

“Whatever Means Necessary”: Weaponizing the Judicial Confirmation Process

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KEY TAKEAWAYS

America’s Founders prescribed how judicial power should be exercised and how judges should be appointed.

Confirmation process norms remained stable for more than two centuries, even during periods of significant debate about the exercise of judicial power.

Confirmation process norms have changed radically since 2000, with the process now weaponized to fight the President, rather than objectively evaluate nominations.

The Constitution gives to the President the power to nominate and, “by and with the Advice and Consent of the Senate,”¹ to appoint judges and many executive branch officials. While there have been conflicts over individual nominations since America’s founding, the Senate has voted to defeat a nomination to any position only *six* times in the past 50 years—and not since 1999.²

In fact, for more than two centuries, the judicial confirmation process has followed a consistent pattern. The Senate confirmed the large majority of judicial nominations with little or no opposition, without a recorded vote or novel uses of Senate rules to delay or defeat nominations, and without systematic partisanship.

This *Legal Memorandum* will outline the prescription of America’s Founders for the exercise of judicial power and for the appointment of judges. It

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will also document how the traditional pattern of the confirmation process, consistent with the Founders' prescription, remained intact even during two periods of significant debate over the Founders' original design for the judiciary.

This historical context places in sharp relief the current state of the confirmation process. That transformation began in 2001, when Senate Minority Leader Tom Daschle (D-SD) vowed that Democrats would use "whatever means necessary" to fight President George W. Bush's judicial nominations. It has accelerated since President Donald Trump's election, with the Senate's confirmation process now virtually detached from its purpose of evaluating nominations—and instead weaponized as a political weapon against the President himself.

The Founders' Prescription for Judicial Power

Article III of the Constitution provides that the "judicial power shall extend to "Cases...[and] to Controversies."³ At her 1993 confirmation hearing, Justice Ruth Bader Ginsburg explained to the Senate Judiciary Committee that, "unlike legislators, courts don't entertain general issues. They resolve concrete cases."⁴ Her colleague Justice Clarence Thomas has described the "judicial task" as "interpret[ing] and apply[ing] written law to the facts of particular cases."⁵

The most important issue regarding the judiciary has always been the proper method or process of fulfilling this judicial task. The Declaration of Independence describes establishing a new system of government as "laying its foundation on such principles and organizing its powers in such form" as will accomplish the government's purpose of securing inalienable rights. The original design for the judiciary, therefore, may be derived by "recurring to principles," as James Madison counseled,⁶ from the overall structure of our system of government, and from the specific instruction of America's Founders.

Principles. One principle is that the judiciary is part of a system of republican government, or "a government which derives all its powers directly or indirectly from the great body of the people."⁷ In a republic, Founder James Wilson explained, "the people are masters of the government."⁸ An approach to interpreting and applying law that defeats the people's mastery over government would depart from the judiciary's original design.

A second principle is that the people assert their mastery over government primarily through a written Constitution. The Constitution contains "the permanent will of the people" and can be "revoked or altered only by the

authority that made it.”⁹ Until the Constitution is “changed by an explicit and authentic act of the whole people,” President George Washington said in his farewell address, “it is sacredly obligatory upon all.”¹⁰

Written law, such as the Constitution or statutes, is more than simply “lines written upon parchment.”¹¹ Like any written text, the real substance of the Constitution or a statute is the meaning of its words.¹² Changing that meaning alters the law as surely as changing its text. In other words, echoing Washington, the “meaning of a written constitution should remain the same until it is properly changed.”¹³ Judges are not the “authority that made” the law and, therefore, they cannot properly change its meaning. Doing so would depart from the judiciary’s original design.

Third, the Constitution is written so that its limits on government will be maintained, including limits intended for “the government of courts, as well as of the legislature.”¹⁴ This principle, stated by the Supreme Court in *Marbury v. Madison*,¹⁵ means that the Constitution—its meaning as well as its words—must control judges, not vice versa.¹⁶

Structure. In addition to these principles, the structure of our system of government helps define how judges should fulfill their task of interpreting and applying written law to decide cases. In particular, the Constitution separates federal government power into three branches. The importance of this limiting and defining structure to America’s Founders cannot be overstated.

The Massachusetts Constitution of 1780 declares that the separation of powers is necessary for this to be a “government of laws, and not of men.”¹⁷ Alexander Hamilton put it even more bluntly, writing that “there is no liberty” without the separation of powers.¹⁸ To America’s Founders, it was the “absolutely central guarantee of a just government.”¹⁹ The legislative branch exercises “will” to make law, the executive branch uses “force” to implement it, and the judiciary uses “judgment” to interpret it. In this way, the judiciary is designed to be the “weakest” and “least dangerous” branch.²⁰

Instructions. America’s Founders explicitly affirmed what these principles and this structure establish. When judges perform the judicial task, their goal must be to determine what “the authority that made” the Constitution or statutes intended them to mean. Judge Robert Bork observed: “Even if evidence of what the Founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution’s words.... The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the U.S. Constitution.”²¹

- Washington said that constitutional change must come by “an amendment in the way that the Constitution designates” rather than by “usurpation.”²²
- Madison insisted that the guide for “expounding”²³ the Constitution must be “the sense in which the Constitution was accepted and ratified by the nation.”²⁴ The Constitution’s “legitimate meaning” comes from “the text itself” and, if necessary, “the sense attached to it by the people” when they ratified it.²⁵
- Thomas Jefferson similarly believed that “every question of construction” requires reliance on “the time when the constitution was adopted.”²⁶ Constitutional interpretation should “conform to the probable [meaning] in which it was passed.”²⁷

Basic principles, the structure of our system of government, and the instruction of America’s Founders establish how the judiciary was designed to perform the “judicial task” of interpreting and applying written law to decide cases. Judges must interpret written law by determining the original meaning of its text and apply that law impartially.²⁸ Approaches to interpretation that undermine the people’s control over the Constitution’s meaning, or their elected representatives’ control over statutory meaning, are inconsistent with the judiciary’s design.

The Founders’ Prescription for Judicial Appointments

The Founders’ second prescription was for the process of appointing judges and includes both a structural design and substantive instructions for its operation. The Constitution gives each branch of government a primary category of power and creates secondary “checks and balances” among them that involve other branches. The President’s authority to veto, for example, is a check on Congress’ primary legislative authority. Similarly, the Senate’s role of “Advice and Consent” is a check on the President’s primary appointment power. The practical meaning of the phrase “Advice and Consent,” which is found in Article II on executive authority rather than Article I on legislative authority, is that the Senate advises the President whether to appoint someone he has nominated by giving or withholding its consent.

Consistent with this assignment of powers in the appointment process, America’s Founders saw the Senate’s role as a “silent operation” that “would be an excellent check upon a spirit of favoritism in the President, and

would tend greatly to prevent the appointment of unfit characters.”²⁹ They expected, however, that “it is also not very probable that his nomination would often be overruled.”³⁰ The Senate would not, for example, oppose a nominee simply because of “the preference they might feel to another.” Because the Senate’s “dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.”³¹

Just as judges should follow the Founders’ prescription when fulfilling their judicial task, the Senate should follow the Founders’ prescription in the confirmation process. That process has two phases. Senate Rule 31 provides that “[w]hen nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees.”³² Nominations to life-tenured courts³³ are referred to the Judiciary Committee, which holds hearings and decides whether to report nominations to the full Senate.

The second phase of the confirmation process occurs after a committee reports a nomination to the full Senate, when it gets listed on the executive calendar. Consideration of a particular nomination, initiated by the majority leader, also has two steps, debate and final consideration. Each of these can be accomplished informally and efficiently, by cooperation between the majority and minority leaders, or formally and slowly when that cooperation fails.

Ending Debate. Informal cooperation in ending debate would mean that the leaders decide whether, and how much, debate is necessary and schedule a final confirmation decision by a recorded vote, voice vote, or unanimous consent. Without that cooperation, ending debate requires the formal steps provided for in Senate rules.³⁴ The Senate’s original rules, adopted in 1789, allowed a simple majority to move “the previous question” and proceed to vote on a pending measure.³⁵

In 1806, the Senate dropped but did not replace this rule³⁶ so that ending debate thereafter required unanimous consent,³⁷ allowing even a single Senator to prevent the Senate from acting. In 1917, the Senate adopted Rule 22, providing that a “two-thirds vote of those voting” could end debate,³⁸ allowing Senators to defeat a measure by preventing a final vote altogether. A filibuster occurs when an attempt to invoke cloture under Rule 22 fails.

This background is important to fully understand certain changes in the confirmation process. From the Senate’s inception, its rules for ending debate and the potential for filibusters applied only in the context of legislation,³⁹ which is within the Senate’s primary power, but not in the context of

nominations, which are within the President's primary power. By covering any pending "measure," therefore, neither the 1789 "previous question" rule nor the original Rule 22 applied to nominations.⁴⁰

The Senate's consideration of nominations was instead informed by the norms, and the original design, of the appointment process. As a secondary check on the President's primary power, the Senate showed significant deference to his nominations. The Senate, in 1949, broadened Rule 22 to cover any pending "matter," intending to include motions as well as bills,⁴¹ but also potentially covering nominations. The record includes no evidence that Senators even considered its impact on nominations. Scholar Martin Gold writes: "Nominations were swept into the rule in 1949, but only by happenstance. The Senate debates include not a single mention of filibusters of nominations, likely because the concept was so alien to the Senate of 1949."⁴²

Final Consideration. After ending debate, whether informally by unanimous consent or formally through the Rule 22 cloture process, the second step in the Senate's consideration of nominations is a final confirmation decision. Like ending debate, this too was traditionally handled informally and efficiently by unanimous consent or a voice vote, which do not require the presence of Senators. Rarely, and only when at least some Senators opposed a nomination, the Senate would make its final confirmation decision by a recorded or roll call vote, which does require all Senators to be present and today takes an average of more than 30 minutes.⁴³

Confirmation Process Norms. The Founders' prescription for the judicial appointment process suggests the general pattern for Senate consideration of nominations. The Senate's evaluation would focus primarily on a nominee's qualifications and whether there exist other "special and strong reasons," such as corruption or lack of character, to justify opposing "unfit characters." The confirmation process would have several practical features:

- Confirmation of most nominations with little or no opposition;
- Confirmation of most nominations without recorded vote;
- Few unanimous recorded votes;
- Little systematic partisanship; and
- No novel uses of Senate rules, such as the filibuster, to delay or attempt to defeat nominations.

This was the consistent pattern of the judicial confirmation process for more than two centuries. Between 1789 and 2000, the Senate confirmed 97 percent of judicial nominations without opposition, 96 percent without recorded votes, and only 6 percent of those recorded votes were unanimous.⁴⁴ During the 20th century, Senators of one party voted against an average of 2.1 percent of judicial nominations made by Presidents of the other party. From 1949, when Rule 22 could apply to nominations, through 2000, the Senate confirmed more than 2,000 judicial nominations but took only 12 cloture votes. While six of those votes failed, resulting in filibusters, only one of those filibustered nominations was never confirmed.⁴⁵

This historical pattern is significant for two reasons. First, it shows that, until the past two decades, the judicial confirmation process operated consistently with its design and the expectations of America's Founders. Second, as the next sections will show, this pattern continued even through two periods of significant debate over the original design for the judiciary's power and role. One of these periods, led by President Franklin D. Roosevelt in the 1930s, rejected the judiciary's original design while the other, led by President Ronald Reagan in the 1980s, embraced that design.

Rejecting the Judiciary's Design

President Franklin D. Roosevelt was elected in 1932, and Democrats gained 12 Senate seats to become the majority. While Roosevelt had promised that the federal government would bring the country out of the Great Depression, his legislative plan required substantially more federal control over the economy than the Constitution provided. As a result, the Supreme Court declared unconstitutional several pieces of Roosevelt's New Deal legislation⁴⁶ during his first term.

On May 27, 1935, the Supreme Court unanimously struck down the National Industrial Recovery Act.⁴⁷ Four days later, Roosevelt held a press conference in which he criticized the decision in broad terms, rejecting the idea that "extraordinary conditions do not create or enlarge constitutional power." Instead, he endorsed using "interpretation" to change the Constitution's meaning "in the light of present-day civilization."⁴⁸ Such "court-approved power," he said, would allow the federal government to achieve its objectives.⁴⁹

While the Founders intended that government conform to the Constitution, Roosevelt sought to conform the Constitution to government. When asked at this press conference whether the constitutional change he wanted could be achieved "without...a constitutional amendment," Roosevelt responded that "we haven't got to that yet."⁵⁰ Seeking a constitutional

amendment would have maintained the people's control over the Constitution. Roosevelt chose instead to take constitutional control away from the people and give it to judges willing to change the Constitution's meaning "in the light of present-day civilization."

The 1936 election resulted in a landslide win for Roosevelt and gave Democrats overwhelming control of Congress: a 76–16 Senate majority and a 334–88 House majority. Within days of his 1937 inauguration, Roosevelt submitted to Congress legislation that would restructure the entire federal judiciary, creating new judgeships that he could fill with the kind of judges that his political program needed. The Judicial Procedures Reform Act, S. 1392, would allow the President to appoint "an additional judge to any court of the United States" whenever a judge who had served for at least 10 years turned 70 but did not resign or retire. The plan would cap the number of Supreme Court justices at 15.

On March 9, 1937, Roosevelt used the first radio address of his second term to say that the federal government needed enough power to make the "economic system...bomb-proof."⁵¹ In his view, the federal government should have the power it needed to do what it wanted rather than the power it was granted by the Constitution. Roosevelt gambled that the American people had the same priorities and would pressure Congress to restructure the judiciary, allowing Roosevelt to appoint judges who would reinterpret the Constitution to expand federal power. Professor Gregory Caldeira writes that "FDR's proposal forced the public to choose between the widely approved policies of an extremely popular president and the institutional integrity of a controversial Supreme Court."⁵²

Roosevelt's gamble failed when the public chose the latter.⁵³ A Gallup poll in February 1937 showed that Americans were evenly divided, 44.8 percent in favor and 45.1 percent against, on Roosevelt's legislative proposal to restructure the judiciary,⁵⁴ and opinion thereafter trended against the plan.⁵⁵ So did opinion in Congress. On June 7, 1937, the Senate Judiciary Committee, with a significant Democrat majority, issued its report on S. 1392 "with the recommendation that it do not pass."⁵⁶ The bill's "ultimate effect would undermine the independence of the courts," the committee concluded, and would "expand political control over the judicial department."⁵⁷

This legislation, the report said, is "an attempt to change the course of judicial decision"⁵⁸ by "neutralizing the views of some of the present members."⁵⁹ The committee's conclusion was this: "Even if every charge brought against the so-called 'reactionary' members of this Court be true, it is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members."⁶⁰ The separation and independence of the three branches is "immeasurably more important... than the immediate adoption of any legislation however beneficial."⁶¹

On July 22, 1937, 70 Senators voted to send S. 1392 back to the Judiciary Committee; 53 were Democrats.⁶² While the American people and their representatives in Congress rejected Roosevelt's means for transforming the judiciary, however, they did not appear to resist his objective of doing so. Roosevelt achieved "orderly but inevitable change" through the regular appointment process, eventually appointing 83 percent of the federal judiciary, including nine Supreme Court justices. He appointed eight of those justices in less than five years, between January 1937 and July 1941, replacing the "Four Horsemen"⁶³ who had consistently followed the traditional approach to constitutional interpretation.

Less than three weeks after Roosevelt's court restructuring bill failed, in *West Coast Hotel v. Parrish*,⁶⁴ the Supreme Court voted 5–4 to uphold a Washington state minimum wage law. The surprising result occurred because Justice Owen Roberts, who had voted to strike down previous New Deal regulation,⁶⁵ joined the majority. In a significant dissent, Justice George Sutherland defended the original design for the judiciary, writing that the "meaning of the Constitution does not change with the ebb and flow of...events."⁶⁶ If the Constitution "stands in the way of desirable legislation," wrote Sutherland, "the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution."⁶⁷

Constitutional change, therefore, must come from the people by "repeal or amendment, and not in false construction.... The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to...convert what was intended as inescapable and enduring mandates into mere moral reflections."⁶⁸

Roosevelt initiated a broad, long-term rejection of the Founders' design for the judiciary.

- In 1953, Justice Robert Jackson lamented the "widely held belief" that the Supreme Court "no longer respects impersonal rules of law but is guided...by personal impressions which from time to time may be shared by a majority of Justices."⁶⁹
- In 1964, political scientist Edward Corwin wrote that "what the framers of the constitution or the generation which adopted it intended it should mean...have no application to the main business of constitutional interpretation, which is to keep the constitution adjusted to the advancing needs of the time."⁷⁰

- In 1981, Professor Henry Monaghan noted: “Some lawyers, many judges, and perhaps most academic commentators view the constitution as authorizing courts to mollify the results of the political process on the basis of general principles of political morality not derived from the constitutional text or the structure it creates.”⁷¹

Confirmation Process Norms. The traditional norms of the judicial confirmation process remained intact, even as the Founders’ design for the judiciary was under attack. The percentage of judicial nominations confirmed without opposition increased from 95.4 percent before 1932 to 97.5 percent during the Roosevelt and Truman Administrations. The percentage confirmed without recorded vote increased from 95 percent to 97.5 percent, and no recorded votes were unanimous. The average Republican Senator voted against just 3 percent of Roosevelt–Truman nominations.

Looking specifically at Supreme Court nominations shows a similar pattern. The Senate confirmed 20 Supreme Court nominations between 1901 and 1932 in an average of 16 days, seven of them without a Judiciary Committee hearing.⁷² Five nominations during this period received any opposition, with an average of 17 votes against confirmation. During the Roosevelt–Truman Administrations, the Senate confirmed 13 Supreme Court nominations in an average of 13 days, five of them without a Judiciary Committee hearing. Nine were confirmed with no opposition, the other four receiving an average of just 13 votes against confirmation.

The confirmation process was even quieter over the next several presidential administrations. From 1953 through 1980, the Administrations of Dwight D. Eisenhower through Jimmy Carter, 98.5 percent of confirmed judicial nominations had no opposition, 98.3 percent occurred without a recorded vote, and only two recorded votes were unanimous. Senators of one party voted against an average of just 0.4 percent of nominations by the opposite party’s President. While confirming more than 1,000 judges to life-tenured courts during this period, the Senate took three cloture votes on judicial nominations; two failed, and only one nomination was not confirmed.

Embracing the Judiciary’s Design

The judicial task includes both interpreting and applying written law to decide cases. America’s Founders prescribed a particular method for fulfilling this task, emphasizing that the meaning of words in the Constitution or statutes must come from “the authority that made” them.

President Franklin Roosevelt rejected this prescription, preferring that judges find the Constitution's meaning in the needs of "present-day civilization." As Justice William Brennan would put it, this new method shifts the "ultimate question" to be "what do the words of the text mean *in our time*."⁷³

Phrases such as "present-day civilization" or "our time" have no objective definition but are proxies for the position that then-Governor Charles Evans Hughes (R) took in 1907 that "the Constitution is what the judges say it is."⁷⁴ Other suggestions for extra-constitutional interpretive standards include "the well-being of our society,"⁷⁵ "deeply embedded" values,⁷⁶ "the living development of constitutional justice,"⁷⁷ or "the settled weight of responsible opinion."⁷⁸ In a 1985 speech, Justice Brennan said that the Constitution is a "sparkling vision of the supremacy of the human dignity of every individual."⁷⁹ And when he was a Senator opposing the 2005 nomination of John Roberts to be Chief Justice, President Obama said that judges decide cases based on their "deepest values...core concerns...broader perspectives on how the world works...the depth and breadth of [their] empathy" and "what is in the judge's heart."⁸⁰ Each of these simply provides cover for judges to control the meaning of the law that they use to decide their cases.

Like Roosevelt, President Ronald Reagan was elected in a landslide, replacing a President of the other political party. As in the 1932 election, Reagan's party gained 12 Senate seats to become the majority. Reagan sought to re-establish the Founders' prescription for judicial power by asserting the merits of their judicial design and appointing judges committed to it. Senator Orrin Hatch (R-UT) writes: "Just as President Franklin Roosevelt moved the judiciary in an activist direction by changing its personnel, President Reagan's strategies for diminishing judicial activism included appointing restrained judges."⁸¹

Despite this significant shift in both political leadership and engagement over the power and role of the judiciary, however, the confirmation process saw little conflict in Reagan's first term. The Senate confirmed 166 judges, all but two without a recorded vote and only one with any opposition. Democrats staged the first filibuster of a nomination to the U.S. Court of Appeals but, after a second cloture vote passed, the Senate confirmed J. Harvie Wilkinson to the Fourth Circuit.

The Senate unanimously confirmed Robert Bork to the U.S. Court of Appeals for the D.C. Circuit in February 1982 without a recorded vote. Long before, during the Lyndon Johnson Administration, Bork had criticized the Supreme Court's drift toward an "interest-voting philosophy." While its decisions may be "clothed in the paraphernalia of legal reasoning," Bork

wrote, “a Supreme Court not itself controlled by law, by principles exterior to the tastes of the Justices, is merely a superlegislature.”⁸²

Reagan’s 1984 re-election was comparable to Roosevelt’s 1936 landslide in electoral votes (97.6 percent vs. 96.7 percent), popular votes (58.8 percent vs. 60.8 percent) and states won (49/50 vs. 46/48). The Reagan Administration began a more public phase of the debate over the judiciary when, in a July 1985 speech to the American Bar Association, Attorney General Edwin Meese III described a “jurisprudence of original intention”⁸³ which, he argued, would be “a limitation on judicial power as well as executive and legislative.”⁸⁴ Justice Brennan responded three months later in a speech at Georgetown University, arguing that originalism “feigns self-effacing deference” but is “little more than arrogance cloaked as humility”⁸⁵ that “turn[s] a blind eye to social progress.”⁸⁶

In August 1985, Random House published Harvard Law School professor Laurence Tribe’s book titled *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*.⁸⁷ Tribe had long argued for a Supreme Court that would “put meaning into the Constitution”⁸⁸ and that the legitimacy of Supreme Court decisions is not “a product of method... but of outcome.”⁸⁹ Because Reagan would continue making judicial nominations, Tribe warned, there was “a potential constitutional revolution in the making.”⁹⁰ Tribe offered a new “model for the Senate to follow in carrying out its constitutional duty” of advice and consent.⁹¹ He argued that the Senate should condition confirmation of judicial nominations on the results they could be expected to reach on particular issues. Rather than the Senate’s “silent operation” as a check on the President to prevent appointment of “unfit characters,” Tribe urged an independent and assertive Senate operation seeking to control which judges are actually appointed.

A year after publication of Tribe’s book, in the 1986 mid-term election, Democrats gained eight seats to become the Senate majority. Then, on the last day of the Supreme Court’s 1986–1987 term, Justice Lewis Powell, confirmed in 1971 by a vote of 89–1, announced his immediate retirement. Reagan nominated Judge Bork four days later and, within hours, Senator Edward Kennedy (D–MA) delivered a Senate floor speech, in which he described what he called “Robert Bork’s America.”⁹² Tribe’s book became “the primer used by Judge Bork’s opponents”⁹³ and, on October 23, 1987, the Senate voted 58–42 to defeat Bork’s nomination, only the sixth nominee to any court defeated in the previous century.

The Reagan Administration’s advocacy of the judiciary’s original design continued nonetheless. In March 1987, for example, the Department of Justice’s Office of Legal Policy published a report titled *Original Meaning*

Jurisprudence: A Sourcebook. Attorney General Meese’s accompanying statement described it as a contribution to the “on-going discussion” about “the fundamental question of how the Constitution should be interpreted, how its words and phrases should be given meaning.”⁹⁴

One year later, the same office published a report titled *Guidelines on Constitutional Litigation*. Meese’s statement said it was “to help government litigators think clearly about issues of constitutional and statutory interpretation.”⁹⁵ The report explicitly embraced the judiciary’s original design. “[C]onstitutional language,” it explained, “should be construed as it was publicly understood at the time of its drafting and ratification and government attorneys should advance constitutional arguments based only on this ‘original meaning.’”⁹⁶

Confirmation Process Norms. Even with this ongoing debate about the Founders’ prescriptions for judicial power and appointments, the overall confirmation process changed little during the Reagan Administration. The Senate confirmed 132 judges during the 99th Congress (1985–1986), the third-highest two-year total in American history; all but six of those nominations were confirmed without a recorded vote, and only five had any opposition. The Senate unanimously confirmed Judge Antonin Scalia to replace William Rehnquist as an Associate Justice after a two-day hearing in 1986, despite his refusal to “answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*.”⁹⁷ Senators such as Kennedy, Howard Metzenbaum (D–OH), and Joseph Biden (D–DE) voted for Scalia even after he said that “the Constitution is obviously not meant to be evolvable so easily that in effect a court of nine judges can treat it as though it is a bring-along-with-me statute and fill it up with whatever content the current times seem to require.”⁹⁸

Reagan was one of only five Presidents since the turn of the 20th century to appoint a majority of the federal judiciary, a particularly significant achievement since the judiciary was more than seven times larger when Reagan left office than it was in 1900. During Reagan’s eight years in office, the Senate confirmed 97.7 percent of his judicial nominations with no opposition, 96.3 percent without a recorded vote. Democratic Senators voted against fewer than 1 percent of Reagan’s judicial nominations and the Senate took only four cloture votes, three of which passed, and each nomination was confirmed.

This pattern looks similar after including the Administrations of George H. W. Bush and Bill Clinton. Overall, from 1981 through 2000, 96.1 percent of judicial confirmations had no opposition and 93.8 percent had no recorded vote. Senators of one party voted against an average of 1.4 percent of other-party nominations. The Senate confirmed 953 judges to life-tenured

federal courts during this period and took only nine cloture votes; two of them failed, but both nominations were confirmed. Even though the 48 votes against the 1991 Supreme Court nomination of Clarence Thomas would have sustained a filibuster, none was attempted.

To summarize, America's Founders prescribed that, in deciding individual cases, judges should determine the original meaning of written law, such as the Constitution and statutes, and apply it impartially. The past century has seen two periods of significant debate over this design. President Roosevelt rejected it and appointed judges who would give the Constitution meaning that would facilitate greater federal government power. President Reagan embraced the original design for the judiciary, arguing for its merits and appointing judges committed to that interpretive approach.

The Founders also prescribed a process for appointing judges that calls for the Senate to confirm most nominations efficiently with little or no opposition and without either systematic partisanship or using Senate rules in novel ways. The Senate's confirmation process followed this pattern for more than two centuries, including through both periods of debate over the judiciary's original design.

Weaponizing the Confirmation Process, Part I

Several circumstances combined to mark the Administration of George W. Bush as breaking this long-standing pattern and launching the weaponization of the confirmation process. The first was the outcome of the 2000 election. President Bush took the oath of office on January 20, 2001, after the closest election in American history. He lost the popular vote by 0.53 percent and won the electoral vote by a margin of 271–266. The 2000 election also resulted in a Senate evenly divided between Republicans and Democrats.

The second circumstance was the judiciary's role in resolving the presidential election, making it possible for President Bush to take office. Not only had half of the voting electorate opposed that result, but many insisted that the Supreme Court had literally installed Bush as President. Early in the Bush Administration, former federal appeals court judge and White House Counsel Abner Mikva wrote in the *Washington Post* that “there is still unhappiness, partisan and otherwise, about the court's intervention.”⁹⁹ He framed the confirmation process in broad political terms, as one way of challenging the president. Arguing that changes to the Supreme Court “ought to be made by a president who has a popular vote mandate,” Mikva urged that “the Senate should not act on any Supreme Court vacancies that might occur until after the next presidential election.”

Third, within days of Bush's 2001 inauguration, Senate Minority Leader Tom Daschle (D-SD) vowed that Democrats would use "whatever means necessary" to oppose judicial nominations.¹⁰⁰ To back up this threat, Democrats allowed confirmation of Attorney General John Ashcroft and Solicitor General Ted Olson, but with opposition sufficient to sustain a filibuster.¹⁰¹ These results were seen as a "shot across the bow"¹⁰² of the Bush Administration, a warning by Democrats that they could, if necessary, use the filibuster to prevent confirmation of majority-supported nominations.

Daschle's threat became a concrete plan in early May 2001, when more than 40 Senate Democrats attended a retreat in Florida. At this gathering, "a principal topic was forging a unified party strategy to combat the White House on judicial nominees."¹⁰³ Professor Tribe attended, advising Senate Democrats about how to "change the ground rules" of the confirmation process.¹⁰⁴

Finally, shortly after this strategy summit, Senator James Jeffords of Vermont announced that he would leave the Republican Party and, as an Independent, begin caucusing with Democrats. Senator Charles Schumer (D-NY), the new chairman of the Judiciary Subcommittee on Administrative Oversight and the Courts, quickly announced that he would hold a series of hearings "formally examining the judicial nominations process."¹⁰⁵ The first hearing focused on "what role ideology should play in the selection and confirmation of judges";¹⁰⁶ the second was to address "the proper role of the Senate in the judicial confirmation process";¹⁰⁷ and the third on what "affirmative burdens" nominees should bear "to qualify themselves for lifetime judicial appointments" or "justify why they would be valuable additions to the bench."¹⁰⁸

The first step in weaponizing the confirmation process was to fully implement Professor Tribe's model, establishing a new set of confirmation norms based not on the Founders' design but on achieving political objectives. Political activists, for example, used Schumer's hearings on the confirmation process to argue that "it would be entirely inappropriate to give deference to the President's selection of judicial candidates."¹⁰⁹ Instead, they claimed, "the Constitution creates and [sic] independent role and set of responsibilities for the Senate in the confirmation process."¹¹⁰ As "an independent—indeed, assertive—partner"¹¹¹ in the process, activists argued, the Senate should demand that judicial nominees "demonstrate a commitment to protecting the rights of ordinary American citizens and the progress that has been made on civil rights and individual liberties, including...the right to privacy (which includes contraception and abortion)."¹¹²

Political activists also advocated this new model in the context of individual nominations throughout the Bush Administration. In 2003, for example, People for the American Way (PFAW) issued a report opposing the nomination of William Pryor to the U.S. Court of Appeals for the Eleventh Circuit.¹¹³ Referring to the Senate’s “co-equal role with the President” in the appointment process, PFAW quoted from a July 2001 letter signed by law professors that individual nominees must affirmatively demonstrate a “record of commitment to the progress made on civil rights, women’s rights, and individual liberties.”¹¹⁴

Four years later, the presidents of PFAW and the Human Rights Campaign wrote the Judiciary Committee to express “serious concerns” about the nomination of Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit.¹¹⁵ Referring again to “the Senate’s co-equal role with the President,” they quoted from the same 2001 letter that nominees must demonstrate a “commitment to protecting the rights of ordinary Americans,’ and a ‘record of commitment to the progress made on civil rights, women’s rights, and individual liberties.”¹¹⁶

This new model of the Senate’s role led to changes in the operation of the confirmation process itself. While their May 2001 strategy retreat occurred when Democrats were in the minority, their tactical focus soon shifted when, after Senator Jeffords switched party identification, they became the majority in June 2001. Democrats no longer needed tactics, like the filibuster, that could give the minority an advantage, but could directly control the pace and composition of Judiciary Committee hearings,¹¹⁷ as well as the timing and selection of nominations for final Senate consideration.¹¹⁸

Once in the majority, however, Democrats neither stopped conducting confirmation hearings nor defeated nominations outright. Under Chairman Patrick Leahy (D-VT), for example, the Judiciary Committee held 26 hearings for 104 nominees from June 2001 to December 2002, a pace that exceeded the average number of nominees per hearing during the previous 12 Congresses and four presidential administrations. Similarly, the Senate confirmed 100 judges to life-tenured federal courts during this period, with only four nominations receiving any opposition.

Instead, Democrats began changing confirmation process norms in other ways. The percentage of judicial nominations confirmed by a recorded vote, for example, jumped to 59 percent during President Bush’s first two years, a record at that time. Because overall confirmation opposition declined, the percentage of these recorded votes that were unanimous more than doubled, a break from past confirmation practice when recorded votes were reserved for nominations opposed by at least some Senators.

Democrats also used Senate rules in two new ways to delay or defeat targeted judicial nominations. The first occurred in 2001. Senate Rule 31 provides that pending nominations expire and are “returned...to the President”¹¹⁹ at the end of each year and when the Senate adjourns for more than 30 days, such as during the month of August. Doing so does not defeat a nomination, but it can add weeks to the time needed for confirmation because it requires re-nomination and referral back to the Judiciary Committee. Traditionally, the Senate simply waived Rule 31 at the August recess to maintain the status quo until the Senate returned. On August 3, 2001, however, Democrats objected to that waiver, forcing 45 judicial nominations to be returned to President Bush—more than in all previous years combined.

Creating Judicial Filibusters. The second novel use of Senate rules had the potential to defeat, rather than simply delay, nominations. As outlined above, extended debate and the possibility of filibusters have long been part of the legislative process—but not the confirmation process. Nomination filibusters were not even possible until the cloture rule’s coverage was broadened in 1949. Over the next 53 years, the Senate confirmed more than 2,000 judges but took just 15 cloture votes on 14 different nominations. Four of those votes failed, resulting in filibusters, but only one of those nominations remained unconfirmed.

After they lost the Senate majority in the 2002 election, however, Democrats turned back to the strategy discussed at their 2001 retreat. They began refusing consent to end debate or schedule final confirmation votes on judicial nominations, forcing the majority to use the Rule 22 cloture process. This not only lengthened the confirmation process for individual nominees, but also created an opportunity for Democrats to filibuster. If at least 41 of their 49 members voted against ending debate, Democrats could prevent any confirmation vote at all. In 16 months, from March 2003 through July 2004, Democrats forced the Senate to take 20 cloture votes on 10 different appeals court nominations. Each of these votes failed, the first filibusters ever used to defeat majority-supported judicial nominations.

Democrats made clear that this was the purpose of their filibusters. On April 8, 2003, when the nomination of Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit was pending before the Senate, Minority Leader Harry Reid (D–NV) objected to unanimous consent requests for a confirmation vote after six or even 10 hours of debate.¹²⁰ Senator Robert Bennett (R–UT), who had made those requests, asked Reid “if any number of hours [of debate] would be sufficient.” Reid replied that “there is not a number in the universe that would be sufficient.”¹²¹ This new use of Rule 22 would not be the last significant change in the confirmation process.

Abolishing Judicial Filibusters. The confirmation process moved back toward its traditional pattern during the first five years of the Obama Administration. From 2009 to November 2013, for example, the Senate took 12 cloture votes on 11 different judicial nominations; six of those votes failed, resulting in filibusters. This was less than one-third the number of filibusters Democrats caused in one-fourth the time during the Bush Administration. Despite the significant decline in nomination filibusters, Democrats in November 2013 virtually eliminated them altogether. Combined with initiating nomination filibusters one decade earlier, abolishing them was the single most consequential change in the history of the confirmation process. The specific purpose behind this move made it even more significant, because doing so further weaponized the confirmation process as a way of politicizing the judiciary.

Republicans controlled the House of Representatives during the first five years of the Obama Administration, making significant policy achievements through legislation unlikely. Instead, Obama changed the leadership of executive branch agencies and redirected them toward more robust policy-making. By thus increasing the possibility of legal challenges to such agency actions, this strategy focused attention on the U.S. Court of Appeals for the D.C. Circuit, which has jurisdiction over such challenges. In 2013, the D.C. Circuit had four Republican appointees, four Democrat appointees, and three vacancies.¹²² Creating a Democratic majority by filling those vacancies could make the court more receptive to the bolder initiatives by the Obama Administration's executive branch agencies.

Democrats' effort to tilt the D.C. Circuit's ideological balance under a Democratic President was in contrast to their effort to maintain that balance under a Republican President. In September 2002, the Senate Judiciary Subcommittee on Administrative Oversight and the Court held a hearing on "the importance of balance" in the D.C. Circuit. Chairman Schumer opened the hearing by stressing "the need for ideological balance on this vital court."¹²³ The D.C. Circuit is important, he said, "because its decisions determine how these Federal agencies go about doing their jobs. And in doing so, it directly impacts the daily lives of all Americans more than any other court in the country, with the exception of the Supreme Court."¹²⁴ The D.C. Circuit had the same balance of four Democrat- and four Republican-appointed active judges when Schumer called for balance as it did in 2013, when Schumer helped lead the effort to shift that balance.

Republicans filibustered Obama's nominations to the three vacancies in October and November 2013, arguing that the D.C. Circuit's caseload did not justify filling the seats at all. The debate about the proper size of the

D.C. Circuit had been ongoing for two decades and was the reason that 23 Republican Senators opposed the nomination of Merrick Garland in March 1997. In the five years before Garland's nomination, the number of appeals filed and pending with the D.C. Circuit had declined by 22 percent and 15 percent, respectively.¹²⁵

The number of appeals filed each year in the D.C. Circuit declined by another 15 percent during the decade after Garland's appointment and, in January 2008, Congress reduced the size of the D.C. Circuit by transferring one of its judgeships to the Ninth Circuit.¹²⁶ Despite the reduction, appeals filed declined by another 15 percent between 2008 and 2013. When Republicans argued in 2013 that the three D.C. Circuit vacancies did not need to be filled, the court had ranked behind all other circuits in appeals filed for 17 consecutive years. For the year ending September 30, 2013, case terminations and written decisions per active D.C. Circuit judge were 68 percent below the national average and about 50 percent below the next-busiest circuit.

Republicans, therefore, had a legitimate argument in 2013 against filling any of the three D.C. Circuit vacancies. Democrats had, with two allied Independents, a 55–45 majority in the 113th Congress but could not muster the 60 votes needed to end debate.¹²⁷ If Democrats could not meet the vote threshold set by Rule 22, therefore, their only chance to create a Democrat majority on the D.C. Circuit would be to lower that threshold. Democrats had two options. They could seek to amend the text of Rule 22 to explicitly provide for a lower vote threshold. Rule 22, however, requires “two-thirds of the Senators present and voting” to end debate on a “measure or motion to amend the Senate rules.”¹²⁸ If Democrats lacked the 60 votes needed to end debate on these D.C. Circuit nominations, they would obviously fail to prevent a filibuster of their attempted rules change.

The other option came with a touch of irony. As described above, the debate about judicial power is about whether judges may change the meaning of the written statutes or constitutional provisions that they use to decide cases. Similarly, if Democrats could not change what Rule 22 actually said, they would have to change what Rule 22 is interpreted to mean in order to achieve their objective. This was a possibility because the Senate functions not only by its written rules, but also by parliamentary decisions about what those rules mean and how they apply. If Democrats could achieve a favorable decision to change the interpretation of Rule 22, backed up by a majority of Senators, they could change Senate practice without having to actually change Senate rules.

On November 21, 2013, Majority Leader Harry Reid raised a “question of order”¹²⁹ that “the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote.”¹³⁰ In other words, Reid requested from the Senate’s presiding officer a ruling that the phrase “three-fifths of the Senators duly chosen and sworn” in Rule 22 actually means “a majority of Senators present and voting.” Since “three-fifths” does not mean “simple majority” and “duly chosen and sworn” does not mean “present and voting,” the presiding officer initially answered Reid’s question in the negative. Reid appealed to the full Senate, which voted 52–48 to reject that ruling.¹³¹ The presiding officer then reversed his ruling, Minority Leader Mitch McConnell (R–KY) appealed, and the Senate voted 52–48 to reject McConnell’s appeal and accept the new ruling.¹³²

The effect of this series of actions was that the Senate endorsed reinterpreting Rule 22 to require a simple majority to end debate on all but Supreme Court nominations.¹³³ The same number of Senators could now both end debate and confirm nominations, even though the text of Rule 22 remained unchanged. Conversely, a group of Senators who lacked the votes to defeat confirmations outright could no longer use the Rule 22 cloture process to prevent confirmation by preventing a confirmation vote. Utilizing this new interpretation of Rule 22, Democrats promptly invoked cloture on, and then confirmed, President Obama’s three D.C. Circuit nominations.

Confirmation Process Norms. The first comprehensive shift in confirmation process norms occurred during the Bush Administration. The percentage of confirmations without opposition declined to 92 percent, the lowest of any period in history. The percentage of confirmations by recorded vote more than quadrupled, to 58.8 percent, from the Clinton Administration, and the percentage of recorded votes that were unanimous skyrocketed to 86.5 percent. The number of recorded votes without opposition during the Bush Administration was six times higher than in all previous American history combined. Democratic Senators voted against an average of 3.4 percent of Bush judicial nominations, the highest of any Administration since at least the turn of the 20th century. And the Senate took a record 30 cloture votes on Bush judicial nominations; 20 of those votes failed, and five nominations were never confirmed.

Democrats’ abolition of nomination filibusters in November 2013 provoked a significant reaction from Republicans during the second half of the 113th Congress. While the Senate had taken just seven cloture votes on President Obama’s judicial nominations before Democrats abolished nomination filibusters in November 2013, Republicans

thereafter forced 84 cloture votes through the end of 2014. Even then, however, 60 percent of Obama's judicial nominations were confirmed without opposition.

Some confirmation process norms changed further during the Obama Administration. Confirmations without opposition declined to 65.6 percent, although nearly 20 percent of opposed Obama nominations received only one or two negative votes. The percentage of confirmations by recorded vote increased further to 71.1 percent, although the percentage of these recorded votes without opposition declined to 51.7 percent. Partisanship increased, with the average Republican Senator voting against 9.7 percent of Obama's judicial nominations.

Weaponizing the Confirmation Process, Part II

As in 2001, specific circumstances combined to accelerate the weaponization of the judicial confirmation process after President Trump took office in 2017. Trump lost the popular vote by a larger margin than Bush had, but won a larger percentage of electoral votes, creating some of the same frustration and calls for resistance that followed the 2000 election.

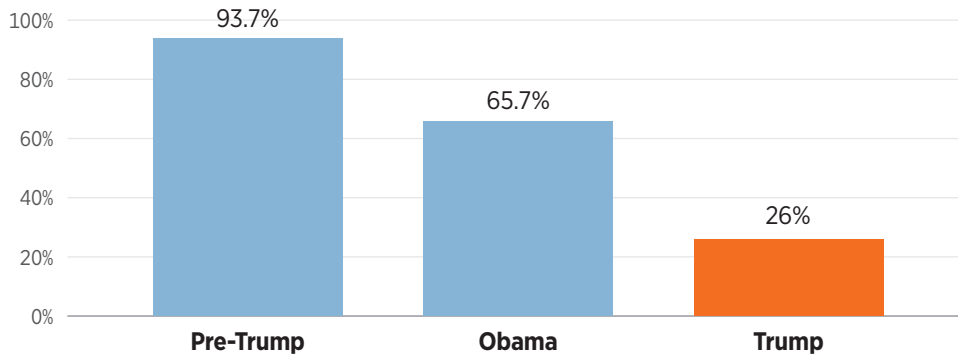
Second, after winning the Senate majority in the 2014 mid-term election, Republicans significantly limited President Obama's judicial appointments in his final two years. The number of judicial nominations given Judiciary Committee hearings or confirmation votes declined significantly. In fact, as a percentage of the judiciary, the Senate confirmed fewer judicial nominations during Obama's last two years in office than in any two-year period in American history. The confirmation total of 22 was far below the average of 62 confirmed in the final two years of the previous four administrations.

Third, Republicans also declined to consider a nomination to replace Justice Antonin Scalia, who died unexpectedly on February 13, 2016, until after the 2016 presidential election. Ten days after Scalia's death, the Republican majority of the Senate Judiciary Committee sent a letter to Majority Leader Mitch McConnell stating that "this Committee will not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017."¹³⁴

Finally, on April 6, 2017, Senate Democrats filibustered Trump's nomination of Neil Gorsuch to replace Justice Scalia. After a cloture vote failed, Republicans used the same parliamentary step that Democrats had used in November 2013 to apply the reinterpretation of Rule 22 to Supreme Court nominations.¹³⁵ Republicans then, by the same margin, invoked cloture and confirmed the Gorsuch nomination.

CHART 1

Judicial Nominations Confirmed without Opposition



SOURCES: Author's calculations based on data from U.S. Senate, "Roll Call Votes," https://www.senate.gov/legislative/votes_new.htm (accessed May 11, 2020); Congress.gov, "Nominations," <https://www.congress.gov/> (accessed May 11, 2020); and Govtrack.us, "Voting Records," [https://www.govtrack.us/congress/votes#chamber\[\]=1&session=__ALL__](https://www.govtrack.us/congress/votes#chamber[]=1&session=__ALL__) (accessed May 11, 2020).session=__ALL__ (accessed May 11, 2020).

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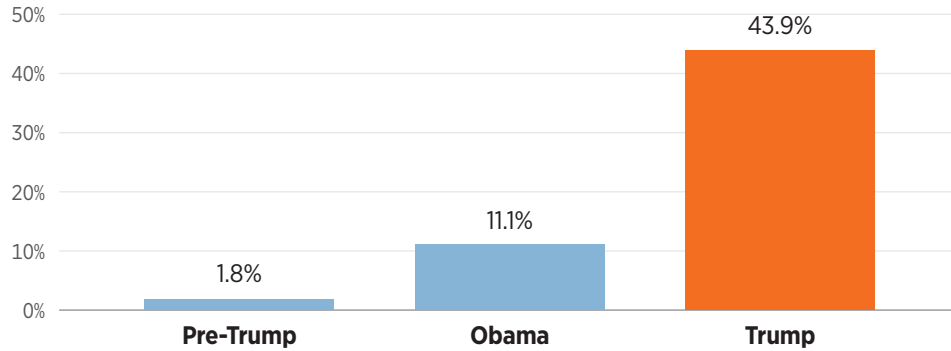
Confirmation Process Norms. Each of the traditional confirmation process norms has seen its most dramatic change since President Trump took office. Charting the data makes this point by comparing current data to both the Obama Administration and the entire pre-Trump period. First, the percentage of confirmations without opposition, which declined during the Obama Administration, has plunged to record lows.

Even more dramatically, the extent or depth of the opposition to Trump judicial nominations has exploded. During the Obama Administration, the same percentage of judicial nominations received more than 40 negative votes as received fewer than three. That ratio of high-to-low opposition for Trump nominations, however, is more than 11-to-one. Nearly half of all judges in American history confirmed with more than 30 percent opposition have been appointed by Trump. Chart 2 shows the jump in the percentage of judicial nominations confirmed with substantial opposition.

Another measure of the deep opposition to Trump's judicial nominations is the total and average number of votes cast against their confirmation. President Trump's 196 confirmed judges have received a total of 4,255 votes against confirmation, compared to 1,336 votes against the 2,691 judges confirmed *during the entire 20th century*. Chart 3 shows the average number of votes against confirmation.

CHART 2

Judicial Nominations with Greater than 30 Percent Opposition

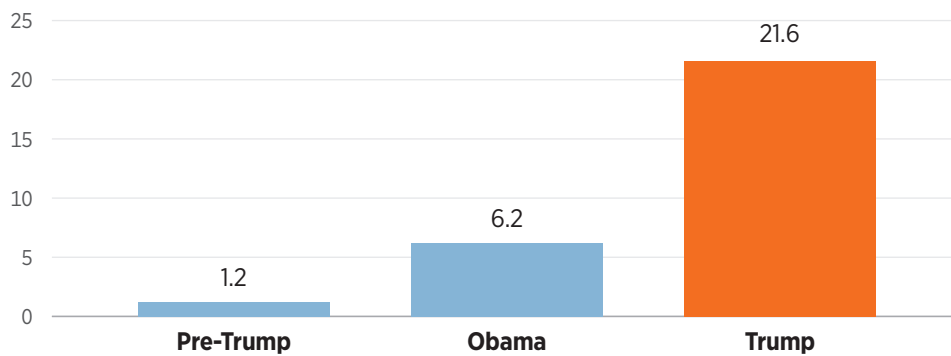


SOURCES: Author’s calculations based on data from U.S. Senate, “Roll Call Votes,” https://www.senate.gov/legislative/votes_new.htm (accessed May 11, 2020); Congress.gov, “Nominations,” <https://www.congress.gov/> (accessed May 11, 2020); and Govtrack.us, “Voting Records,” [https://www.govtrack.us/congress/votes#chamber\[\]=1&session=__ALL__](https://www.govtrack.us/congress/votes#chamber[]=1&session=__ALL__) (accessed May 11, 2020).session=__ALL__ (accessed May 11, 2020).

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CHART 3

Judicial Confirmation Average Number of “No” Votes

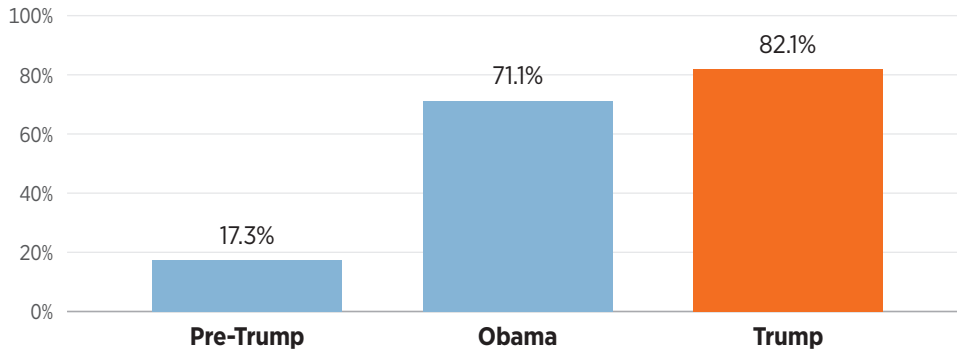


SOURCES: Author’s calculations based on data from U.S. Senate, “Roll Call Votes,” https://www.senate.gov/legislative/votes_new.htm (accessed May 11, 2020); Congress.gov, “Nominations,” <https://www.congress.gov/> (accessed May 11, 2020); and Govtrack.us, “Voting Records,” [https://www.govtrack.us/congress/votes#chamber\[\]=1&session=__ALL__](https://www.govtrack.us/congress/votes#chamber[]=1&session=__ALL__) (accessed May 11, 2020).session=__ALL__ (accessed May 11, 2020).

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CHART 4

Judicial Nominations Confirmed by Recorded Vote



SOURCES: Author's calculations based on data from U.S. Senate, "Roll Call Votes," https://www.senate.gov/legislative/votes_new.htm (accessed May 11, 2020); Congress.gov, "Nominations," <https://www.congress.gov/> (accessed May 11, 2020); and Govtrack.us, "Voting Records," [https://www.govtrack.us/congress/votes#chamber\[\]=1&session=__ALL__](https://www.govtrack.us/congress/votes#chamber[]=1&session=__ALL__) (accessed May 11, 2020).

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Another confirmation norm has been that most nominations were confirmed without a recorded vote. The fact that, in the past, most confirmations were also unanimous means that recorded votes were reserved primarily as a way for Senators to register opposition to judicial nominations. Conversely, forcing the Senate to use a time-consuming recorded vote to confirm nominations that lack any opposition is a tactic to slow the overall process.

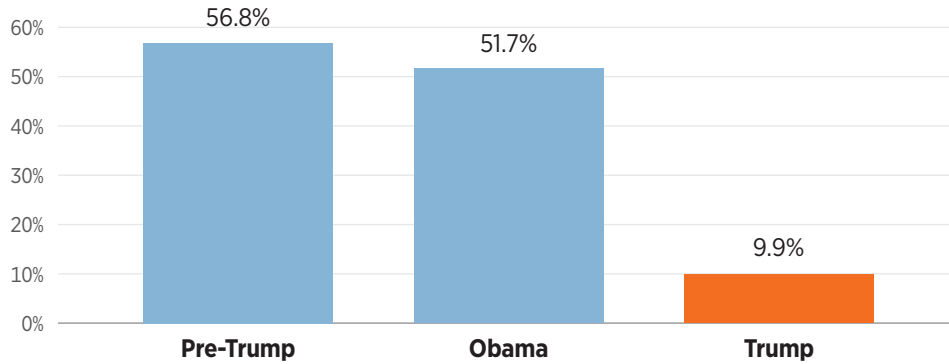
The percentage of confirmations by recorded vote, however, does not tell the whole story. Just as "opposition" can include one Senator or nearly half of the Senate, a recorded vote can be unanimous and without opposition or show a high number of negative votes. While the percentage of confirmations by recorded vote jumped significantly during the George W. Bush Administration, for example, 86.5 percent of those recorded votes were unanimous, without opposition. More than half of the recorded confirmation votes on Obama judicial nominations were also unanimous.

In contrast, not only did the percentage of recorded votes reach a record 89.1 percent during the Trump Administration, the percent of those recorded votes without opposition plunged from 69.5 percent before 2017 to less than 10 percent.

The most consequential changes in the judicial confirmation process concern ending debate and the possibility of filibusters. Democrats

CHART 5

Recorded Judicial Confirmation Votes without Opposition



SOURCES: Author’s calculations based on data from U.S. Senate, “Roll Call Votes,” https://www.senate.gov/legislative/votes_new.htm (accessed May 11, 2020); Congress.gov, “Nominations,” <https://www.congress.gov/> (accessed May 11, 2020); and Govtrack.us, “Voting Records,” [https://www.govtrack.us/congress/votes#chamber\[\]=1&session=__ALL__](https://www.govtrack.us/congress/votes#chamber[]=1&session=__ALL__) (accessed May 11, 2020).session=__ALL__ (accessed May 11, 2020).

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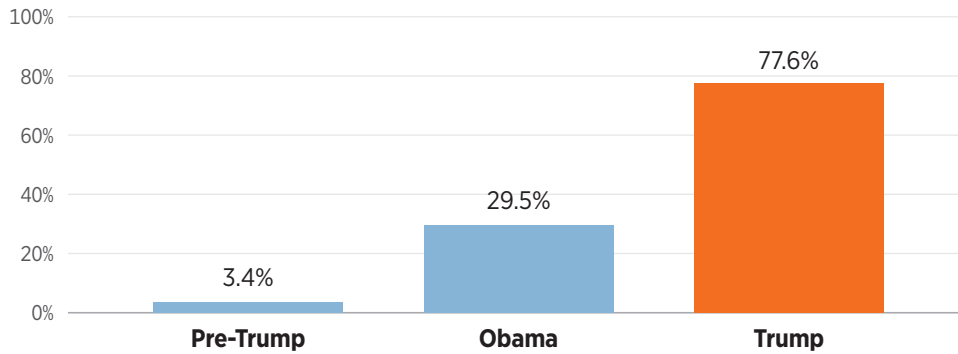
initiated the use of filibusters to defeat judicial nominations in 2003 and abolished those filibusters in 2013. Because Rule 22 was reinterpreted rather than actually amended, however, the cloture process itself remains the only way to end debate if the minority objects to unanimous consent. With the cloture and confirmation vote thresholds equalized, the cloture process can be used to delay, but not to defeat, judicial nominations.

Republicans forced the Senate to take just 12 cloture votes on judicial nominations during the first five years of the Obama Administration. They began doing so regularly in 2014, after Democrats abolished the nomination filibusters they had created 10 years earlier. Today, in contrast, Democrats have made cloture votes a regular feature of the confirmation process since Trump took office. In fact, the percentage of confirmations that first had a cloture vote has risen each year since then.

Finally, opposition to Trump’s judicial nominations is routinely partisan, another change from traditional confirmation process norms. The percentage of other-party judicial nominations that Senators oppose has risen from 2.1 percent prior to the Trump Administration to 46.2 percent since he took office. This new level of partisan opposition dwarfs the previous high mark during the Obama Administration, when Republicans opposed an average of 9.7 percent of judicial nominations.

CHART 6

Confirmed Judicial Nominations that First Had a Cloture Vote

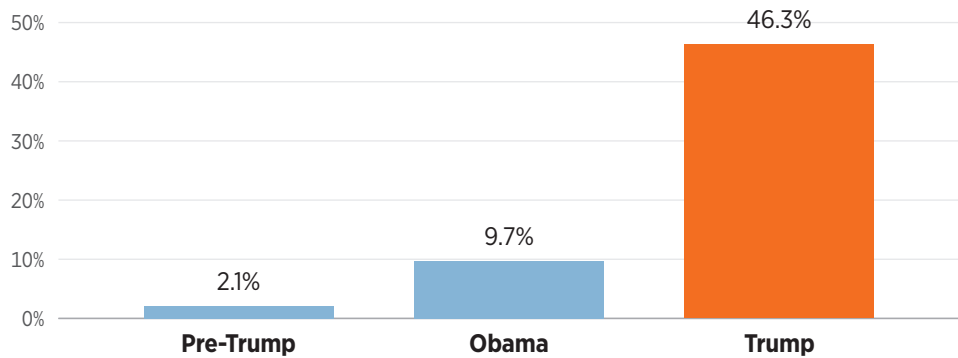


SOURCES: Author's calculations based on data from U.S. Senate, "Roll Call Votes," https://www.senate.gov/legislative/votes_new.htm (accessed May 11, 2020); Congress.gov, "Nominations," <https://www.congress.gov/> (accessed May 11, 2020); and Govtrack.us, "Voting Records," [https://www.govtrack.us/congress/votes#chamber\[\]=1&session=__ALL__](https://www.govtrack.us/congress/votes#chamber[]=1&session=__ALL__) (accessed May 11, 2020).session=__ALL__ (accessed May 11, 2020).

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CHART 7

Average Opposition per Senator to Other-Party Judicial Nominations



SOURCES: Author's calculations based on data from U.S. Senate, "Roll Call Votes," https://www.senate.gov/legislative/votes_new.htm (accessed May 11, 2020); Congress.gov, "Nominations," <https://www.congress.gov/> (accessed May 11, 2020); and Govtrack.us, "Voting Records," [https://www.govtrack.us/congress/votes#chamber\[\]=1&session=__ALL__](https://www.govtrack.us/congress/votes#chamber[]=1&session=__ALL__) (accessed May 11, 2020).session=__ALL__ (accessed May 11, 2020).

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Explaining the Confirmation Revolution

If confirmation process norms remained unchanged for two centuries, even through significant upheaval in the country's understanding of the judiciary's power and role, what explains the recent, near-total abandonment of those norms?

Some claim the explanation is that Trump nominees are poorly qualified. The most widely recognized measure of judicial nominees' qualifications is provided by the American Bar Association (ABA), which has rated potential or actual Article III judicial nominees since the late 1940s. Today, the ABA bases its ratings on three criteria: integrity, professional competence, and judicial temperament.¹³⁶ The ABA's 15-member evaluation committee provides three ratings based on these criteria: well qualified, qualified, and not qualified.¹³⁷ The committee states in its publications¹³⁸ and on its website¹³⁹ that its majority rating is a nominee's official ABA rating.

Several studies have examined whether the ABA's judicial nominee ratings show measurable or systematic partisan bias. In 2001, Professor James Lindgren found that, among nominees without prior judicial experience and controlling for other credentials, Clinton nominees were at least 10 times more likely to receive the ABA's highest rating.¹⁴⁰ Also in 2001, American Enterprise Institute scholar John Lott found "some evidence that on average Clinton nominees have been treated more favorably than Bush nominees."¹⁴¹ Lott returned to this subject in 2009, examining ABA ratings for nominees to both the district and appeals courts between 1977 and 2004. His study "reveals the ABA as systematically giving lower ratings to Republican circuit court nominees, although no similar bias appears to exist for district court nominees."¹⁴² And in 2011, three political scientists studied ABA ratings for nominees to the U.S. Court of Appeals between 1977 and 2008. They found "strong evidence of systematic bias in favor of Democratic nominees,"¹⁴³ concluding that "the ABA's ratings are systematically lower for Republican nominees than for Democratic nominees, regardless of the broader political environment."

With that evidence of bias in mind, it is significant that, during his first three years in office, 66 percent of Trump's judicial nominations received a "well-qualified" rating compared to 65 percent for President Obama, 67 percent for President George W. Bush, and 67 percent for President Clinton during the same period. At the other end of the scale, nine of President Trump's judicial nominations have received a "not qualified" rating; seven have been confirmed and two were not re-nominated.

Trump is not the first President to have some judicial nominations rated “not qualified” by the ABA. From 1993 through 2016,¹⁴⁴ the ABA rated 12 judicial nominations “not qualified.” The Senate confirmed nine of them, six without a recorded vote, and another by a vote of 98–1. Presidents of both parties have chosen not to re-nominate individuals rated “not qualified” after the Judiciary Committee¹⁴⁵ or the full Senate¹⁴⁶ did not take final action on the nominations.

The fact that 5 percent of Trump’s judicial nominees have received a “not qualified” rating cannot explain abandoning confirmation process norms from the previous two centuries for virtually all nominations. Opposition to nominees rated “well-qualified” is comparable.

The radical rejection of confirmation process norms during the past two decades cannot be explained by anything rationally related to the judicial appointment process itself. President Trump is committed to appointing the same kind of judges as President Reagan, judges who embrace the Founders’ original design for the judiciary. While the confirmation process changed little under Reagan, however, it has changed dramatically under Trump.

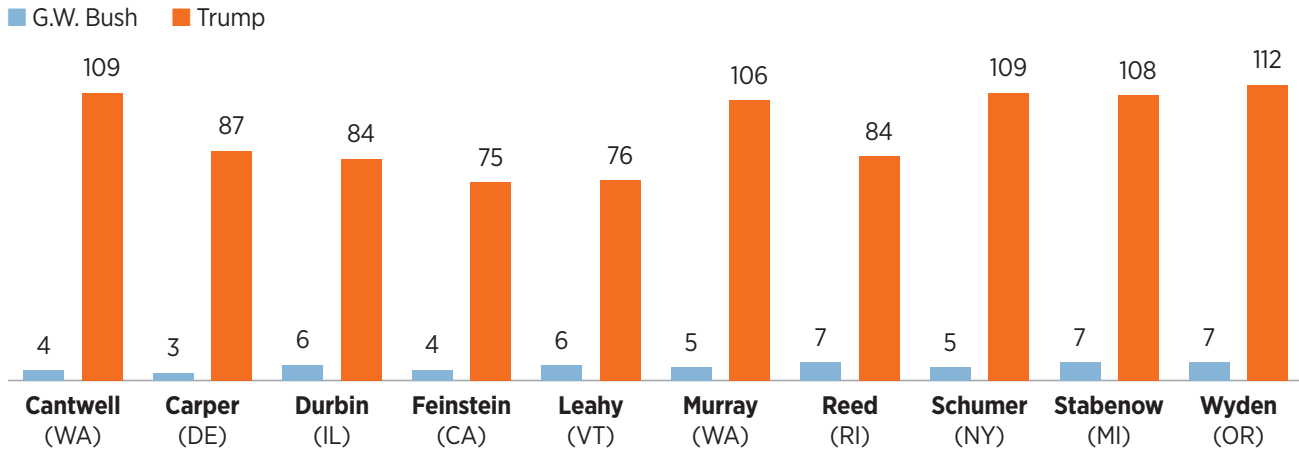
Nor is this transformation explained by ordinary partisanship. Ten current Democratic Senators also served during the first term of the George W. Bush Administration. Each Republican President’s nominations had the same pattern of AvBA ratings. These Senators voted against an average of five Bush nominations, or 3.2 percent. These 10 Senators have voted against an average of 97 Trump nominations, or 49.3 percent.

The changing *operation* of the judicial confirmation process, in which confirmation process norms have been rejected, is a symptom. The cause is the changing *purpose* of that process. The Founders designed the appointment process, including the Senate’s role, as a check on the President’s appointment power. Democrats have rejected the Founders’ design in two ways, first becoming independent of the President, and now using the confirmation process as a weapon to fight the President.

Democrats today are treating nominations as proxies for the President. They have turned their 2001 pledge to use “whatever means necessary” to fight President Bush’s judicial nominations into a plan to use whatever means necessary to fight President Trump himself. They have, in effect, determined that being nominated by President Trump is, by itself, a sufficiently “special and strong reason” to oppose his nominations.

CHART 8

Judicial Nominations Opposed by Individual Senators



SOURCES: Congress.gov, “Current Legislative Activities,” <https://www.congress.gov/> (accessed May 11, 2020), and U.S. Senate, “Roll Call Votes,” <https://www.senate.gov/legislative/votes.htm> (accessed May 11, 2020).

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Conclusion

America’s Founders designed both the judicial branch and the process for appointing its judges. Even through two periods of significant challenge to the former, the latter remained stable. The regular order of the judicial confirmation process was to confirm the vast majority of a President’s judicial nominations with little or no opposition, without a recorded vote, and without either routine partisanship or attempts to use Senate rules to delay or defeat nominations. Opposition required “special and strong reasons.”

Those who rejected the original design for the judiciary, however, eventually rejected the original design for the appointment process. A new, assertive model for the Senate’s role of “advice and consent” was presented in 1985 and was implemented in two stages. During the George W. Bush Administration, specific tactics were used for the first time and others were used more often. During the Trump Administration, confirmation process norms have been abandoned so completely that the process seems to have been weaponized—disengaged from its purpose altogether and redirected as a way of politically opposing the President.

Thomas Jipping is Deputy Director of the Edwin Meese III Center for Legal and Judicial Studies and Senior Legal Fellow, of the Institute for Constitutional Government, at The Heritage Foundation.

Endnotes

1. U.S. CONST., art. II, § 2, cl. 1. See John O. McGinnis, *Appointments Clause*, in HERITAGE GUIDE TO THE CONSTITUTION, available at <https://www.heritage.org/constitution/#!/articles/2/essays/91/appointments-clause>.
2. On October 5, 1999, the Senate voted 45–54 on the nomination of Ronnie White to the U.S. District Court for the Eastern District of Missouri; on March 9, 1989, the Senate voted 47–52 on the nomination of John Tower to be Secretary of Defense; on October 23, 1987, the Senate voted 42–58 on the nomination of Robert Bork to be Associate Justice of the Supreme Court; on May 24, 1976, the Senate voted 33–37 on the nomination of S. John Byington to the Consumer Product Safety Commission; on April 8, 1970, the Senate voted 45–51 on the nomination of G. Harold Carswell to be Associate Justice; and on November 21, 1969, the Senate voted 45–55 on the nomination of Clement Haynesworth to be Associate Justice. The Senate has defeated a total of 11 nominations to the Supreme Court. See Henry B. Hogue, *Supreme Court Nominations Not Confirmed, 1789–August 2010* CRS Report No. RL31171 (August 20, 2010), at 2.
3. U.S. CONST., art. III, § 2; See Robert J. Pushaw, Jr., *Judicial Vesting Clause*, in HERITAGE GUIDE TO THE CONSTITUTION, available at <https://www.heritage.org/constitution/#!/articles/3/judicial>.
4. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings before the S. Comm. on the Judiciary*, United States Senate, 103rd Cong., 1st Sess. (1993), at 229. See also *id.* at 52 (“Judges in our system are bound to decide concrete cases, not abstract issues.”); *id.* at 333 (“I simply cannot...answer an issue abstracted from a concrete case. That is not the way a judge works.”).
5. *Gamble v. United States*, 587 U.S. ____ (Thomas, J., concurring), slip op. at 8. See also ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 13 (1997) (“Every issue of law resolved by a federal judge is an interpretation of text—the text of a regulation, or of a statute, or of the Constitution.”).
6. The Federalist No. 39 (James Madison).
7. *Id.*
8. 1 COLLECTED WORKS OF JAMES WILSON 718 (Kermit L. Hall & Mark David Hall, eds. 2007).
9. *VanHorne’s Lessee v. Dorrance*, 2 U.S. 304,308 (1795). See also *South Carolina v. United States*, 199 U.S. 437,448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. That which it means when adopted, it means now.”).
10. George Washington, Farewell Address (Sept. 19, 1796), available at https://avalon.law.yale.edu/18th_century/washing.asp.
11. Russell Kirk, *Edmund Burke and the Constitution*, available at <https://theimaginativeconservative.org/2012/05/russell-kirk-edmund-burke-and-constitution.html>.
12. See Thomas L. Jipping, *Which Is to Be Master?: The People, Judges, and the Constitution’s Meaning*, 2 LIBERTY U. L. REV. 419, 423–27 (2008).
13. Randy Barnett, *The Original Meaning of the Judicial Power*, 12 S. CT. ECON. REV. 115,120 (2004).
14. *Marbury v. Madison*, 5 U.S. 137,180 (1803).
15. *Id.* at 176.
16. See Thomas Jipping, *The Constitution Must Control Judges, Not Vice Versa*, THE HERITAGE FOUNDATION LEGAL MEMO. No. 262, April 7, 2020, available at <https://www.heritage.org/the-constitution/report/the-constitution-must-control-judges-not-vice-versa>.
17. Mass. Const., art. XXX, available at <http://www.nhinet.org/ccs/docs/ma-1780.htm>.
18. The Federalist No. 78 (Alexander Hamilton) (quoting Montesquieu, *THE SPIRIT OF THE LAWS* 152 (Rothman ed. 1991) (1748)).
19. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
20. Federalist 78, *supra* note 18.
21. Robert H. Bork, *The Case Against Political Judging*, NATIONAL REVIEW, December 8, 1989. See also Keith E. Whittington, *How to Read the Constitution: Self-Government and the Jurisprudence of Originalism*, FIRST PRINCIPLES SERIES No. 5, 2 (May 1, 2006) (“Originalism is implicit in the design of a written constitution.”); Antonin Scalia, *ORIGINALISM: THE LESSER EVIL*, 57 U. of Cincinnati L. Rev. 849, 862 (1989) (“originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system.”).
22. Washington, *supra* note 10.
23. Letter from James Madison to H. Lee (June 25, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 441–42 (J.B. Lippincott 1867).
24. See also *Ex Parte Bain*, 121 U.S. 1, 12 (1887) (“in the construction of the language of the constitution here relied on, as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.”).
25. 9 THE WRITINGS OF JAMES MADISON 191 (Hunt ed. 1900–10).
26. THE JEFFERSON CYCLOPEDIA 193 (John P. Foley ed. 1900).
27. *Id.*
28. See also ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi, ed. 2007); U.S. Department of Justice, Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook* (1987).

29. The Federalist No. 76 (Alexander Hamilton).
30. *Id.*
31. *Id.*
32. Sen. R. 31, available at <https://www.rules.senate.gov/rules-of-the-senate>. See also Elizabeth Rybicki, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, CRS Report No. RL31980 (April 11, 2017), at 2.
33. Judges on these courts, established under Article III, “hold their Offices during Good Behaviour,” which means that impeachment is the only method of involuntary removal. See David F. Forte, *Good Behavior Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION, available at <https://www.heritage.org/constitution/#!/articles/3/essays/104/good-behavior-clause>. Today, the four life-tenured courts are the U.S. Supreme Court, the U.S. Court of Appeals, the U.S. District Court, and the U.S. Court of International Trade.
34. U.S. CONST., art. I, § 5, cl. 1 (allowing each house to determine its own “rules of proceeding.”); See David F. Forte, *Rules Clause*, in HERITAGE GUIDE TO THE CONSTITUTION, available at <https://www.heritage.org/constitution/#!/articles/1/essays/208/rules-clause>.
35. Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J. OF L. & PUB. POL. 205, 213 (2004).
36. See *id.* at 215–216.
37. See Orrin G. Hatch, *Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 839–42.
38. Gold & Gupta, *supra* note 35, at 226–227.
39. See Valerie Heithusen, *Majority Cloture for Nominations: Implications and the “Nuclear” Proceedings*, CRS Report for Congress No. R3331, at 1 (Dec. 6, 2013) (“When the rule was adopted in 1917, the cloture process applied only to legislation.”).
40. Gold & Gupta, *supra* note 35, at 226.
41. *Id.* at 229. This amendment was necessary because, in 1948, the Senate’s presiding officer had ruled that the term “measure” in Rule 22 included bills and resolutions, but not motions. *Id.* at 227–228. Ending debate on a motion to proceed to a bill, therefore, still required unanimous consent, making Rule 22 itself ineffective. In the 1949 amendment, the vote threshold to invoke cloture was raised to “two-thirds of the Senators duly chosen and sworn.” On March 7, 1975, the Senate voted 56–27 to lower the vote threshold for cloture to “three-fifths of the Senators duly chosen and sworn.” *Id.* at 259–260.
42. *Id.*
43. The U.S. Senate maintains “minute books” that record, to the minute, every action on the Senate floor. This includes when votes begin and end. The author consulted the minute books to calculate, over the course of a year, the average length of time for recorded votes to confirm judicial nominations.
44. The author is responsible for the calculations in this *Legal Memorandum*. Data on recorded votes used in these calculations were obtained from the U.S. Senate website, https://www.senate.gov/legislative/votes_new.htm, congress.gov, govtrack.us, and records kept in the libraries of the U.S. Senate and U.S. Senate Judiciary Committee.
45. The first Senate cloture vote on a nomination occurred on October 1, 1968, on President Lyndon Johnson’s nomination of Abe Fortas to be Chief Justice of the Supreme Court. The 45–43 vote, and the nearly even bipartisan opposition to cloture, suggested that Fortas did have enough support for confirmation. President Johnson promptly withdrew the nomination. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J. OF L. & PUB. POL. 181, 218–19 (2003).
46. See, e.g., *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935) (8–1 vote, provision of the National Industrial Recovery Act); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) (5–4 vote, Railroad Pension Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (9–0 vote, National Industrial Recovery Act); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (9–0 vote, Frazier-Lemke Act); *United States v. Butler*, 297 U.S. 1 (1936) (6–3, provision of Agricultural Adjustment Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (6–3 vote, Bituminous Coal Conservation Act).
47. *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495, 528 (1935).
48. *Id.* at 548.
49. Press Conference #209, transcript at 12, (May 31, 1935) available at http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0022.pdf.
50. *Id.* at 29.
51. Radio Address of the President, at 2 (March 9, 1937) available at http://www.fdrlibrary.marist.edu/_resources/images/msf/msf01071.
52. Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR’s Court-Packing Plan*, 81 AM. POL. SCIENCE REV. 1139, 1140 (1987).
53. See William D. Blake, *Justice Under the Constitution, Not Over It: Public Perceptions of FDR’s Court-Packing Plan*, 49 PRES. STUD. QUARTERLY 204, 204 (2019) (“While public opinion opposed the Supreme Court’s invalidation of the New Deal, most Americans also opposed Court packing as a means to resolve this constitutional conflict.”).
54. Gregory A. Caldeira, *FDR’s Court-Packing Plan in the Court of Public Opinion*, Appendix I (Aug. 4, 2004), available at [http://epstein.wustl.edu/research/courses.LAPSCaldeira.pdf](http://epstein.wustl.edu/research/courses/LAPSCaldeira.pdf).
55. *Id.* at Appendix III.

56. *Reorganization of the Federal Judiciary: Hearing before the S. Comm. on the Judiciary*, United States Senate, 75th Congress, 1st Session, Report No. 711 (June 7, 1937), at 1.
57. *Id.* at 3.
58. *Id.* at 11.
59. *Id.* at 14.
60. *Id.*
61. *Id.* at 8.
62. *Senate Vote #42 in 1937 (75th Congress)*, GovTrack.us, <https://www.govtrack.us/congress/votes/75-1/s42>.
63. Justice Hugo Black replaced Justice Willis Van Devanter in 1939, Justice Stanley Reed replaced Justice George Sutherland in 1938, Justice Frank Murphy replaced Justice Pierce Butler in 1940, and Justice James Byrnes replaced Justice James McReynolds in 1941.
64. 300 U.S. 379 (1937).
65. See *supra* note 46. Roberts wrote the opinion in *Alton and Butler*.
66. 300 U.S. at 402 (Sutherland, J., dissenting).
67. *Id.* at 404.
68. *Id.*
69. *Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring).
70. Edward S. Corwin, *Constitution v. Constitutional Theory*, in *AMERICAN CONSTITUTIONAL HISTORY* 108 (1964).
71. Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L REV 353,353 (1981).
72. See Orrin G. Hatch, *There's Nothing "Super" About Roe v. Wade*, 29 STAN. L. & POL. REV. ONLINE 1, 3 n.7 (2018).
73. William J. Brennan, *Address to the Text and Teaching Symposium at Georgetown University* (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 17 (1986) (emphasis added).
74. Charles Evans Hughes, Lecture, *Speech Before the Elmira Chamber of Commerce* (May 3, 1907), in *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES* 133-39 (Robert H. Fuller & Gardner Richardson eds., 1908).
75. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BU L REV 204, 226 (1980).
76. See G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 160 (1978); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040 (1979).
77. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iii (1st ed. 1978).
78. Mark Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 279 (1975).
79. Brennan, *supra* note 73, at 18.
80. Congressional Record, Sept. 22, 2005, at S10366.
81. Hatch, *supra* note 37, at 813-814. The labels "judicial restraint" and "judicial activism" had long been used for the two approaches discussed in this memorandum. In particular, "judicial restraint" referred to judges being restrained by the text and original meaning of the Constitution and statutes; "judicial activism" referred to judges freed from such restraint. See also Diarmuid F. O'Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 MARQUETTE L. REV. 895, 896-97 (2008).
82. Robert H. Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, December 1963, at 140.
83. *The Great Debate: Interpreting Our Written Constitution* (1986), at 9, available at <https://fedsoc.org/commentary/publications/the-great-debate-attorney-general-ed-meese-iii-july-9-1985>. See also Edwin Meese III, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1, 5 (1986). See also Edwin Meese III, *The Battle for the Constitution*, *POLICY REVIEW* (Spring 1986), at 84; Edwin Meese III, *Perspectives on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution*, 61 *TULANE L. REV.* 979 (1987), available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/tulr61&div=39>.
84. *THE GREAT DEBATE*, *supra* note 73, at 10.
85. *Id.* at 14, available at <https://fedsoc.org/commentary/publications/the-great-debate-justice-william-j-brennan-jr-october-12-1985>.
86. *Id.* at 15.
87. Senator Orrin Hatch (R-UT) reviewed the book, arguing that this outcome-based strategy was intended to change the balance of authority between the President and the Senate. See Orrin G. Hatch, *Save the Court From What?* 99 *HARV. L. REV.* 1347, 1353-54 (1986).
88. *Id.* at 43.
89. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at iii-vii (1st ed. 1978).
90. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* xviii (1985).

91. *Id.* at 125.
92. Senator Kennedy's speech begins at 25:35 of the following C-SPAN clip, <https://www.c-span.org/video/?45973-1/robert-borks-america>. For the text, see Congressional Record, July 1, 1987, at 18518.
93. U.S. Department of Justice, Office of Legal Policy, *By and With the Advice and Consent of the Senate: The Bork and Kennedy Confirmation Hearings and the Implications for Judicial Independence* (January 31, 1989), at 6.
94. U.S. Department of Justice, Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook* (March 12, 1987), unnumbered page.
95. U.S. Department of Justice, Office of Legal Policy, *Guidelines on Constitutional Litigation* (February 19, 1988), unnumbered page.
96. *Id.* at 3.
97. *Nomination of Judge Antonin Scalia: Hearings before the S. Comm. on the Judiciary*, United States Senate, 99th Congress, 2nd Session, S. Hrg.99-1064, at 33.
98. *Id.* at 48. Scalia said that he was "more inclined to the original meaning than I am to a phrase like 'living Constitution.'" *Id.* at 49. Scalia would later identify himself as "one of a small number of judges...who are known as originalists. Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people." Justice Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way* (remarks given at the Woodrow Wilson International Center for Scholars in Washington, D.C., on March 14, 2005), available at https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf.
99. Abner Mikva, *Supreme Patience*, WASHINGTON POST (Jan. 25, 2002), <https://www.washingtonpost.com/archive/opinions/2002/01/25/supreme-patience/2564a7bb-b83a-413f-a6b8-322b6516e4c2/>. Professor Bruce Ackerman argued later that year that when "sitting justices retire or die, the Senate should refuse to confirm any nominations offered up by President Bush." Bruce Ackerman, *The Court Packs Itself*, THE AMERICAN PROSPECT, December 3, 2001.
100. See, e.g., *Confirmation of Ashcroft Fills Cabinet*, THE MICHIGAN DAILY, February 2, 2001, <https://www.michigandaily.com/content/confirmation-ashcroft-fills-cabinet>.
101. The Senate voted 58–42 on Ashcroft's nomination and 51–47 on Olson's.
102. Helen Dewar, *A Serious Breach in Bipartisanship: Democrats Fire 'Shot Across the Bow'*, WASHINGTON POST, February 2, 2001, at A2.
103. Neil A. Lewis, *Democrats Readying for Judicial Fight*, NEW YORK TIMES, May 1, 2001, at A19.
104. *Id.*
105. *The Judicial Nomination and Confirmation Process: Hearings before the S. Subcomm. on Administrative Oversight and the Courts of the Committee on the Judiciary*, United States Senate, 107th Congress, 1st Session, S. Hrg. 107–463 (June 26 and September 4, 2001), at 1.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 77 (Statement of Marcia D. Greenberger).
110. *Id.*
111. *Id.* at 78.
112. *Id.*
113. *Report of People for the American Way In Opposition to the Confirmation of William H. Pryor, Jr. to the United States Court of Appeals for the Eleventh Circuit* (June 10, 2003), <http://files.pfaw.org/uploads/2017/01/william-pryor-report.pdf>.
114. *Id.* at 2.
115. *Confirmation Hearing on the Nominations of Leslie Southwick, to be Circuit Judge for the Fifth Circuit et al. before the S. Comm. on the Judiciary*, United States Senate, 110th Congress, 1st Session, S. Hrg.110-131, May 10, 2007, at 184.
116. *Id.* at 188–89.
117. Democrats had also been the majority during the 102nd Congress (1991–1992). Judiciary Committee Chairman Joseph Biden (D–DE) refused to give a hearing to more than 50 of President George H. W. Bush's nominees, the *New York Times* reporting that "the Democrats who control the Senate have begun to delay confirming some of President Bush's nominees for major judgeships to preserve the vacancies for Gov. Bill Clinton to fill if he is elected President." Neil A. Lewis, *Waiting for Clinton, Democrats Hold Up Court Confirmations*, THE NEW YORK TIMES, September 1, 1992. As a result, 109 positions on life-tenured courts, or 13.3 percent of the judiciary, were vacant when President Bill Clinton took office in January 1993.

118. During the 114th Congress (2015–2016), with Republicans in the majority, the Judiciary Committee held a hearing for 53 judicial nominees, more than 40 percent below the two-year average over the previous two decades. Even more dramatically, the Senate confirmed just 22 judicial nominees during the 114th Congress, one-fourth the previous average. As a percentage of the judiciary, this was the lowest confirmation total for any Congress in American history. See Thomas Jipping, *Judicial Appointments in the 115th Congress*, THE HERITAGE FOUNDATION LEGAL MEMO. No. 244 (May 15, 2019), at 2–3, available at https://www.heritage.org/sites/default/files/2019-05/LM-244_0.pdf.
119. Sen. R. 31, available at <https://www.rules.senate.gov/rules-of-the-senate>.
120. Congressional Record, April 8, 2003, p. S4949.
121. *Id.*
122. One of these vacancies occurred on September 29, 2005, when then-Judge John Roberts was appointed Chief Justice of the Supreme Court. President George W. Bush nominated Peter Keisler to that vacancy on June 29, 2006, but he did not have a hearing in the last few months of the 109th Congress. The 2006 election made Democrats the Senate majority and, after Bush re-nominated Keisler on January 7, 2007, they denied him a hearing for the next two years. President Obama nominated Caitlin Halligan to this vacancy five times between September 2010 and January 2013. When the second cloture vote on the Halligan nomination failed, Obama nominated Patricia Millett to the vacancy on June 4, 2013. The second vacancy occurred on October 14, 2011, when Judge Douglas Ginsburg took senior status. Obama did not nominate Cornelia Pillard to this vacancy until June 4, 2013. The third vacancy occurred on February 12, 2013, when Judge David Sentelle took senior status. Obama nominated Robert Wilkins to this vacancy on June 4, 2013.
123. *The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the S. Subcomm. On Administrative Oversight and the Courts of the Committee on the Judiciary*, United States Senate, 107th Congress, 2nd Session, S.Hrg. 107-972 (September 24, 2002), at 1.
124. *Id.* at 2.
125. Administrative Office of the U.S. Courts, *Federal Court Management Statistics*, <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>.
126. Court Security Improvement Act, Pub. L. 110-177, 121 Stat. 2534 (Jan. 7, 2998).
127. On October 31, 2013, the Senate voted 55–38 on the cloture motion for the nomination of Patricia Millett. On November 12, 2013, the Senate voted 56–41 on the cloture motion for the nomination of Cornelia Pillard. On November 18, 2013, the Senate voted 53–38 on the cloture motion for the nomination of Robert Wilkins.
128. Sen. R. 22, available at <https://www.rules.senate.gov/rules-of-the-senate>.
129. Sen. R. 20, available at <https://www.rules.senate.gov/rules-of-the-senate>.
130. Congressional Record, November 21, 2013, at S8417.
131. *Id.* at S8418.
132. *Id.*
133. On April 6, 2017, the Senate twice voted 55–45 on cloture motions for the nomination of Neil Gorsuch to be Associate Justice of the Supreme Court. Congressional Record, April 6, 2017, at S2389. After voting 48–52 to reject Minority Leader Charles Schumer’s motion to postpone a confirmation vote for more than two weeks, the majority Republicans used the same parliamentary approach to apply the November 2013 precedent regarding the votes needed for cloture to Supreme Court nominations. *Id.*
134. Letter from Senate Judiciary Committee to Senator Mitch McConnell (Feb. 23, 2016), available at <https://www.grassley.senate.gov/sites/default/files/judiciary/upload/SCOTUS%2C%2002-23-16%2C%20member%20signed%20letter%2C%20no%20hearings.pdf>.
135. Congressional Record, April 6, 2017, at S2389.
136. The ABA says that judicial temperament includes “the nominee’s compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law.” American Bar Association Standing Committee on the Federal Judiciary, *What it is and How it Works* 3 (2017), available at <https://www.americanbar.org/content/dam/aba/unategorized/GAO/Backgrounder.pdf>.
137. *Id.* at 6.
138. *Id.* at 7.
139. American Bar Association, *Ratings*, https://www.americanbar.org/groups/committees/federal_judiciary/ratings/.
140. James Lindgren, Examining the American Bar Association’s Ratings of Nominees to the U.S. Court of Appeals for Political Bias, 1989–2000, J. OF L. AND POLITICS, Oct. 2001.
141. John R. Lott, Jr., *The American Bar Association, Judicial Ratings, and Political Bias*, 17 J. OF L. & POLITICS 1 (2001).
142. John R. Lott, *What Does the American Bar Association Rating Really Measure*, PUBLIC CHOICE, Vol. 156, Nos.1–2 (2013).
143. Susan Navarro Smelcer et al., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POLITICAL RESEARCH QUARTERLY 837 (2011).

144. This time frame is appropriate because the ABA changed its rating scale for judicial nominees in 1990, in the middle of the George H. W. Bush Administration.
145. President Clinton nominated Bruce Greer to the U.S. District Court for the Southern District of Florida on August 1, 1995, despite his majority “not qualified” rating. Clinton withdrew the nomination on May 13, 1996, after the Judiciary Committee did not hold a hearing. President George W. Bush nominated Frederick Rohlifing to the U.S. District Court for the District of Hawaii on January 7, 2003, despite his unanimous “not qualified” rating. Bush withdrew the nomination on May 6, 2004, after the committee did not hold a hearing. Bush nominated Daniel Ryan to the U.S. District Court for the Western District of Oklahoma on February 14, 2005, despite his substantial majority “not qualified” rating. Bush withdrew the nomination on March 30, 2006, after the committee did not hold a hearing. Bush first nominated Michael Wallace to the U.S. Court of Appeals for the Fifth Circuit on February 8, 2006, despite his unanimous “not qualified” rating. The Judiciary Committee held a hearing but did not vote on the nomination. The nomination was returned to the President on December 9, 2006, at the close of the 109th Congress, and Wallace was not re-nominated. Trump nominated John O’Connor to the Northern/Eastern/Western Districts of Oklahoma on April 10, 2018, despite his unanimous “not qualified” rating. The Judiciary Committee held a hearing but took no further action. The nomination was returned to the President on January 3, 2019, at the close of the 115th Congress, and O’Connor was not re-nominated.
146. President Donald Trump nominated Brett Talley to the U.S. District Court for the Middle District of Alabama on September 7, 2017, despite his unanimous “not qualified” rating. The Judiciary Committee held a hearing and reported the nomination, but the Senate took no further action. The nomination was returned to the President on January 3, 2018, after the first session of the 115th Congress, and Talley was not re-nominated.