIGURE 1. Total Federal Article III Judgeships, 1932–2016¹⁰

Note: Shaded areas are periods of unified government.

judicial reform of 1801, became an infamous case of political overreach.⁸ The reaction to those efforts to manipulate the federal judiciary for partisan ends helped construct our “small-c constitution,” the norms and practices that bolster and extend the rules formally entrenched in our textual Constitution.⁹ We have taken the lesson of the Court-packing plan to be that elected officials should not push too hard to reshape the courts.

But what counts as “too hard”? In the summer of 1968, Chief Justice Earl Warren and President Lyndon Johnson tried to ensure that a Democratic appointee would succeed Warren, even as the Democratic presidential hopes in 1968 looked increasingly dim. Warren’s strategically timed retirement was called

8. William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L. J. 673, 674–77 (1985); Kathryn Turner, *Midnight Judges*, 109 U. PENN. L. REV. 494, 521–23 (1961).

9. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 40–71 (1999); Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/> [https://perma.cc/4YWZ-27MF].

10. *Authorized Judgeships*, USCOURTS.GOV, <http://www.uscourts.gov/sites/default/files/allauth.pdf> [https://perma.cc/4BRQ-7FN5].

out for the political ploy that it was, and even a Democratic-controlled Senate balked at confirming Abe Fortas as chief justice on the eve of the election, and so the seat fell to the Republican Richard Nixon to fill after the inauguration.¹¹ On the other hand, the Democratic Party took advantage of their return to unified control of Congress and the presidency after Watergate to reorganize and expand the federal judiciary. President Jimmy Carter was somewhat unlucky in not seeing a Supreme Court vacancy during his one term of office, but thanks to Congress he was able to fill an unusually large number of seats on the federal circuit courts.¹² As [Figure 1](#) illustrates, the size of the federal judiciary has been increased in a series of steps over the decades since the New Deal. The most notable jump came when the Democrats unified government control with the election of Jimmy Carter. Since the 1980s, Republicans have been routinely charged with trying to “pack the courts,” not because they have been manipulating the number of available judgeships but because they have been unusually focused on the judicial philosophy of their nominees when filling routine vacancies.¹³

The current political era has been remarkable not only because both parties have been focused on winning the constitutional trifecta and shaping the courts, but also because neither party has been particularly successful in doing so. In the past, these partisan battles over the federal judiciary have usually been decisively won by one side or the other. The Repeal Act of 1802 put an end to the Federalists’ “midnight appointments.”¹⁴ The Jacksonian reorganization of the courts gave the South a working majority on the bench.¹⁵ The Republican reorganization of the courts during the Civil War put the Court in a Northern hammerlock.¹⁶ The electoral success of the New Deal coalition smashed conservative obstruction in the federal courts.¹⁷

Since the crack-up of the Democratic coalition in the 1960s, however, American politics has mostly been characterized by stalemate and gridlock.

11. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 465–84 (2000).

12. Keith E. Whittington, *The President's Nominee: Robert Bork and the Modern Judicial Confirmation Process*, 42 BAKER CENTER J. APPLIED PUB. POL. 85, 87–88 (2012); John M. de Figueiredo, Gerald S. Gryski, Emerson H. Tiller & Gary Zuk, *Congress and the Political Expansion of the U.S. District Courts*, 2 AMER. L. & ECON. REV. 107, 112 n.9 (2000).

13. David M. O'Brien, *Packing the Supreme Court*, 62 VA. Q. REV. 189 (1986); HERMAN SCHWARTZ, *PACKING THE COURTS* (1988); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111 (1994); Vivian Salama, *Trump Begins Effort to Pack Courts with Conservatives*, BOSTON GLOBE, May 9, 2017, <https://www.bostonglobe.com/news/nation/2017/05/08/trump-begins-effort-pack-courts-with-conservatives/tUMiwYUaAZn5QX74qPMmLL/story.html>.

14. William S. Carpenter, *Repeal of the Judiciary Act of 1801*, 9 AMER. POL. SCI. REV. 519 (1915); RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS* 36–52 (1971); WHITTINGTON, *supra* note 10, at 40–50.

15. Crowe, *supra* note 8, at 115–130; HOWARD GILLMAN, MARK A. GRABER, AND KEITH E. WHITTINGTON, 1 AMERICAN CONSTITUTIONALISM 191–192 (2d ed. 2017).

16. Crowe, *supra* note 8, at 132–170; GILLMAN, GRABER, AND WHITTINGTON, *supra* note 16, at 248–251.

17. Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ken Kersch and Ronald Kahn eds., 2006); KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE* 127–34 (2004).

Partisan rotation, divided government and happenstance have extended the fighting over the courts rather than allowing one side to simply claim victory. Republicans have been able to push the courts in a more conservative direction, but their relationship with the U.S. Supreme Court has been as much one of frustration as cooperation. Justice Antonin Scalia's departure from the Court at the tail end of Barack Obama's Administration and the likely prospects of a Hillary Clinton electoral victory might have been expected to finally tilt the balance of the Court and create a stable liberal majority, but late-term Republican control of the Senate and Clinton's improbable defeat wound up extending the impasse.

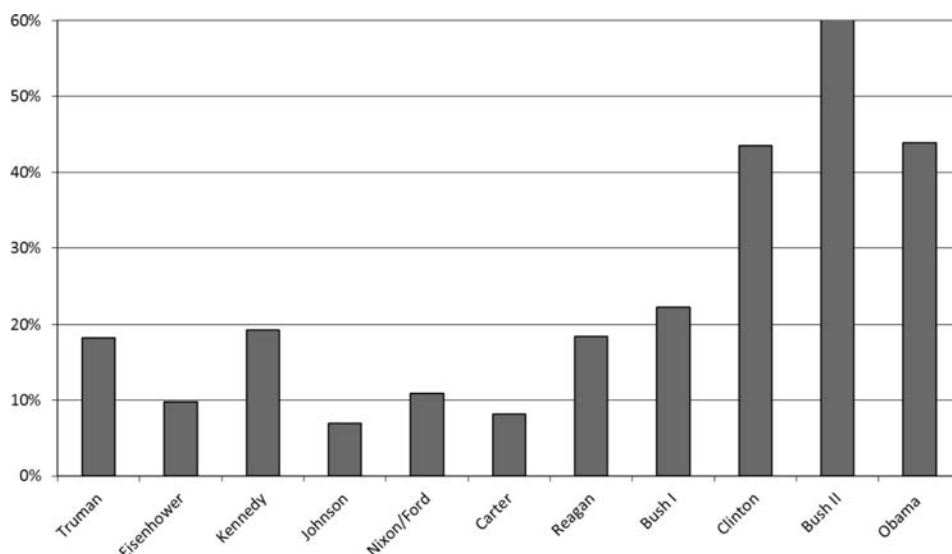
With the Supreme Court in limbo, partisans turned their attention to the federal circuit courts. Presidential nominations to the lower federal courts had long been routinely confirmed. Circuit court nominations only occasionally found themselves mired in controversy. That has changed, and the change is no longer recent.¹⁸ Figure 2 lays bare the transformation, simply observing the percentage of nominations to the circuit courts made by each president that never resulted in a confirmed judge assuming a seat on the bench. The Senate obstructs presidential appointments to the lower federal courts primarily by refusing to act on those nominations rather than through up-or-down votes on the Senate floor. Nominations to the Supreme Court have traditionally been high enough profile to require active consideration by the Senate, but the lower profile nominations to the district and circuit courts can simply be ignored and allowed to languish.

Ever since the Monica Lewinsky scandal consumed the latter portion of Bill Clinton's presidency, Senate obstruction of circuit court nominations has been at a record high. Before that, regardless of the administration or the partisan composition of the Senate, presidential nominations to fill circuit court vacancies would have been expected to end with Senate confirmation. Since the late 1990s, the odds of a circuit court nomination being confirmed have been little better than a coin flip.

For over a quarter century, the Senate has obstructed circuit-court nominations at a historically unprecedented rate. The new obstructionism reflects a shift in both presidential and Senate behavior. Figure 3 breaks down the nominations and confirmations by year of nomination from the Reagan administration through the Obama administration, showing that there has been substantial variation across presidential terms and also over time and presidencies. Beginning in the summer of 1991, the Democratic-controlled Senate dramatically slowed the pace of confirmations. With more than a year left in his presidency, George H.W. Bush found his ability to place judges on the circuit courts to be significantly reduced. No similar slowdown can be seen at a comparable point during Ronald Reagan's second term of office, when he also had to deal with a Senate under the control of the opposite party. When the Republicans seized control of the Senate during the mid-term election of President Bill Clinton's first term of office, they initiated a similar

18. AMY STEIGERWALT, *BATTLE OVER THE BENCH* (2010); Scott Basinger and Maxwell Mak, *The Changing Politics of Federal Judicial Nominations*, 37 CONG. & PRESIDENCY 157 (2010).

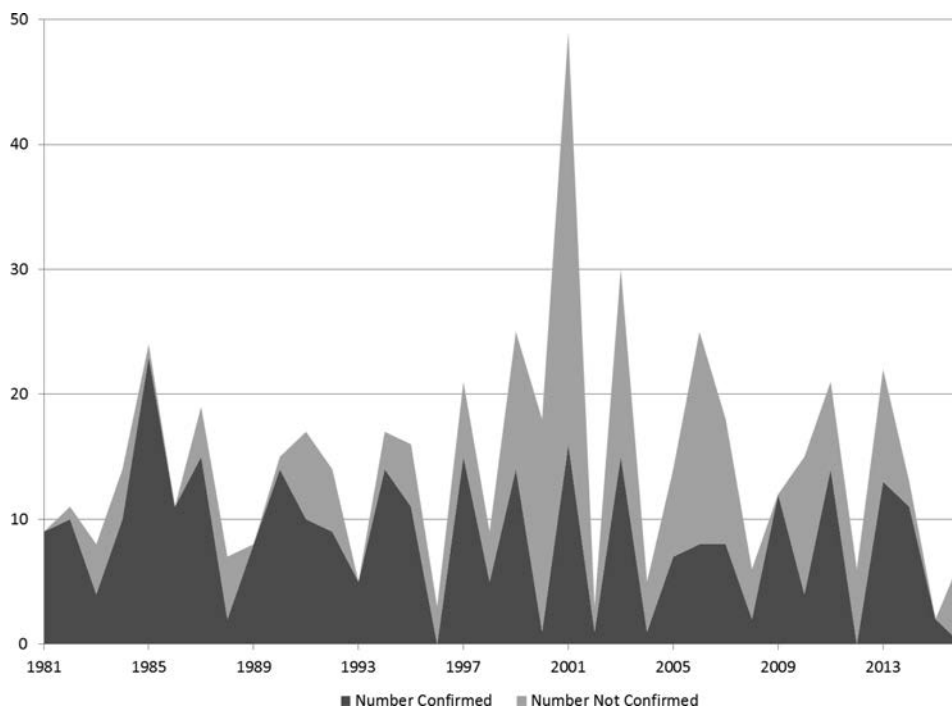
FIGURE 2. Percentage of Federal Circuit Court Nominations Not Confirmed, 1945–2016¹⁹



slowdown of the President's circuit-court confirmations a year before he faced reelection. The Republicans allowed the pace of confirmations to pick up again after the President won reelection, but when confirmations again began to slow as a new election loomed, Clinton took the unusual step of blitzing the Senate with an unprecedented number of election-year and lame-duck circuit-court nominees. Although such a maneuver might have been expected to succeed if the same party controlled both the White House and the Senate, it was doomed to failure when the Senate was in the opposition's hands, and the rate of failed nominations spiked. President George W. Bush entered office unusually prepared to send judicial nominations to the Senate, and sent many judicial nominations to the Senate relatively quickly. The Senate had traditionally been very accommodating to presidential nominations at the opening of a presidential term, but the newly Democrat-controlled Senate in this case was unusually obstructionist.²⁰ The rate of confirmation has never recovered, and the remainder of both Bush's and Barack Obama's presidencies were characterized by high rates of failures. The number of unconfirmed nominations grew, and the number of confirmed judges shrank.

19. GILLMAN, GRABER & WHITTINGTON, *supra* note 16, at 604.

20. For a somewhat different measure of Senate obstruction with similar results, see Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251 (2003).

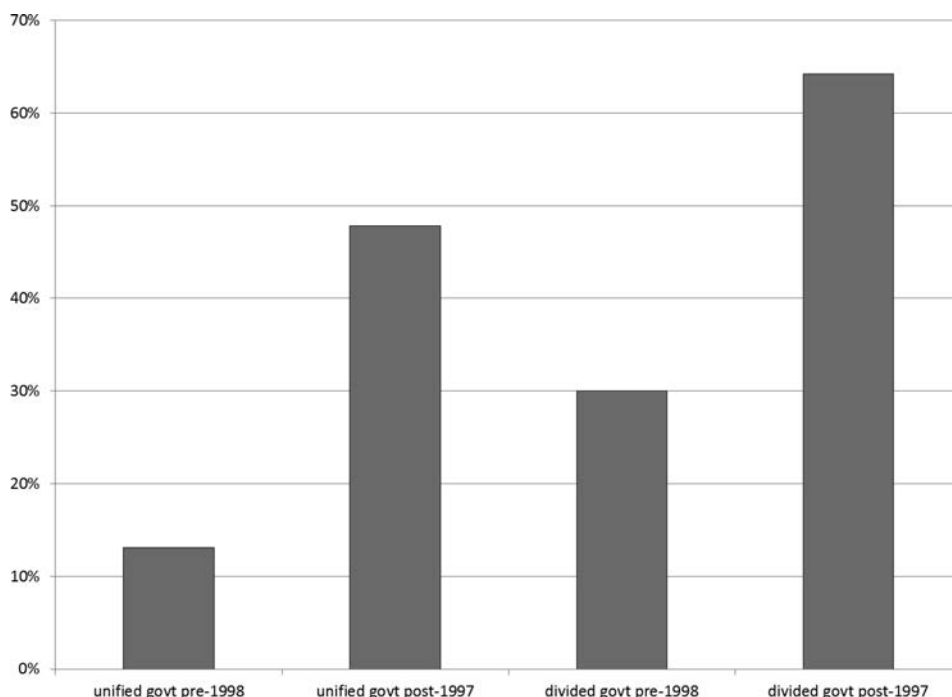
FIGURE 3. Outcomes of Circuit Court Nominations, 1981–2016²¹

Because of this unusual level of Senate obstruction, George H.W. Bush left a surprisingly small mark on the circuit courts. During his single term as President and aided by the 1978 judicial expansion, Jimmy Carter filled 50 percent more circuit court seats than did Bush. But Clinton, George W. Bush, and Obama also appointed fewer circuit court judges than would have been expected for two-term Presidents. The degree of Senate obstruction during this period is inflated a bit by the aggressiveness of the Presidents in making nominations (e.g., George W. Bush sent 50 percent more nominations to the Senate than did Ronald Reagan), but the overall effect has been to leave the courts understaffed and to reduce the number of judges that either Democratic or Republican Presidents could put into service.

The story of Senate obstruction of circuit-court nominations over the last several presidencies is only partly a story of divided government. The Senate and the White House have been controlled by different parties for a significant portion of the time since the final years of the Reagan Administration, but there have also been several periods of unified government. George H.W. Bush did not see a

21. Library of Congress, THOMAS. The Congress.gov website provides a record of every presidential nomination to a seat on a circuit court and the actions taken on that nomination. The graphs tracks those nominations that were eventually confirmed by a Senate vote and those that were not.

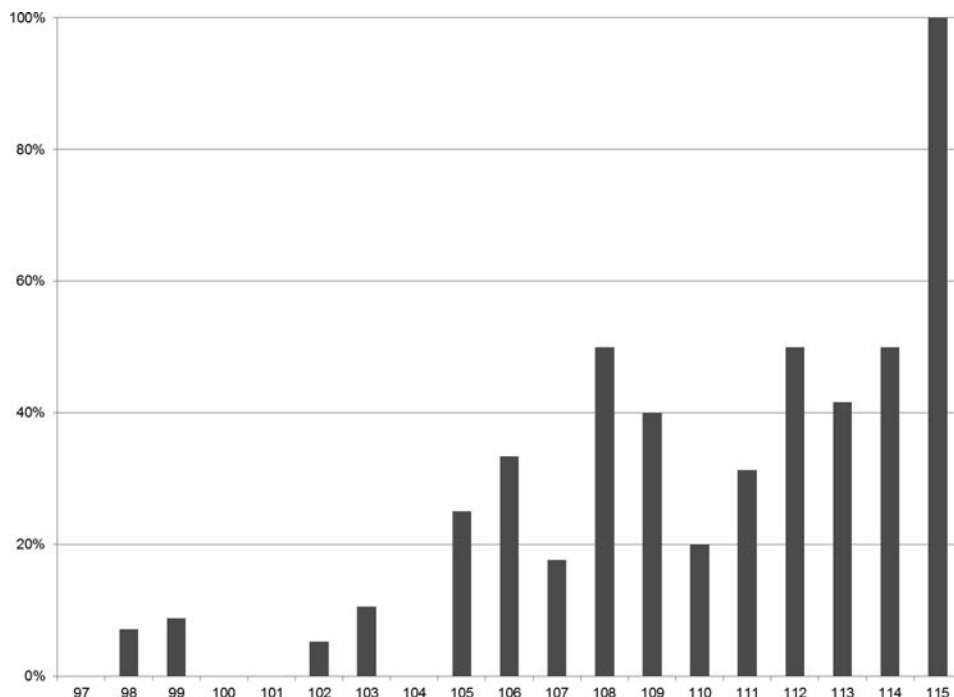
FIGURE 4. Percentage of Circuit Court Nominations Not Confirmed by Divided Government and Pre- and Post-Lewinsky



unified government during his single term of office, but Bill Clinton, George W. Bush, and Barack Obama all enjoyed years of same-party control of the Senate. Unlike the modern U.S. House of Representatives, the U.S. Senate has traditionally allowed many avenues for obstruction by the minority party.²² Figure 4 emphasizes that while Senate obstructionism is greater during periods of divided government, there have also been some significant changes in these patterns. Prior to the Monica Lewinsky scandal and President Bill Clinton's impeachment, senators mostly had not blocked opposite-party presidents when it came to circuit court nominations. Divided party control dampened the rate of Senate confirmations, but prior to 1998 even opposite-party Senates were relatively willing to confirm circuit court nominations. Since 1998, however, even same-party Senates have found themselves unable to confirm judges. When presidents have faced opposition-controlled Senates since 1998, circuit-court confirmations have been at a near standstill.

22. SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE* 68–85 (1997); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER* 6–13 (2007).

FIGURE 5. Percent of Floor Votes on Circuit Court Nominations with Recorded Nays²⁴



The growing willingness of senators to obstruct circuit court nominations has mirrored their willingness to express opposition to nominees in floor votes. [Figure 5](#) tracks the percentage of floor votes on circuit court nominations that included votes cast against the nominee from the opening of the Reagan Administration through the first year of the Trump Administration. Although there were occasional controversies over judicial appointments during the Reagan presidency, most circuit court confirmations were mere voice votes without any recorded dissents. By the Clinton Administration, roll call votes became more common. Those roll calls allowed supporters to go on record with their support, but more importantly they allowed opponents to go on record with their opposition. Such negative votes have no practical consequence, but they can be valuable position-taking for constituents, interest groups, and donors.²³ The growing number of negative votes cast during successful confirmation roll calls indicate that senators are under increasing pressure to demonstrate their opposition, to “vote the right way” even when they are unable to block a nominee.

23. On position-taking, see DAVID R. MAYHEW, *CONGRESS 61–91* (2d ed. 2004).

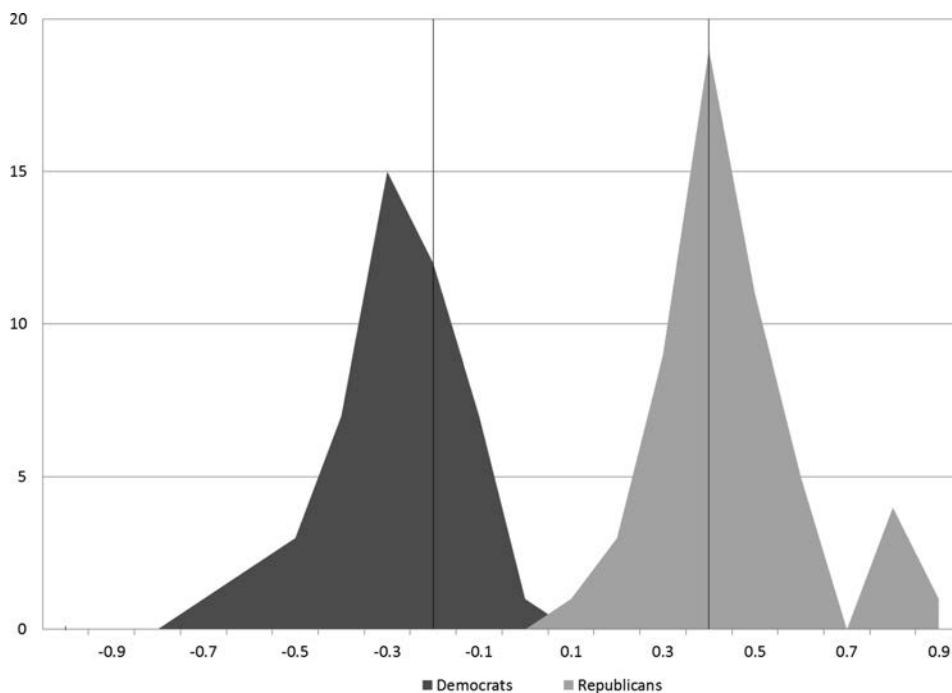
24. Library of Congress, THOMAS.

Forced to go on record in a roll call, conservative senators feel obliged to vote against a liberal nominee, and liberal senators feel equally obliged to vote against a conservative nominee. It was not long ago that such votes only needed to be cast in the case of the occasional “controversial” nominee. But the number of apparently “controversial” nominees has been increasing with political polarization and the elevated salience of circuit court appointments. During much of the Bush and Obama Administrations, nearly half of the confirmed circuit court judges assumed the bench over the explicit objections of some of the senators. During the first year of the Trump Administration, *every* confirmation vote included votes cast in opposition. Moreover, during the last two presidencies, the opposition party has not simply mounted token opposition to nominees from the ideological wings. If some senators go on record in opposition to a nominee, nearly every member of that party’s caucus will similarly cast a nay vote. Notably, the heightened drama surrounding confirmation votes came primarily during periods of unified government, when the majority was capable of ushering judges through the Senate despite opposition. During divided government, the opposition has simply refused to allow nominees to reach the floor for a vote.

Entering the twenty-first century, the Senate had become increasingly dysfunctional on the question of circuit-court confirmations. The increased political salience of lower-court judicial appointments intersected with growing political polarization in the Senate (as well as in the House).²⁵ Minority obstruction of judicial confirmations through withholding blue slips and threatening filibusters might not have had much staying power if a significant component of the two parties overlapped ideologically.²⁶ Finding a path to 60 votes for cloture might have been manageable if the more liberal wing of the Republican Party and the more conservative wing of the Democrat Party were largely in agreement and shared a similar perspective and electorate. That is no longer the case. The distribution of senators is now distinctly bimodal. The gap between the Republicans and the Democrats is substantial. Moreover, the ideological distance that would need to be travelled to get to 60 votes is now very large. The 115th Congress elected in 2016 is representative of the recent ideological polarization in Congress, and as [Figure 6](#) shows there is a yawning gap between the Republicans and Democrats. If senators vote their sincere preferences on judicial nominees, there is little possibility of any notable judicial candidate winning bipartisan support.

25. Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees* 117 POL. SCI. Q. 259, 272–76 (2002); Nancy Scherer, Brandon L. Bartels, and Amy Steigerwalt, *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026, 1036–37 (2009); NANCY SCHERER, SCORING POINTS 108–180 (2005); Barry C. Burden, *Polarization, Obstruction, and Governing in the Senate*, 9 THE FORUM (2011), <https://doi.org/10.2202/1540-8884.1480> [<https://perma.cc/6H9N-FFX2>].

26. Ryan C. Black, Anthony J. Madonna, & Ryan J. Owens, *Obstructing Agenda-Setting: Examining Blue Slip Behavior in the Senate*, 9 THE FORUM (2011), <https://doi.org/10.2202/1540-8884.1476> [<https://perma.cc/X5SW-D7H7>]; David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 91–103 (2006).

FIGURE 6. Ideological Distribution of U.S. Senators, 115th Congress²⁷

Note: The figure shows the number of Republican and Democratic senators occupying a given point on an ideological spectrum ranging from very liberal on the left to very conservative on the right. Vertical lines represent 60th member needed for cloture vote from right and left ends of the ideological spectrum. For Democrats to put together 60 votes in the Senate, for example, they would need to sway senators near the ideological center of the Republican caucus.

For either party in the current Senate, constructing a filibuster-proof majority requires reaching far into the ideological center of the opposite party. That is simply a bridge too far. It is possible that the threat of minority obstruction might lead the President to moderate his judicial nominations and seek compromise candidates who could command 60 votes, but in the current environment it is not clear that any such compromise candidates exist. Requiring presidents to sell a judicial candidate to something close to the median senator of the opposition party would risk losing significant numbers from their own party and would negate

27. See VOTEVIEW.COM, <https://voteview.com/congress/senate/text> [<https://perma.cc/D6CW-UDUZ>]. Ideology of senators illustrated by DW-NOMINATE scores, based on the propensity of individual senators to vote with one another across all roll call votes.

much of the significance of winning either the White House or majority control of the Senate.

Given that political reality, it is no surprise that the Senate has instead moved to rein in the ability of the minority party to obstruct judicial confirmations.²⁸ In 2013, the Senate Democrats under the leadership of Harry Reid nuked the filibuster option on circuit court nominees in order to facilitate the ability of President Obama to fill judicial vacancies when his own party controlled the Senate, and the President swiftly took advantage of the new rules.²⁹ When the Democrats lost the chamber as a result of the 2014 elections, judicial confirmations largely ground to a halt. The current Republican move to curtail the ability of individual senators to use the blue slip to hold up nominees is the natural follow-up to Reid's effort to streamline the confirmation process. The Senate is now able to confirm circuit-court judges on a primarily majoritarian basis, which largely eliminates the need for appealing to the minority party and should effectively return judicial confirmations to the operational norms that held sway until the last decade of the twentieth century—at least when the same party controls both the White House and the Senate.

The question now is what comes next? The Senate is presently able to confirm judicial nominees when the same party controls both the White House and the Senate, returning us to an efficiency that would have been familiar for most of the twentieth century. President Donald Trump has benefitted from the new rules under Majority Leader Mitch McConnell in much the same way that Barack Obama did under Majority Leader Harry Reid. Judicial nominees made with the same party controlling the Senate have been confirmed, at least until a presidential election year. But election years were a difficult time to move judicial nominees through the Senate even before the 1990s.

There is no reason to think, however, that the Senate will be able to return to twentieth-century norms when we have a return to divided government. The recent rule changes have allowed the Senate majority to work around obstructionist minorities, but party polarization will mean that few judicial nominees will be satisfactory to a Senate controlled by the opposition party. Senators might be moved by a desire to have a fully functional federal judiciary, an expectation that their own party will benefit in the long-run if Senate majorities are willing to confirm judges nominated by opposition presidents, or a renewed sense that partisan differences in judicial philosophy are not so consequential in the lower courts. But recent experience is not encouraging. Will a Senate controlled by the opposition party refuse to seat circuit-court nominees at the beginning of a presidential term in the same way that it has recently refused to seat those nominees at the end

28. Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97–110 (2017).

29. Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1677–81 (2015).

of a presidential term, or will presidents be able to enjoy a brief honeymoon even when working with the opposition party? Would a Senate willing to allow vacancies to accumulate in the lower federal courts rather than confirm a judicial candidate advanced by the other party's President be similarly willing to allow a vacancy to sit on the U.S. Supreme Court, not just for a period of months but for a period of years?³⁰ Presidents have sometimes had difficulty filling a Supreme Court vacancy near the end of their term, but the Senate has not completely blocked the President from filling seats on the Supreme Court since Andrew Johnson fell out with congressional Republicans over Reconstruction. Will a party with unified control of Congress and the White House eventually take the advice of their most zealous partisans and create additional judgeships to maximize their temporary advantage, and perhaps even expand the size of the Supreme Court itself? If so, battles over control of the federal courts could reach extremes not seen since the Civil War.

Over the past several presidencies, both parties have escalated the conflict over appointments to seats on the circuit courts. Each side has blamed the other, while taking an additional step of its own not merely to continue the fight but to compound it. Conflict that could once be expected on extreme occasions has become routinized. For the majority, delay became a standard means for killing nominations. For the minority, filibusters and the refusal to return blue slips became normalized measures for obstructing even the most mainstream of presidential nominations. When Senators in the minority were not able to quash a nominee entirely, they have been expected to cast symbolic votes against the nominee. While obstruction and dissent could once be expected at the end of a presidential administration, it can now be expected throughout an administration. Both parties feel justified in doing whatever is necessary to advance their favored nominees and block their disfavored nominees, not only because they can point to a history of grievances in which the other side did the same but also because every nominee in an age of polarization seems like an extremist to the opposite party. Both sides are convinced any steps taken to ratchet down the conflict will only result in unilateral disarmament and reward the other party for its bad behavior.

The norms and practices of the small-c constitution are ultimately sustained and enforced by political means.³¹ If extreme obstruction in the Senate proves to be a winning electoral strategy, then senators will engage in more of it. If presidents are able to hold senators accountable to the electorate and voters are willing to punish senators for obstructing judicial nominees, then senators might return to the old ways and once again vote to confirm judges nominated by the other party. If proposals to manipulate the size of the federal judiciary so as to create more

30. Jack Holmes, *What If the Senate Refused to Confirm Supreme Court Justices . . . Forever?*, *ESQUIRE*, Apr. 13, 2016, <https://www.esquire.com/news-politics/news/a43819/merrick-garland-senate-hypothetical/> [<https://perma.cc/KBG7-SGN9>].

31. Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. OF ILL. L. REV. 1847, 1860–64.

seats for a friendly president to fill are electorally costless at worst, then the courts will be made into a partisan plaything. Thus far, it would appear that senators are politically rewarded for going to the mat on circuit-court confirmations. Their electoral base and activist supporters expect nothing less.

It will be difficult enough to preserve the independence and authority of the courts in the current politically polarized environment. It will be far more difficult if senators cannot find a way to allow judicial selections favored by their opponents to take a seat on the bench and insist that the only acceptable court is a partisan court. Political leaders on both sides of the partisan aisle need to recognize that the escalation of partisan conflict over the judiciary will ultimately only serve to damage the courts.³² Proposals to pack the courts by altering the size of the judiciary and suggestions that Senate majorities should deny opposition presidents the ability to appoint judges are subversive of basic constitutional norms that have worked over time to prevent a constitutional crisis.³³

In the absence of a decisive electoral victory that would allow one side to claim the spoils of the judiciary, the country might be better served by Congress exploring how to deescalate the conflict rather than ratchet it up. For example, rather than expanding the size of the federal judiciary so as to temporarily pack the courts with allies, Congress could institutionalize bipartisanship on the circuit courts by creating an expectation that each circuit contain an equal number of Republican and Democratic judges and allow each side to fill its half of the bench with its own favorites. If there are no consensus nominees, there could at least be a consensus institutional design that gives each party half a loaf and allows the judiciary to function.

Senators have the capacity to paralyze the government and allow the judiciary to sink into ineffectiveness if they resolve to hobble rather than cooperate with presidents with whom they disagree. Perhaps in extreme cases such refusal to cooperate on the basic functioning of the government is justified, as when Congress and the President battled over the fate of the nation in the 1860s. It is rather more difficult to imagine justifying crippling conduct when the disagreements are less severe and the stakes less monumental. The constitutional system functions best if the formal rules are supplemented by a robust set of norms and practices that deter government officials from using all the political weapons at

32. Lexington, *Conservative Lawyers are among the President's Biggest Enablers*, ECONOMIST, Nov. 23, 2017, <https://www.economist.com/news/united-states/21731639-they-will-come-regret-it-conservative-lawyers-are-among-presidents-biggest-enablers>.

33. Dahlia Lithwick, *Judges over Principles*, SLATE (Nov. 22, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/the_never_trump_legal_movement_has_morphed_into_a_plan_to_pack_the_courts.html [https://perma.cc/YNQ6-JTYU?type=image]; Mark Tushnet, *Expanding the Judiciary, the Senate Rules, and the Small-c Constitution*, BALKINIZATION (Nov. 25, 2017), <https://balkin.blogspot.com/2017/11/expanding-judiciary-senate-rules-and.html> [https://perma.cc/GA8V-A5YK]; Ilya Somin, Opinion, *The Case Against Court-Packing*, WASHINGTON POST, Nov. 27, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/?utm_term=.877b7b434349 [https://perma.cc/PQ43-UCWJ]; Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093 (2002).

their disposal.³⁴ We should be cautious not to allow the prospect of short-term political gain to lead us into actions that could threaten the long-term blessings of constitutional order.

34. Keith E. Whittington, *Constitutional Norms Matter*, LAW AND LIBERTY (Feb. 16, 2017), <http://www.libertylawsite.org/2017/02/16/constitutional-norms-matter> [<https://perma.cc/KZ5B-PNKB>].