

President Biden’s Judicial Appointments: A First-Year Analysis

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KEY TAKEAWAYS

In his first year, Biden appointed a larger percentage of the federal judiciary than any new President in four decades.

Biden’s approach, emphasizing personal and professional diversity, seeks to appoint judges who will reliably advance liberal interests.

Biden’s first-year judicial appointment success occurred as the confirmation process has been rapidly changing and becoming more volatile.

President Joe Biden took office in January 2021 with a plan for appointing judges very different not only from his predecessor, President Donald Trump, but from what America’s Founders prescribed for the system of government they established. For this reason, it is important to assess Biden’s progress in appointing judges and, by doing so, in pushing the judiciary in his preferred direction.

Many of Biden’s supporters had already described the judicial selection approach they expected his Administration to take. More than 70 liberal organizations, for example, issued a statement shortly after the 2020 election that Biden’s nominees should have “a demonstrated commitment to equal justice,” be “demographically diverse,” and “come from a range of professional backgrounds.”¹ While some advocates suggest that “personal” and “professional diversity” will simply add “perspectives to the Federal bench,”²

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this approach is actually motivated by the belief that a judge's personal views and past experiences not only can, but should, drive his or her decisions.³

Liberals generally see the judiciary's role as producing desirable outcomes and, therefore, look for nominees with the personal or demographic characteristics, life experience, or professional background that they believe will contribute to this goal. The 2020 statement mentioned above, for example, plainly stated this objective. "All the [Biden] administration's priorities, from preserving the Affordable Care Act, voting rights, women and reproductive rights, communities of color, LGBTQ communities, workers, the environment, consumers, and key civil rights hang in the balance in the courts."⁴

One month later, the incoming Biden Administration made clear that its judicial nomination process would follow these instructions. Dana Remus, Biden's choice for White House Counsel, wrote U.S. Senators that the Administration wanted to appoint judges with a "wide range of life and professional experiences, including those based on their race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, veteran status, and disability." The Biden Administration was "particularly focused on nominating individuals whose legal experiences have been historically underrepresented on the federal bench, including those who are public defenders, civil rights and legal aid attorneys, and those who represent Americans in every walk of life."⁵ Specific life experiences and professional backgrounds are not an end in themselves, but a means to the end of more favorable judicial decisions on key issues.

The observation that personal characteristics or professional background can potentially influence a judge's decision is not, by itself, unusual. Traditionally, however, that has been seen as a factor to be deliberately minimized rather than fostered. This is because the most foundational principle of the judicial system is the *impartial* application of the law. The oath that federal judges take, for example, requires them to "administer justice without respect to persons, and do equal right to the poor and to the rich."⁶ Chiseled in stone above the Supreme Court's entrance are the famous words "Equal Justice Under Law."

The previous Democratic President, Barack Obama, also had a subjective approach to judicial appointments that undermined the principle of impartiality. As a Senator opposing the 2005 nomination of Chief Justice John Roberts, for example, Obama argued that judges should decide cases based on their "deepest values...core concerns...broader perspectives on how the world works, and the depth and breadth of [their] empathy."⁷ Four years later, as President, Obama appointed Sonia Sotomayor to the Supreme

Court, who had given speeches questioning even the possibility of impartiality: “I would hope,” she said, “that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”⁸

The Biden Administration appears to have gone even further down this road. Biden first promised that he would appoint a black woman to the Supreme Court during the presidential campaign. At the Democratic candidates’ debate on February 25, 2020, Biden said he would do so “to make sure that we, in fact, get everyone represented.” He has never explained who is included in “everyone” or what he meant by “represented,” a term better understood in relation to the legislative or executive branches.

Similarly, Senate Majority Leader Charles Schumer (D-NY) recently said that courts should “look more like the country they serve.”⁹ Schumer has not explained how any group of nine men and women can “look like” a diverse country of 330 million people. He has, however, argued that when Americans go to court, “they should trust that those who render judgment will be able to understand each litigant’s lived experience and bring a modicum of human understanding required to apply the law equitably.”¹⁰ That still begs important questions, such as how litigants can possibly know what particular judges may understand about their “lived experience,” whether that understanding is even correct, whether or how it should factor into judicial decision-making, or what it means for judges to apply the law “equitably.”

This *Legal Memorandum* will evaluate Biden’s success in appointing judges to life-tenured federal courts¹¹ during his first year in office. Data regarding his appointments will be presented in the context of both long-term confirmation process norms and previous presidents’ first-year judicial appointments.

The Founders’ Prescriptions

The Constitution provides for both the exercise of judicial power and the appointment of those who would exercise it. At her 1993 confirmation hearing, the late Justice Ruth Bader Ginsburg explained that “[j]udges in our system are bound to decide concrete cases, not abstract issues,” by applying the governing law to the facts of each case.¹² More recently, Justice Clarence Thomas similarly described the “judicial task” as “interpret[ing] and apply[ing] written law to the facts of particular cases.”¹³ By taking their oath of office, judges pledge to perform these duties “impartially.”¹⁴

The ongoing debate over the power and proper role of judges in our system of government focuses primarily on interpretation of written law.¹⁵ In a system of government based on the “consent of the governed,”¹⁶ the Constitution “contains the permanent will of the people...and can be revoked or altered only by the authority that made it.”¹⁷ The Constitution is written so that its assignment of powers to the different branches, and its limits on those powers, “may not be mistaken, or forgotten.”¹⁸

Since written law can be “altered” by changing either its text or the meaning of that text, impartial interpretation must seek the meaning of written law intended by the “authority that made it.” Otherwise, Justice George Sutherland warned in 1937, the judiciary could amend the Constitution “in the guise of interpretation.”¹⁹ The Founders thus sought to “avoid an arbitrary discretion in the courts” by binding judges with “strict rules and precedents” that would “define and point out their duty in every particular case that comes before them.”²⁰

The Founders also established a process for appointing those who would exercise judicial power. The Constitution gives to the President the power to nominate federal judges and requires the “Advice and Consent of the Senate”²¹ for the President to appoint his nominees. The President thus exercises the primary appointment power, while the Senate’s secondary role can be “an excellent check” to prevent “the appointment of unfit characters.”²² Rejecting a nominee, the Founders believed, would require “special and strong reasons” rather than simply “the preference [the Senate] might feel to another.”²³

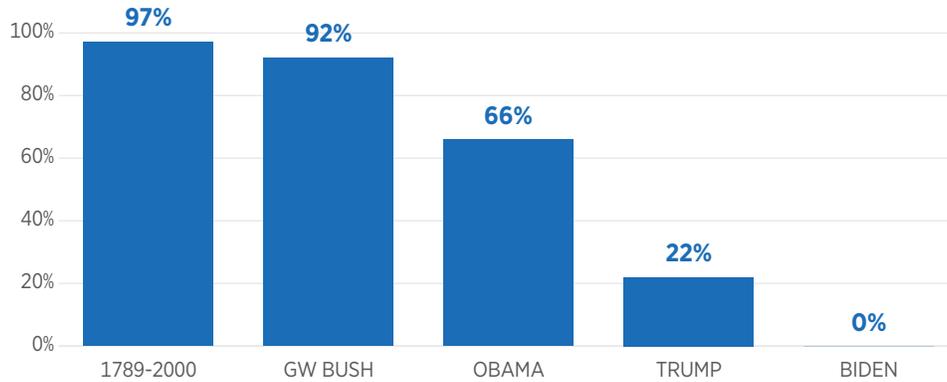
Confirmation Process Norms

These prescriptions led naturally to several long-standing norms for the Senate’s confirmation process.²⁴ For most of American history, the Senate respected the President’s appointment power and, absent “special and strong reasons” for opposition, confirmed nearly all judicial nominees with little or no opposition, without a recorded vote, and with neither systematic partisanship nor procedural obstacles such as separate votes to end debate as a condition of final approval. Confirmation conflicts, which focused on individual nominees, were the rare exception rather than the rule. The following charts show the long-term historical pattern for each of these norms and how they have changed during the most recent presidential administrations.

Increasing Overall Opposition. From 1789 to 2000, the Senate confirmed 97 percent of nominees to life-tenured federal court with no

CHART 1

Percent Confirmed Without Opposition



SOURCES: Author's calculations based on data from Federal Judicial Center, "Biographical Director of Article III Federal Judges, 1789–Present," <https://www.fjc.gov/history/judges> (accessed March 14, 2022), and "Voting Records," GovTrack, <https://www.govtrack.us/congress/votes> (accessed March 14, 2022).

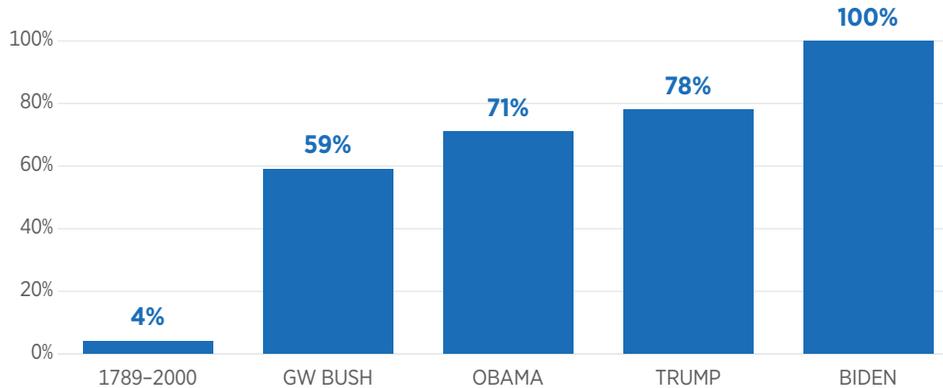
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opposition. This pattern remained true even when there was a significant conflict over an individual Supreme Court nominee during a particular administration. While the Reagan Administration, for example, is remembered for the defeat in 1987 of Supreme Court nominee Robert Bork, only six of Reagan's 383 judicial appointments had any confirmation opposition. Similarly, while the conflict over Justice Clarence Thomas' 1991 Supreme Court nomination will always be associated with the George H. W. Bush Administration, only 1.5 percent of Bush's judicial nominees were confirmed with any opposition at all. The first significant drop in the percentage of judicial nominees confirmed without opposition occurred during the Barack Obama Administration; the trend increased under President Donald Trump and has dropped to zero since Biden took office.

Use of Recorded Votes. The Senate can confirm nominees informally and quickly, or formally and slowly. Traditionally, nominees with no opposition were confirmed by either unanimous consent or voice vote, which does not require the presence of Senators and takes only a minute or two. For the rare nominees with opposition, the Senate used a recorded vote, which requires the presence of all Senators and takes an average of 35 minutes or more.²⁵ Unanimous recorded votes, therefore, were rare; less than 1 percent of the judicial nominees confirmed without opposition between 1789 and 2000 had a recorded vote.

CHART 2

Percent Confirmed by Recorded Vote



SOURCES: Author's calculations based on data from Federal Judicial Center, "Biographical Directory of Article III Federal Judges, 1789–Present," <https://www.fjc.gov/history/judges> (accessed March 14, 2022), and U.S. Senate, "Votes," https://www.senate.gov/legislative/votes_new.htm (accessed March 14, 2022).

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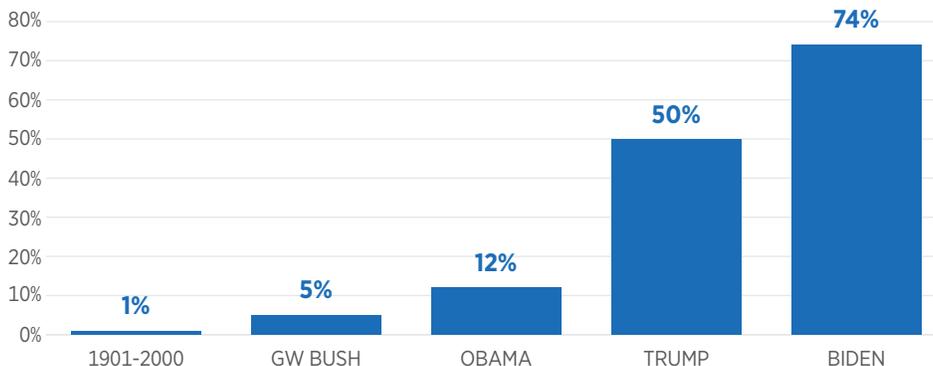
This norm changed significantly during the George W. Bush Administration. While the percentage of judicial nominees confirmed without opposition remained high, the percentage confirmed by recorded vote rose 15-fold from the historical average. For the first time during any administration, a majority of Bush nominees confirmed without opposition had a recorded vote.

Systematic Partisan Opposition. The historical pattern of confirming most judicial nominees without opposition or recorded votes did not vary with partisan control of either the Senate or the White House. Senators of one party opposed very few judicial nominees by Presidents of the other party. The largest shift in this norm occurred during President Donald Trump's term, the first in which other-party Senators opposed, on average, a majority of a President's judicial nominees. Before 2017, no Senator of either party opposed more than 14 percent of judicial nominees by a President of the other party; under President Trump, no Democrat opposed less than 19 percent of his nominees.

A Senator directly expresses opposition to a nominee by a recorded negative vote on confirmation. Chart 3 presents the average number of judicial nominees by each President opposed by Senators of the other party who served during at least three-quarters of that President's tenure.²⁶

CHART 3

Percent Opposed by Other-Party Senators



SOURCES: Author’s calculations based on data from Federal Judicial Center, “Biographical Directory of Article III Federal Judges, 1789–Present,” <https://www.fjc.gov/history/judges> (accessed March 14, 2022), and U.S. Senate, “Votes,” https://www.senate.gov/legislative/votes_new.htm (accessed March 14, 2022).

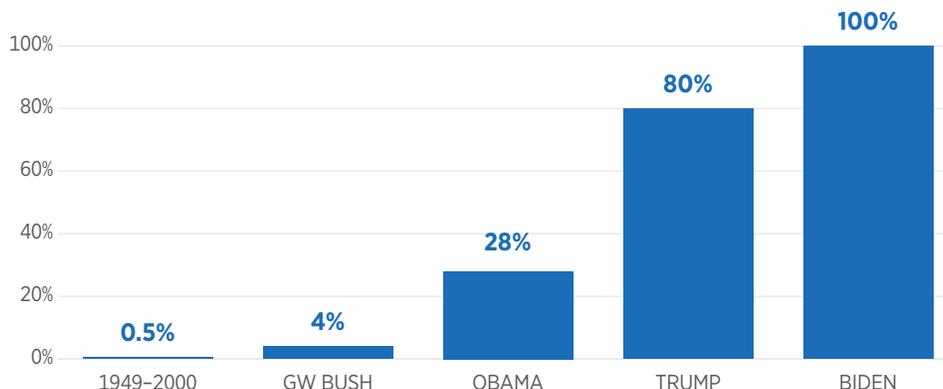
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Cloture Votes. Another confirmation process norm was that the Senate proceeded to final confirmation without any procedural obstacles such as a separate vote to invoke cloture, or end debate. The Senate’s legislative process has included requiring a supermajority to end debate²⁷ since the turn of the 19th century and was formalized in Senate Rule 22 in 1917.²⁸ While the Senate’s 1949 extension of the rule to any pending “matter,” intended to include motions as well as bills,²⁹ could arguably cover nominations, the Senate did not take a cloture vote on a nomination for another two decades. In fact, the Senate took a cloture vote on less than 1 percent of the judicial nominees confirmed to Article III courts between 1949 and 2000, and only one nominee was not confirmed.³⁰

This norm changed during George W. Bush’s first term. Democrats forced the Senate to take 23 cloture votes on 13 different appeals court nominees; 20 cloture votes failed, resulting in filibusters. These were the first filibusters in American history to block confirmation of majority-supported judicial nominees.³¹ Even though filibusters declined significantly when Democrats controlled the Senate during the Obama Administration,³² Democrats succeeded in eliminating the filibuster for nominations to every executive and judicial position but the Supreme Court in November 2013. They used a prearranged parliamentary ruling, endorsed by a party-line Senate vote, to reinterpret the “three-fifths” required by Rule 22 to mean only a simple

CHART 4

Percent Confirmed After Cloture Vote



SOURCE: U.S. Senate, “Cloture Motions,” <https://www.senate.gov/legislative/cloture/clotureCounts.htm> (accessed March 14, 2022).

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majority.³³ As a result, the same majority that can confirm a nominee can also invoke cloture, effectively abolishing nomination filibusters.

As this history demonstrates, this confirmation process norm changed in two ways. First, between 2003 and 2013, when Rule 22’s supermajority requirement meant what it said, filibusters were used to prevent final confirmation votes of judicial nominees. Second, since 2013, with Rule 22’s supermajority requirement “amend[ed] in the guise of interpretation,”³⁴ cloture votes have become a routine step in the confirmation process even though they can no longer prevent confirmation. In 2014, for example, Republicans forced the Senate to take a cloture vote on 78 of the 89 nominees confirmed to Article III courts, even though each nominee who had a cloture vote was then confirmed, a majority of them without any final opposition.

During the Trump Administration, the percentage of judicial nominees who were subjected to a cloture vote before confirmation vote nearly tripled, and it has been the uniform practice since Biden took office.

President Biden’s First-Year Judicial Appointments

Judicial Vacancies. President Biden took office and began appointing judges against this backdrop of changing confirmation process norms. The

nomination and confirmation pace during the Trump Administration had reduced vacancies in January 2021 to 5.4 percent, compared to an average of 8.7 percent when Biden's six predecessors took office. Biden made his first judicial nominations on March 17, 2020, earlier than the five previous new Presidents of a different party than their predecessor.³⁵ Although Biden appointed judges at a faster pace than his predecessors, the number of judicial vacancies actually increased by 61 percent during 2021. One factor is that 56 judges vacated their appointed position in 2021 by taking "senior status," the highest number on record. Two-thirds of these had been appointed by Presidents Obama or Bill Clinton.³⁶

The Administrative Office of the U.S. Courts not only reports the total number of vacancies on Article III courts at a given time, but also designates some vacancies as "emergencies" because of their longevity and caseload impact. The percentage of judicial vacancies in this category dropped by 28 points, from 70 percent to 42 percent, during 2021, the largest decline in a new President's first year for which data are available. The influence of Senators in recommending candidates to fill judicial vacancies in their states explains this decline.

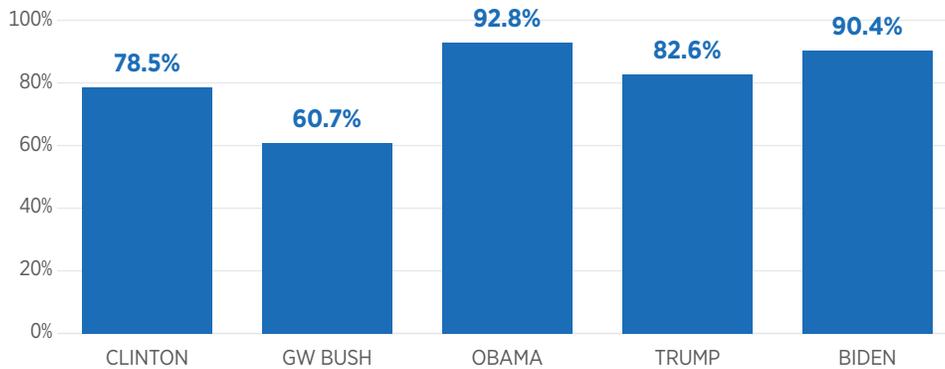
Many Senate Democrats refused to cooperate with the Trump Administration in finding acceptable nominees for vacancies in their states. As a result, 28 of the 32 emergency vacancies that existed when Biden took office in January 2021 were in states with two Democratic Senators and the rest were in Ohio, with one Democrat Senator, or the District of Columbia. These Democrats, in the majority when Biden took office, readily worked with the new Administration to identify and confirm nominees to fill these emergency vacancies.

ABA Ratings. The American Bar Association (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 1952.³⁷ Its current system bases ratings of *well qualified*, *qualified*, and *not qualified* on the criteria of integrity, professional competence, and judicial temperament.³⁸

Most Presidents have agreed to receive the ABA's rating of a judicial candidate before making a formal nomination. This unique role was initially deemed legitimate because the ABA did not address political issues, focusing instead on the legal profession and general administration of justice. Since the early 1970s, however, the ABA has taken consistently liberal positions in the form of resolutions and legal briefs on a wide range of divisive political issues.³⁹ This trend raises concern that politics may taint the ABA's ratings of judicial nominees⁴⁰ and led Presidents George W. Bush and Donald Trump to stop asking for an ABA rating before making nominations.

CHART 5

Percent ABA-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/ (accessed March 14, 2022).

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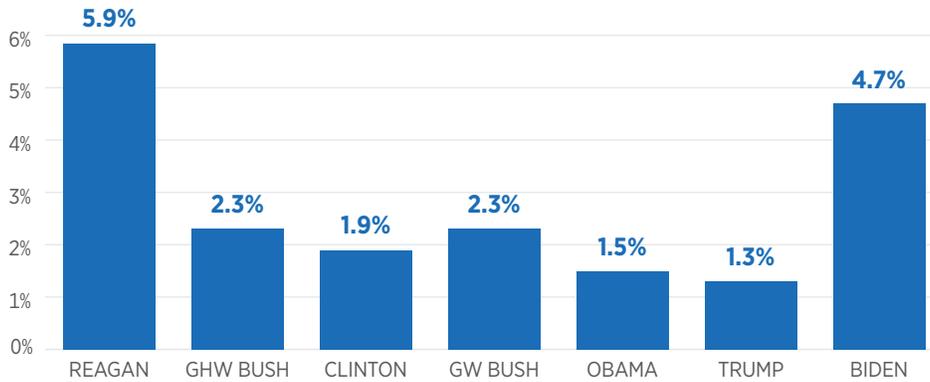
With that in mind, and with the caveat that the number of judicial nominees in a given year can vary widely, Chart 5 presents the percentage of nominees confirmed in each President’s first year who received a “well qualified” rating from the ABA.⁴¹

Total Appointments. The most common way to express a President’s judicial appointment success is by the aggregate number of nominees confirmed by the Senate within a specific period of time. This statistic, however, can be misleading both on its own and when used to compare presidential administrations. On its own, the confirmation total will naturally be lower if, for example, few judicial positions are vacant, the President has made few nominations, or few nominees can be confirmed because they have not yet been reported to the full Senate by the Judiciary Committee. For comparative purposes, this statistic does not account for those variables or any changes Congress may have made in the number of Article III judgeships.⁴²

Charts 6 and 7 minimize these problems. Chart 6 takes vacancies into account, dividing each President’s first-year appointment total by the average vacancy rate during the year. The result is the Confirmation Productivity Index. A lower confirmation total or a consistently higher vacancy rate will limit this measure of confirmation productivity. Chart 7 takes the size of the judiciary into account by presenting each President’s first-year appointment total as a percentage of existing positions on Article III courts filled during that year.

CHART 6

Confirmation Productivity Index, Year 1

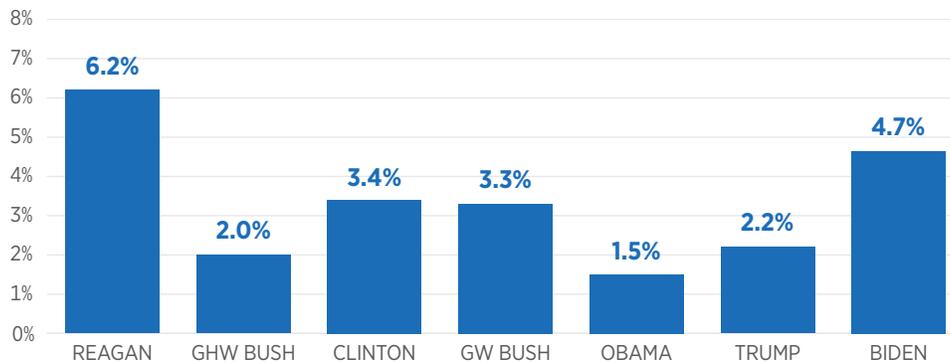


SOURCES: Author’s calculations based on data from Federal Judicial Center, “Biographical Directory of Article III Federal Judges, 1789–Present,” <https://www.fjc.gov/history/judges> (accessed March 14, 2022), and United States Courts, “Archive of Judicial Vacancies,” <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (accessed March 14, 2022).

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CHART 7

Percent of Judiciary Appointed

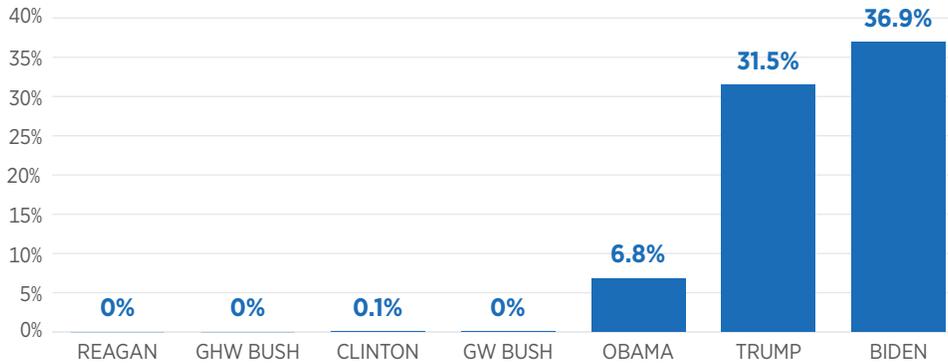


SOURCES: Author’s calculations based on data from United States Courts, “Authorized Judgeships,” <https://www.uscourts.gov/judgesjudgeships/authorized-judgeships> (accessed March 14, 2022), and Federal Judicial Center, “Biographical Directory of Article III Federal Judges, 1789–Present,” <https://www.fjc.gov/history/judges> (accessed March 14, 2022).

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CHART 8

Average Votes Against Confirmation

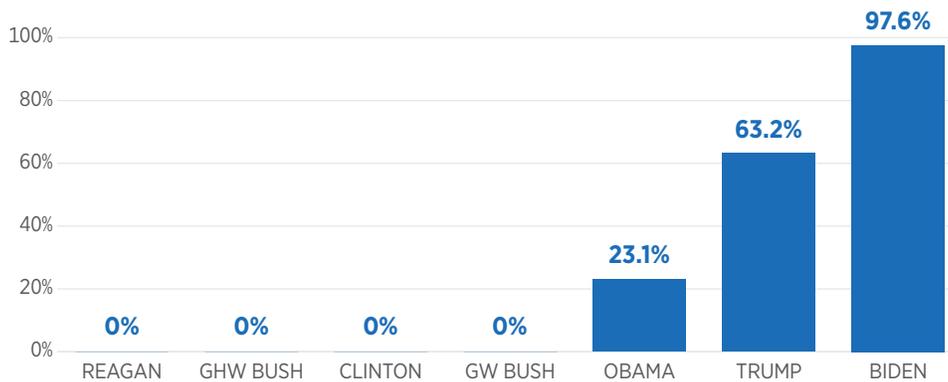


SOURCE: Author's calculations based on data from U.S. Senate, "Votes," https://www.senate.gov/legislative/votes_new.htm (accessed March 14, 2022).

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CHART 9

Percent Confirmed With >25% Opposition



SOURCE: Author's calculations based on data from U.S. Senate, "Votes," https://www.senate.gov/legislative/votes_new.htm (accessed March 14, 2022).

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Votes Against Confirmation. As noted above, the historic norm of confirming most judicial nominees without any opposition has changed significantly and, in 2021 at least, may have disappeared entirely. The converse observation that most judicial nominees now have at least some opposition,

however, equates opposition by one or two Senators with opposition by nearly half the Senate. One way to go beyond the *fact* of opposition and assess the *level* of opposition is to compare the average number of votes against confirmation of each President's first-year nominees.

Another way to present opposition to a President's judicial nominees takes into account that at least some, and sometimes many, Senators are not present for most recorded votes. The number of absent Senators, and whether they are consistent supporters or opponents of a President's nominees, can inflate or depress the average number of negative votes that nominees receive. One way to account for this is to express opposition as the percentage of votes actually cast on confirmation of a particular nominee.

Conclusion

President Biden, with the help of Senate Democrats, is aggressively pursuing his goal of a judiciary that will more reliably deliver liberal political results. His first-year success came despite rapidly changing confirmation process norms including significant overall opposition, use of recorded votes, systematic opposition by other-party Senators, and procedural obstacles such as cloture votes. Biden started making judicial nominations earlier than previous presidents and appointed a larger percentage of the judiciary in his first year than any President in the past four decades.

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Endnotes

1. Alliance for Justice, *Statement of Principles: The Biden Administration Must Prioritize Judges* (Nov. 19, 2020), <https://www.afj.org/document/statement-of-principles-the-biden-administration-must-prioritize-judges/>.
2. See, e.g., CONG. REC., Nov. 1, 2021, at S7524 (statement of Sen. Schumer).
3. Demand Justice, for example, has published research demonstrating, they say, that judges from different professional backgrounds decide cases differently. Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship Between Professional Diversity and Judicial Decisions*, <https://bit.ly/3v9n4CA>.
4. Alliance for Justice statement, *supra* note 1.
5. Jennifer Bendery, *Biden's Team Tells Senate Democrats to Send Him Judicial Nominees ASAP* (Dec. 30, 2020), <https://bit.ly/355jrmi>.
6. 28 U.S.C. § 453.
7. Cong. Rec., Sept. 22, 2005, at S10366.
8. Sonia Sotomajor, *Lecture: "A Latina Judge's Voice,"* N.Y. TIMES, May 14, 2009, <https://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>.
9. Cong. Rec., Feb. 3, 2022, at S504. See also Cong. Rec., Feb. 1, 2022, at S421 ("the Supreme Court should look more like America").
10. *Id.*
11. Created by Congress with authority provided by Article III of the Constitution, these courts' judges serve "during Good Behaviour," U.S. Const., Art. III, Sec. 1. Article III courts currently include the U.S. Supreme Court, created by the Judiciary Act of 1789, with nine seats; the U.S. District Court, also created by the Judiciary Act of 1789, with 663 positions across 94 geographical districts; the U.S. Court of Appeals, created by the Judiciary Act of 1891, with 179 positions across 12 geographical circuits and one subject-matter circuit; and the U.S. Court of International Trade, created in 1980 when Congress reorganized the U.S. Customs Court, with nine members.
12. Nomination of Ruth Bader Ginsburg: Hearing Before the S. Comm. on the Judiciary, 103rd Cong. 52 (1993).
13. *Gamble v. United States*, 139 S.Ct. 1960,1984 (2019) (Thomas, J., concurring). Justice Ruth Bader Ginsburg made a similar point during her 1993 confirmation before the Senate Judiciary Committee: "Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law."
14. See *supra* note 6.
15. "Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution." Antonin Scalia, *A Matter of Interpretation* 13 (Princeton University Press, 1997).
16. The Declaration of Independence.
17. *VanHorne's Lessee v. Dorrance*, 2 U.S. 304,308 (1795).
18. *Marbury v. Madison*, 5 U.S. 137,176 (1803).
19. *West Coast Hotel v. Parrish*, 300 U.S. 379,404 (1937) (Sutherland, J., dissenting). See also *Reynolds v. Sims*, 377 U.S. 533,591 (1964) (Harlan, J., dissenting) (objecting to the Supreme Court's "exercise of the amending power" through interpretation); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668,686 (Scalia, J., dissenting) (criticizing "this Court's Constitution-making process").
20. The Federalist No. 78 (Alexander Hamilton).
21. U.S. CONST., art. II, § 2.
22. THE FEDERALIST NO. 76 (ALEXANDER HAMILTON).
23. *Id.*
24. See Thomas Jipping, "Whatever Means Necessary": *Weaponizing the Judicial Confirmation Process*, HERITAGE FOUND. LEGAL MEMO., No. 266 (June 11, 2020), at 4–7, https://www.heritage.org/sites/default/files/2020-06/LM266_0.pdf.
25. While the United States Senate is in session, staff members record by hand exactly when different activities, such as votes or quorum calls, begin and end in "minute books." See Automated Legislative Record Keeping System for the United States Senate, 92d Cong., 2d Sess., February 29, 1972, at 126. While on the staff of a U.S. Senator, the author consulted the minute books for a two-year period to calculate the average length of recorded votes on judicial nominations.
26. Confirmation without a recorded vote and a recorded vote that a Senator missed were both counted as a vote in favor of confirmation. In December 2021, 23 Republican Senators missed the last nine confirmation votes of the year, nearly one-quarter of the 2021 confirmation total. If those Senators had been present for those nine votes, and followed the pattern of their previous confirmation votes, Republicans would have opposed an average of 86 percent of Biden's judicial nominees.
27. A "filibuster" occurs when an attempt to end debate, such as a cloture vote, fails. Ending debate on a nomination required 100 percent agreement between 1806 and 1949, two-thirds of Senators between 1949 and 1975, and 60 percent since then.

28. See Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803,839-49.
29. *Id.* at 842-43.
30. On October 1, 1968, the Senate voted 45-43 (far less than the two-thirds required by Rule 22 at the time) on a motion to invoke cloture on the nomination of Abe Fortas to be Chief Justice. The bipartisan vote against cloture, with 24 Republicans and 19 Democrats, and comments from Senators who did not vote on cloture, indicated that Fortas likely did not have majority support for confirmation. Fortas promptly asked President Lyndon Johnson to withdraw his nomination, which Johnson did the following day. Lyndon B. Johnson, *Statement by the President Upon Withdrawing the Nomination of Justice Abe Fortas as Chief Justice of the United States*, AMN. PRESIDENCY PROJECT (Oct. 2, 1968), <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-withdrawing-the-nomination-justice-abe-fortas-chief-justice>.
31. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 218,223 (2003) (explaining that 1968 nomination of Abe Fortas to be Chief Justice lacked majority support for confirmation).
32. Republicans forced the Senate to take a cloture vote on 6 percent of the judicial nominees confirmed during President Barack Obama's first five years.
33. Less than four years later, when partisan control of the White House and Senate had again changed hands, Republicans used the same parliamentary method to eliminate the filibuster for Supreme Court nominees.
34. See *supra* note 20.
35. This does not include President Donald Trump's nomination of Neil Gorsuch on February 1, 2017.
36. Data regarding the number of judges leaving their appointed position, the reason for doing so, and the appointing President were obtained from the database maintained by the Federal Judicial Center, <https://www.fjc.gov/history/judges>.
37. STEVEN G. CALABRESI, *THE ABA IN LAW AND SOCIAL POLICY: WHAT ROLE?* 101 (Federalist Society for Law, 1994); Testimony of ABA President Robert D. Raven: Before S. Comm. on the Judiciary, 101st Cong. (1991).
38. See Amn. Bar. Ass'n., *Standing Committee on the Federal Judiciary: What It Is and How It Works* (2020), at 3, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/background-9-21-2020.pdf.
39. See Thomas Jipping, *Judicial Appointments in the 116th Congress*, HERITAGE FOUND. LEGAL MEMO. No. 281 (Feb. 18, 2001), at 7-8 (The ABA endorsed the Equal Rights Amendment; the Uniform Abortion Act; decriminalizing homosexual conduct; racial quotas for the death penalty; United Nations' Women's Conference agendas; allowing health care workers to ask patients about gun ownership and civil suits against gun manufacturers; and legalizing marijuana).
40. Several studies have found systematic ratings bias toward Republican judicial nominees. See, e.g., James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Court of Appeals for Political Bias, 1989-2000*, J. L. AND POLITICS (Oct. 2001); Susan Navarro Smelcer *et al.*, *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RSCH. Q. 835 (2012).
41. The ABA's Standing Committee on the Federal Judiciary, which evaluates and rates nominees, has 15 members. While the ABA provides details for ratings that are not unanimous, its official policy is that "[i]n all circumstances, the majority rating is the official rating of the ABA Standing Committee on the Federal Judiciary." Amn. Bar. Ass'n., *Ratings of Article III And Article IV Judicial Nominees*, Standing Committee on the Federal Judiciary (Mar. 1, 2022), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-117.pdf.
42. The number of judicial vacancies immediately jumps when Congress adds new judgeships. During the period covered by this report, Congress added 12 judgeships in 1982 (when it created the U.S. Court of Appeals for the Federal Circuit); 77 judgeships in 1984; 80 in 1990; 10 in 2000; and 12 in 2003. Congress' last comprehensive expansion of the federal judiciary occurred in 1990, with the creation of 11 seats on the U.S. Court of Appeals and 66 on the U.S. District Court.