

# Judicial Appointments During the 116th Congress

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## KEY TAKEAWAYS

President Trump appointed more judges to life-tenured federal courts, in either absolute or percentage terms, than his most recent five predecessors.

Trump's nominees to Article III courts received higher ratings from the American Bar Association than first-term nominees since the current rating scale began.

Opposition to and obstruction of Trump's judicial nominees broke several basic confirmation norms that had been consistent for more than two centuries.

## Introduction

The Declaration of Independence explains that “institut[ing] new Government” requires “laying its foundation on such principles and organizing its powers in such form” as will accomplish its purpose. To that end, America’s Founders laid a foundation for republican government in which “the people are masters of the government”<sup>1</sup> and structured its powers into three separate branches.

While these are designed to be separate and coordinate, the Founders believed that in a republic, the legislative branch, which represents and is elected by the people, “necessarily predominates.”<sup>2</sup> The judicial branch, in contrast, would be the “weakest” and “least dangerous” branch because it uses “judgment” rather than “will”<sup>3</sup> to settle legal disputes that take the form of actual “Cases” and “Controversies.”<sup>4</sup>

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This paper, in its entirety, can be found at <http://report.heritage.org/lm281>

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At her 1993 confirmation hearing before the Senate Judiciary Committee, Justice Ruth Bader Ginsburg explained that “unlike legislators, courts don’t entertain general issues. They resolve concrete cases.”<sup>5</sup> In doing so, Justice Clarence Thomas recently observed, “[w]e interpret and apply written law to the facts of particular cases.”<sup>6</sup> As they designed our system of government, America’s Founders prescribed how judges should fulfill this task. Many conflicts about judicial appointments are really about whether to retain or abandon this prescription for the exercise of judicial power.<sup>7</sup>

Many Americans fail to understand the mechanics, let alone the importance, of judicial appointments because they know too little about our system of government in general and about the judicial branch in particular. For example:

- A 2016 poll by the American Council of Trustees and Alumni discovered that 10 percent of *college graduates* believe that TV’s Judge Judy is currently serving on the Supreme Court of the United States and that one-third of Americans could not locate the Court in the judicial branch of government.<sup>8</sup>
- The Annenberg Public Policy Center found in 2017 that fewer than one-quarter of respondents could name the three branches of government, one-third could not name even one, and 37 percent could not name a single right protected by the First Amendment.<sup>9</sup>
- A September 2020 Marquette University Law School poll found that, regardless of political party or ideology, 35 percent to 40 percent of Americans believe that the Supreme Court decides cases mainly on the basis of politics rather than the law.<sup>10</sup>
- The Pew Research Center found that 55 percent of Americans say the Supreme Court should base its decisions on what the Constitution means “in current times” rather than “as originally written.”<sup>11</sup>

Nevertheless, it remains true, as President James Madison said in 1810, that “a well-instructed people alone can be permanently a free people.”<sup>12</sup> To that end, this *Legal Memorandum* provides background and analysis regarding judicial appointments during the 116th Congress (2019–2020)<sup>13</sup> and during President Donald Trump’s full term.

## The Judicial Branch

The Constitution created the Supreme Court and gives Congress two categories of power to create other courts. Under Article I, Congress can “constitute Tribunals inferior to the supreme Court.”<sup>14</sup> The judges on these Article I courts, which are sometimes referred to as legislative tribunals, have limited terms, and most are appointed by the President with the Senate’s consent.<sup>15</sup> Article I courts include the territorial courts of the Virgin Islands and Guam, the U.S. Tax Court, U.S. Court of Appeals for the Armed Forces, and U.S. Court of Federal Claims.

Article III of the Constitution vests the “judicial Power of the United States” in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>16</sup> Judges on Article III courts have unlimited terms, serving “during good Behaviour”<sup>17</sup> or until they choose to leave, die, or are removed by impeachment. The Constitution gives to the President the power to nominate Article III judges and, “by and with the Advice and Consent of the Senate,” to appoint those whom he has nominated.<sup>18</sup>

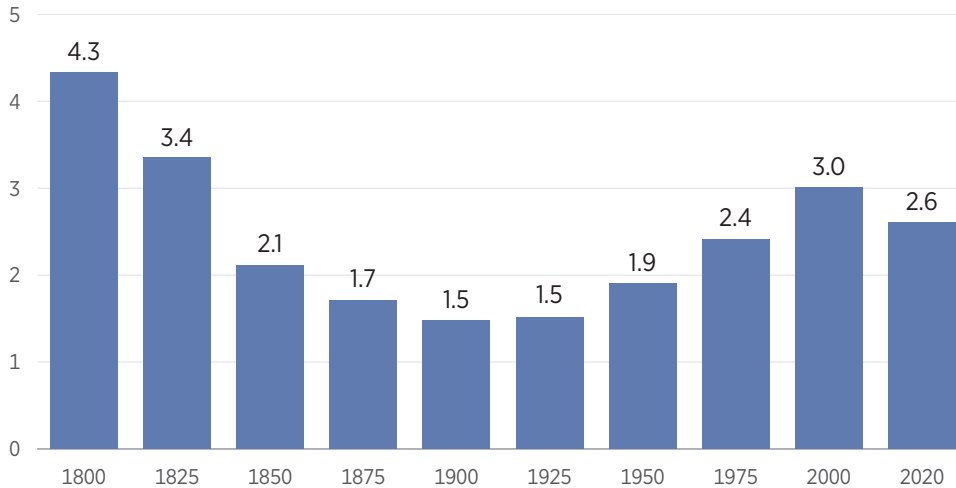
Congress determines the number and distribution of judges on Article III courts. With the exception of five years during the Civil War, the Supreme Court has had nine seats since 1837. Since 1990,<sup>19</sup> the U.S. Court of Appeals has had 179 positions distributed among 12 geographical circuits and one subject-matter circuit. In 1981, Congress split the Fifth Circuit, which stretched from Texas to Georgia, to form the Eleventh Circuit, which today includes Georgia, Florida, and Alabama. The U.S. District Court has had 663 positions since 2002,<sup>20</sup> distributed among 94 districts across the country. The U.S. Court of International Trade has had nine members since it was created in 1980.<sup>21</sup>

**Senior Judges.** Since 1919, Congress has provided that Article III judges may assume “senior status” when they meet specific age and judicial service criteria. The current rule, in effect since 1984, makes senior status available when a judge has served for at least 10 years and the combination of age and length of service equals at least 80.<sup>22</sup> Senior judges retain the salary they received when they took senior status and can choose how to fulfill an ongoing service requirement. Many do so by maintaining a reduced caseload, with senior judges handling approximately 20 percent of all district and appeals court cases.<sup>23</sup>

Based on annual data from the Administrative Office of the U.S. Courts (AOUSC), an average of 86 senior judges have served on the U.S. Court of Appeals since Congress last created new judgeships in 1990. In addition, an average of 25 judges on the U.S. District Court take senior status each year.<sup>24</sup>

CHART 1

### Article III Judges per Million Population



**SOURCES:** U.S. Courts, “Authorized Judgeships,” <https://www.uscourts.gov/sites/default/files/allauth.pdf> (accessed February 8, 2020), and ThoughtCo., “U.S. Population Throughout History,” <https://www.thoughtco.com/us-population-throughout-history-1435268> (accessed February 8, 2020).

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Chart 1 presents the number of active judges on Article III courts, adjusted for population, since the turn of the 19th century.

The 18-year period since Congress last created any new Article III judgeships is the longest in American history; the previous record was the 14 years between 1822 and 1836. In 2019, the Judicial Conference of the United States, which makes biannual recommendations for new judgeships, called for adding five judgeships to the U.S. Court of Appeals for the Ninth Circuit and 65 judgeships to the U.S. District Court across 24 districts.<sup>25</sup>

## Judicial Vacancies

**Background.** Judicial vacancies create the opportunity for Presidents to appoint new judges to positions that occur by either creation or attrition. The 1990 Judicial Improvements Act, for example, tripled existing judicial vacancies by creating 11 new judgeships on the U.S. Court of Appeals and 69 on the U.S. District Court. Most vacancies, however, occur by attrition. Over the past two decades, approximately 40 vacancies have occurred each year through attrition, three-quarters of them by judges taking senior status.

The AOUSC organizes and reports data on judicial vacancies in three categories.

- **Current vacancies**<sup>26</sup> are judicial positions that are empty at a given time.
- **Future vacancies**<sup>27</sup> exist when a judge has made known that he or she plans to leave, either on a specific date or at a time to be determined, such as when a successor is chosen.
- **“Judicial emergency” vacancies**<sup>28</sup> are designated using a formula that incorporates the longevity of a vacancy and its impact on judicial caseloads. Over the past two decades, an average of 40 percent of current vacancies have been designated as judicial emergencies.

**Analysis.** The context for evaluating judicial vacancies during the 116th Congress and the Trump term begins with pre-Trump confirmation developments. From 1981 through 2014, the Senate confirmed an average of 93 Article III judges during each two-year Congress. During President Barack Obama’s final two years in office, the Senate confirmed 22 judges, the lowest two-year total since 1951–1952 when the judiciary was one-third the size that it is today. As a percentage of the judiciary, however, the number of judges confirmed by the Senate during Obama’s last two years was less than the number confirmed by any other Congress in American history except the 11th Congress (1809–1810), when the Senate confirmed no judges at all. As a result, 106 vacancies existed on Article III courts when President Trump took office in January 2017, and the number rose to 134 by the end of 2018.

During the 116th Congress, however, vacancies declined by 62 percent, the largest two-year drop in more than four decades. This dramatic decline resulted primarily from the Senate’s significantly accelerated confirmation pace. In addition, 25 percent fewer judges took senior status than the historical average.<sup>29</sup> Vacancies on the U.S. Court of Appeals dropped to single digits from April 2019 through July 2020 and, for the first time in at least four decades, to zero for the next four months. When the 116th Congress adjourned, there was one vacancy on the First Circuit<sup>30</sup> and one on the Seventh Circuit.<sup>31</sup>

Overall, vacancies on Article III courts declined by 56 percent during Trump’s first term, compared to an increase of 57 percent for Obama and declines of 64 percent for George W. Bush, 31 percent for Clinton, 10 percent

for George H. W. Bush, and 40 percent for Ronald Reagan.<sup>32</sup> At the same time, the percentage of vacancies designated as emergencies rose from 36 percent to 49 percent during the 115th Congress and to nearly 70 percent when the 116th Congress adjourned—the highest level on record. An average of 52 vacancies were in emergency status during Trump’s four years in office, compared to less than 43 percent during the first terms of the previous three Presidents.

## Nominations

**Background.** Each President decides how to structure the executive branch process for assisting him or her in making nominations. Typically, the White House Counsel’s Office and the Department of Justice’s Office of Legal Policy play significant roles in the identification and evaluation of potential nominees. Two other groups outside the executive branch also influence a President’s nomination decisions. The first is comprised of individual Senators, who recommend individuals for nomination to judicial vacancies in their states. These home-state Senators have had an increasingly recognized role in the judicial appointment process since 1917,<sup>33</sup> when Senate Judiciary Committee Chairman Charles Culberson (D-TX) began the “informal practice”<sup>34</sup> of asking, on a blue slip of paper, for their “opinion and information” about a nominee.<sup>35</sup>

Opposition, however, “did not give a Senator an absolute right to block a judicial nomination and prevent committee action.”<sup>36</sup> Political scientists Sarah Binder and Forrest Maltzman describe the blue-slip courtesy as “an early warning system, not an absolute veto.”<sup>37</sup> In other words, “a negative blue slip provided information to the chair[man] about the potential for strong floor opposition should the nomination be reported favorably from the Judiciary Committee.”<sup>38</sup> In some cases, an opposing home-state Senator asked for the opportunity to present his views at a nominee’s confirmation hearing. In others, the nomination might move forward with a negative recommendation from the Judiciary Committee. Either way, as an expression of Senatorial courtesy, the full Senate took those views into account.

Only two Judiciary Committee chairmen since 1917, Senators James O. Eastland (D-MS) and Patrick Leahy (D-VT), have treated a negative blue slip as an actual veto of committee consideration. The more common approach by chairmen of both parties magnifies home-state Senators’ influence on nominations. In a letter to President Ronald Reagan in June 1989, for example, Chairman Joseph Biden (D-DE) stated that a negative blue slip is a “significant factor to be weighed by the committee...but it will not preclude consideration of that nominee unless the Administration has not

consulted with both home state Senators prior to submitting the nomination to the Senate.”<sup>39</sup> Chairmen Orrin Hatch (R–UT), Charles Grassley (R–IA), and Lindsey Graham (R–SC) followed a similar policy.

The second group that may influence a President’s nominations is the American Bar Association. Although the ABA considers itself the “national representative of the legal profession,”<sup>40</sup> its membership today includes fewer than 15 percent of America’s lawyers,<sup>41</sup> down from more than 50 percent four decades ago.<sup>42</sup> The ABA has provided its evaluation of judicial nominees to the Senate Judiciary Committee since 1948 and, at the request of the Justice Department, to the executive branch since 1952.<sup>43</sup>

The Justice Department agreed to allow ABA evaluation of individuals being considered for nomination. This prenomination role, while unique among private organizations, was not controversial at the time because the ABA had chosen not to address political issues, focusing instead on the legal profession and general administration of justice. At its 1933 annual meeting, for example, the ABA considered amending its constitution to “enlarge the scope” of its mission. A proposed amendment would have allowed the ABA to “express and advocate its views on such questions of public interest or pertaining to the general welfare as it would deem proper.”<sup>44</sup> Even though the ABA’s Executive Committee recommended this change, ABA members soundly rejected it.

In 1965, then-ABA president and later Supreme Court Justice Lewis Powell described the “prevailing view” that the ABA should avoid “political and emotionally controversial issues...unless they relate directly to the administration of justice.”<sup>45</sup> As an example of permissible ABA involvement, Powell cited President Franklin Roosevelt’s “proposal to pack the Supreme Court.” Speaking out on issues beyond this “sharply” defined category, he argued, would “dilute the effectiveness of the Association in the areas of its primary responsibility as a professional organization.”<sup>46</sup>

If this was the prevailing view in 1965, it did not last long. Since the early 1970s, the ABA’s House of Delegates has taken consistently liberal positions on hundreds of resolutions covering a wide range of the most divisive political issues.<sup>47</sup> In the 1970s, for example, the ABA endorsed the Equal Rights Amendment and the Uniform Abortion Act and called for both federal funding of abortion and decriminalization of homosexual conduct. ABA resolutions have supported imposition of racial quotas on the death penalty, the agenda of United Nations Women’s Conferences, and legislation to make same-sex relationships a permissible basis for sponsoring foreign individuals for permanent U.S. residence. Resolutions have opposed limiting the ability of health care workers to ask their patients whether

they own guns and “counsel” them on the dangers of firearms and have opposed civil liability protections for firearm manufacturers. At its 2019 annual meeting, the ABA endorsed federal legalization of marijuana.

Several academic studies have found measurable and systematic ratings bias against Republican judicial nominees.

- In a 2001 study, for example, Professor James Lindgren found that among nominees without prior judicial experience and controlling for other credentials, President Bill Clinton’s nominees were at least 10 times more likely than President George H. W. Bush’s to receive a unanimous “well qualified” rating.<sup>48</sup>
- In another study, published in 2009, three political scientists focused on ABA ratings for nominees to the U.S. Court of Appeals between 1977 and 2009. They found “strong evidence of systematic bias in favor of Democratic nominees” and concluded that “the ABA’s ratings are systematically lower for Republican nominees than for democratic nominees, regardless of the broader political environment.”<sup>49</sup>

Nonetheless, current Senate Majority Leader Charles Schumer (D–NY) and former Judiciary Committee Chairman Patrick Leahy wrote President George W. Bush in early 2001 to defend the ABA’s prenomination role. The ABA’s ratings, they insisted, are the “gold standard by which judicial candidates are judged.”<sup>50</sup>

Today, the ABA bases its ratings on three criteria: integrity, professional competence, and judicial temperament.<sup>51</sup> The third criterion appears to be more subjective than the others, and the ABA says it includes “the nominee’s compassion, patience, freedom from bias and commitment to equal justice under the law.”<sup>52</sup> The 15-member evaluation committee provides three ratings based on these criteria: “well qualified,” “qualified,” and “not qualified.” On its website<sup>53</sup> and in its publications<sup>54</sup> and correspondence,<sup>55</sup> the ABA makes clear that the committee’s majority rating is the ABA’s official rating for a nominee.

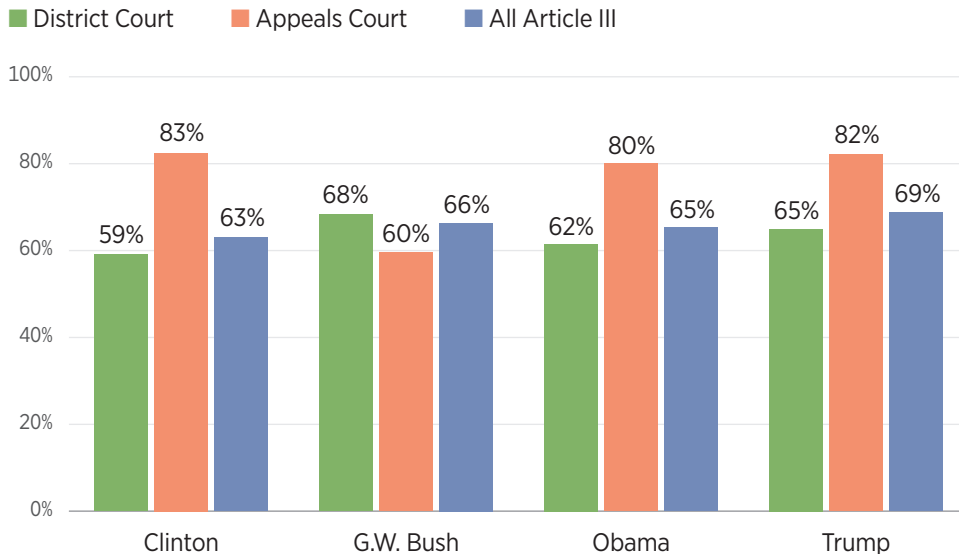
**Analysis.** The ABA adopted its current three-level ratings scale in 1991 and posts its ratings of nominees on its website. Chart 2 shows the percentage of nominees during the first term of the past four Presidents to the U.S. District Court, U.S. Court of Appeals, and all Article III courts receiving a “well qualified” ABA rating.

The ABA’s bias against Republican nominees makes even more significant the fact that a higher percentage of Trump nominees received the ABA’s top



CHART 2

## Percent of Judicial Nominees Rated “Well Qualified”



**SOURCE:** American Bar Association, “Ratings of Article III and Article IV Judicial Nominees,” [https://www.americanbar.org/groups/committees/federal\\_judiciary/ratings/](https://www.americanbar.org/groups/committees/federal_judiciary/ratings/) (accessed February 8, 2020).

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rating. Assistant Attorney General Beth Williams, who headed the Justice Department’s Office of Legal Policy, wrote about this issue in June 2020. She quoted liberal commentator Ian Millhiser: “Based solely on objective legal credentials, the average Trump appointee has a far more impressive resume than any past president’s nominees.”<sup>56</sup> Williams noted that two-thirds of Trump’s nominees to the U.S. District Court received a “well qualified” rating—higher than the nominees of five of the previous six Presidents.

**Nominees Rated “Not Qualified.”** From 1991 through 2020, 22 judicial nominees (1.3 percent) received a “not qualified” rating, and 16 of these (68.3 percent) were confirmed, nine of them (60 percent) with no opposition. It is important to note that the ABA publishes its ratings only of individuals who are actually nominated and that Clinton and Obama, but not Bush or Trump, sought ABA ratings prior to nomination. As a result, we do not know how many individuals were not nominated by either Clinton or Obama because they had received a “not qualified” rating.

A judicial nominee may receive a “not qualified” ABA rating for narrow or technical reasons. Justin Walker, for example, was rated “not qualified” for his 2019 nomination to the U.S. District Court for the Western District

of Kentucky. The reason may have been that Walker had fewer than the minimum of 12 years of courtroom experience that the ABA says a nominee should have.<sup>57</sup> In 2020, however, the ABA rated Walker “well qualified” for appointment to the U.S. Court of Appeals for the D.C. Circuit.

## Hearings

**Background.** The Senate has the power to “determine the Rules of its Proceedings,”<sup>58</sup> and Senate Rule 31 provides that nominations are “referred to appropriate committees.”<sup>59</sup> Nominations to Article III courts are referred to the Judiciary Committee, which gathers information on and conducts a hearing for each nominee. The chairman of the Senate Judiciary Committee controls the scheduling, composition, and pace of hearings on judicial nominations. Factors that influence the committee’s hearing schedule include the number of judicial vacancies, the views of home-state Senators, the pace and timing of a President’s nominations, and the party of the President and the Senate majority.

When different parties control the nomination and confirmation phases of the appointment process, the Judiciary Committee may hold fewer confirmation hearings as a presidential election nears. In 1992, for example, Judiciary Committee Chairman Joe Biden denied a hearing to more than 50 of President George H. W. Bush’s judicial nominees. *The New York Times* reported at the time 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.”<sup>60</sup> As a result, 109 judicial positions were vacant when President Clinton took office in January 1993.

When Democrats controlled the Senate during the first two years of President Obama’s second term, the Judiciary Committee held 32 hearings for 128 judicial nominees. When Republicans controlled the Senate during the final two years of Obama’s term, the committee held 14 hearings for 53 nominees. As a result, 106 judicial positions were vacant when Trump took office in January 2017.

**Analysis.** During the first two years of the Trump Administration, under Chairman Grassley, the Judiciary Committee held 33 hearings for a total of 134 nominees to Article III courts. During the 116th Congress, under Chairman Graham, the committee held 29 hearings for 101 nominees to Article III courts. The reduced pace reflected the declining number of judicial vacancies and corresponding reduction in nominations, as well as the disruption caused by the coronavirus pandemic.

The Judiciary Committee held confirmation hearings for 37 nominees to Article III courts in 2020, compared to an average of 41 nominees given a hearing in the previous 10 presidential election years. Prior to the Trump Administration, the Judiciary Committee held a single confirmation hearing after Election Day at the end of four of the previous six Presidents' first terms. The committee held two confirmation hearings after Election Day 2020, the latter on December 16, 2020.

## Cloture Votes

**Background.** If reported by the relevant committee to the full Senate, all nominations are listed on the Senate's executive calendar,<sup>61</sup> and the Senate Majority Leader has authority to decide when the Senate will consider individual nominations. The first step in that consideration is ending debate, which can occur either informally by agreement between the two party leaders or formally through the process outlined in Senate Rule 22.

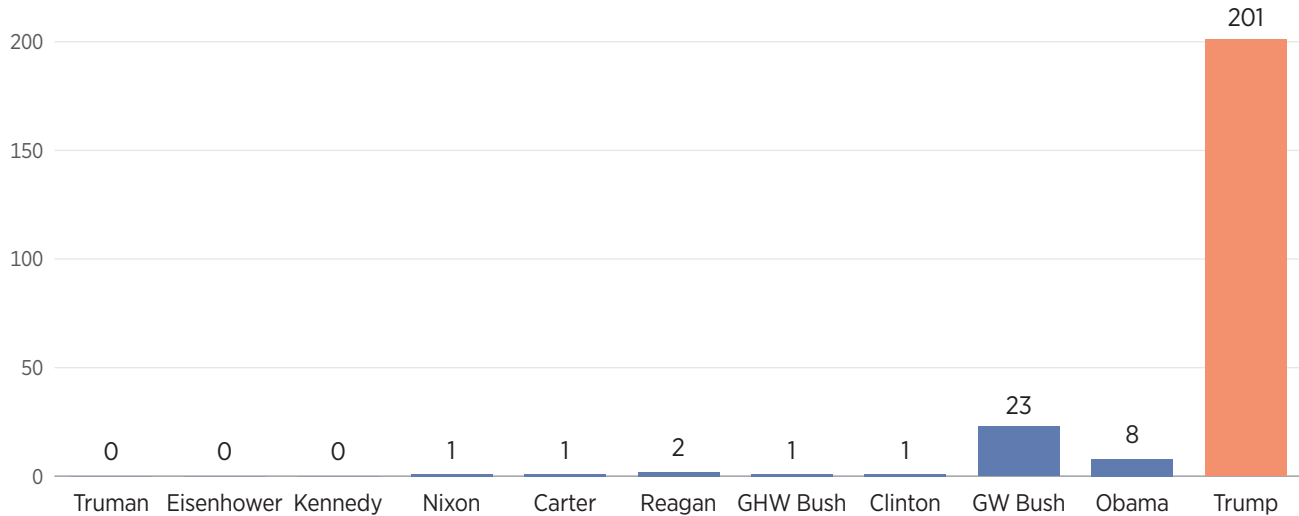
That formal process begins when a motion to invoke cloture, or end debate, signed by at least 16 Senators is filed. Two days later, if the motion is not withdrawn, it is subject to a vote by the full Senate. The Senate adopted Rule 22 in 1917 to address obstruction in the legislative process by providing for cloture votes on any pending "measure."<sup>62</sup> That term was interpreted narrowly to include bills or resolutions but not motions, and the Senate amended Rule 22 in 1949 to cover any pending "matter."<sup>63</sup> Although no evidence exists that Senators considered it, this broader term made possible Rule 22's application to the confirmation process. The Senate took 28 cloture votes on nominations, most of them to fill executive branch positions, over the next 50 years, and all but three filibustered nominations were later confirmed.

Rule 22 requires "three-fifths of the Senators duly chosen and sworn" to invoke cloture and thereafter allows up to 30 hours of debate.<sup>64</sup> A filibuster occurs when a cloture vote fails. While Rule 22's language remains unchanged, parliamentary rulings in 2013<sup>65</sup> and 2017<sup>66</sup> interpreted that language to require only a simple majority to invoke cloture on nominations. Another ruling in 2019 interpreted Rule 22's 30-hour cap on post-cloture debate to apply only to very senior positions in the executive branch and to the U.S. Court of Appeals and U.S. Supreme Court in the judicial branch.<sup>67</sup>

**Analysis.** During the first terms of the previous nine Presidents (Harry Truman through Barack Obama), the Senate took a total of 37 cloture votes on nominations to either Article III or Article I courts. The highest number during any previous President's first term was 23 cloture votes

CHART 3

## Cloture Votes on First-Term Judicial Nominations



SOURCE: U.S. Senate, "Cloture Motions," <https://www.senate.gov/legislative/cloture/clotureCounts.htm> (accessed February 8, 2020).

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during George W. Bush's first term. Twenty-five of those 37 cloture votes failed, resulting in filibusters, and five of the filibustered nominations were never confirmed.

In contrast, the Senate took 201 cloture votes on all judicial nominations during the four years of the Trump Administration, an increase of 443 percent over the historical total. The cloture votes during 2017–2020 included 13 nominations to Article I courts such as the U.S. Court of Federal Claims, U.S. Tax Court, and the territorial court in the Virgin Islands. In fact, all but one of the cloture votes on Article I judicial nominations in American history occurred during the Trump Administration.

Taken together, 59 percent of all cloture votes on judicial nominations have occurred in the past four years. From 1949 through 2016, the Senate took cloture votes on 1.2 percent of the judicial nominations it confirmed. That figure jumped to 58 percent during the 115th Congress (the first two years of Trump's term) and 93 percent during the 116th Congress. Overall, 80 percent of Trump's judicial nominations were subject to separate cloture votes before being confirmed.

This pattern of cloture votes is significant for another reason. Trump was the first President elected since 2013, when the Senate equalized the

vote threshold for cloture and confirmation. As a result, a group of Senators lacking the votes to defeat confirmation outright could no longer prevent confirmation by blocking a final confirmation vote. Therefore, the cloture process can now be used only to delay, but not to defeat, nominations. Despite that, not only did the number of cloture votes skyrocket during the Trump Administration, but nearly four dozen of them resulted in fewer than 10 negative votes. Chart 3 presents the number of cloture votes on all judicial nominations during each President's first term.

## Confirmations

**Background.** The Constitution divides the appointment process into two parts. The President has the power to “nominate, and by and with the Advice and Consent of the Senate, [to] appoint...Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>68</sup> The Founders intended that the Senate's role would be “in general, a silent operation.”<sup>69</sup> It would be “an excellent check” on the President's appointment power to “prevent the appointment of unfit characters.”<sup>70</sup> The Founders thought that opposing a President's nominations would require “strong and special reasons.”<sup>71</sup>

**Analysis.** Confirmation of Article III judges within a specific time frame can be presented and evaluated in several different ways. The first and most common is the aggregate total of judges confirmed to Article III courts. During the 116th Congress, the Senate confirmed 149 Article III judges, the second-highest two-year total in American history. President Jimmy Carter appointed 198 Article III judges during the 95th Congress (1979–1980) after Congress had created 151 new judgeships in 1978, the largest single expansion of the judiciary.

Trump set another record by appointing 54 judges to the U.S. Court of Appeals, the highest one-term total. This total accounts for 23 percent of Trump's total appointments, the highest since President Dwight D. Eisenhower's 24 percent during his first term (1953–1956). Trump appointed at least 10 appeals court judges in three consecutive years, a pattern exceeded only by President Reagan's appointments during 1984–1987. Like Carter's one-term total, however, Reagan's appointments during that period followed Congress's creation of 24 new appeals court judgeships in 1984.

A second way to assess judicial confirmations is as a percentage of the judiciary during a particular period. This is a more accurate way to present these data when making comparisons over an extended period of time

because, as noted, Congress periodically creates vacancies by expanding the number of judgeships that can be filled. For example, compared to Presidents John F. Kennedy and Lyndon Johnson during 1961–1964, Trump appointed more than twice as many (54 vs. 24) but a smaller percentage (30 vs. 31) of U.S. Court of Appeals judges.

Another way to assess a President’s judicial appointments is to consider not the judges he appoints, but the judges being replaced. Since judges appointed to Article III courts do not have limited terms, judges themselves determine when vacancies occur. Nonetheless, these judges serve for an average of 20 to 25 years. A President’s opportunity to replace judges appointed by the other party is, therefore, significantly influenced by both election results and the decisions of individual judges.

This measure looks more at confirmation impact than simply confirmation totals and assumes that judges appointed by Presidents of one party are generally similar and, as a group, different from judges appointed by Presidents of the other party. President Obama appointed 54 judges to the U.S. Court of Appeals during his two terms,<sup>72</sup> and President Trump appointed the same number during his one term. While 35 percent of Trump appointees replaced Democrats, however, 54 percent of Obama appointees replaced Republicans.

## Confirmation Opposition

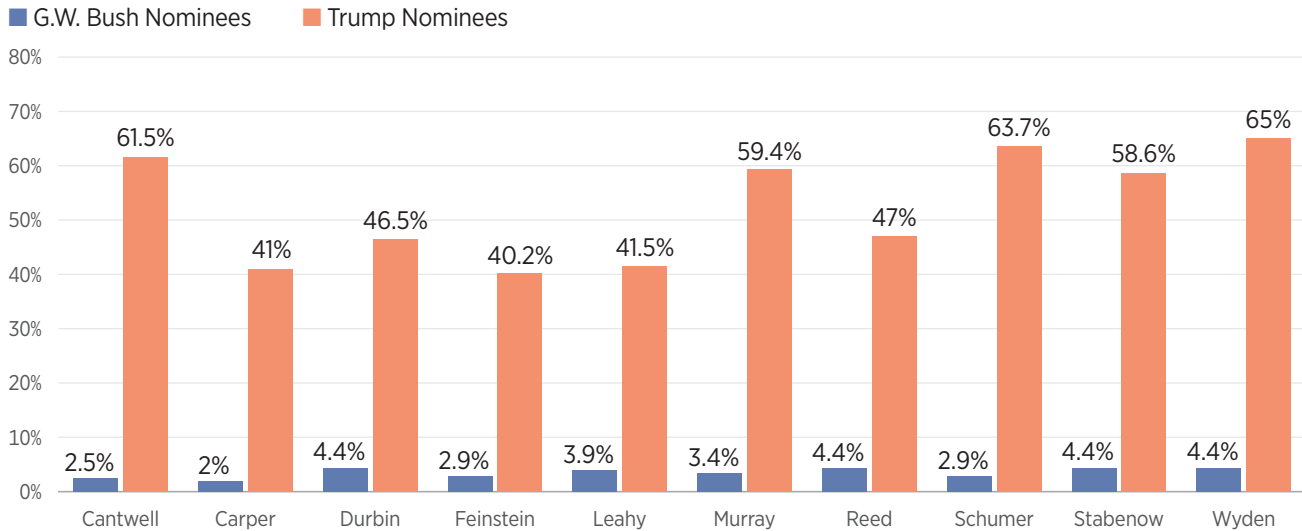
**Background.** As noted, the Constitution gives the power to nominate and, subject to Senate consent, the power to appoint judges to the President. The Founders believed that, as a check on the President, the Senate would oppose nominees only for “special and strong” reasons. From 1789 through 2016, consistent with this division of authority, the Senate confirmed 94 percent of judicial nominations without any opposition. Confirmation conflicts were confined to individual nominations, and the sources of the conflicts were the nominees and their own records or qualifications.

**Analysis.** The percentage of nominations opposed for confirmation jumped to 20 percent during the 115th Congress and 97 percent during the 116th Congress. Overall, two-thirds of Trump’s judicial nominations received at least some opposition—more than 10 times the historical level.

The fact of opposition, however, is less significant than the level of that opposition. To account for both the changing size of the Senate and the absence of Senators on particular votes, this level is best expressed as a percentage of the votes cast on confirmation. By this measure, 91 judicial nominations confirmed between 1789 and 2016 received more than 30

CHART 4

## Percent of Judicial Nominees Opposed by Individual Senators



**SOURCE:** Congress.gov, “Current Legislative Activities,” <https://www.congress.gov/> (accessed February 8, 2020), and U.S. Senate, “Roll Call Votes,” <https://www.senate.gov/legislative/votes.htm> (accessed February 8, 2020).

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percent opposition. The total jumped to 105 judicial nominations during the Trump term.

More than 54 percent of all votes against confirmation of nominees to Article III courts throughout our history were cast in the past four years. The average number of negative votes received by Trump judicial nominees was 20 times higher than the previous average.

In addition to negative votes received by judicial nominees, opposition may be examined by focusing on votes cast by Senators. The 43 Democrats who served in the Senate during Trump’s entire term opposed an average of 116 judicial nominations, or 49.6 percent. By comparison, Republicans who served in the Senate during Obama’s entire first term opposed an average of 17 judicial nominations, or 9.8 percent.

Some have suggested that Trump’s nominees attracted more opposition because they were less qualified. As the foregoing discussion shows, however, a higher percentage of Trump’s nominees received the ABA’s highest “well qualified” rating than those of his predecessor received. In addition, the average number of votes against confirmation of nominees rated “well qualified” was 79 percent higher than votes against confirmation of nominees rated “qualified.”

An additional comparison supports the conclusion that opposition to Trump nominees cannot be attributed to ordinary partisanship. Ten current Senate Democrats served during both Trump's term and President George W. Bush's first term. Comparing their voting record on judicial nominations during each period indicates whether the substantial and sustained opposition to Trump nominees simply continues a partisan pattern. These 10 Senators voted against an average of seven judicial nominations during Bush's first term, compared to an average of 123 Trump nominees. Adjusting for the higher number of Trump nominees shows that these Democrats opposed an average of 3.5 percent of Bush nominees and 52.4 percent of Trump nominees.

Chart 4 shows the percentage of Bush and Trump first-term judicial nominees opposed by each Senator. These results strongly indicate that opposition to Trump nominees is not ordinary or routine partisanship.

## Conclusion

When the available evidence is considered objectively, a clear pattern emerges with respect to Donald Trump's judicial nominations. Specifically:

- Trump's nominees to Article III courts received higher ratings from the American Bar Association than his three predecessors' first-term nominees received, despite the ABA's demonstrable bias against Republican nominees.
- Of all cloture votes on Article III judicial nominees, 57.4 percent have occurred during the past four years even though the cloture process can be used only to delay, rather than defeat, confirmation.
- Of Trump's confirmed Article III nominees, 80.3 percent were subject to a cloture vote, compared to an average of 3.6 percent of his five predecessors' first-term nominees.
- Trump's confirmed Article III judges received, on average, 20 times as many votes against their confirmation as the previous average since the turn of the 20th century.
- Trump appointed 27.2 percent of the judiciary and 30 percent of the U.S. Court of Appeals, more than were appointed during the first terms of his five predecessors.



- Of all votes against confirmation of Article III nominees in American history, 55 percent were cast against Trump nominee.
- Senate Democrats opposed an average of 49.6 percent of Trump's Article III nominees, compared to Senate Republicans who opposed an average of 9.8 percent of Obama's first-term nominees.

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## Endnotes

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14. U.S. CONST. art. I, § 8, cl. 9. See DAVID ENGAHL, INFERIOR COURTS, THE HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!/articles/1/essays/47/inferior-courts>.
15. See generally Andrew Nolan & Richard M. Thompson II, *Congressional Power to Create Federal Courts: A Legal Overview*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR MEMBERS AND COMMITTEES OF CONGRESS No. R43746 (Oct. 1, 2014). Some Article I judges, however, are appointed within the judicial branch. United States Magistrates, for example, are appointed by the U.S. District Court, while U.S. Bankruptcy Court judges are appointed by the U.S. Court of Appeals.
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31. U.S. Circuit Judge Joel Flaum, appointed by President Ronald Reagan in 1983, took senior status on November 30, 2020. President Trump did not make a nomination to fill that vacancy before he left office.
32. The calculation for Presidents George H. W. Bush and Reagan covered the period of time before Congress created a significant number of new judgeships: January 1989 to December 1990 for Bush and January 1981 to July 1984 for Reagan.
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