

16. Is Advice and Consent Broken?

The Contentious Politics of Confirming Federal Judges and Justices

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The Constitution empowers the Senate to offer its advice and consent to the president over the selection of judges and justices for the nation's federal courts. After three decades of partisan and ideological conflict over choosing federal judges, advice and consent for filling lifetime seats on the federal bench is broken. In this chapter, we explore the impact of intensely polarized and competitive parties on confirming federal judges, paying special attention to the Senate's treatment of President Barack Obama's judicial nominations. We put recent trends in confirmation outcomes into historical perspective and pinpoint new battles over the makeup of the federal bench, including conflict over filling Supreme Court vacancies in a presidential election year. We conclude that no corner of Capitol Hill is immune to partisan and ideological conflict waging in Washington in recent years.

The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or vote him down. . . . Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice.

—Chief Justice William Rehnquist, 1997¹

Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. . . . There remains . . . an urgent need for the political branches to find a long-term solution to this recurring problem.

—Chief Justice John Roberts, 2010²

Not even a rebuke by the chief justice of the United States can convince warring parties inside and outside the Senate to lay down their arms in a decades-long conflict over who serves on the federal bench. That battle reached epic proportion in 2016, at the start of the last year of the Obama administration, when the sudden death of Associate Justice Antonin Scalia opened a pivotal vacancy on the U.S. Supreme Court. Within hours of Scalia's passing, Senate Republican leader Mitch McConnell, R-Ky., vowed to shut down advice and consent for any nominee selected by the outgoing Democratic president—knowing that replacing a staunch conservative justice with an Obama nominee would cement the power of liberals on the Court.

Close observers of advice and consent during the Obama years might not have been surprised by Republican escalation of confrontational tactics over the federal bench. When their party lost the White House in 2008, the Senate Republican minority vowed to block any Obama nominee who failed to pass muster with key Republican senators. Advice and consent proved rockier than Republicans had promised, with Senate Republicans launching filibusters against Obama nominees who even had the support of Republican lawmakers from their home states. Democratic tactics also inflamed the conflict, going “nuclear” in 2013 to eliminate filibusters of nominees for the lower federal courts. No surprise that Republicans turned the tables and nearly stopped confirming Obama nominees when the GOP regained control of the Senate in 2014.

After three decades of senatorial foot-dragging by both Democratic and Republican senators, advice and consent for filling lifetime seats on the federal bench remains broken. In this chapter, we explore the contemporary politics of confirming federal judges, focusing in particular on the experiences of the Obama administration. We put recent trends in confirmation politics into historical perspective and pinpoint new flash points in battles over the makeup of the bench. In contrast to scholars who claim that the process of selecting federal judges has always been political, we argue that conflict over judicial appointees has varied significantly over the past several decades and across the various levels of the bench. In many ways, advice and consent has worsened over the Obama years, leading us to conclude that no corner of Capitol Hill is immune to intense partisan and ideological battles being waged in Washington in recent years.

Competing Accounts of Judicial Selection

Federal judges in the United States resolve some of the most important and contentious public policy issues. Some hold onto the notion that the federal judiciary is simply a neutral arbiter of complex legal questions, but the justices and judges who serve on the Supreme Court and the lower federal bench are crafters of public law. We need look no further than the Court’s decision to uphold parts of the landmark Affordable Care Act in 2012 and 2015 to recognize the enormous impact of the federal judiciary on the shape of public law. Whether the Court is striking down Washington, D.C.’s ban on handguns or, most famously, determining the outcome of the 2000 presidential election, the judiciary is an active partner in making public policy.

As the breadth and salience of federal court dockets has grown, the process of selecting federal judges has drawn increased attention. Judicial selection has been contentious before in American history, but seldom has it seemed more acrimonious and dysfunctional than in recent years. Fierce battles to confirm Robert Bork and Clarence Thomas to the Supreme Court are now ones for the history books; an even more divisive political climate pervades Washington today. Alongside these high-profile disputes have been scores of less conspicuous

confirmation cases held hostage in the Senate, resulting in declining confirmation rates and unprecedented delays in filling federal judgeships. In the summer of 2016, 10 percent of the federal bench was vacant. Even when Senate parties reach periodic agreements to release their hostages, conflict soon recurs.

Political scientists and legal scholars have offered different approaches to understanding conflict over federal judges. Legal scholars have questioned the growing salience of ideology in confirmation hearings while judicial scholars have examined how presidential ambitions shape the selection of judges and how interest groups succeed in derailing nominees they oppose.³ Such studies provide excellent but partial portraits of the forces shaping the contemporary politics of advice and consent.

Two alternative accounts have been proposed to explain the broader crisis in judicial selection, neither of which fully captures the political and institutional dynamics that underlie contemporary advice and consent. One account—call it the “big bang theory” of judicial selection—points to a breaking point in national politics, after which prevailing norms of deference and restraint in judicial selection fell apart. The result is said to have been a sea change in appointment politics, with a rockier path to confirmation and less certainty about getting there. An alternative account—call it the “nothing new under the sun theory”—suggests that ideological conflict over the makeup of the bench has been an ever-present force in shaping the selection of federal judges and justices. Judicial selection has always been political and ideological, as senators and presidents vie for influence over the bench.

Adherents of the big bang account typically point to a cataclysmic event in Congress or the courts that had an immediate and lasting impact on the process and politics of judicial selection thereafter. Most often, scholars point to the battle over Robert Bork’s nomination to the Supreme Court in 1987 that precipitated a new regime in the treatment of presidential appointments by the Senate. Ronald Reagan’s willingness to nominate a conservative deemed outside the mainstream by the Democratic majority and Senate Democrats’ willingness to challenge a qualified nominee on grounds of how he would rule on the bench—together, these developments are said to have radically altered advice and consent for judicial nominees. Adherents of the big bang have also argued that the Bork debacle spilled over into the politics of lower court nominations, significantly increasing the politicization of selecting judges for the lower federal bench.⁴

Other versions of the big bang theory point to the Supreme Court’s 1954 *Brown v. Board of Education* decision. As Benjamin Wittes has argued, “We can reasonably describe the decline of the process as an institutional reaction by the Senate to the growth of judicial power that began with the *Brown* decision in 1954.”⁵ Still other versions of the big bang point to the transformation of party activists (from seekers of material benefits to seekers of ideological or policy benefits) and the mobilization of political elites outside the Senate seeking to affect the makeup of the bench.⁶

No doubt, the Bork debacle, the changing character of elite activists, and the emergence of the courts as key policy makers—each of these forces has shaped, to some degree, the emergence of conflict over appointments in the postwar period. Still, these explanations do not help us to pinpoint the timing or location of conflict over judges. The increasing role of the Warren Court on a range of controversial issues must have played a role in increasing the salience of judicial nominations to senators. If the Court had avoided controversial social, economic, and political issues, senators would have cared little about the makeup of the bench. But we don't see marked changes in the advice and consent until well after both the 1954 decision and the emergence of more ideological activists in the 1960s. Certainly, the no-holds-barred battle over the Bork nomination showed both parties that all-out opposition to a presidential appointment was within the bounds of acceptable behavior after 1987. Still, the Bork fight leaves us unable to explain significant variation in the Senate's treatment of judicial nominees before and after the One Hundredth Congress. The Senate also began to scrutinize executive-branch appointments in the late 1980s and 1990s. Thus, evidence in favor of the big bang account is incomplete. More likely, episodes like the Bork confirmation battle are symptoms, rather than causes, of a more taxing road to confirmation in recent decades.

In contrast, the “nothing new under the sun” alternative suggests that “the appointments process is and always has been political because federal judges and justices themselves are political.”⁷ As Lee Epstein and Jeffrey Segal argue, presidents have always wanted to use the appointment power for ideological and partisan purposes, and senators have always treated appointees as a means to “help further their own goals, primarily those that serve to advance their chances of reelection, their political party, or their policy interests.”⁸ As these scholars argue, we should expect to see legislators and presidents engage in purposeful behavior shaped by their goals. But that is only a starting point in accounting for the dynamics of advice and consent. It is difficult to explain variation in the Senate's treatment of judicial appointments—over time and across circuits—if we maintain that the process has always been politicized. We recognize the political nature of advice and consent but also seek to identify the ways in which politicians exploit Senate rules and practices to target appointees deemed most likely to shift the ideological tenor of the federal bench.

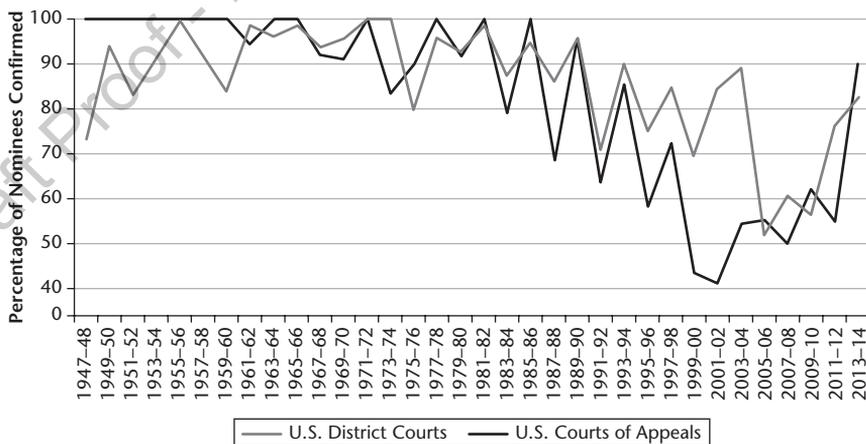
Patterns in Judicial Selection

Figure 16-1 shows confirmation rates for appointees to the U.S. district courts and courts of appeals between 1947 and 2014. One might reasonably conclude from the graph that advice and consent over the postwar period has gone awry. With the recent exception of 2013 to 2014 (which we address later), the bottom has fallen out of the confirmation process in recent decades. Presidents before the 1980s could count on the Senate confirming roughly 90 percent of their nominees. Between 1981 and the end of Obama's first term, the average confirmation

rate for appellate nominees fell to 65 percent. District court nominees were largely immune to this conflict over the postwar period. But by the end of George W. Bush's second term, trial court nominees were scrutinized as closely as appellate nominees. In the context of these broader trends, it is notable that Obama nominees in both the 111th (2009–2010) and 112th (2011–2012) Congresses were confirmed at higher rates than were George W. Bush's nominees: The Senate confirmed roughly 60 percent of Obama's appellate court nominees but only 50 percent of Bush's nominees. Overall, Obama's district court nominees also fared slightly better than Bush's nominees but only after Republicans held confirmation rates below 60 percent during Obama's first two years in office.

No doubt, the Senate's slightly better than average record during the first term of the Obama administration led Minority Leader Mitch McConnell, R-Ky., to argue in June of 2013 that "the president's been treated very fairly on judicial [nominees]." Such claims, however, rang hollow to Democrats, who pointed to other metrics for capturing the path to confirmation. Instead of emphasizing confirmation rates, Democrats decried how long it took the Senate to confirm Obama's nominees. Figure 16-2 shows the trend, with the first four years of the Obama administration surpassing previous records set in the late Clinton administration for how long it takes the Senate to confirm nominees. During the Obama administration, Republican senators threw enough curve balls to force nominees to wait more than half a year to be confirmed. If we add in the fates of nominees who the Senate never confirmed, the wait time for a decision extended to nearly eleven months in the 112th Congress. (That said, as of 2014, Democrats held the postwar record for sluggish confirmation of an opposition party's nominees:

Figure 16-1 Confirmation Rates for Judicial Nominations, 1947–2014



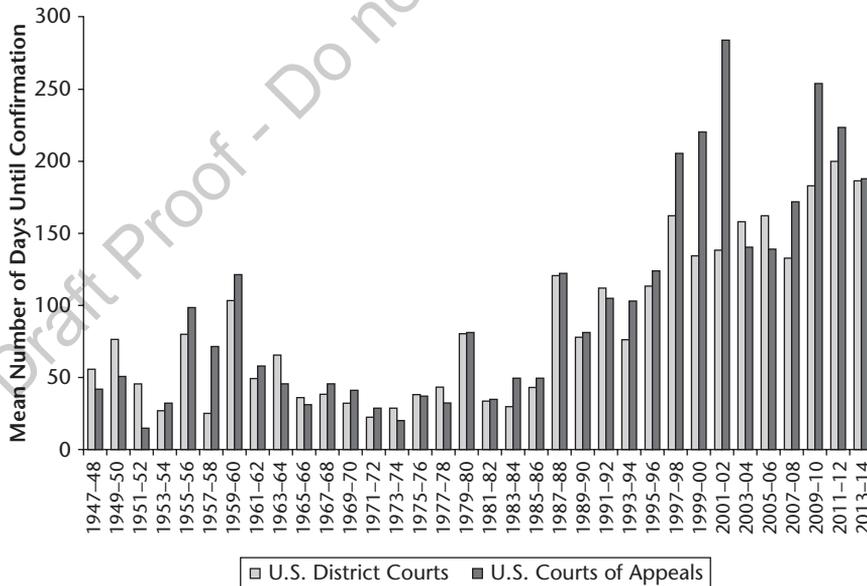
Source: Updated from Sarah Binder and Forrest Maltzman, *Advice and Dissent* (Washington, DC: Brookings Institution Press, 2009).

Confirmation delays hit record delays in 2001–2002 after Republicans lost control of the Senate early in George W. Bush’s first term.)

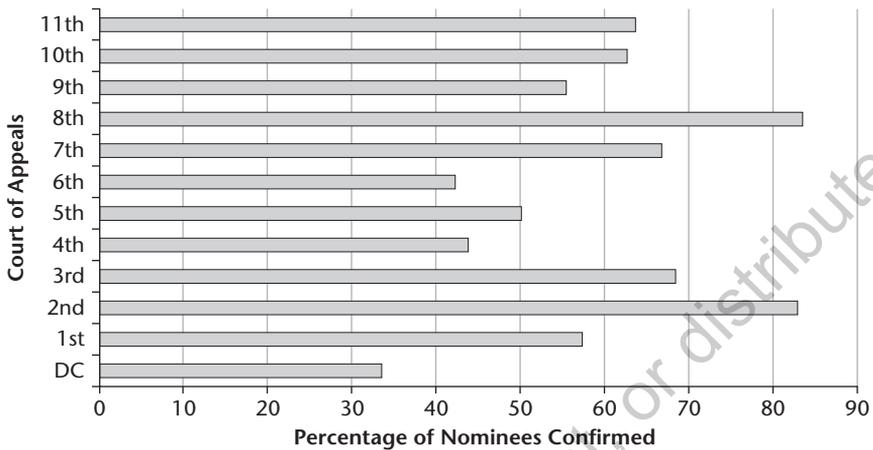
Note, as well, that conflict across the twelve federal circuits is uneven. As seen in Figure 16-3, nominations for some appellate vacancies attract little controversy, such as New York’s Second Circuit and the Mountain states’ Eighth. Not so for the D.C. Circuit Court of Appeals or for the appeals courts in the Fourth and Sixth Circuits. Since the beginning of the Clinton administration in the early 1990s, more than half of the nominees for these circuits have stalled. The uneven pattern across the circuits reminds us that senators do not care equally about each circuit, meaning that some circuits bear the brunt of conflict over judges while others escape largely unscathed.

Confirmation statistics do not tell the full story of the Senate’s treatment of Obama’s judicial nominations. Senate Republicans have raised the stakes over nominations by attempting to filibuster some of Obama’s appellate and district court nominees. To be sure, Republicans filed cloture some thirty times when Democrats filibustered George W. Bush nominees, filing cloture seven times on one nominee for the D.C. Circuit Court of Appeals. During Obama’s first four years in office, Republicans returned the favor; GOP filibusters of Obama nominees led Democrats to attempt cloture on nominations roughly ten times.

Figure 16-2 Length of Confirmation Process for Successful Judicial Nominees, 1947–2014



Source: Updated from Binder and Maltzman, *Advice and Dissent*.

Figure 16-3 Confirmation Rates by Circuit, 1993–2012

Source: Updated from Binder and Maltzman, *Advice and Dissent*.

Majority Leader Harry Reid, D-Nev., also threatened to move forward with cloture votes on seventeen district court nominees in March of 2012, a tactic that brought the GOP to the bargaining table to resolve the fate of the nominees.

Republican filibusters of Obama nominees are notable for two reasons. First, Republicans filibustered some nominees who had secured the support of Republican home state senators. For example, Republican Richard Lugar of Illinois publicly supported David Hamilton, a candidate for the Seventh Circuit Court of Appeals. But Lugar's GOP colleagues delayed a confirmation vote for eight months on account of Hamilton's ties to the ACLU. As one conservative activist suggested at the time, Hamilton might have been targeted simply because he was Obama's *first* nominee.⁹ In contrast, Republican senators offered no reason to justify the six-month delay they imposed on Barbara Keenan's nomination to the Fourth Circuit Court of Appeals. The Senate ultimately confirmed Keenan, 99–0. Such data suggest that Republicans had little interest in blocking some nominees yet felt emboldened to delay confirmation if only to keep the seats vacant for as long as possible.

Second, the GOP also sought to block Senate confirmation votes on district court nominees. Before the GOP launched a filibuster against Rhode Island District Court nominee John McConnell in May 2011, only three district judges since 1968 had ever faced a cloture motion, and all three were ultimately confirmed.¹⁰ The confirmation vote divided the GOP conference. John Cornyn, R-Tex., rallied votes against cloture, arguing that McConnell was unfit to serve on the bench. But other GOP senators drew the line between appellate and trial court nominees, wary of crossing the line into a new era of filibustering district

court nominees. “We don’t want to establish precedents that will be repeated,” warned Senator John McCain, R-Ariz. “Quite often we establish precedents and you find out when you get back in the majority it wasn’t that good of an idea.”¹¹ Eleven GOP members heeded McCain’s warning and joined the Democrats in voting to cut off debate on the McConnell nomination. Within a year, however, Reid had filed seventeen cloture motions on pending district court nominees in the face of new threats to block the Senate from voting on trial court nominees.

To be sure, there is recent precedent for delaying district court nominations, as the Senate confirmed only about half of President Bush’s trial court nominees in the 109th Congress (2005–2006). That trend continued in the following Congresses, leaving the Obama administration unable to fill numerous seats on the lower federal bench. As one Democratic aide noted in 2011, “They [the GOP] have approached district court nominees with the same exacting inquiry standards that used to be reserved for the Supreme Court and for controversial circuit court nominees, not even all circuit court nominees. But now it extends to every lifetime appointment.” Republicans that year were not shy about owning up to their new strategy:

Each nominee is assessed on his or her own merits regardless of the position in the court system to which they are nominated because this is a lifetime appointment. . . . They [district court judges] deal with serious issues. They deal with Proposition 8, they deal with “don’t ask, don’t tell,” they deal with terrorism cases, health care, and that’s my boss’s view of it. . . . When President Bush was in power and you didn’t want to do this and you just rubber stamped District Court nominees, that’s your problem.¹²

The GOP strategy of targeting Obama’s district court nominees makes plain that every judicial vacancy can have important policy consequences for the political parties.

In some ways, the GOP strategy was just tit for tat—retaliating against Democrats for their foot-dragging over Bush’s second-term trial court nominees that began in 2005. One Republican strategist suggested that Obama’s relatively moderate courts-of-appeals nominees—and the White House’s sluggishness in sending nominations up to the Senate—left relatively few appellate targets for Republicans to oppose. To some degree then, foot-dragging over trial court nominees might be situational. Still, recent developments suggest that advice and consent is on the verge of a breakdown, begging the question why such conflict over judicial selection has taken root and spilled over all three levels of the federal bench.

The Politics of Advice and Consent

How do we account for the Senate’s uneven performance in confirming federal judges? Why have confirmation rates slid downward over the past couple of

decades, and why does it take so long for the Senate to render its decisions? Four forces shape the fate of nominations sent to the Senate. First and foremost are ideological forces: The array of policy views across the three branches affects the probability and speed of confirmation. Second, partisan forces matter: Electoral competition between the parties has increased each party's unwillingness to easily confirm nominees from the other party. Third, institutional rules and practices in the Senate shape the likelihood of confirmation. Fourth, the electoral context matters. All four of these forces have come into play, especially during the Obama years, fueling conflict over advice and consent and leading the Democrats to ban judicial filibusters.

Partisan and Ideological Forces

Partisan and ideological forces are inextricably linked in the contemporary Senate, as the two parties have diverged ideologically in recent decades. Not surprisingly, Washington pundits assessing the state of judicial selection have often pinpointed poisoned relations between liberal Democrats and President Bush and between conservative Republicans and President Obama as the proximate cause of the slowdown in advice and consent. Democrats' foot-dragging over the course of the Bush administration was often attributed to ideological conflict and partisan pique, as liberal Democrats criticized Bush's tendency to nominate extremely conservative (and presumably Republican) judges. The rise of intense ideological differences between the two parties over the past two decades, in other words, directly affects the pace and rate of confirming new federal judges. Given that polarization of the parties has been rising steadily over the past two decades, no surprise that confirmation rates hover around 60 percent for Obama's nominees.

Partisan politics may affect the process of advice and consent more broadly in the guise of divided party government. Because judges have life tenure on the bench and thus make lasting contributions to the shape of public law, senators have good cause to scrutinize the views of potential judges. Presidents overwhelmingly seek to appoint judges who hail from their own party, so Senate scrutiny of judicial nominees should be particularly intense when different parties control the White House and the Senate. Not a surprise then that nominees considered during a period of divided control take significantly longer to be confirmed than those nominated during a period of unified control. Judicial nominees are also less likely to be confirmed during divided government: Between 1947 and 2012, the Senate confirmed, on average, 83 percent of appellate court nominees considered during periods of unified control but only 70 percent of nominees during divided government.

Partisanship is also likely to affect the fate of nominations to particular circuits when the circuit is balanced between appointees of Democratic and Republican presidents. Because most appellate court cases are heard by randomly generated three-judge panels, nominations to courts that are evenly divided are likely to have a more significant impact on the law's development, as compared to appointments

to courts that lean decidedly in one ideological direction or the other. Senate majorities appear especially reluctant to confirm nominees to such courts when the appointment would tip the court balance in the favor of a president from the opposing party. The battle in 2013 over vacancies on the D.C. Court of Appeals is a perfect example. With four Democratic and four GOP appointees sitting on the circuit bench, Senate Republicans resolutely blocked Obama's picks for the court's three vacant seats. In response, Democrats went nuclear that fall, eliminating senators' opportunity to filibuster judicial nominations. In short, partisan dynamics—fueled, in part, by ideological conflict—strongly shape the Senate's conduct of advice and consent, making it difficult for presidents to mold the federal courts to their party's policy advantage.

Institutional Forces

The capacity to derail nominees depends on the rules and practices of advice and consent—a set of institutional tools that distributes power across the Senate. To explain the fate of the president's judicial nominees, we need to know something about institutional venues in which advice and consent take place. Senators seeking to shape the fate of a nominee have several options, including an array of committee and floor rules and practices that can be exploited by individual senators and the two political parties.¹³ In theory, nominees only have to secure the consent of a floor majority, as nominations are considered for an up-or-down vote in the Senate's executive session. In practice, nominees must secure the support of several pivotal Senate players—meaning that more than a simple majority may be needed for confirmation.

A nominee's first institutional hurdle is clearing the Senate Judiciary Committee. By tradition, senators from the home state of each judicial nominee take the lead in casting first judgment on potential appointees. The power of home state senators is institutionalized in Judiciary panel procedures. Both of the home state senators are asked their views about judicial nominees from their home state pending before the committee. Senators can return a "blue slip," demarking their support or objection to the nominee, or they can refuse to return the slip altogether—an action that signals their opposition to the nominee. A negative blue slip from a home state senator traditionally sufficed to block further action. As the process has become more polarized in recent years, committee chairs are tempted to ignore objections from minority party senators. Indeed, Senator Pat Leahy's equivocation at the start of the 111th Congress (2009–2010) over how he would treat blue slips from Republican senators led Republican senators, in 2009, to threaten to filibuster nominees from states with Republican senators if their prior consent was not secured. Even today, after floor filibusters of nominees have, in effect, been eliminated, blue slips still weigh heavily in the committee chair's assessment on whether, when, and how to proceed with a nominee.

Historically, greater policy differences between the president and the home state senator for appellate nominees have led to longer confirmation proceedings,

suggesting the power of home state senators to affect panel proceedings. Conversely, the strong support of one's home state senator is essential in navigating the committee successfully. Given the often fractured attention of the Senate and the willingness of senators to heed the preferences of the home state senator, having a strong advocate in the Senate with an interest in seeing the nomination proceed is critical in smoothing the way for nominees.

Once approved by committee, a nomination must clear a second hurdle: making it onto the Senate's floor agenda. By rule and precedent, both majority and minority party coalitions can delay nominations after they clear committee. Because the presiding officer of the chamber gives the majority leader priority in being recognized to speak on the Senate floor, the majority leader has the upper hand in setting the chamber's agenda. When the president's party controls the Senate, this means that nominations are usually confirmed more quickly; under divided control, nominations can be kept off the floor by the majority leader—who wields the right to make a nondebatable motion to call the Senate into executive session to consider nominees. With Democrats presiding over the Senate in the 107th (2001–2002) and 109th (2005–2006) Congresses, it was no wonder that the confirmation rates for Bush nominees in those Congresses were nearly fifteen points lower than the rates in the two Congresses in which Republicans controlled the Senate during the Bush years.¹⁴

Until the fall of 2013, securing a vote on confirmation essentially required the consent of the minority party. If a single senator objected to voting to confirm a nominee, the majority leader either shelved the nomination or pursued a supermajority of sixty senators to end debate and bring the Senate to a confirmation vote. In fact, the chance that a nomination might be filibustered typically motivated the majority leader to seek unanimous consent of the full chamber before bringing a nomination before the Senate. Such consultation meant that nominations were unlikely to clear the Senate without the endorsement of at least some members of the Senate minority party.

The *de facto* requirement of minority party assent granted the party opposing the president significant power to affect the fate of nominees, even if that party did not control the Senate. As policy differences increase between the president and the opposing party, that party is more likely to exercise its power to delay nominees. Given the high degree of polarization between the two parties and the centrality of federal courts in shaping public law, judicial nominations have become a partisan flash point. Indeed, when Democrats lost control of the Senate after the 2002 elections, they turned to a new tactic to block Bush nominees they disliked: the filibuster. To be sure, some contentious nominations have, in the past, been subject to cloture votes. But all of those lower court nominees were eventually confirmed. In 2003, however, numerous judicial filibusters were successful. Use of such tactics likely flowed from the increased polarization of the two parties and from the rising salience of the federal courts across the interest group community. Much of the variation in the fate of judicial nominees before 2014 was thus likely driven by ideologically motivated players and parties in both the

executive and legislative branches exploiting the rules of the game in an effort to shape the makeup of the federal bench.

Temporal Forces

Finally, it is important to consider how secular or cyclical elements of the political calendar may shape the fate of judicial nominees. It is often suggested that delays encountered by judicial nominees may be a natural consequence of an approaching presidential election. Decades ago, the opposition party in the Senate might have wanted to save vacancies as a pure matter of patronage: foot-dragging on nominations would boost the number of positions the party would have to fill if it won the White House. More recently, the opposition might want to save vacancies so that a president of their own party could fill the vacancies with judges more in tune with the party's policy priorities.

Finally, there is ample evidence of vacancy hoarding in presidential-election years in the recent past. For example, with control of both the Senate and the White House up for grabs in November 2012, Senate minority leader Mitch McConnell declared in June of 2012 that he was invoking the *Thurmond rule*, a quadrennial practice (unevenly applied) of preventing Senate action on appellate nominees in the run up to a presidential-election year. Caught in the net of the Thurmond rule that month were several pending appellate court nominees, including four who appeared to have had the support of Republican senators.¹⁵ More generally, over the past sixty-five years, the Senate has treated judicial nominations submitted or pending during a presidential-election year significantly different than other judicial nominations. First, the Senate has historically taken longer to confirm nominees pending in a presidential election than those submitted earlier in a president's term. Second and more notably, these presidential-election-year nominees are significantly less likely to be confirmed. For all judicial nominations submitted between 1947 and 2012, appointees for the courts of appeals pending in the Senate in a presidential-election year were nearly 40 percent less likely to be confirmed than nominees pending in other years.

Explaining Trends in Advice and Consent

How do we account more systematically for variation in the degree of conflict over judicial nominees? The multiple forces outlined before are clearly at play. For social scientists investigating patterns over time, this raises a key question: Taking each of these forces together, how well do the trends noted here hold up? Once subjected to multivariate controls, what can we conclude about the relative impact of partisan, ideological, and institutional forces on the pace and rate of judicial confirmations? Our answers to these questions are consequential, as they help us to evaluate how well the president and the Senate perform their constitutional duties of advice and consent.

To explain variation in conflict over judicial nominees, we tracked the fate of all nominations to the U.S. courts of appeals between 1947 and 2012 and used

these data to estimate a model of the likelihood of confirmation.¹⁶ The results help us to disentangle the relative importance of forces shaping the Senate's treatment of presidential appointees to the bench.¹⁷ First, we found that partisan polarization lowers the chances of confirmation. During the least polarized Senate of the postwar period (the Eightieth Congress, 1947–1948), the likelihood of confirmation was 99 percent.¹⁸ During the most polarized Congress in the study (2011–2012), we found a 60 percent chance of confirmation. As the two parties take increasingly different positions on major policy issues, they are less and less likely to give the other party's nominees an easy path to the bench. Second, we found a smaller impact of divided party control on the probability of confirmation. Nominees are about 10 percent less likely to be confirmed in periods of divided government, assuming an average level of polarization over the postwar period.¹⁹ Third, approaching presidential elections matter: Confirmation is roughly 20 percent less likely when control of the White House—and power to nominate judicial candidates—is at stake. Fourth, the partisan balance of the circuit seems to slightly affect the chances of confirmation, dropping 3 percent when senators consider a nomination for a balanced circuit (assuming unified party control outside of a presidential election and average polarization). In a period of much higher polarization, nominations for these critical circuits face a much tougher road to confirmation: The likelihood of success drops twelve percentage points. General disagreement over the policy views of the nominees certainly fuels senators' opposition, but opposition is particularly intense in polarized periods when the ideological balance of a regional bench is at stake.

Finally, we found only weak evidence that nominee quality, as signaled by the American Bar Association (ABA), affects the likelihood of confirmation. Perhaps the ABA is not seen as a neutral evaluator of judicial nominees, and thus, senators systematically ignore the association's recommendations. Alternatively, judicial qualifications might not be terribly important for most nominees. Very few nominees merit an unqualified rating, and senators might not perceive a difference between well-qualified and qualified nominees. Thus, other considerations likely shape senators' decisions about whether to support a nominee.

A New War of Advice and Consent

These analyses suggest that partisan, institutional, and temporal forces mold the fate of presidential appointments to the federal bench. These tensions boiled over late in 2013, when Senate Democrats went “nuclear,” reinterpreting Senate rules to ban filibusters of executive and most judicial nominations. The Democrats' nuclear move merits close examination, as does its impact on the fate of judicial nominations during Obama's second term in the White House. Before digging deeper into the Democrats' parliamentary maneuver, we review the political and other forces that brought the Senate parties to this institutional brink.

One of the most visible changes to the confirmation process in recent decades is the rising political salience of nominations to the federal bench. Both parties—often fueled by supportive groups outside of the chamber—have made the plight

of potential judges central to their campaigns for the White House and Congress.²⁰ The salience of judicial nominations to the two political parties—inside and outside of the halls of the Senate—is *prima facie* evidence that there is definitely “something new under the sun” when it comes to the selection of federal judges. Not every nominee experiences intense opposition: Democrats acquiesced to over three hundred of President Bush’s judicial nominees, just as Republicans supported scores of Obama nominees. But the public salience of advice and consent increased sharply starting in the early 1980s and continued with full force under the presidencies of Clinton, Bush, and Obama.

The rising salience of federal judgeships is visible on several fronts. First, intense interest in the selection of federal judges is no longer limited to the home state senators for the nomination. Second, negative blue slips from home state senators no longer automatically kill a nomination, as recent Judiciary panel chairs sometimes hesitate to accord such influence to their minority party colleagues. Third, recorded floor votes are now the norm for confirmation of appellate court judges, as nominations are of increased importance to groups outside of the institution. Fourth, nominations now draw the attention of strategists within both political parties.

How do we account for the rising salience of federal judgeships to actors in and out of the Senate? It is tempting to claim that the activities of organized interests after the 1987 Supreme Court confirmation battle over Robert Bork are responsible. But interest groups have kept a close eye on judicial selection for quite some time. Both liberal and conservative groups were involved periodically from the late 1960s into the 1980s. And in 1984, liberal groups, under the umbrella of the Alliance for Justice, commenced systematic monitoring of judicial appointments, as had the conservative Judicial Reform Project of the Free Congress Foundation earlier in the decade. Although interest group tactics may have fanned the fires over judicial selection in recent years, the introduction of new blocking tactics in the Senate developed long after groups had become active in the process of judicial selection.²¹ Outside groups may encourage senators to take more aggressive stands against judicial nominees, but by and large, Senate opposition reflects senators’ concerns about the policy impact of judges on the federal bench.

Rather than attribute the state of judicial selection to the lobbying of outside groups, our sense is that the politics of judicial selection have been indelibly shaped by two trends. First, the political parties are more ideologically opposed and electorally competitive today than they have been for the past few decades. The analysis earlier suggests that ideological and partisan differences encourage senators to exploit the rules of the game to their party’s advantage in filling vacant judgeships or blocking new nominees.

Second, if the courts were of little importance to the two parties, then polarized relations would matter little to senators and presidents in conducting advice and consent. However, the federal courts today are intricately involved in the interpretation and enforcement of federal law. Indeed, pervasive legislative

deadlock in recent years (see Chapter 8 in this volume) can make the courts central to the resolution of conflict when legislative disagreements arise. Supreme Court decisions during the Obama years on the constitutionality of the Voting Rights Act, Affordable Care Act, Federal Defense of Marriage Act, and other laws drive home the impact of the federal courts in settling issues that a polarized Congress cannot resolve.

The rising importance of the federal courts makes extremely important the second trend affecting the nature of judicial selection. When Democrats lost control of the Senate after the 2002 elections, the federal courts were nearly evenly balanced between Democratic and Republican appointees: The active judiciary was composed of 380 judges appointed by Republican presidents and 389 judges appointed by Democratic presidents.²² By the end of the Bush administration, in 2008, Republican-appointed appellate court judges outnumbered Democratic judges, ninety-nine to sixty-five. After nearly six years of Obama appointments to the judiciary, Democratic appointees to the appellate courts outstripped Republicans, ninety-five to seventy-five. Even more dramatic was the partisan turnover of the appellate courts. When Obama came into office in 2009, only one of thirteen federal courts of appeals had a majority of Democratic appointments; six years later, nine of the thirteen featured Democratic majorities.²³

When federal courts were on the edge of partisan balance, near the outset of the Bush administration, it was no surprise that Democrats, in 2003, made scrutiny of judicial nominees a caucus priority and achieved remarkable unity in blocking nominees they deemed particularly egregious. It was no small wonder then that Republicans responded in kind in 2005, threatening recalcitrant Democrats with the “nuclear option.”²⁴ Republicans envisioned a series of procedural steps that would have led the Senate to a new interpretation of the chamber’s Rule 22, the mechanism for ending debate on contentious measures and nominations. The new interpretation would have banned judicial filibusters, requiring only fifty-one votes to end debate and come to a confirmation vote. Republicans backed down when a bipartisan “gang of fourteen” emerged to defuse tensions over the nuclear option, with both sides promising to reserve the filibuster for only the most extraordinary circumstances.

Ten years later, Democrats pulled the fuse and took the chamber nuclear in late November 2013. Repeated GOP filibusters of executive-branch nominees a few months earlier had been resolved with a bipartisan *détente*.²⁵ After ninety-eight senators went behind closed doors in the old Senate chamber to air grievances, senators John McCain, R-Ariz., and Charles Schumer, D-N.Y., negotiated what would turn out to be a temporary truce. Republicans ended their filibusters of several long-stalled Obama nominations to labor, consumer, and environmental positions, and Democrats backed away from cracking down on filibusters. The agreement left the Senate’s cloture rule unchanged—allowing Republicans to filibuster in the future—and Democrats refused to take the nuclear option to ban filibusters off the table. As Republican senator Lindsey Graham of

South Carolina admitted to reporters, senators were filibustering some nominees because Republicans opposed the law that created their position. “That’s not a reason to deny someone their appointment. We were wrong.”²⁶

Four months later, the truce went up in flames, spectacularly. The immediate spark was a set of GOP filibusters against three Obama nominees to the D.C. Court of Appeals. Some Republicans opposed the nominees on ideological grounds; others admitted that they sought to keep Obama from tilting a perfectly balanced circuit toward the liberal pole—reflecting the dynamic uncovered earlier when senators are called on to approve nominations to critical circuits. More broadly, the battle reflected years of partisan frustrations: Democrats added up the litany of GOP efforts to block Obama’s agenda and his picks for prime appointments and collectively lit the fire. After repeated, failed cloture votes and warnings from Majority Leader Harry Reid, D-Nev., that he had the votes to ban filibusters of executive and judicial nominees (save for the Supreme Court), Reid and fifty-one Democratic colleagues detonated their nuclear device.

How did Senate Democrats accomplish this? Senate rules require two-thirds of senators present and voting to cut off debate on a motion to change the rules. Lacking a two-thirds majority for cloture on a resolution to change the Senate’s Rule 22 (the cloture rule), Democrats took an easier route (albeit one theoretically easier to reverse). In the Senate, simple majorities can interpret formal rules as they see fit. By mustering a simple majority, senators can set a new *precedent*—a new way of interpreting a chamber rule. In November 2013, Senate Democrats, by a simple-majority vote, set a new precedent that reinterpreted Rule 22. Unless reversed by a future majority vote, the Senate now requires only a simple majority to invoke cloture on all executive and judicial nominations, except for the Supreme Court (rather than sixty votes stipulated in the Senate’s formal rules).²⁷ In other words, the language of Rule 22 was not touched; only the chamber’s *interpretation* of the rule changed. That is why Republicans charged that Democrats had changed the rules by breaking the rules. “It’s a sad day in the history of the Senate,” McConnell told reporters, deeming Reid’s move a “power grab.”²⁸ McConnell charged that Reid would be remembered as the “worst majority leader ever,” tweeting a drawing of Reid’s tombstone with the words “killed the Senate” inscribed.

Three dimensions of the GOP response to the nuclear move bear attention. First, the procedural change markedly increased the prospects for confirmation. Before the Senate went nuclear at the end of 2013, roughly thirty nominees were confirmed to the district and appellate courts. One year later, nearly one hundred nominees who had either been nominated or pending on the floor after the Democrats went nuclear in 2013 were confirmed. Overall, over 90 percent of the president’s judicial nominees reached the bench in the 113th Congress—a success rate last reached in the late 1980s.

Second, Republicans did not completely submit to the new parliamentary regime of majority cloture. To be sure, the Senate confirmed Obama nominees more swiftly after the Democrats went nuclear than before.²⁹ But once a simple

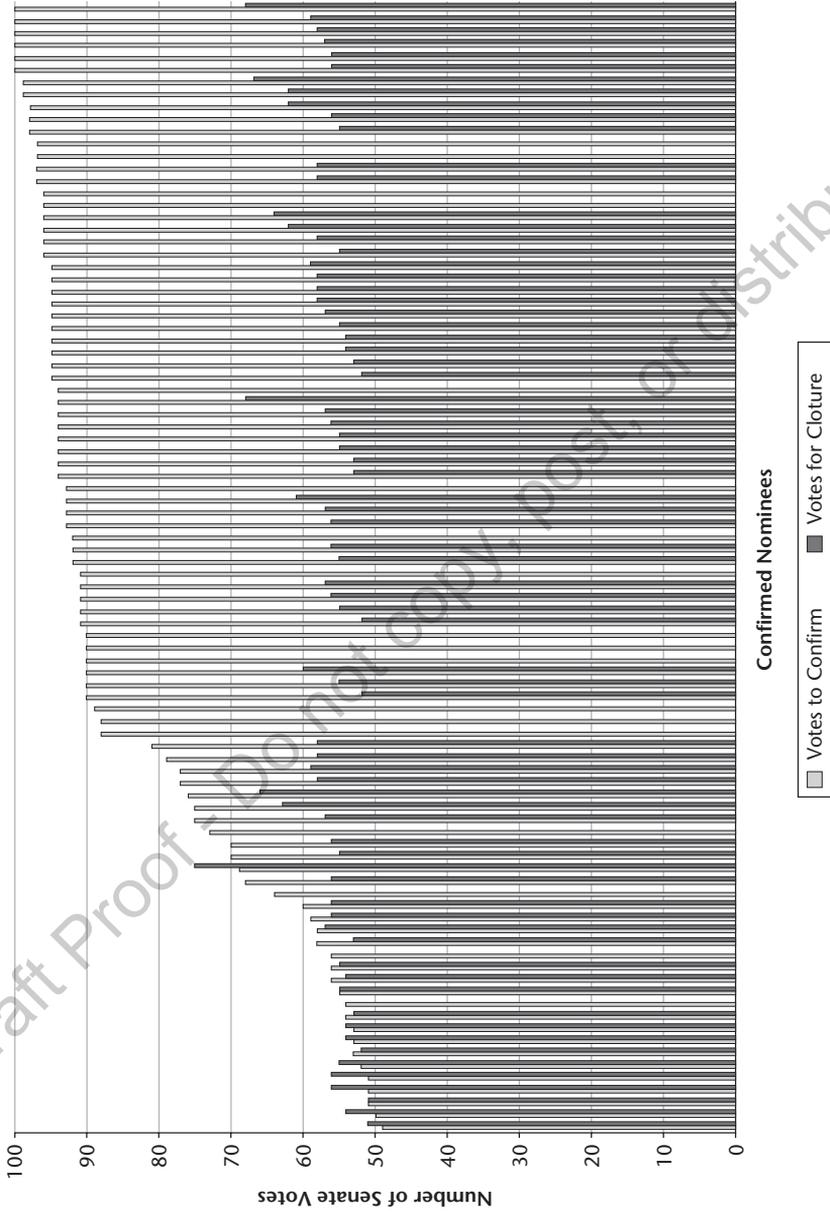
majority became sufficient to bring the chamber to a confirmation vote, Republicans retaliated by dragging their feet at all stages of the nomination and confirmation process.³⁰ The White House found it harder to reach consensus with senators over nominations to vacancies in states with one or more GOP senators, meaning that judgeships remained vacant for longer before nominees could be selected and formally nominated. Republicans also forced recorded votes whenever Democrats sought cloture on a nominee, even though Republican senators did not typically object to most of the nominees.

Figure 16-4 arrays confirmed nominees in 2013 and 2014 in order of the number of votes to confirm. The dark bars show the total number of votes each nominee received for cloture; the light bars record the total number of votes to confirm. Remarkably, Republicans voted against cloture for a large number of nominees, even though they knew that Democrats could invoke cloture on the nomination with just fifty-one votes. Republicans then voted to confirm most of those nominees, nearly unanimously. In fact, GOP senators opposed very few judges on both cloture and confirmation. That is perhaps not surprising. One recent study concluded that after Democrats went nuclear, Obama's judicial nominees were not appreciably more liberal than previous nominees.³¹ Still, the opposition party's insistence on running through the time-consuming cloture process—despite strong support for so many of the nominees—highlights the poor condition of advice and consent. Rather than just filling the bench when the parties agree on nominees, the Republican opposition put the chamber through procedural hoops seemingly only to waste the Senate's time. Keep in mind that the White House selected many of these nominees with the consent of Republicans, who were happy to fill vacant judgeships in their home states.

Second, the Republican response to the Democrats' nuclear move was perhaps not as drastic as many predicted beforehand. Republican senators did not in fact "blow up every bridge in sight," as many senators had feared. Some conflict was likely defused because the chair of the Senate Judiciary Committee, Democrat Patrick Leahy of Vermont, retained the panel's blue slip. Leahy's decision allowed Republicans to continue to block nominees to their home states by withholding their blue slips. Nor did Republicans appreciably ramp up obstruction of other Senate business unrelated to nominees. As Gregory Koger noted at the time, we could safely assume that Senate Republicans were probably "already filibustering in every case where the benefits of obstruction outweigh the costs."³² That is what helped to corral fifty-one Democratic votes to go nuclear in the first place.

Third, despite their dramatic reactions to Reid's move, Republicans kept the new cloture thresholds once they regained control of the Senate in the 2014 elections. Why has the procedural change been so sticky? One reason is that Republicans disagreed about the right course of action. Those GOP divisions were sufficient to derail efforts to reinstate the sixty-vote hurdle for cloture when Republicans began organizing their new majority. Moreover, with a Democrat in the White House, the Republican majority could defeat Obama nominees simply by refusing to call them up for a confirmation vote. Indeed, by spring 2016,

Figure 16-4 Senators' Votes for Confirmed Nominees, 2013–2014



Source: Data from U.S. Senate (www.senate.gov).

confirmation of lower court nominees all but ground to a halt; barely a quarter of lower court nominees had been confirmed by May 2016. Most famously, Republicans blocked the president's pick for the Supreme Court after the sudden death of conservative justice Antonin Scalia earlier that year. Most Republicans running for reelection in 2016 in states won by Obama lined up to support the GOP's strategy of refusing to consider or vote on the nomination of Judge Merrick Garland for the Supreme Court.

The nuclear option also appears to have proven sticky because most senators from both parties quickly adapted to the new parliamentary regime. Sen. Richard Shelby, R-Ala., suggests, in effect, that Republicans have little choice: "It's hard to put the toothpaste back in the tube."³³ Or as Sen. Roy Blunt, R-Mo., put it to *Politico*, the Democrats' change was "long-term and permanent."³⁴ Because Republicans have thus far kept the Democrats' change, it is fair to call the filibuster ban *institutionalized*—incorporated into the Senate's parliamentary fabric. Remarkably—given how vociferously Republicans objected to the nuclear move—Blunt also argued, "I think it's well within the traditions of the Senate for a majority to decide nominations and a supermajority to decide legislation."³⁵ Right away, Republicans both rationalized and internalized the nomination filibuster ban as part and parcel of Senate "tradition." Even the most hallowed Senate traditions can be unmasked as no more than the by-product of hard-fought politics.

Conclusions

In the run up to the 2008 presidential election, Senate Democrats opted to close down the confirmation process for nominations to the lower federal courts. Reflecting on the impasse, Texas Republican senator John Cornyn observed that Democrats were playing "a short-sighted game, because around here what goes around comes around. . . . When the shoe is on the other foot, there is going to be a temptation to respond in kind."³⁶ The senator's point was on the mark: Each party's intolerance of the other party's nominees is reciprocated when the parties swap positions in the Senate. Such behavior by both political parties—and the breach of Senate trust that accompanies it—does not bode well for lifting the Senate out of its confirmation morass.

The breakdown in advice and consent fell to a historic low in 2016 when Republicans refused to consider the president's nomination of Judge Garland to the Supreme Court. Democrats charged Republicans with brazen disregard for advice and consent when they objected to even meeting with Garland. Republicans claimed historical precedent for refusing to consider Supreme Court nominees during a presidential-election year, but most neutral observers refuted their claims as inaccurate.³⁷ Republican intransigence on Garland was surely propelled by Republican leaders' desire to "respond in kind," as Senator Cornyn had predicted. The GOP strategy—pushing off confirmation at least until after the results of a presidential election were known, if not until a new administration

takes office in 2017—raises the possibility that future Supreme Court vacancies will only be filled when a single party controls both the Senate and the White House—potentially after a future majority has gone nuclear to ban filibusters of Supreme Court nominees.

Ultimately, the ease with which Republicans shut down Garland's confirmation process (as of summer 2016) attests to the fragility of constitutional and other norms that senators depend on to keep the Senate's institutional fabric strong. Such norms dictate that the Senate will at least consider the president's nominations to the nation's highest court, even if the opposition would prefer a more ideologically compatible nominee. The Garland affair reminds us that Senate norms are only as strong as both parties want them to be. Unfortunately for the federal bench, there are few signs that wars of advice and consent will abate soon. The stakes of who sits on the federal bench are too high for combatants in partisan battles to lay down arms.

Notes

1. William Rehnquist, *1997 Year-End Report on the Federal Judiciary* (Washington, DC: U.S. Supreme Court, 1997).
2. John Roberts, *2010 Year-End Report on the Federal Judiciary* (Washington, DC: U.S. Supreme Court, 2010).
3. Legal studies addressing judicial selection are surveyed, for example, by Stephen B. Burbank, "Politics, Privilege, & Power: The Senate's Role in the Appointment of Federal Judges," *Judicature* 86, no. 1 (2002): 24–27. On the impact of presidential agendas, see Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven, CT: Yale University Press, 1997), and on the role of interest groups, see Lauren Cohen Bell, *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation* (Columbus: Ohio State University Press, 2002), and Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford, CA: Stanford University Press, 2005).
4. See, for example, Wendy L. Martinek, Mark Kemper, and Steven R. Van Winkle, "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998," *Journal of Politics* 64 (2002): 337–61.
5. See Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (Lanham, MD: Rowman and Littlefield, 2006), 59.
6. See Scherer, *Scoring Points*, and Bell, *Warring Factions*.
7. Lee Epstein and Jeffrey Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2005), 4.
8. Epstein and Segal, *Advice and Consent*, 3.
9. Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, "Obama's Judiciary at Midterm: The Confirmation Drama Continues," *Judicature* 94 (2011): 262–303.
10. The McConnell filibuster is reviewed in Niels Lesniewski and Brian Friel, "Senate Avoids Standoff on Judicial Nominees," CQ Today Online News, May 4, 2011.
11. *Ibid.*
12. Goldman, Slotnick, and Schiavoni, "Obama's Judiciary," 280.
13. The relative effects of these multiple rules and practices are explored in David M. Primo, Sarah A. Binder, and Forrest Maltzman, "Who Consents? Competing Pivots in Federal Judicial Selection," *American Journal of Political Science* 52 (2008): 471–89.

14. Democrats regained control of the Senate in April 2011 after Vermont Republican Jim Jeffords switched parties and handed control of the chamber midsession to the Democrats.
15. John Gramlich, "Senators Argue Over End-of-Term Nominees, 'Thurmond Rule,'" CQ Today Online News, June 19, 2012, <http://public.cq.com/docs/news/news-000004107978.html>.
16. Results are available from authors. We compiled data on judicial nominations for the Eightieth through 107th Congresses from the *Final Calendars* printed each Congress by the Senate Committee on the Judiciary. Nominations data for the 108th through 110th Congresses (2003–2008) are drawn from the Department of Justice's Office of Legal Policy Web site: <http://www.usdoj.gov/olp>. Data for the 111th and 112th Congresses are drawn from the Senate Committee on the Judiciary's Web site. We include the Court of Appeals for the District of Columbia but exclude the appellate court for the federal circuit on account of its limited jurisdiction.
17. The independent variables are measured as follows. We measure polarization as the difference in the mean ideology for each Senate party (as measured by DW-NOMINATE scores available at <http://www.voteview.com>). The partisan balance of each circuit in each Congress is measured as the proportion of active courts-of-appeals judges appointed by Democratic presidents and serving during the Congress. Nominee quality is rated by the Standing Committee on the Federal Judiciary of the American Bar Association and is available for the 101st through 112th Congresses here: <http://www.abanet.org/scfedjud/ratings.html>. I thank Sheldon Goldman for ABA ratings for the previous Congresses.
18. We assume a well-qualified nominee pending in a period of unified party control outside of a presidential-election year who is slotted for a circuit that is not balanced between the parties.
19. The impact of polarization on the likelihood of confirmation is resilient across the time period. If we look only at the period before Ronald Reagan came to office (1947–1980), increases in polarization still reduce the chances of confirmation, as does the misfortune of being a nominee pending during a presidential-election year.
20. Involvement of interest groups in lower court judicial selection reaches back decades, but a marked increase in their organized involvement occurred in the early 1980s. See Gregory A. Caldeira and John R. Wright, "Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships," in *Contemplating Courts*, Lee Epstein (Washington, DC: CQ Press, 1995), 44–71. See also Roy B. Flemming, Michael B. MacLeod, and Jeffery Talbert, "Witnesses at the Confirmations? The Appearance of Organized Interests at Senate Hearings of Federal Judicial Appointments, 1945–1992," *Political Research Quarterly* 51 (1998): 617–31, and Bell, *Warring Factions*.
21. Tactics of two leading interest groups are detailed in Bob Davis and Robert S. Greenberger, "Two Old Foes Plot Tactics in Battle Over Judgeships," *Wall Street Journal*, March 2, 2004.
22. See Alliance for Justice Judicial Selection Project, *2001–2 Biennial Report*, Appendix 3 (2002).
23. Jeremy W. Peters, "Building Legacy, Obama Reshapes Appellate Bench," *New York Times*, September 13, 2014, <http://www.nytimes.com/2014/09/14/us/politics/building-legacy-obama-reshapes-appellate-bench.html>.
24. The nuclear option conflagration in the Senate in 2005 is detailed in Sarah A. Binder, Anthony J. Madonna, and Steven S. Smith, "Going Nuclear, Senate Style," *Perspectives on Politics* 5 (2007): 729–40.

25. Jonathan Weisman and Jennifer Steinhauer, "Senators Reach Agreement to Avert Fight Over Filibuster," *New York Times*, July 16, 2013, <http://www.nytimes.com/2013/07/17/us/politics/senators-near-agreement-to-avert-fight-over-filibuster.html>.
26. *Ibid.*
27. Technically, after Democrats failed to secure sixty votes for cloture on the nomination of Patricia Ann Millett and other nominees in the fall of 2013 for vacancies on the D.C. Circuit Court of Appeals, Reid returned to the nomination on the Senate floor on November 21, 2013. Reid raised a point of order, arguing that only a simple majority was required to invoke cloture on a nomination. The chair—on the advice of the parliamentarian—ruled that according to Rule 22, a three-fifths (sixty-vote) majority was required to invoke cloture and thus the point of order was not sustained. Reid appealed the ruling of the chair. Because cloture-related appeals are nondebatable under Rule 22, Reid's appeal was voted on immediately. Democrats overturned the ruling of the chair with fifty-two votes. That vote set the new precedent, interpreting Rule 22 to require only a simple majority for all executive and judicial nominations below the Supreme Court. Minority leader Mitch McConnell, R-Ky., then made a point of order that cloture requires sixty votes, and the chair—ruling under the newly created precedent—ruled that only a simple majority was (now) required. McConnell appealed the ruling, the chair put the question to the Senate to decide on appeal, and fifty-two Democratic senators voted to sustain the new ruling of the chair. With those parliamentary steps, Democrats went "nuclear."
28. Paul Kane, "Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees," *Washington Post*, November 21, 2013, https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.
29. Christina L. Boyd, Michael S. Lynch, and Anthony J. Madonna, "Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations," *The Forum* 13 (2015): 623–41.
30. Al Kamen and Paul Kane, "Did 'Nuclear Option' Boost Obama's Judicial Appointments?" *Washington Post*, December 17, 2014, <https://www.washingtonpost.com/blogs/in-the-loop/wp/2014/12/17/did-nuclear-option-boost-obamas-judicial-appointments>.
31. Boyd, Lynch, and Madonna, "Nuclear Fallout," 638.
32. Gregory Koger, "Reid's Tactical Nuke and the Future of the Senate," *Washington Post*, November 21, 2013, <https://www.washingtonpost.com/news/monkey-cage/wp/2013/11/21/reids-tactical-nuke-and-the-future-of-the-senate>.
33. Sarah Binder, "Why Republicans Are Unlikely to Reverse the 'Nuclear Option,'" *Washington Post*, December 4, 2014, <https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/04/why-republicans-are-unlikely-to-reverse-the-nuclear-option>.
34. Manu Raju, "GOP Unlikely to Reverse 'Nuclear Option,'" *Politico*, December 3, 2014, <http://www.politico.com/story/2014/12/gop-senate-filibuster-113308#ixzz45UGzg5a5>.
35. *Ibid.*
36. James Rowley, "Senate Standstill to Let Obama or McCain Tip Balance on Courts," *Bloomberg News*, August 7, 2007, <http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=aPaxOvQrYI7k>.
37. See, for example, Lauren Carroll, "Mitch McConnell Exaggerates 'Tradition' of Not Confirming Election Year Supreme Court Nominees," *Politifact*, March 22, 2016 <http://www.politifact.com/truth-o-meter/statements/2016/mar/22/mitch-mcconnell/mitch-mcconnell-exaggerates-tradition-not-confirmi>.