

# The Rise of Ideology and the Fall of Bipartisanship in Lower Court Confirmations

Jonathan M. King  
Assistant Professor  
West Virginia University  
jonathan.king@mail.wvu.edu \*

March 10, 2025

## Abstract

Nominations and confirmations to the federal judiciary were once an afterthought. Particularly at the circuit and district levels, a nomination was almost always confirmed to a lifetime position – often without opposition. In the relatively recent past, however, lower court nominations now resemble the partisan struggle we have come to expect from Supreme Court nominations: voting on ideological lines with more nominations failing to be confirmed now than ever before. I investigate the breakdown in Senate norms beginning in the W. Bush administration in 2001 to the end of Biden’s first Congress in 2022. I demonstrate that deteriorating Senate norms has led to a breakdown in bipartisanship in the nominations process with several factors (qualifications, gender, race/ethnicity) that previously helped confirmation success no longer mattering. Ultimately, I find that the main factor determining how a senator votes – and potential confirmation success – is whether the nominating president is the same party as the senator casting the vote.

---

\*This is a preliminary draft. Please do not distribute without author’s permission.

When Samuel Alito was confirmed to the U.S. Supreme Court in 2005, he received only four "yea" votes from Democratic senators, a marked decrease in bipartisanship compared to previous Supreme Court confirmations. However, just a few months later, Neil Gorsuch – a future Supreme Court justice – was confirmed without any opposition to his seat on the 10th Circuit Court of Appeals. This contrast – controversy for Supreme Court justices but consensus for lower court nominees – was the norm for judicial nominations for decades. Fast forward to 2017 and Supreme Court confirmation voting continues to largely fall along partisan lines as Brett Kavanaugh receives only one Democratic senator's "yea" vote.<sup>1</sup> Just a few weeks later, however, we see a dramatic shift in how senators vote for lower court judges as Amy Coney Barrett is confirmed to the 7th Circuit Court of Appeals by a vote of 54-42. Unlike the previous consensus for lower court confirmations, Coney Barrett receives support from just three Democratic senators.

For decades, voting for Supreme Court justices was an almost entirely partisan endeavor while confirmations to the lower federal courts were a bastion of bipartisanship. Even controversial nominees to the lower federal courts were routinely confirmed, often without noted opposition (Goldman 1997). Comparatively, recent nominees routinely face significant partisan opposition going so far as requiring the vice president to cast tiebreaking votes (Raymond 2023; Carney 2018). Clearly, the state of play for lower court nominations has changed and now face a process similar to that of the Supreme Court. Research has demonstrated the importance of ideology in voting for Supreme Court nominees (Epstein et al. 2006; Segal, Cameron and Cover 1992), but the influence of ideology had not previously permeated to lower court confirmations (Binder and Maltzman 2002). Has this changed and is ideology now the determining factor in senator voting for lower court nominees?

In this paper, I seek to better understand senator voting for lower court judicial nominations. Particularly, I am curious about the changing role ideology plays in the confirmation process. To do so, I use original data of all roll-call votes for lower court nominees from the

---

<sup>1</sup>Joe Manchin, (D-WV).

beginning of the W. Bush administration through the first two years of the Biden administration (2001-2023). My results show that ideology, once unimportant, is now the driving factor in how senators vote in lower court confirmations. Further, attributes that once aided garnering bipartisan votes, such as qualifications, are no longer influential. These findings suggest that the primacy of ideology in judicial nominations extend past just Supreme Court confirmations and now impact *all* federal judicial nominations.

This paper significantly contributes to the literature on federal judicial nominations in two significant ways. It provides the first examination of senator voting behavior on lower court nominations. Previous examinations of senator voting for judicial nominees has been limited to Supreme Court justices (Epstein et al. 2006; Kastellec, Lax and Phillips 2010; Kastellec et al. 2015) with studies of the lower courts being limited to aspects such as confirmation delay (Binder and Maltzman 2002; Scherer, Bartels and Steigerwalt 2008; Bond, Fleisher and Krutz 2009). Identifying how and why senators vote for lower court nominations is significant in our understanding of staffing the federal judiciary and mine is the first to do this.

Second, it demonstrates that ideology is now the determining factor in how senators vote in lower court judicial nominations. While this has been evident for decades at the Supreme Court level, lower courts were shaped more by institutional constraints than ideology (Binder and Maltzman 2002, 2009). My findings are the first to empirically demonstrate the shifting considerations of senatorial voting behavior for lower court nominees and the primacy of ideology in lower court confirmation politics.

# 1 Declining Bipartisanship in Lower Court Confirmations

The lower federal courts are increasingly influential actors in U.S. law and policy. From the growing prevalence of nationwide injunctions by single district judges (Ernst 2019) to circuit courts being the *de facto* courts of last resort for the majority of cases (Bowie, Songer and Szmer 2014), lower court judges influence almost every aspect of U.S. politics. With a "dysfunctional" Congress featuring a decline in legislation (Binder 2015; Willis and Kane 2018) and Supreme Court that decides fewer cases each year (Owens and Simon 2012; Lane 2022), lower court judges – and the decisions they make – are increasingly consequential.

Presidents have used the courts as a potential mechanism for policy gains for decades. Indeed, presidents have used lower court nominations as a way to create a "judicial legacy" with judges that will promote policy initiatives long after a president would leave office (Goldman 1997). However, presidents must weigh nominating judges that will promote their policies with who they can get confirmed by the Senate (Carter 1994). Consequently, the Senate has increasingly scrutinized lower court nominees because of their importance in law and policy (Hartley and Holmes 2002).

Unlike the Supreme Court, lower court nominations have been driven by the norm of senatorial courtesy. Senatorial courtesy, institutionalized by the "blue slip" process, grants tremendous powers to individual senators in the confirmation of lower court judges (Binder 2007). While not limitless, senatorial courtesy provides senators with significant deference on nominees to their state (Binder and Maltzman 2004). This norm incentivized presidents to consult with senators – even opposition party senators – in order to confirm their nominees.

Because of these norms, partisan obstruction was limited for lower court nominations. Often, the main mechanism of obstruction was the strategic delay of nominations (Binder and Maltzman 2002, 2009; Hendershot 2010; Martinek, Kemper and Winkle 2002). This, in turn, could lead to nominations failing due to "malign neglect" (Bond, Fleisher and Krutz 2009). But, for the most part, if home state senators signed off on a nominee – or at least

did not issue a formal objection – they would be confirmed (Binder and Maltzman 2002; Binder 2007).

While these norms have dictated the lower court confirmation process for centuries, they have gradually broken down over the past several decades. Beginning in the 1980s, the Reagan administration shifted the selection mechanism of lower court judges from a senator-driven process to a more centralized and politicized process (Goldman 1997). Senators still had significant say in the confirmation process (Binder and Maltzman 2004), but they had significantly less say in the *selection* process (Goldman 1997). Confirmations were still a relatively bipartisan and cooperative process<sup>2</sup>, but the initial cracks in the process appeared.

For the next several decades, these norms held strong even with the nomination and confirmation of more ideological judges (Goldman 1997). The next major attack on confirmation norms took place during the presidency of George W. Bush. Facing consistent partisan delay of his lower court nominees, W. Bush called for the Senate to “go nuclear” and change its confirmation procedure in order to confirm his nominees (Binder, Madonna and Smith 2007). Only through a compromise ending the obstruction of lower court nominations by a group of bipartisan senators, known as the “Gang of 14”, was the confirmation process left unaltered (Scherer 2005).

Although the Senate ultimately did not “go nuclear” in the early 2000s, the precedent was set for procedural reform to occur in the face of partisan obstruction. Akin to the gradual movement of tectonic plates eventually resulting in an earthquake, the steady attacks against confirmation norms eventually led to a breaking point. In 2013, following a patterns of minority obstruction for judicial nominees, the Senate “went nuclear” on all lower court nominations (Smith 2007; Boyd, Lynch and Madonna 2015). Through a series of procedural mechanisms, the cloture threshold – the required number of votes needed to end a filibuster

---

<sup>2</sup>For example: now-Justice Sonia Sotomayor originally was nominated to the federal judiciary by President George H.W. Bush. This nomination was not because she was considered conservative – she was not – but instead because of an agreement the New York senators used to have where the minority party senator could choose one out of every four district seats (York 2009).

– was reduced from 60 to a simple majority.

In effect, this maneuver ended the need for any bipartisan cooperation. So long as a party controlled both the Senate and the presidency, judicial nominations would be confirmed and the minority party would not be able to block them. In doing so, the majority party could “stamp out the voices of the minority” and put forward nominees without any need to consult opposing party senators (Everett and Kim 2013). Put another way, past requirements for bipartisanship were no longer necessary because of institutional reforms.

This breakdown in norms is a story that we have seen before play out at the Supreme Court level. Following the failed confirmation of Robert Bork, the process politicized and simply being nominated no longer guaranteed confirmation (Guliuza, Reagan and Barrett 1994; Epstein et al. 2006). Moreover, senator behavior shifted. Confirmation hearings became an opportunity for senators to advance their political agendas (Farganis and Wedeking 2014; Schoenherr, Lane and Armaly 2020). The confirmation process was no longer about assessing the justices but instead a “vapid and hollow charade” with senators incentivized to vote against nominees put forward by opposition party presidents (Kagan 1995; Cottrill and Peretti 2013).

Senator voting for Supreme Court nominees became driven by partisanship and ideology. Voting against a nominee was strategic as blocking a nomination could lead to a policy victory for the party (Smith 2007; Lee 2009). Nominations that a senator’s constituent supported still received “nay” votes as partisanship trumped representation (Kastellec et al. 2015). Even when voting against their constituents’ demands was electorally damaging, senators consistently voted along party lines for Supreme Court nominations (Bass, Cameron and Kastellac 2022). Essentially, modern Supreme Court nominees are nominated with the assumption they will garner little bipartisan support.<sup>3</sup>

We have seen a breakdown in confirmation norms for the entire federal judicial. Be-

---

<sup>3</sup>This is exemplified by the confirmation of Justice Amy Coney Barrett in 2020 who, for the first time in history, was confirmed with *only* Republican senator support.

cause of its importance in crafting law and policy, the Supreme Court confirmation process devolved into partisan politics while the lower courts maintained a bipartisan process. However, with the increased prominence of the lower courts in policy, the stakes have changed. Nominations to the federal judiciary are now a significant electoral issues (Badas and Simas 2021) and judicial nominations are a focal point of presidential campaigns (King, McAndrews and Ostrander 2022; Schonfeld 2023; Johnson 2023). With the changes in institutional norms combined with the increased importance of lower court judges, we need to reevaluate our past empirical expectations of lower court nominations being a largely bipartisan process and examine if they now reflect the partisanship previously only seen at the Supreme Court.

## 2 Empirical Expectations

Drawing on insights from the Supreme Court nominations process, I argue that many of these mechanisms now also drive voting behavior in the lower courts confirmation process. That is, that the previously non-contentious – and often unanimous – confirmation of lower court judges now features the partisan vitriol previously only experienced by Supreme Court nominees.

The first of these arguments is simple: the confirmation environment has significantly changed compared to past studies of lower court confirmations. Past literature has noted the confirmation process has become more contentious and nominees face more scrutiny (Hartley and Holmes 2002). For example, lower court confirmation hearings – once a formality – often reflect Supreme Court confirmation hearings (Dancey, Nelson and Ringsmuth 2020). With recent lower court nominees facing a confirmation environment similar to the more contentious Supreme Court process, my first hypothesis reflects this changing dynamic in senator voting for lower court nominees:

**H1:** *Recent presidents’ nominees are significantly less likely to receive an opposition senator’s vote than previous presidents’ nominees.*

My next argument focuses on the prevalence of ideology in lower court confirmation voting. The primacy of ideology has been apparent at the Supreme Court for decades (Segal, Cameron and Cover 1992; Epstein et al. 2006; Kastellec, Lax and Phillips 2010). The importance of ideology goes so far as superseding constituent preferences when voting for nominees (Kastellec et al. 2015). As my overall argument is the lower court confirmation environment now mirrors the Supreme Court, my next hypothesis is that the primacy of ideology has now trickled down to the lower courts and is the main driver of senator voting behavior for these nominations.

**H2:** *As the ideological distance between a senator and nominee increases for recent nominations, the likelihood of receiving a senator's vote decreases.*

Replacements to the federal judiciary do not take place in a vacuum. As we know from the Supreme Court, senators frequently look to the past – to who is being replaced – to explain their vote for a current nominee (Kastellec, Lax and Phillips 2010). With the increased importance of the lower federal judiciary in policymaking (Bowie, Songer and Szmer 2014), it is rationale to assume that senators follow similar behavior for lower court confirmations. This leads me to my third hypothesis:

**H3:** *Senators in more recent nominations are less likely to support nominees who are more ideologically distant than the judge they are replacing.*

Finally, past nominees were able to overcome ideological "problems" by having superior qualifications (Epstein et al. 2006). Moreover, research on lower court nominations has consistently shown that qualifications matter with higher quality nominees more likely to be confirmed (Martinek, Kemper and Winkle 2002; Black, Madonna and Owens 2014). However, as ideology is now the main driver of senator voting behavior for lower court nominees, I claim the impact of qualifications has diminished. This leads me to my final hypothesis:

**H4:** *The influence of nominee characteristics that previously increased support has decreased in recent presidencies.*



### 3 Data and Methods

To investigate the diminishing bipartisanship in senator voting on lower court nominations, I collect a novel dataset of roll-call votes for U.S. federal circuit and district court nominations from 2001-2022. This includes all lower court nominations from the administration of George W. Bush through the first two years of the Biden presidency. This timeline coincides with the increase in contentiousness of confirmation hearings (Dancey, Nelson and Ringsmuth 2020) and confirmation proceedings (Hartley and Holmes 2002).

I test my hypotheses on nominations with a final, recorded vote on the Senate floor. Specifically, I examine how senators vote for nominees from the opposition party. That is, how Republican senators vote for nominees from Democratic presidents and vice-versa. I limit my analyses to opposition party voting behavior as that is where the variation lies. Copartisans – Democratic senators voting for Democratic president nominees and vice-versa – vote affirmatively for nominees 99% and lead to issues of perfect prediction. Accordingly, I examine the 26,763 roll-call votes cast by opposition party senators on lower court nominations.

For each nomination, I collect several variables of interest. As I investigate the influence of ideology on receiving a senator’s vote, I include variables for the ideology of each individual senator as well as of the nominee. To measure a senator’s ideology, I use the first dimension of their DW-NOMINATE score (Lewis et al. 2022). For nominees, I gather their Judicial Common Space (JCS) score (Epstein et al. 2007).<sup>4</sup> I then create a variable for the ideological distance between a senator and a nominee.<sup>5</sup>

In addition to the ideological distance between a senator and a nominee, I examine

---

<sup>4</sup>JCS highly correlates with another measure of ideology – CF Scores (Bonica 2016) – as shown in Figure A1. However, CF scores do not have information on all judicial nominations and drop a sizeable number of nominees. As such, I use JCS scores for my empirical analyses.

<sup>5</sup>Ideological distance is calculated by subtracting the DW-NOMINATE score of the senator from the JCS score of a nominee. I then take the absolute value of the result to generate the distance between a nominee and senator.

the impact a nomination makes to the ideology of the seat they are replacing. That is, how does the shift in ideology from the departing judge to the nominee alter a senator’s voting for that nominee? To measure the effect of ideological shift, I generate a variable that accounts for this shift in ideology relative to the senator.<sup>6</sup>

Beyond ideology, I am also interested in how nominee characteristics may influence senator voting patterns. To account for a nominee’s qualifications, I include whether a nominee attended an “elite” law school for their legal training.<sup>7</sup> Additionally, as I am concerned with trends over time by administration, I create a categorical variable for each presidential administration.<sup>8</sup>

In addition to the above covariates of interest, I collect several control variables for the nominees. As female nominees are more likely to be confirmed than male nominees Asmussen (2011); Solowiej, Martinek and Brunell (2005), I include the gender of a nominee. Similarly, I include the race or ethnicity of a nominee as found in the Federal Judicial Center’s (FJC) Biographical Database.<sup>9</sup> As a nominee’s age influences confirmation outcomes (Goldman 1997; Binder and Maltzman 2004), I account for the nominee’s age at the time of their nomination. And, since elite law school attendance may not fully account for a nominee’s qualifications, I include the nominee’s American Bar Association (ABA) rating.<sup>10</sup>

---

<sup>6</sup>Ideological shift is calculated by taking the absolute value of the difference between the JCS score of the departing judge from the JCS score of the nominee. The ideological shift is then the absolute value of this difference subtracted from the DW-NOMINATE score of a senator.

<sup>7</sup>For my purposes, a nominee is coded as having attended an elite law school if they received legal training from a traditional “Top 14” law school, according to the U.S. News and World Report. This includes the following law schools: Columbia, Cornell, Duke, Georgetown, Harvard, NYU, Northwestern, Stanford, UC-Berkely, Chicago, Michigan, Penn, Virginia, and Yale.

<sup>8</sup>In 2013, the Senate enacted the “nuclear option”, reducing the threshold for cloture on a nomination from 60 votes to a simple majority. To account for the institutional shifts of the rule change, I separate Obama administration nominations into two categories: pre-nuclear option and post-nuclear option.

<sup>9</sup>The FJC’s Biographical database categorizes the race or ethnicity of a nominee into one of five categories: White, Black, LatinX, Asian, or Other.

<sup>10</sup>Past research has demonstrated these ratings are biased against minority nominees (Sen 2014*b*) and frequently rate Republican nominees lower than Democratic nominees (Smelcer, Steigerwalt and Vining 2012). Further, these ratings are poor indicators of future judicial efficacy (Sen 2014*a*). However, ABA ratings are frequently used by senators in their evaluations of judicial nominations and are subjectively useful

Further, I control for several senatorial or institutional factors that may influence how a senator votes on a nominee. As senators may need to worry about potential electoral considerations, I control for whether the senator is facing reelection as well as their previous win margin in their most recent election. Further, I account for the president’s popularity and include their Gallup approval rating at the time of the nomination (*The American Presidency Project* N.d.). Additionally, I consider institutional factors such as senatorial courtesy (Binder and Maltzman 2004; Binder, Madonna and Smith 2007) and code for whether a senator is from the state a nomination resides. Finally, I account for political considerations based on who is in control of the Senate majority and create a continuous variable for the Senate majority size. When the president faces an opposition Senate, commonly known as “divided government”, the variable is negative while an allied Senate has a positive value.

My dependent variable is the dichotomous “yea” or “nay” for vote a nominee by an individual senator. As my dependent variable is dichotomous, I estimate a logistic regression model with robust standard errors clustered on each nomination in my data. Consistent with the literature, I estimate separate regression models for the circuit and district levels to account for their unique institutional considerations (Primo, Binder and Maltzman 2008; Martinek, Kemper and Winkle 2002).

## 4 Results

I begin my analysis of the changing dynamics of senator voting for lower court nominees with a descriptive examination of voting in circuit and district nominations. Figure ?? provides initial evidence of an increasingly contentious confirmation environment for lower court nominees. At both the circuit and district court levels, recent nominees are receiving dramatically fewer “yea” votes from opposition senators than previous nominees. This is perhaps most evident in Figure 2 with W. Bush’s district nominees almost unanimously

---

to senators in voting for nominees.

received opposition senator support. Starkly contrasted are Biden’s nominees which gained less than 20% of opposition senator ”yea” votes. From even a purely descriptive view, there is clear evidence of shifting voting strategies by senators for lower court nominees.

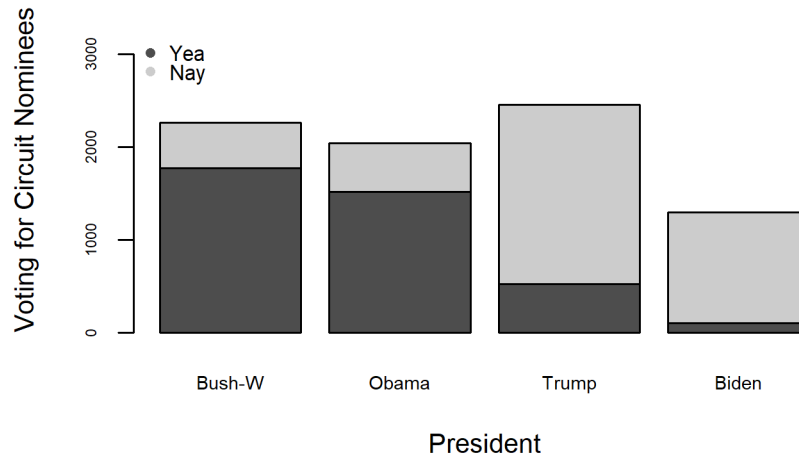


Figure 1: Senator Voting in Circuit Nominations

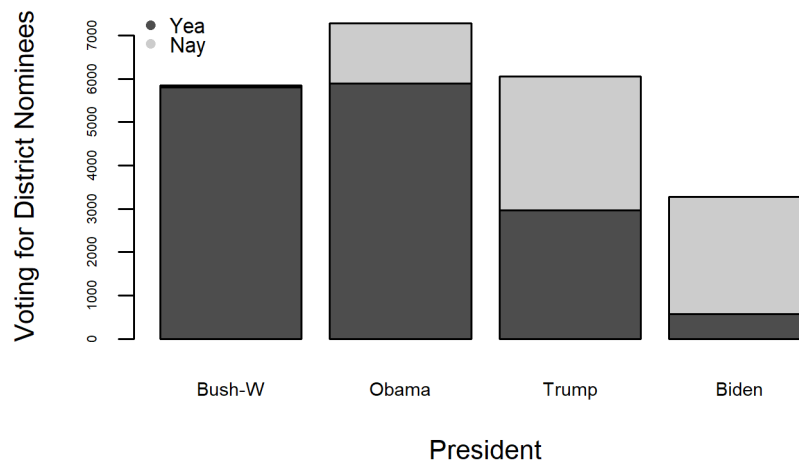


Figure 2: Senator Voting in District Nominations

But, are nominees significantly less likely to receive a senators vote in recent administrations compared to previous ones? Figures 3 and 4 provide the predicted likelihood of senator yea votes by presidential administration for circuit and district nominations, respectively.<sup>11</sup> As is evident from Figures 3 and 4, recent nominations are significantly less likely

<sup>11</sup>To be conservative, I separate Obama nominations in two distinct categories: ”pre” and ”post” to

to receive an opposition senator’s yea vote at both the circuit and district levels.<sup>12</sup>

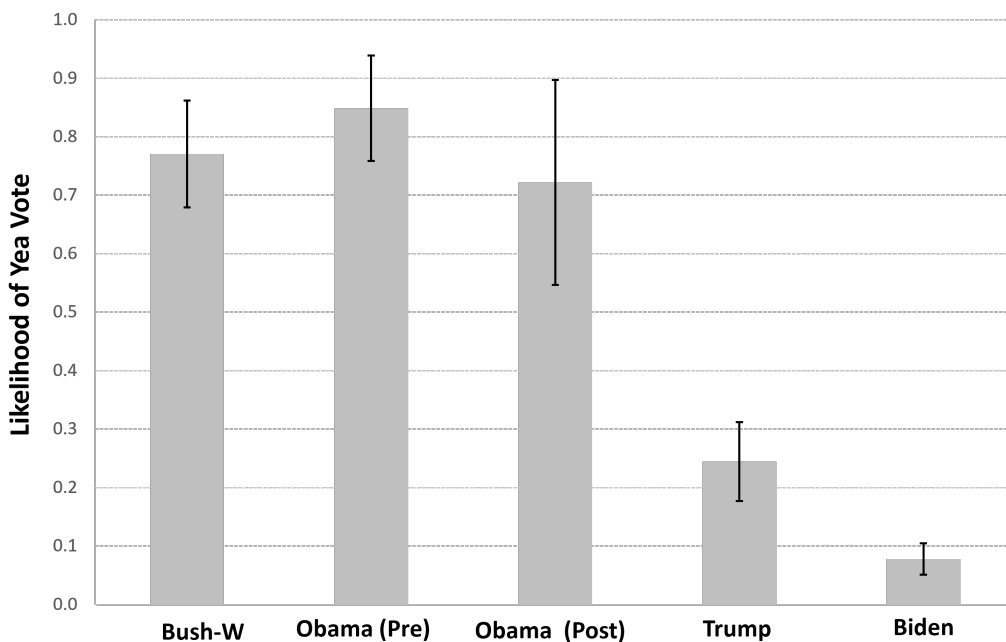


Figure 3: Opposition Senator Yea Vote for Circuit Nominations by President

At the circuit level, Figure 3 shows opposition senators consistently had a high likelihood of voting during the W. Bush and Obama administrations, never dropping below a predicted likelihood of 0.7 for a yea vote. However, this significantly decreases during the Trump administration and culminates with another significant decrease in the Biden administration with nominees having a significantly lower likelihood of receiving an opposition senator’s vote than any previous administration. In the current confirmation environment, circuit court nominees are unlikely to receive any opposition party support much like Supreme Court nominees.

At the district level, Figure 4 reveals the decline is more gradual. Yet, each administration is significantly less likely to receive an opposition senator’s vote than their predecessor. Up through the Trump administration, nominees were more likely than not to gain a senator’s yea vote. However, this significantly decreases for nominees in the Biden

---

account for the different institutional environments following the 2013 rules change.

<sup>12</sup>Tables A1 and A2 provide the full regression tables.

administration. From these results, I find support for my first hypothesis that recent nominees are significantly less likely to receive an opposition senator's vote than nominees under previous presidents.<sup>13</sup>

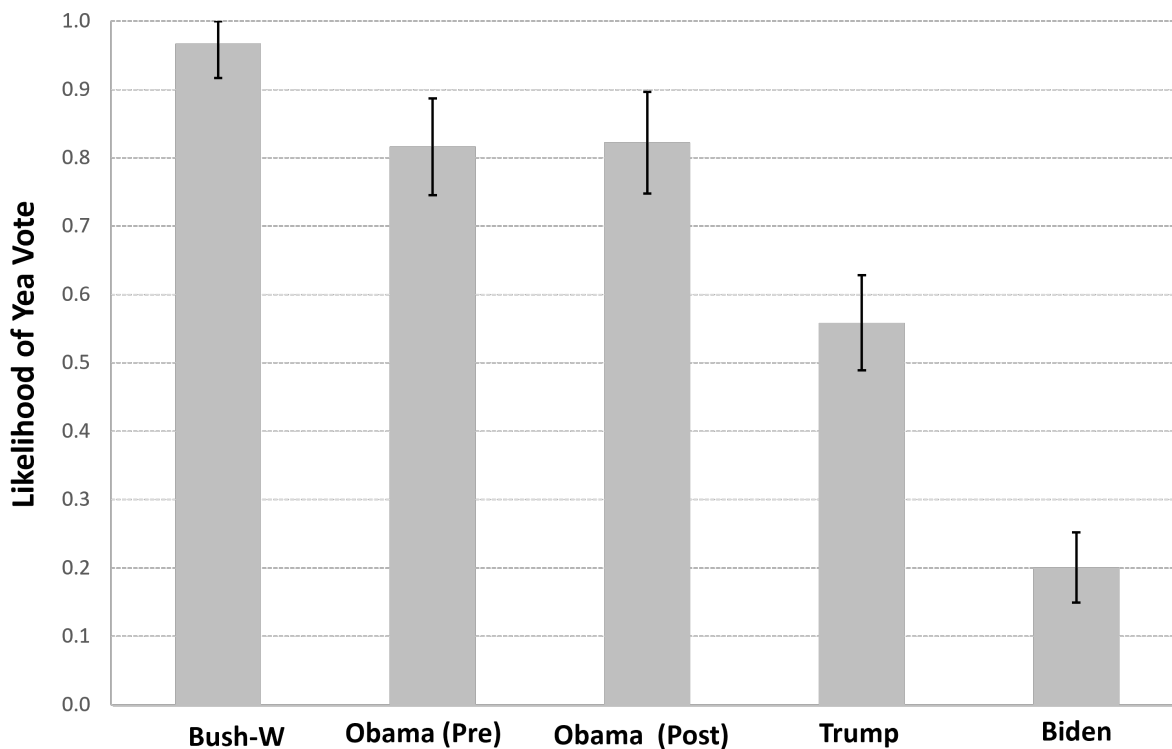


Figure 4: Opposition Senator Yea Vote for District Nominations by President

Having established that lower court nominations are receiving less opposition party support in recent times, I turn my attention to what I theorize is driving this decrease: ideology. Figures 5 and 6 provide the predicted probability of receiving an opposition senator's vote based on the ideological distance between a senator and a lower court nominee. Smaller values indicate closer ideological proximity while larger values represent increased ideological distance. As my second hypothesis argues the impact of ideology on winning a senator's vote is a recent phenomenon, Figures 5 and 6 compares a relatively older president (W. Bush) with the most recent (Biden) for circuit and district nominations, respectively.

<sup>13</sup>A skeptic may argue that the decreasing bipartisanship is simply because presidents are now unrestrained and nominating more ideological nominees. Boyd, Lynch and Madonna (2015) find this not to be the case and Figures A2 and A3 show recent nominees are not significantly more ideological than past nominees.

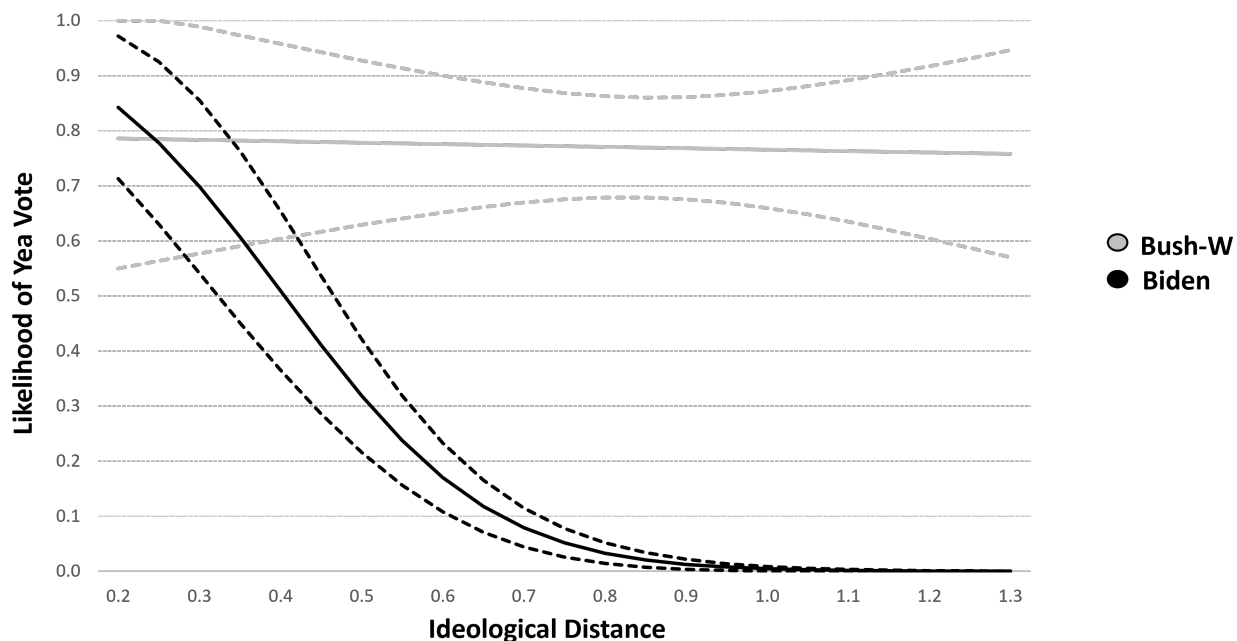


Figure 5: Ideological Distance between Senator and Circuit Nominee

As is evident in both figures 5 and 6, ideology has a significant impact in receiving an opposition senators votes for recent nominees while ideology did not influence senator voting behavior in the past. Figure 5 shows that, for W. Bush’s circuit nominees, ideology played no role in the likelihood of receiving an opposition senator’s vote. For Biden’s nominees, however, ideology is a crucial factor. Specifically, as the ideological distance between a senator and nominee increases, the likelihood of receiving that senator’s vote plummets to essentially zero for ideologically distant nominees.

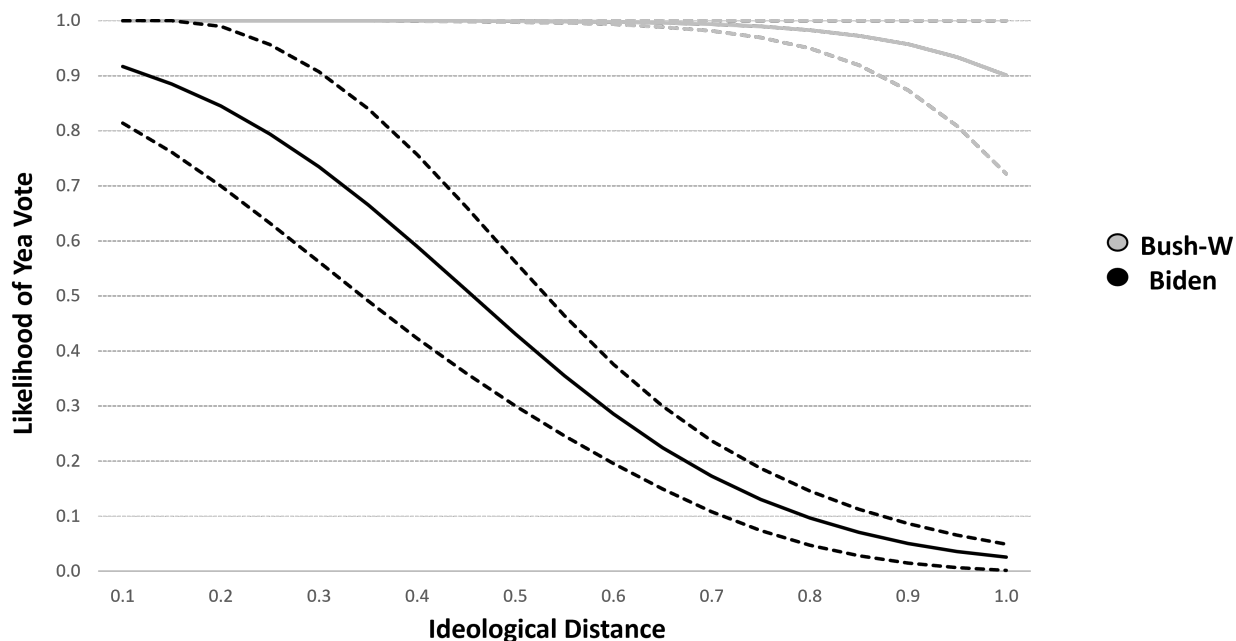


Figure 6: Ideological Distance between Senator and District Nominee

I find a similar pattern for district court nominees. As seen in Figure 6, W. Bush’s district nominees were virtually guaranteed to gain an opposition senator’s vote. Even the most ideologically distant district nominee had greater than a 0.9 likelihood of a yea vote. For Biden’s nominees, increasing ideological distance significantly decreases the likelihood of a yea vote. Nominees with an ideological distance of 0.5 – the distance between President Biden and the most Republican senator, Susan Collins – have less than a coin flips chance of receiving a yea vote. Taken together, I find support for my second hypothesis. Ideology is driving factor in how opposition senators vote for lower court nominees and this is recent phenomenon.

Nominations do not exist in a void and senators may look to who a nominee is replacing in determining their vote. That is, will the nominee shift the ideological makeup of the court closer to (or further from) an individual senator? Figure 7 looks into the impact of ideological shift in senator voting for circuit nominations. Specifically, negative values along the x-axis denote complete ”flips” in a seat while positive values represent moving towards a senator’s ideological preferences. For example, Amy Coney Barrett replacing Ruth Bader



Ginsburg would represent a "flip" of the seat relative to a Democratic senator.

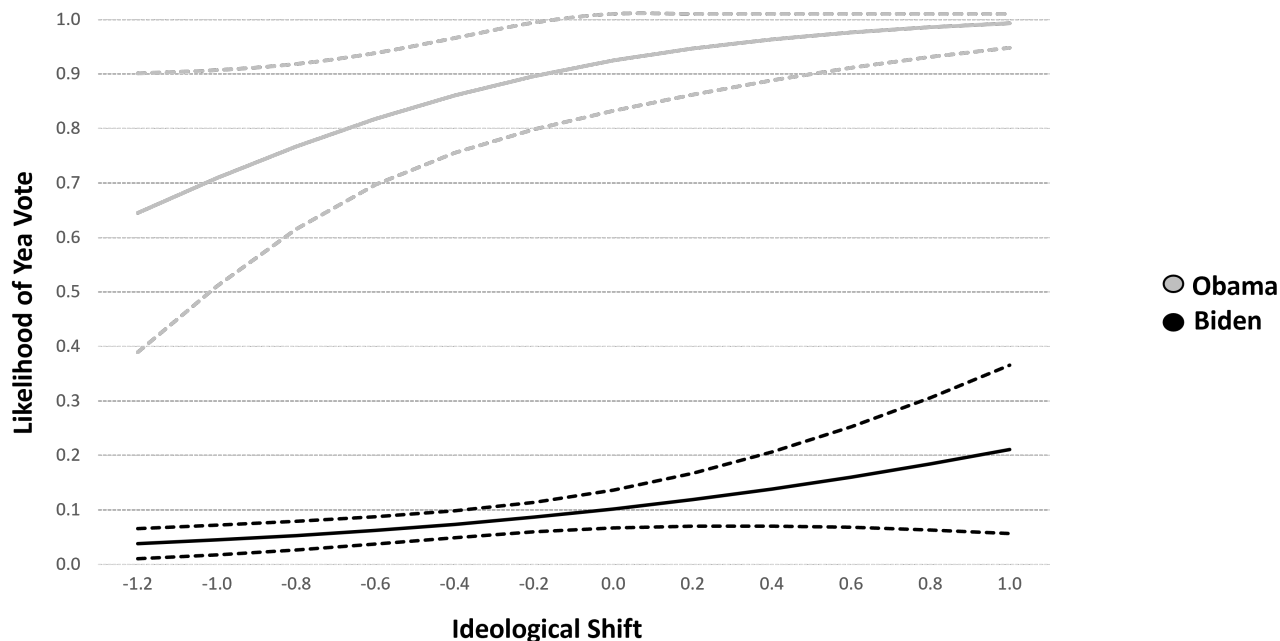


Figure 7: Ideological Shift of Nomination

Using nominations from the Obama and Biden administrations as an example, Figure 7 demonstrates that as a nomination moves away from "flipping" a seat and towards maintaining the status quo, the likelihood of opposition senators voting for a circuit nominee increases. For Obama's nominees, moving from nominees that would completely flip a seat to a nominee that would simply maintain the status quo represents a 20 percentage point increase in receiving a senator's vote. And, if a nomination moves the seat towards a senator ideologically, they were virtually assured that senator's yea vote.

For Biden nominees, moving from a seat flip towards a senator's ideology is a significant 17 percentage point increase. However, the overall likelihood is much lower than previous presidents. Nominations that would alter the ideological composition of a court have essentially no chance at receiving an opposition senator's vote. Even nominees with an ideological shift of 0, those that simply maintain the status quo, have less than a 10% likelihood of receiving a yea vote from opposition senators.

Interestingly, ideological shift is only significant for circuit nominations. Even though

ideology is a key driver in receiving a senator’s vote for recent district nominees, it appears who a nominee is replacing matters less. This may, however, be an artifact of the current usage of blue slips in lower court confirmations. While blue slips are no longer honored for circuit nominations (Dinan 2019; Levine 2021), they are currently honored at the district level. However, this norm may be crumbling (Raymond 2022; Alder and Cohen 2022) and district nominees may face similar circumstances as circuit nominees in the near future.

For decades, senators have used nominee characteristics, such as their qualifications, in evaluating nominees and deciding their vote. But do qualifications still influence a senator’s vote in an era where ideology dominates? Figure 8 provides evidence that one measure of nominee quality – attending an elite law school – no longer influences senator voting for circuit nominees. Specifically, Figure 8 provides the marginal effect of attending an elite law school on gaining a senator’s yea vote. Values above zero mean nominees attending a law school were significantly more likely to receive a senator’s vote while values below mean significantly less likely. If the confidence intervals cross over the dotted line at zero, there is no significant difference between the two groups.

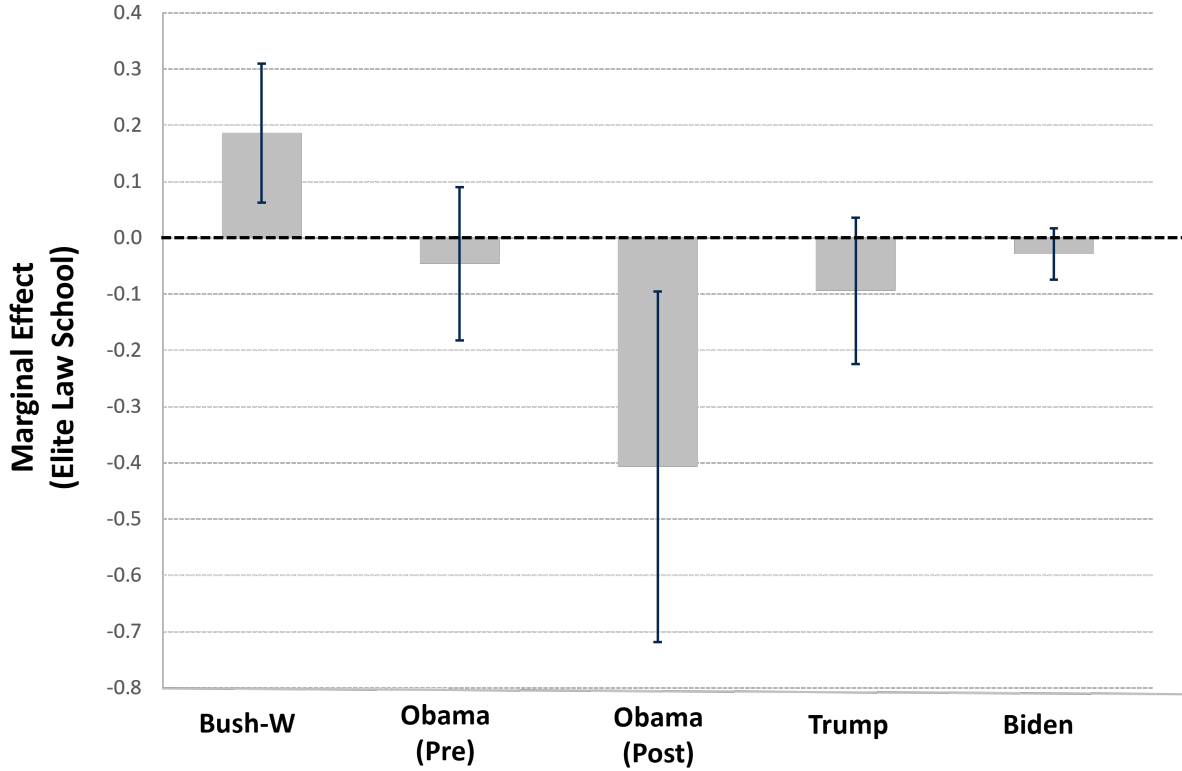


Figure 8: Elite Law School Attendance and Senator Voting for Circuit Nominees

As seen in Figure 8, W. Bush’s circuit nominees that attended an elite law school were significantly more likely to achieve an opposition senator’s vote. However, for nominees since, attending an elite law school actually has no effect, and may even hurt a nominee as seen for Obama’s post-change nominees. This may be a result of forward-thinking by opposition senators. Attending an elite law school is almost a prerequisite for Supreme Court nominations (Cameron and Park 2011). Further, potential Supreme Court nominees almost exclusively arrive from the circuit courts (Badas 2020). As such, voting against circuit nominees from elite law schools may be strategic for these senators in an attempt to keep potential Supreme Court candidates from the federal bench.

For district nominees, I find a similar story. However, as most district nominees attend local law schools – the vast majority of which are not considered “elite” – I use the nominee’s American Bar Association (ABA) rating. Figure 9 provides the marginal effect

of ABA rating, comparing well qualified and qualified nominees.<sup>14</sup> Values above the dotted line at zero mean well qualified nominees are more likely to receive an opposition senators vote, below mean less likely, with confidence intervals crossing zero meaning no significant difference.

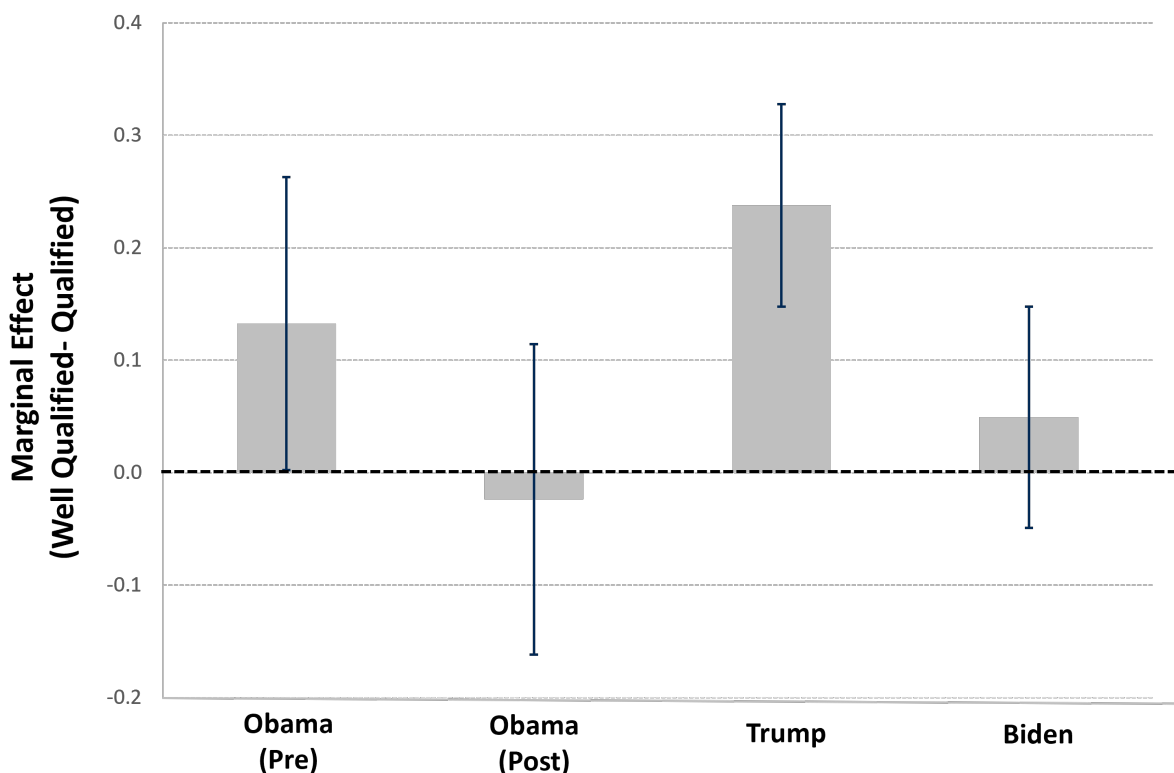


Figure 9: American Bar Association Rating and Senator Voting for District Nominees

As seen in Figure 9, nominees rated as well qualified were significantly more likely to receive an opposition senator's vote than qualified nominees during the pre-nuclear option Obama administration.<sup>15</sup> Interestingly, post-nuclear option Obama nominee qualifications did not influence receiving a senator's vote. But, the positive impact of qualifications returns under the Trump administration with higher rated nominees more likely to receive an opposing senator's vote. Yet, the influence of qualifications is yet again insignificant for

<sup>14</sup>Less than 1% of district nominees with a recorded vote have been rated as not qualified. Of the four district nominees rated as not qualified in my data, one was nominated by W. Bush and three by Trump.

<sup>15</sup>I exclude W. Bush from Figure 9 as qualifications are a perfect predictor of receiving an opposition senator's vote.

Biden nominees. This finding makes sense when coupled with earlier results that demonstrated district courts lagged in their contentiousness compared to circuit nominees and that ideology is now the driving factor in senator voting for district nominees. Taking the results from Figure 8 and 9 together, I find support for my fourth hypothesis. While being highly qualified could buy nominees out of an ideological problem in the past, this is no longer the case with qualifications no longer influencing opposition senator support.

## 5 Conclusion

For decades, lower court nominees received high bipartisan support and a relatively non-contentious confirmation process. However, over the past several years, Senate norms for judicial confirmations have gradually broken down (Binder, Madonna and Smith 2007; Boyd, Lynch and Madonna 2015). How has this breakdown in norms impacted the lower court confirmation process? What factors are now the determinants of how senators vote on nominees?

My findings demonstrate that lower court nominees now face a partisan, contentious process reflective of the rancor previously only seen at the Supreme Court. Specifically, ideology is now the driving factor in determining how a senator will vote. For lower court nominees, senators simply do not vote for ideologically distant nominees. Even factors that used to be able to overcome ideological problems – their qualifications – have no impact on gaining opposition senator’s support. The state of lower court confirmations has changed and now reflects the Supreme Court confirmation environment where partisanship and ideology reign (Kastellec, Lax and Phillips 2010; Kastellec et al. 2015).

This change in confirmation environment has profound implications for the judiciary moving forward. My findings point to a scenario where unified government – the same party controlling the presidency and Senate majority – is required for nominees to be confirmed. While we have already seen a start to this with the failed nomination of Merrick Garland to the Supreme Court and several failed lower court nominations (Slotnick, Schiavoni and

Goldman 2017), presidents have still been able to confirm at least *some* of their nominees under divided government in the recent past. However, with ideology now primarily driving opposing senators' votes, it is possible the opposition party may block *all* judicial appointments. Presidents may be able to counteract this by "going public" on nominations (Holmes 2007) but with the cost of other policy initiatives. Conversely, several positions may simply go unfilled, current judges may struggle to keep up with their caseloads, and the federal judiciary may become backlogged with cases.

This paper adds to the literature in several ways. It provides the first empirical examination of senator voting behavior for lower court nominees- something previously limited to only the Supreme Court. Circuit and district court judges are creators of legal policy and it is important for us to understand the process by which they gain access to those powers. Second, and importantly, I demonstrate that the lower court confirmation process has significantly shifted in recent years and now is driven by partisan ideology. These findings imply that past intuitions about lower court confirmation politics may need to be re-examined in this new, partisan environment.

There are several future studies scholars should pursue moving forward. Past scholarship has shown that constituents punish senators electorally when voting against their preferences for Supreme Court justices (Bass, Cameron and Kastellac 2022). Examining the electoral consequences of not representing constituents – particularly for district courts that directly rule on issues in a senator's state – would be beneficial to determine if the electoral connection between senator voting behavior and judicial confirmations extends to the lower courts. Further, scholars should examine whether the polarized confirmation process impacts views of court legitimacy. Are decisions from judges that were confirmed by bipartisan majorities considered more legitimate or supported more by the public when compared to decisions from judges confirmed by only co-partisans? In short, there is plenty of work left to be done to determine the impact of this new, contentious era of judicial confirmations.

## References

- Alder, Madison and Zach C. Cohen. 2022. “Biden, GOP Should Deal on Red-State Judge Picks, Durbin Says.” *BloombergLaw* .  
**URL:** <https://news.bloomberglaw.com/us-law-week/biden-gop-should-deal-on-red-state-judicial-picks-durbin-says>
- Asmussen, Nicole. 2011. “Female and Minority Judicial Nominees: President’s Delight and Senators’ Dismay?” *Legislative Studies Quarterly* 36(4):591–619.
- Badas, Alex. 2020. “Elevation Potential Among Circuit Nominees and ITs Effect on the Senate’s Confirmation Behavior.” *Political Research Quarterly* 73(1):96–110.
- Badas, Alex and Elizabeth Simas. 2021. “The Supreme Court as an Electoral Issue: Evidence from Three Studies.” *Political Science and Research Methods* .
- Bass, Leeann, Charles M. Cameron and Jonathan P. Kastellac. 2022. “The politics of accountability in Supreme Court nominations: voter recall and assessment of senator votes on nominees.” *Political Science Research Methods* .
- Binder, Sarah. 2015. “The Dysfunctional Congress.” *Annual Review of Political Science* 18:85–101.
- Binder, Sarah A. 2007. “Where do institutions come from? Exploring the origins of the senate blue slip.” *Studies in American Political Development* 21(1):1–15.
- Binder, Sarah A., Anthony J. Madonna and Steven S. Smith. 2007. “Going Nuclear, Senate Style.” *Perspectives on Politics* 5:729–740.
- Binder, Sarah A. and Forrest Maltzman. 2002. “Senatorial Delay in Confirming Federal Judges.” *American Journal of Political Science* 46(1):190–199.
- Binder, Sarah A. and Forrest Maltzman. 2004. “The Limits of Senatorial Courtesy.” *Legislative Studies Quarterly* 29(1):5–22.
- Binder, Sarah A. and Forrest Maltzman. 2009. *Advice & Dissent: The Struggle to Shape the Federal Judiciary*. Brookings Institution Press.
- Black, Ryan, Anthony Madonna and Ryan Owens. 2014. “Qualifications or Philosophy? The Use of Blue Slips in a Polarized Era.” *Presidential Studies Quarterly* 44(2):290–308.
- Bond, Jon R., Richard Fleisher and Glen S. Krutz. 2009. “Malign Neglect: Evidence That Delay Has Become the Primary Method of Defeating Presidential Appointments.” *Congress & the Presidency* 36(3):226–243.
- Bonica, Adam. 2016. “Database on Ideology, Money in Politics, and Elections.” *Stanford University Libraries* .  
**URL:** <https://data.stanford.edu/dimegt>

- Bowie, Jennifer Barnes, Donald R. Songer and John Szmer. 2014. *The View from the Bench and Chambers: Examining Judicial Process and Decision Making on the U.S. Courts of Appeals*. Charlottesville, VA: University of Virginia Press.
- Boyd, Christina L., Michael S. Lynch and Anthony J. Madonna. 2015. "Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations." *The Forum* 13(4):623–641.
- Cameron, Charles and Jee-Kwang Park. 2011. "Going Public When Opinion is Contested: Evidence from Presidents' Campaigns for Supreme Court Nominees, 1930-2009." *Presidential Studies Quarterly* 41(3):442–470.
- Carney, Jordan. 2018. "Pence casts tie-breaking vote for Trump appeals court judge." *The Hill* .  
**URL:** <https://thehill.com/homenews/senate/420848-pence-casts-tie-breaking-vote-for-trump-appeals-court-judge/>
- Carter, Stephen L. 1994. *The Confirmation Mess: Cleaning Up the Federal Appointments Process*. Basic Books.
- Cottrill, James B. and Terri J. Peretti. 2013. "The Partisan Dynamics of Supreme Court Confirmation Voting." *Justice System Journal* 34(1):15–37.
- Dancey, Logan, Kjersten R. Nelson and Eve M. Ringsmuth. 2020. *It's Not Personal: Politics and Policy in Lower Court Confirmation Hearings*. University of Michigan Press.
- Dinan, Stephen. 2019. "Lindsey Graham: Blue slips won't derail Trump appeals court picks." *AP News* .  
**URL:** <https://apnews.com/article/86c05f4d011a7c1b15d970fa8e552d0a>
- Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, and Organization* .
- Epstein, Lee, Rene Lindstadt, Jeffrey A. Segal and Chad Westerland. 2006. "The Changing Dynamics of Senate Voting on Supreme Court Nominees." *Journal of Politics* .
- Ernst, Joni. 2019. "Nationwide Injunctions from District Courts." .  
**URL:** <https://www.rpc.senate.gov/policy-papers/nationwide-injunctions-from-district-courts>
- Everett, Burgess and Seung Min Kim. 2013. "Senate goes for "nuclear option"." *Politico* .  
**URL:** <https://www.politico.com/story/2013/11/harr-reid-nuclear-option-100199>
- Farganis, Dion and Justin Wedeking. 2014. *Supreme Court Confirmation Hearings in the U.S. Senate: Reconsidering the Charade*. University of Michigan Press.
- Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. University of California Press.



- Guliuza, Frank, Daniel J. Reagan and David Barrett. 1994. "The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria." *Journal of Politics* 56(3):773–787.
- Hartley, Roger and Lisa Holmes. 2002. "The Increasing Senate Scrutiny of Lower Federal Court Nominees." *Political Science Quarterly* 117(2):259–278.
- Hendershot, Marcus E. 2010. "From Consent to Advice and Consent: Cyclical Constraints within the District Court Appointment Process." *Political Research Quarterly* 63(2):328–342.
- Holmes, Lisa M. 2007. "Presidential Strategy in the Judicial Appointment Process: "Going Public" in Support of Nominees to the U.S. Court of Appeals." *American Politics Research* 35(5).
- Johnson, Carrie. 2023. "One Year IN, Trump Has Kept a Major Promise: Reshaping The Federal Judiciary." *NPR* .  
**URL:** <https://www.npr.org/2018/01/21/579169772/one-year-in-trump-has-kept-a-major-promise-reshaping-the-federal-judiciary>
- Kagan, Elena. 1995. "Confirmation Messes, Old and New." *University of Chicago Law Review* 62:919–942.
- Kastellec, Jonathan, Jeffrey Lax, Michael Malecki and Justin Phillips. 2015. "Polarizing the Electoral Connection: Partisan Representation in Confirmation Politics." *Journal of Politics* 77(3):787–804.
- Kastellec, Jonathan P., Jeffrey R. Lax and Justin H. Phillips. 2010. "Public Opinion and Senate Confirmation of Supreme Court Nominees." *Journal of Politics* 72(3):767–784.
- King, Jonathan M., Peter McAndrews and Ian Ostrander. 2022. "President Trump and the Politics of Judicial Nominations." *Justice System Journal* 43(4):524–543.
- Lane, Elizabeth A. 2022. "A Separation-of-Powers Approach to the Supreme Court's Shrinking Caseload." *Journal of Law and Courts* 10(1):1–12.
- Lee, Frances E. 2009. *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*. University of Chicago Press.
- Levine, Marianne. 2021. "Senate Dems take a page from GOP in judicial nominee battles." *Politico* .  
**URL:** <https://www.politico.com/news/2021/02/17/court-nominees-democrats-469500>
- Lewis, Jeffrey B., Keith Poole, Howard Rosenthal, Adam Boche, Arron Rudkin and Luke Sonnet. 2022. "Voteview: Congressional Roll Call Votes Database." .  
**URL:** <https://voteview.com/>
- Martinek, Wendy L., Mark Kemper and Steven R. Van Winkle. 2002. "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998." *The Journal of Politics* 64(2):337–361.

- Owens, Ryan J. and David A. Simon. 2012. "Explaining the Supreme Court's Docket Size." *William and Mary Law Review* 53(4):1219–1285.
- Primo, David, Sarah Binder and Forrest Maltzman. 2008. "Who Consents? Competing Pivots in Federal Judicial Selection." *American Journal of Political Science* 52(3):471–489.
- Raymond, Nate. 2022. "Durbin threatens to speed up judicial nominees after GOP senator's "blue slip" denials." *Reuters* .  
**URL:** <https://www.reuters.com/legal/government/durbin-threatens-speed-up-judicial-nominees-after-gop-senators-blue-slip-denials-2022-07-20/>
- Raymond, Nate. 2023. "VP Harris breaks tie for 2nd time to confirm Biden judicial pick." *Reuters* .  
**URL:** <https://www.reuters.com/legal/government/vp-harris-breaks-tie-2nd-time-confirm-biden-judicial-pick-2023-03-01/>
- Scherer, Nancy. 2005. *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process*. Stanford University Press.
- Scherer, Nancy, Brandon L. Bartels and Amy Steigerwalt. 2008. "Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process." *Journal of Politics* 70(4):1026–1039.
- Schoenherr, Jessica A., Elizabeth Lane and Miles T. Armaly. 2020. "The Purpose of Senatorial Grandstanding During Supreme Court Confirmation Hearings." *Journal of Law and Courts* 8(2):333–358.
- Schonfeld, Zach. 2023. "Biden hits 100 judicial confirmations, outpacing Trump and Obama." *The Hill* .  
**URL:** <https://thehill.com/regulation/3857564-biden-hits-100-judicial-confirmations/>
- Segal, Jeffrey A., Charles M. Cameron and Albert D. Cover. 1992. "A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations." *American Journal of Political Science* 36(1):69–121.
- Sen, Maya. 2014a. "How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates." *Journal of Law and Courts* pp. 33–65.
- Sen, Maya. 2014b. "How Minority Judicial Candidates Have Changed, but the ABA Ratings Gap Has Not." *Judicature* 97(7):46–53.
- Slotnick, Elliot, Sara Schiavoni and Sheldon Goldman. 2017. "Obama's Judicial Legacy." *Journal of Law and Courts* pp. 363–422.
- Smelcer, Susan Navarro, Amy Steigerwalt and Richard Vining. 2012. "Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees." *Political Research Quarterly* 64(4):827–40.

- Smith, Steven S. 2007. *Party Influence in Congress*. Cambridge: Cambridge University Press.
- Solowiej, Lisa A., Wendy L. Martinek and Thomas L. Brunell. 2005. "Partisan Politics: The Impact of Party in the Confirmation of Minority and Female Federal Court Nominees." *Party Politics* 11(5):557–577.
- The American Presidency Project*. N.d. . Forthcoming.  
**URL:** <https://www.presidency.ucsb.edu/statistics/data/presidential-job-approval>
- Willis, Derek and Paul Kane. 2018. "How Congress Stopped Working." *ProPublica* .  
**URL:** <https://www.propublica.org/article/how-congress-stopped-working>
- York, Byron. 2009. "Why Did George H.W. Bush pick Sotomayor for the courts?" *Washington Examiner* .  
**URL:** <https://www.washingtonexaminer.com/why-did-george-hw-bush-pick-sotomayor-for-the-courts-99114>

Supplemental Appendix: Tables & Figures

**Correlation: JCS and CF Scores**

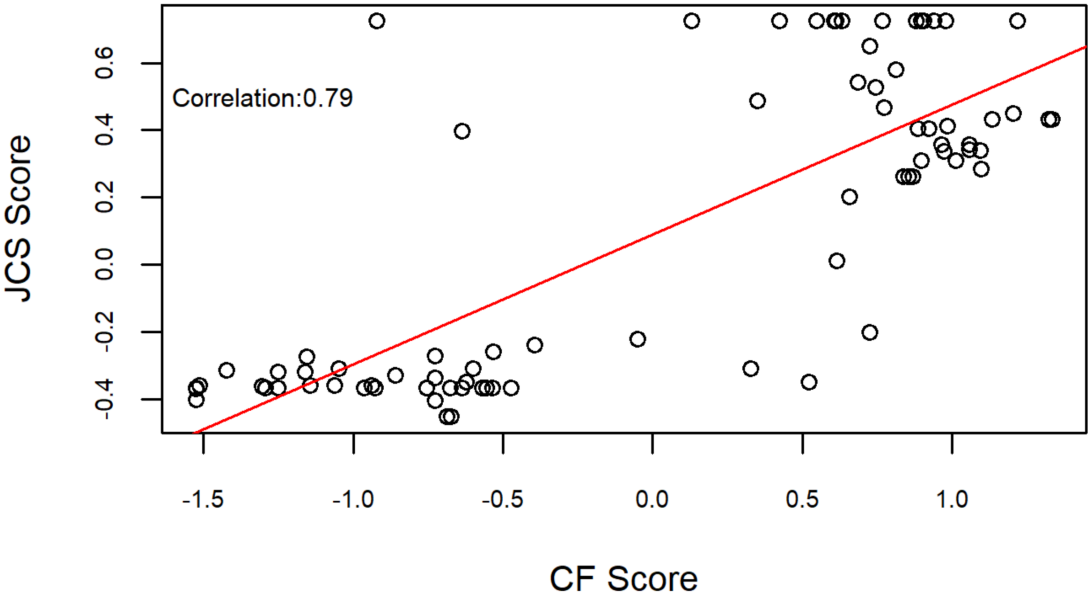


Figure A1: Correlation: JCS and CF Scores

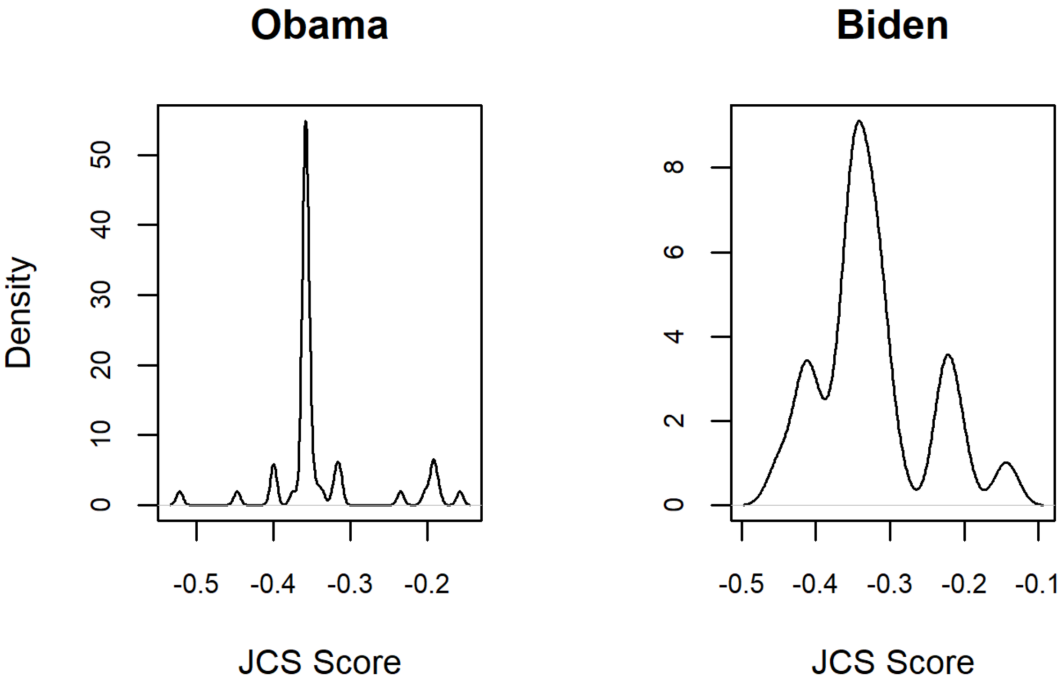


Figure A2: Correlation: JCS and CF Scores

Table A1: Senator Voting for Circuit Nominees

	<i>Dependent variable</i>
	Senator Vote
Female	0.307 (0.360)
Black Nominee	-0.490 (0.608)
LatinX Nominee	1.435** (0.583)
Asian Nominee	0.162 (0.581)
Nominee Age	0.085*** (0.032)
Elite Law School	1.743* (0.892)
Qualified	-0.117 (0.422)
JCS Difference	-1.098 (1.523)
JCS Shift	-1.584** (0.781)
Senate Majority Size	-0.113* (0.063)
Home State Senator	0.979*** (0.257)
Senator Election Year	0.597*** (0.230)
Senator Previous Win %	-0.004** (0.002)
Presidential Approval	-0.020 (0.024)
Obama (Pre)	3.156* (1.648)
Obama (Post)	3.334* (1.848)
Trump	1.509 (1.491)
Biden	2.814** (1.411)
JCS Difference $\times$ Obama (Pre)	-1.300 (1.850)
JCS Difference $\times$ Obama (Post)	-1.144 (1.647)
JCS Difference $\times$ Trump	-4.564*** (1.728)
JCS Difference $\times$ Biden	-8.802*** (1.896)
JCS Shift $\times$ Obama (Pre) 3.240***	(1.237)
JCS Shift $\times$ Obama (Post)	1.997 (1.664)
JCS Shift $\times$ Trump	1.043 (0.908)
JCS Shift $\times$ Biden	0.286*** (1.066)
Elite School $\times$ Obama (Pre)	-2.192* (1.166)
Elite School $\times$ Obama (Post)	-4.653*** (1.446)
Elite School $\times$ Trump	-2.442** (1.077)
Elite School $\times$ Biden	-2.340** (1.094)
Constant	-1.283 (2.219)
Observations	7,573
Log Likelihood	-2,876
Akaike Inf. Crit.	5,815

Note:

\*p&lt;0.1; \*\*p&lt;0.05; \*\*\*p&lt;0.01

Table A2: Senator Voting for District Nominees

	<i>Dependent variable</i>
	Senator Vote
Female	0.583** (0.274)
Black Nominee	0.039 (0.349)
LatinX Nominee	0.839*** (0.319)
Asian Nominee	-0.214 (0.535)
Other Nominee	1.442*** (0.459)
Nominee Age	0.010 (0.017)
Elite Law School	-0.397* (0.240)
Qualified	-0.515 (0.461)
JCS Difference	-10.181*** (1.857)
JCS Shift	-6.442*** (1.846)
Senate Majority Size	-0.037 (0.030)
Home State Senator	1.945*** (0.300)
Senator Election Year	0.321*** (0.115)
Senator Previous Win %	-0.009*** (0.001)
Presidential Approval	-0.009 (0.018)
Obama (Pre)	-7.591*** (1.257)
Obama (Post)	-9.468*** (1.359)
Trump	-8.200*** (1.326)
Biden	-8.471*** (1.395)
JCS Difference $\times$ Obama (Pre)	7.669*** (1.896)
JCS Difference $\times$ Obama (Post)	9.533*** (1.914)
JCS Difference $\times$ Trump	6.619*** (1.906)
JCS Difference $\times$ Biden	2.758 (2.159)
JCS Shift $\times$ Obama (Pre)	7.391*** (1.938)
JCS Shift $\times$ Obama (Post)	6.958*** (1.974)
JCS Shift $\times$ Trump	6.863*** (1.906)
JCS Shift $\times$ Biden	5.181*** (1.919)
Qualified $\times$ Obama (Pre)	-0.472 (0.647)
Qualified $\times$ Obama (Post)	0.442 (0.709)
Qualified $\times$ Trump	-0.685 (0.576)
Qualified $\times$ Biden	
Constant	11.666 (1.872)***
Observations	19,190
Log Likelihood	-7,790
Akaike Inf. Crit.	15,643

Note: \* p<0.1; \*\* p<0.05; \*\*\* p<0.01

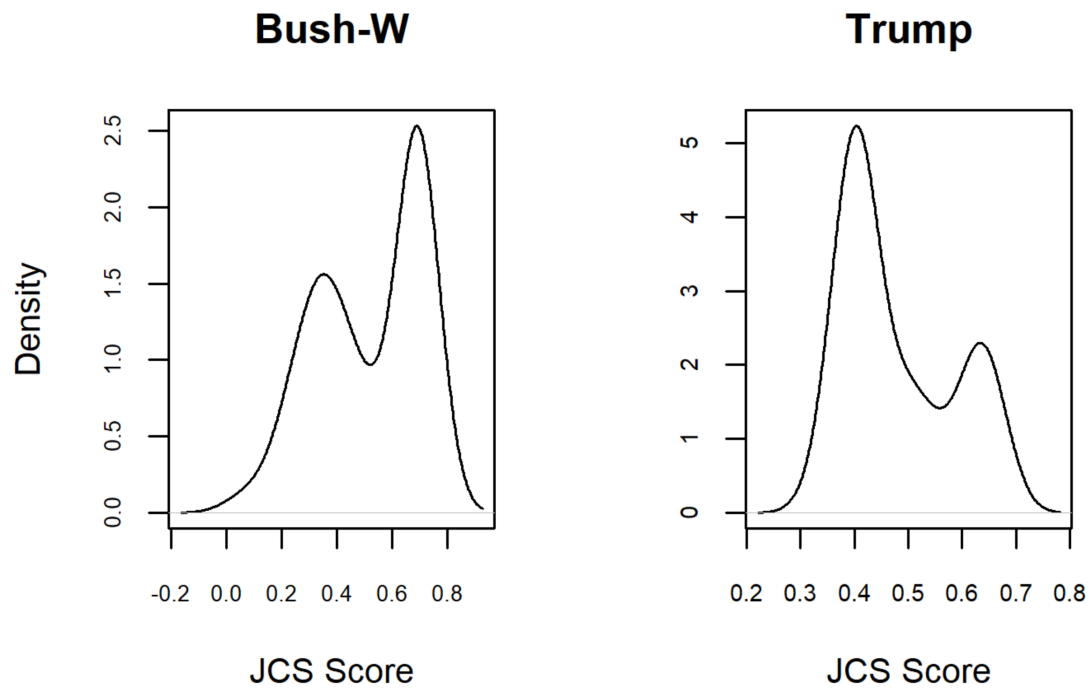


Figure A3: Correlation: JCS and CF Scores