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Quick to Judge? Confirmation by Cloture in the Post-Nuclear Senate

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Abstract

The 2013 Senate rules change transformed the judicial confirmation process by lowering the effective vote threshold for success. Presidents with supportive Senate majorities may now bypass filibusters and confirm nominees without *any* minority party votes. The change influences how nominations proceed, the speed of confirmation, success rates, and ultimately the composition of every federal court. We must now reevaluate existing intuitions. Using data on over 2600 lower court nominations between 1981 and 2022, we test theoretical expectations for how the change influenced judicial appointments. We provide evidence of a radically altered confirmation process with key nominations moving through faster, and more successfully, but with a reliance on unified government and cloture for confirmations. These findings have broad implications for filling vacancies in all federal courts and raise concerns for the future of the appointment process generally.

Keywords

judicial nominations, senate rules, federal courts

In just four years, Donald Trump had an historic impact on the federal judiciary despite having thin Senate majorities during a period of intense partisanship and polarization with often unified Democratic opposition. With similarly slight Senate margins in the same era of polarization, President Biden was also successful in filling judicial vacancies. How was this possible? The cornerstone of this success was the 2013 Senate rules reform dubbed the "nuclear option." The reform lowered the vote threshold required to end or prevent a filibuster – known as invoking cloture – from a supermajority of 60 votes to a simple majority of senators voting. Without the rules change, a polarized Senate would not have been able to confirm judges at these rates and speed with such slim majorities.

While the presidential appointment process has existed since 1789, appointment politics changes over time (Hendershot, 2010; Hollibaugh & Rothenberg, 2021). During the George W. Bush administration, one such shift was an expansion in the use of minority obstruction tactics aimed at denying the President judicial nominations (Binder, Madonna, & Smith, 2007; Tushnet, 2004). Following a cycle of obstruction and restriction (Smith, 2014), these tactics eventually culminated in the nuclear option. The reform did not eliminate the filibuster, but it did make obstruction easier to overcome (Ostrander, 2017; O'Connell, 2015). Now, if a president's party has even a slim majority in the Senate, judges can gain relatively swift confirmation without *any* opposition support. This is a stark contrast to prior years in which judicial nominations were likely to languish in "malign neglect" (Bond et al., 2009) for years due to partisan obstruction (Binder & Maltzman, 2002; Box-Steffensmeier et al., 2016).

The Senate rules change likely altered which nominations are confirmed, how they are confirmed, and how quickly they move through the process. We must now revisit many of our basic intuitions. For example, prior literature often stressed the importance the filibuster pivot to presidential decisions as well as the duration and outcome of nominations (Hollibaugh & Rothenberg, 2017; Primo, Binder, & Maltzman, 2008; Shipan & Shannon, 2003). But if simple-majorities can now clear a path to confirmation this logic may no longer apply, allowing nominations to proceed faster and fail less often than before. This may embolden presidents to choose judicial nominees closer to their own ideological ideal point (Boyd, Lynch, & Madonna, 2015) while making it harder for opposition senators to "alter the presumption of success"

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required for flawed nominations to fail (Krutz, Fleisher, & Bond, 1998).

Only presidents with at least simple majority support in the Senate can expect to take advantage of the new lower cloture thresholds. Without a Senate majority, most of President Obama's judicial nominees were "blockaded" to the point of failure through majority party inaction despite the new rules (Slotnick, Schiavoni, & Goldman, 2017). These actions represent a shift in institutional norms within a larger Senate cycle of minority obstruction followed by majority restrictions (Smith, 2014) accelerated by recent rule innovation in the face of procedural constraints (Binder, 2018; Shepsle, 2017). Presidents may now expect confirmation of judicial nominations when their own party has the Senate majority, and blockades when they do not. If these trends continue, the judicial nominations process may become a boom and bust cycle in which the partisan relationship between the Senate majority and presidency broadly determines success or failure.

We examine how the reform influenced the use of cloture on lower court nominations as well as the downstream effects on the duration, prioritization, and success of these nominations. The following section discusses the Senate rules change as well as exploring its impact on cloture use and the nominations process more generally. Building on these foundations, we then introduce our expectations for how the lower court confirmation process has changed. To test these predictions, we created a data set of over 2600 circuit and district court nominations made between 1981 and 2022. Ultimately, we find evidence for a radically altered process in which key nominations can move faster and more successfully towards confirmation when presidents enjoy majority support in the Senate. Taken together, these results suggest that we must update several of our pre-nuclear intuitions about judicial appointments.

Lower Court Confirmations

While less salient than the Supreme Court, lower courts are still supremely influential to law and policy (Corley, Collins, & Calvin, 2011). As noted by Steigerwalt (2010), the Supreme Court can only take a handful of cases each year, leaving the task of interpreting federal law most often to the lower courts. With the Supreme Court continually shrinking their docket (Lane, 2022; Owens & Simon, 2012), the Courts of Appeals serve as the "de facto courts of last resort" (Bowie, Songer, & Szmer, 2014, 26). Further, higher court nominations are often made from the ranks of lower courts (Black & Owens, 2016; Bonica & Sen, 2020; Choi et al., 2015; Norris, 2020; Savchak et al., 2006), meaning that lower court appointments influence the future composition of higher courts. Recognizing their value, conservative interest groups such as the Federalist Society have spent decades working to place like-minded judges onto the federal bench, particular at the Courts of Appeals (Bird & McGee, 2023). Interest groups and partisans now increasingly pay attention to lower court nominations, often sounding "fire alarms" on nominees that threaten their organizations (Scherer, Bartels, & Steigerwalt, 2008; Cameron et al., 2020), which may increase the salience of a nomination and a more intense confirmation hearing (Dancey et al., 2020). While Supreme Court nominations are often the focus of public and scholarly attention (Shomade et al., 2014), lower court nominations have become increasingly consequential.

Presidents since at least the Reagan administration have sought policy gains by submitting more ideologically congruent nominees for the lower courts (Goldman, 1997) while the Senate has increasingly scrutinized such nominees in response (Hartley & Holmes, 2002). Because the Senate historically lacked a simple majority means of ending debate (Binder & Smith, 1997; Koger, 2010), this scrutiny often took the form of partisan obstruction lower court nominees (Bell, 2002; Binder & Maltzman, 2002, 2009; Martinek et al., 2002). In fact, any one senator can use a hold, often secretly, to obstruct a nomination from reaching a final vote (Howard & Roberts, 2015, 2019). Beyond filibusters, the norm of senatorial courtesy – in which home state senators can reject nominations for positions within their state boundaries – has been institutionalized by the use of "blue slips" within the Senate Judiciary Committee (Binder, 2007). While home state senators are not a president's sole consideration (Binder & Maltzman, 2004), senatorial courtesy allows senators to exercise a virtual veto over executive appointments that fall within their state boundaries. As partisan polarization increased over time, these structural features have become more salient, particularly at district courts where presidents simply fail to fill seats in states with two opposing senators because of partisan obstruction (Willis, 2024).

Presidents can be more successful in making ideological gains through judicial nominations than many models would suggest (Cottrell, Shipan, & Anderson, 2019), but the Senate remains a strong constraint on presidents. Unlike agency officials in which presidents can take advantage of temporary or "acting" interim officials (Kinane, 2021; O'Connell, 2020), presidents have no similar option for bypassing the confirmation process for judges. Presidents have used recess appointments to place individuals on the bench for a short period of time (Graves & Howard, 2010), but only Senate confirmation will yield a lifetime judicial appointment. Recess appointments are now also highly unlikely in the face of congressional adaptations and the 2014 Supreme Court ruling in *NLRB* versus *Noel Canning* (Black et al., 2011) as well as the nuclear option making appointments easier to achieve with Senate majorities (Ostrander, 2015). Gaining lower court confirmations is a strategic interaction where a president's desire to achieve policy preferences through nominating like-minded judges

is pitted against the constraints of the Senate confirmation process.

Going "Nuclear"

Filibusters are the keystone of Senate obstructionism and they function by forcing a super-majority vote to end debate and take a final vote on an issue. Furthermore, by denying majorities floor time, the filibuster is a tool that becomes more powerful with frequent use (Oppenheimer, 1985). While the Senate filibuster can often protect itself from direct revisions (Binder & Smith, 1997), majorities have always retained the ability to alter Senate precedent through complex procedural maneuvering (Wawro & Schickler, 2006). The mechanism is a reform by ruling, which entails a point of order, a ruling of the chair, and a non-debatable vote that would allow a simple majority to establish a new precedent.[1] Early opponents of the reform by ruling tactic dubbed the maneuver the "nuclear option" both to highlight the severity of the action as well as to underscore the threat of retaliation (Smith, 2014, p. 15). A Senate majority can use a reform by ruling with just a simple-majority to change the voting threshold for invoking cloture – which is the vote to end debate and proceed to a vote on the issue at hand – from a super-majority requirement of 60 votes to a simple majority.[2]

The nuclear option first entered judicial confirmation politics during the G.W. Bush administration, as Republican senators sought to bypass minority party obstructionism (Binder et al., 2007). At this time, a bipartisan coalition of moderate senators was able to negotiate a deal in which some nominees were withdrawn, others proceeded to a vote, and the 60-vote cloture threshold for judicial nominations remained intact. The deal, however, could not hold indefinitely. Democratic Majority Leader Harry Reid, finally triggered the nuclear option for nearly all executive nominations in November 2013. This tactic reduced the cloture threshold on all lower court nominations from a super-majority of 60 votes to a simple-majority of senators voting.[3] In part, the nuclear option was triggered in response to the systematic obstruction of President Obama's nominations to the D.C. Circuit Court.

While President Obama gained Senate confirmation on many long-lingering judicial nominations after the nuclear option, the Republican retaliation was swift. Most immediately, Republican senators voted against cloture on President Obama's nominees. Republican protest votes on cloture did not always translate to "no" votes on confirmation, but they represented the party's anger and demonstrated a growing shift in Senate norms. Once Democrats lost the Senate majority, Republican senators were able to "blockade" President Obama's judicial nominees by failing to advance them out of committee or schedule them for a confirmation vote (Slotnick et al., 2017). While the most prominent example of this obstructionism was the failure to act on the Supreme Court nomination of Merrick Garland, many of Obama's lower court nominees faced the same fate. Furthermore, this tactic was rewarded in that President Trump inherited dozens of judicial vacancies from the Obama administration (King & Ostrander, 2020), which were ultimately filled by the Trump administration with the help of a Republican Senate majority.

Using Cloture

Contrary to intuition, we expect that reforms making it easier to overcome filibusters and obstruction are likely to *increase* the use of these dilatory tactics rather than render them obsolete (Dion et al., 2016). For example, Koger (2010) observed that lowering the cloture threshold in 1975 from 2/3 of voting senators to 3/5 of the chamber, along with other reforms, had the seemingly unlikely effect of increasing filibuster activity even while making it easier to overcome. The relationship may not be causal, as reform is likely in periods of increasing obstruction. However, increased obstructionism may also be an attempt to increase the potency of a weakened filibuster (Koger, 2011, p. 8) by taking advantage of the fact that individual dilatory tactics gain more power through repeated and frequent use (Oppenheimer, 1985). Opposition party members may still gain some benefits from slowing down nominations that will ultimately succeed (Jo, 2017; Ostrander, 2016), and forcing cloture votes on *all* nominations can slow the process down considerably (Ostrander, 2017). Majority Leaders may now routinely use the lower cloture threshold to preempt expected dilatory tactics rather than wait for an actual filibuster to unfold.[4]

The frequency of cloture motions on judicial nominations between 1981 – 2022 is demonstrated in Figure 1.[5] As expected, cloture use on judicial nominations substantially and significantly increased after the 2013 reform from a relatively rare event to the common vehicle for moving to confirmation.[6] Until the G.W. Bush administration, cloture motions were used sparingly, if at all. Consistent use of cloture motions occurred during the G.W. Bush administration when the nuclear option was initially threatened, but use in these years stays below 10 cases. The spike of over 20 cloture motions during 2012 under the Obama administration stood out at the time as a significant increase relative to prior years. However, after triggering the nuclear option in late 2013, we see 90 instances of cloture motions used during the Obama administration in 2014 to advance a backlog of lower court nominations. This was the only full year during the Obama administration that Democrats had access to the new rules while also enjoying a co-partisan Senate majority.

Interestingly, the use of cloture in President Trump's first Congress is muted by comparison to 2014. These results may be a reflection of transition effects (JoyntKumar, 2008; Pfiffner, 2018), a backlog of inherited vacancies, and the fact that the new administration had to first find, vet, and nominate judges in order to take advantage of the new rules (King & Ostrander, 2020). Prior research has also noted that the Trump administration prioritized filling Supreme Court and circuit

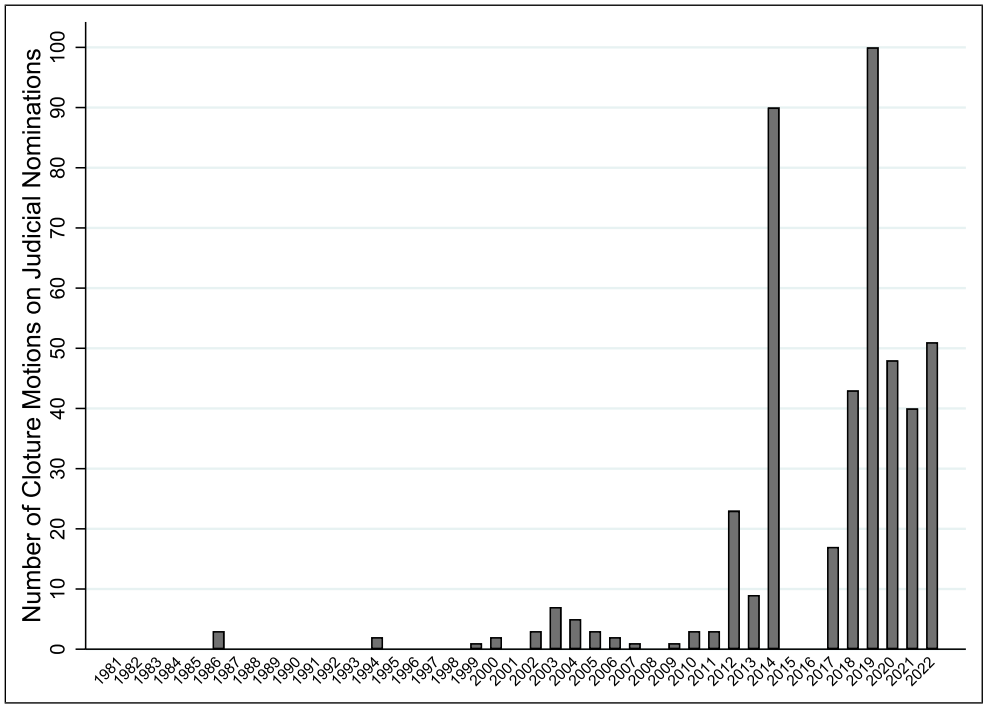

Figure 1. Cloture use on judicial nominations by year: 1981–2022.

vacancies while moving more slowly on the larger number of district court vacancies (King, McAndrews, & Ostrander, 2022). Use of cloture increased dramatically during Trump's second Congress, with 100 instances in 2019 alone. By comparison, President Biden's first Congress, where he enjoyed a co-partisan Senate majority, experienced cloture between about 40 and 50 times each year.

Perhaps the most interesting story about cloture in Figure 1 is where it is not used at all. Cloture was never used on judicial nominations in the 114th Congress (2015–2016) in which President Obama faced a Republican Senate majority. While a co-partisan Senate majority or minority does not guarantee or preclude a president's nominee winning a cloture vote, as a procedural vote, cloture is likely to induce "team play" among senators where they vote with their party (Lee, 2009). The post-nuclear Senate rules make overcoming minority obstruction on nominations easier, but they provide little help to a president attempting to overcome Senate *majority* party opposition. In fact, President Trump's success in filling dozens of lower court vacancies carried over from the Obama administration demonstrates the incentive for blockading an opposition president's judicial nominees. New norms may now suggest a bifurcated process where presidents who enjoy majority support in the Senate can take advantage of simple majority cloture while nominations languish without advancing to a vote for presidents facing a hostile Senate majority.

While the "blockade" under President Obama developed around the same time as the nuclear option, it may simply be the case that intense polarization and partisanship in the Senate led to both outcomes. Regardless of the cause, the blockade and subsequent partisan Senate votes on nominees demonstrate the continued or even growing political salience of judicial nominations. Such salience – and the obstruction that comes with it – highlights the direct impact of the cloture rule change. Under the pre-reform supermajority threshold, about 60% of cloture votes (220 of 362 cases) would have failed. The slim Senate majorities from 2013 to 2022 would likely have yielded endemic delay often leading to failed nominations (Bond et al., 2009). But instead, the new rules allowed over 99% of these nominations (381 of 384 cases) to quickly advance to confirmation.

Investigating "Nuclear" Reform Effects

Our expectations are based on two theoretical premises. First, that rules influence both process and outcomes. The 2013 Senate rules change was a significant departure from prior rules and norms, and as such we believe that it significantly altered the speed and likelihood for confirming lower court appointments. Both are substantively significant. Faster nominations are more likely to succeed, and they offer presidents quicker influence over the courts. Confirmation success influences the composition and thus the nature and ideological balance of the courts. Second, we believe that the new rules are used for partisan advantage when the president and Senate majority share a party affiliation. When these conditions are met, Senate Majority leaders will prioritize key judicial nominations and speed them through the process.

Perhaps the most profound change ushered in by the rules change is how lower court nominees are confirmed. Voice votes were once common for lower court confirmations (Goldman, 1997, p. 12), but now cloture votes are the norm. As noted in the discussion of Figure 1 above, cloture use significantly increased after the 2013 Senate rules reform. However, the exact relationship between cloture and how the judicial confirmation process unfolds has not yet been tested. While a cloture motion is still *technically* no guarantee of success, it does serve as an expedient vehicle for quickly confirming nominations for which sufficient support exists. Furthermore, when presidential nominees are unlikely to benefit from cloture because of partisan divisions between the president and the Senate, nominations will likely be less successful overall. Given the shift in institutional norms and incentives, we expect that most successful appointments following the rules change will experience a cloture motion.

Expectation 1. Post-reform, the majority of confirmed lower court nominations will have experienced a cloture motion when the same party controls the presidency and Senate.

While some scholars have suggested that the nuclear option has "fizzled" and thus failed to speed the confirmation process (Ba, Cmehil-Warn, & Sullivan, 2020), we expect that simple majority cloture will significantly speed up Senate consideration for lower federal court judges when the president's party also has a Senate majority. We expect this to be the case because majority leaders will have an incentive to use simple majority cloture as a means to expedite consideration of a co-partisan president's judicial nominees. Given their influence and lifetime appointments, judicial nominations are important enough to warrant the expenditure of floor time. With partisan divisions between the Senate and presidents, however, these incentives do not hold and are likely to be reversed. This is an important consideration as blockades of nominees when the Senate is controlled by a president's opposition may make nominations appear to move more slowly overall after the rules change.

Expectation 2. Nominations will proceed more quickly after the rules reform when the president's party forms a Senate majority.

Not all judicial nominations are created equal. And while any one nomination can be advanced through opposition using the new rules, the use of cloture on *all* nominations may be prohibitively costly because of post-cloture debate time requirements and procedural transaction costs (Ostrander, 2017). Even after cloture is successfully invoked, the minority can often force 30 hours of post cloture debate for many nominations.[7] Because Senate Majority Leaders seek to preserve floor time (Smith, Ostrander, & Pope, 2013), we expect circuit court nominations to be prioritized for faster confirmation over district court nominations because of their place in the court hierarchy. This expectation is contrary to what had been observed before the rules change. In particular, Martinek et al. (2002, p. 340) find that circuit court nominations tended to take more days on average between the Carter and Clinton administrations.

Expectation 3. Post-reform, circuit nominations will move faster through the process than district nominations when the president's party forms a Senate majority.

Most importantly, we believe that the use of the nuclear option made judicial nominations more likely to succeed in periods where presidents have majority support in the Senate. By moving judicial nominees faster through Senate consideration, fewer of these nominations will be delayed to death through "malign neglect" (Bond et al., 2009). In addition, it may also be the case that more nominations will win now that super-majority votes are no longer a potential requirement. In short, nominations can win now that would have failed or been eventually withdrawn before the 2013 Senate rules reform.

Expectation 4. Post-reform, nominations will be more likely to be confirmed when the president's party forms a Senate majority than compared to the period before the reform.

Overall, these expectations yield three distinct but connected dependent variables of interest. First is the process under which judicial nominations proceed through the Senate as measured by whether a nomination experienced a cloture petition. Second, we examine the pace of the nomination process by measuring the time between the formal presidential nomination and the ultimate conclusion of Senate consideration. Third and finally, we consider the factors that make some nominations more likely to end with successful confirmation.

Data & Coding

In order to investigate the changing judicial confirmations process under the reformed Senate rules, we set our unit of analysis to the formal presidential nomination delivered to the Senate. We collected a dataset using Congress.gov records for all lower court judicial nominations from the Reagan through the early Biden administrations (1981–2022), comprising 2690 observations.[8] Importantly, information such as nomination and confirmation dates, as well as instances of cloture are included.[9] Nominations that do not receive a vote by the end of a Congress are "returned" to the president and coded as unsuccessful. While an individual may be re-nominated and ultimately confirmed in a later Congress, our unit of analysis is the individual nomination and not the nominee. This unit of analysis is common to studies of Senate duration in the nomination process as it

ensures the continuity of institutional features within observations (Binder & Maltzman, 2002; Ostrander, 2016; McCarty & Rose, 1999).[10]

Our expectations stem from comparisons made in nominations before versus after the 2013 rules reform. We have coded each nomination within our data set for whether it was under consideration at or after the date of the reform (1) or not (0). Our hypotheses are also specific to unified partisan control of the presidency and Senate majority (1) or not (0). We account for the interaction of political conditions and the rules change by creating a categorical variable containing: (1) unified control, pre-rules change; (2) divided control, pre-rules change; (3) unified control, post-rules change; and (4) divided control post-rules change. This allows us to directly test and compare how the reform impacts nominations differently depending on the president's partisan relation to the Senate majority.

We also include a variety of traditional controls. Because prior presidents have used female nominees divergently and to gain more ideologically proximate judges (Asmussen, 2011; King, Schoenherr, & Ostrander, 2024), we control for the gender of a nominee. We also include whether a nominee was previously nominated to the same position ("renomination"), as nominations may fail simply due to "malign neglect" and are subsequently renominated in the next Congress (Bond et al., 2009). Additionally, we include a categorical variable for the Senate delegation of a state the nomination takes place in order to consider potential blue slip implications (Binder & Maltzman, 2002; Howard & Hughes, 2020). This includes the baseline of "allied" (both senators the same party as the president), "mixed" (one senator the same party as the president), and "opposed" (both senators opposing party than the president).[11] As the D.C. circuit does not have elected senators, we treat D.C. courts as unique creating a dichotomous variable, "D.C. Court" that we compare to the baseline category of allied delegations.[12] We also include the American Bar Association's (ABA) rating of judges with a baseline of "well qualified" as a rough measure of nominee quality. Further, we include the amount of time left in a two-year Congress – "days left" – when a nomination is put forth as all unsuccessful nominations at the termination of a Congress are automatically "returned" to the president. To account for between-group heterogeneity unique to administrations, we include presidential fixed effects in order.

Finally, because of the differing dynamics that take place in nominations across the court hierarchy, we analyze court levels separately (Martinek et al., 2002; Primo et al., 2008). In particular, we do this because of the changing influence of "blue slips." As of 2016, blue slips are no longer honored for circuit nominations with home state senators having little to no say over these positions (Dinan, 2019; Levine, 2021). However, blue slips are still honored for district court nominations with no plans to change in the near future (Headley, 2024). Because of these diverging process by court level, and in line with previous research on lower court nominations, we analyze nominations to each court level independently.

Findings

As noted in Figure 1, cloture is now used in judicial nominations significantly more often than before the rules change. Knowing that cloture has become more common, we now investigate how this change has influenced the confirmation process for judicial nominations within the Senate. Our first expectation is that most of the successful nominations when partisan unity exists between the president and the Senate majority will proceed through cloture. To test this, we examine the proportion of all successful nominations before and after the rules change that experienced cloture.

Figure 2 shows the percent of successful judicial confirmations that experienced a cloture motion in each Congress between 1981 and 2022 (the 97th to 117th Congress) along with a Lowess estimate of the overall trend and a vertical reference line for the 2013 rules reform. With the exception of the 114th Congress starting in 2015 where President Obama's nominations were blockaded, cloture motions were present for the vast majority of post-reform confirmations. These results demonstrate the new dichotomy of the judicial confirmation process. If presidents enjoy a co-partisan Senate majority, their nominations proceed to confirmation with cloture rates ranging from 70 to 100%.[13] In contrast, cloture has not been used after the rules change to advance judicial nominations when presidents face an opposition majority party in the Senate. While it is hard to generalize from the one Congress of divided control, the many instances where presidents have enjoyed a Senate majority support our expectation that in these conditions a cloture motion is present in the majority of successful judicial confirmations.

Next, we investigate what impact this use of cloture may have on the speed, prioritization, and success of judicial nominations in the Senate. The rise of cloture itself may not be indicative of broader changes to the process if it is merely a procedural gimmick tied to nominations that would have similarly succeeded under the old rules structure. To demonstrate the profound changes that ubiquitous cloture use has on judicial nominations, we now turn towards our expectations that judicial nominations will now proceed more quickly and successfully when presidents have a co-partisan Senate majority. Furthermore, we believe that cloture has allowed Senate majority leaders to re-prioritize judicial nominations in the post-nuclear Senate.

Confirmation Speed

We begin our analysis with a simple look at the speed of the confirmation process before and after the 2013 rules reform in

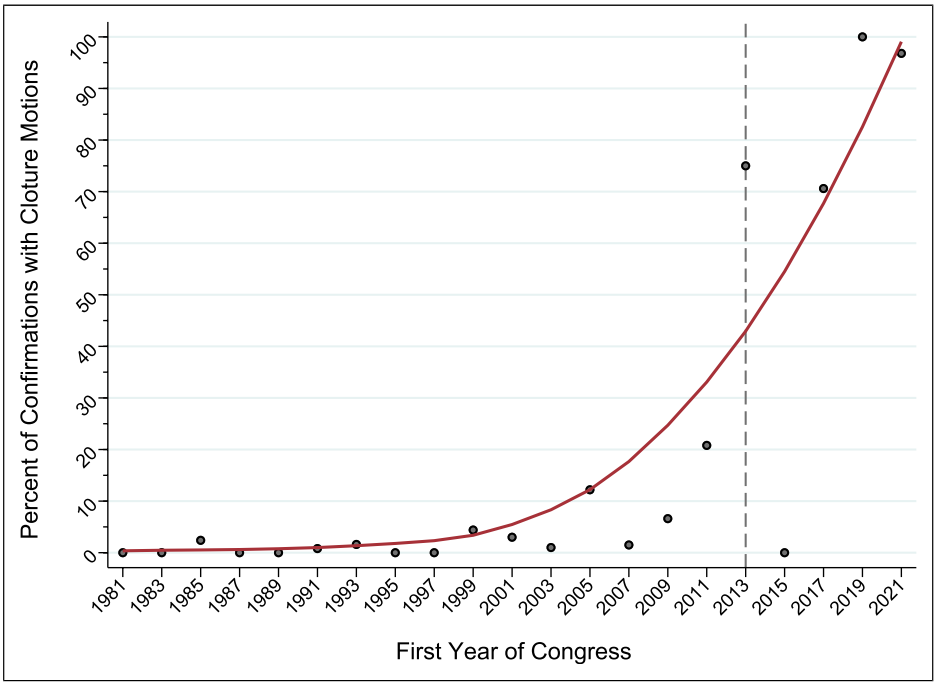

Figure 2. Cloture use on successful confirmations by congress.

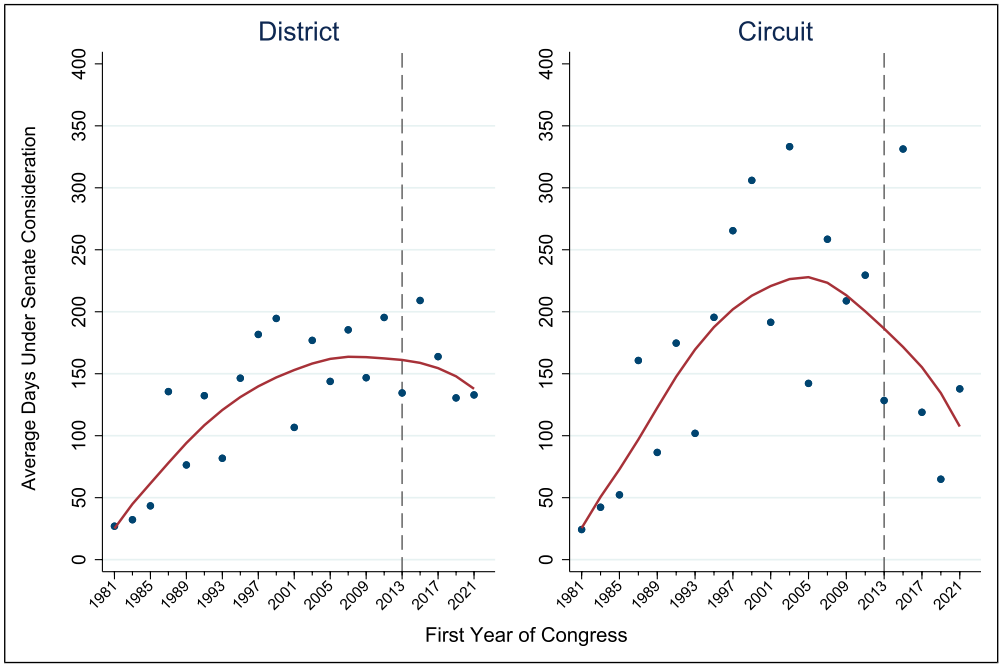

Figure 3. Time under senate consideration by congres. *Note*: Dashed reference line for the Senate rule change.

the Senate. Figure 3 shows the average time in days that district and circuit nominations were under Senate consideration within each Congress from 1981 to 2022 with points representing Congress averages, Lowess estimates of the trend, and vertical reference lines to mark the 2013 reform. This figure provides some support for our second expectation that nominations will move faster after the reform when presidents enjoy a Senate majority. The trends for both court types are down after the rules reform generally even though the delays experienced

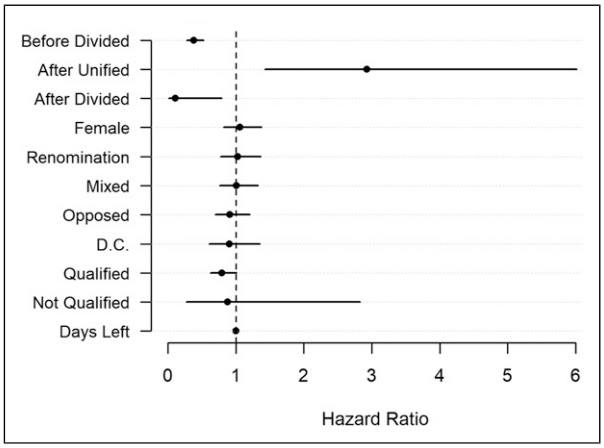

Figure 4. Weibull duration model: Circuit.

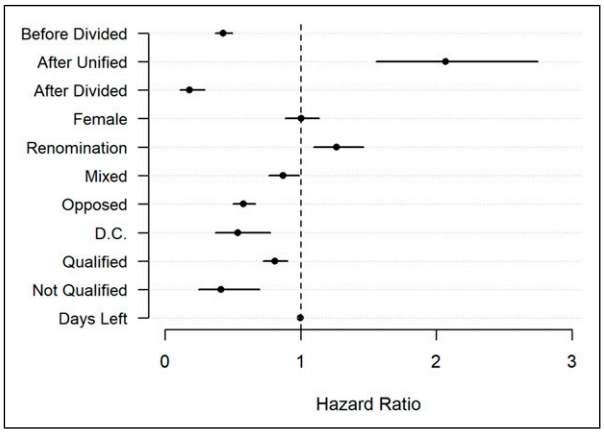

Figure 5. Weibull duration model: District.

during the "blockade" of President Obama's judicial nominations in the 114th Congress (starting in 2015) were the among the highest recorded for both district and circuit nominees. It also appears that the break is much more pronounced within circuit nominations, which provides some support for our third expectation that circuit court nominations will be prioritized after the rules reform.

We utilize duration modeling to examine the influence of the rules change on the time nominations spend under Senate consideration.[14] Specifically, we use the Weibull duration model as is common in studies of the nomination process (Martinek et al., 2002; Ostrander, 2016; McCarty & Rose, 1999). These models are especially useful in cases where one expects that the risk of an event changes as time goes by.[15]

The results of the Weibull models for our main covariates of interest – political circumstances and the 2013 rules change – for circuit and district courts are presented in Figures 4 and 5, respectively. We express the estimates of the Weibull models in terms of hazard ratios, which can be directly interpreted. Estimates above the dotted line at one are predicted to go faster while estimates below one are predicted to move more slowly through the Senate. Estimates with confidence intervals crossing the dotted line at one are not significantly different from their reference category. The full results of these Weibull models of Senate duration can be found in Table A1 in the appendix.

The Weibull models shown in Figures 4 and 5 provide support for our second expectation that nominations will proceed more quickly after the rules reform when the president's party controls a majority in the Senate. With a reference category of pre-reform rules and unified party control of the presidency and Senate, we find that both circuit and district court nominations proceed significantly faster during unified party control after the rules change. At the circuit level, nominations during unified party control after the rules change moved to confirmation 109 days faster than before the rules change. At the district level, nominations moved to confirmation 69 days faster after the rules change under unified control compared to before.

In addition to our key substantive findings, we also find that party control and the rules change drive confirmation speed for circuit nominations. With the exception of presidential administrations – where all nominations have proceeded slower when compared to President Reagan – no other variables impact confirmation speed. That is, gender, being renominated, home state senator composition, qualifications, or days left in a congressional session do not influence circuit confirmation speed.

Conversely, we find that district confirmation speed is influenced by several factors. Nominations facing mixed or opposed senator delegations, as well as those to the D.C. district proceed significantly slower than those in allied districts highlighting the importance of the blue slip at the district level.[16] This may be attributed to the differing influence of blue slips on district, compared to circuit, nominations (Dinan, 2019; Levine, 2021). Similarly, qualified and not qualified nominees progress significantly slower than well qualified nominees. And, finally, nominees that are renominated proceed significantly faster than first time nominations. This may be an artifact of presidential prioritization of circuit over district nomination (King & Ostrander, 2020; King et al., 2022), with district nominees put forward later in a congressional session and more likely to be returned to the president under Senate Rule XXXI (Rybicki, 2013; Uribe-McGuire, 2017, ND). Put together, these findings provide further evidence of the distinction between circuit and district nominations and the factors that influence confirmation speed across the court hierarchy.

Before the rules reform, circuit court nominations moved more slowly through the Senate confirmation process as compared to district nominations (Martinek et al., 2002).

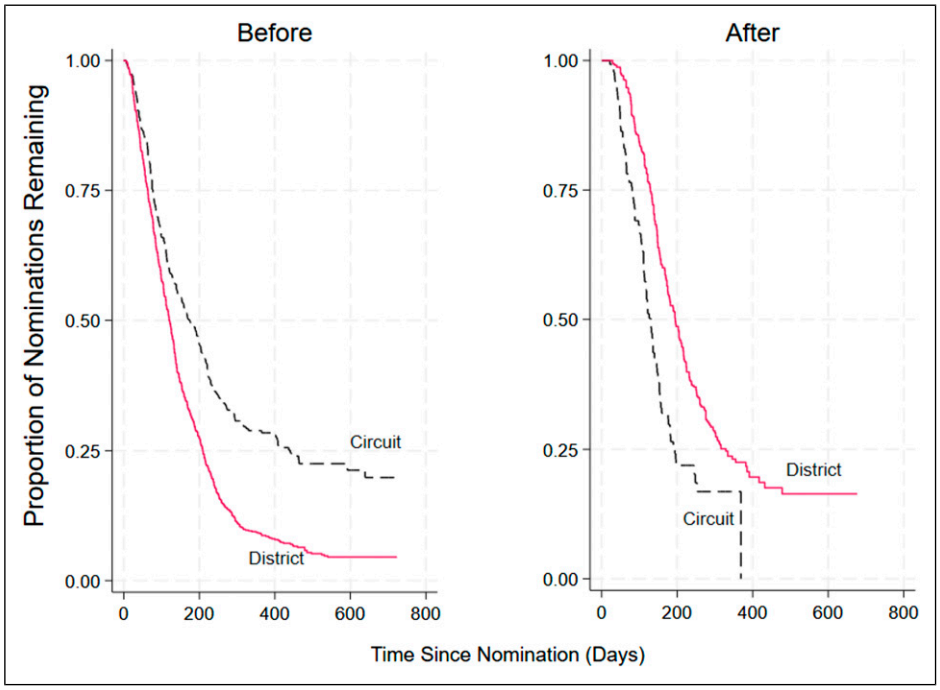

Figure 6. Kaplan-Meier plots of senate duration before & after reform.

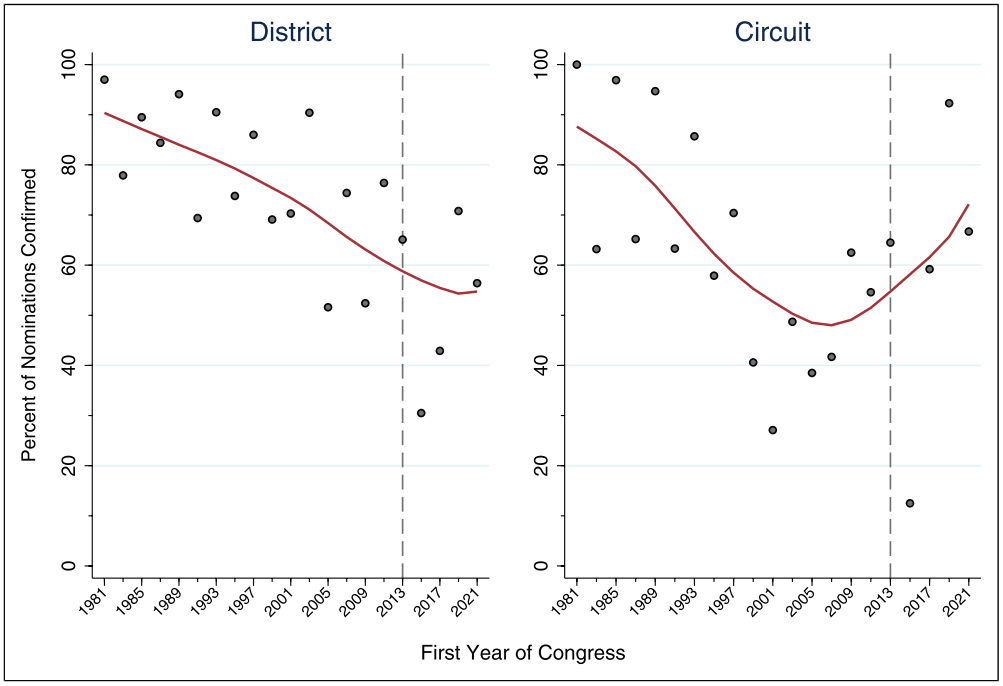

Figure 7. Confirmation percentages by congress. *Note*: Dashed reference line for the Senate rule change.

Circuit court nominations may have been targets of partisan obstruction because of the wider reach of circuit courts and the relative value of these positions. Because not all judicial nominations are viewed equally, we would expect that after the rules reform majority leaders would prioritize using cloture and moving faster on a co-partisan president's circuit court nominations over those to district courts. As such, our third expectation is that circuit court nominations will

actually proceed faster through the nominations process after the rules reform as compared to district court nominations.

As not all judicial nominations are viewed equally, our third expectation was that circuit court nominations will proceed faster through the nominations process after the rules change compared to district court nominations. We expected that circuit nominations may be more likely to receive partisan obstruction and move to confirmation slower before the rules change due to their relative value. Following the rules change, with these barriers removed, we expected this to flip with circuit nominations proceeding to confirmation significant faster. Figure 6 shows this to be the case.

Figure 6 shows the difference between the time it took to consider circuit and district nominations before and after the rules change in 2013. The contrast is stark. Before the rules change, district nominations moved significantly faster than circuit nominations. For example, only about 10% of district court nominations were still under consideration after 300 days while at the same point about 30% of circuit nominations remained. This relationship reverses after the rules change with circuit nominations consistently processed faster than district nominations. Furthermore, the figure demonstrates that after the rules change no circuit court nomination took more than 400 days, while before the change approximately 20% of circuit court nominations remained under consideration after more than 700 days.

Overall, the flip in this relationship provides strong support for our third expectation that circuit nominations will be prioritized after the rules reform. However, this effect is likely dependent upon partisan unity between the Senate majority and the president. In a divided context, as evidenced by Figure 3 for the 114th Congress starting in 2015, circuit nominations were under consideration over 100 days longer than district nominations on average. Going forward, if circuit nomination prioritization reverses during periods of partisan division, then it provides further evidence of the bifurcation of the judicial appointments process.

Confirmation

Our final expectation is that judicial nominations are more likely to be successful after the rules reform when the presidency and Senate majority are controlled by the same party. For a simple examination of this expectation, Figure 7 shows the percentage of district and circuit nominations that were confirmed each Congress between 1981 and 2022 (the 97th to 117th) along with a Lowess estimate of the trend and a vertical reference line for the rules change. We find mixed results in these descriptive data. While district nominations generally trend down, circuit court nominations appear to become more successful starting in the Obama administration and continuing through the rules change. This bifurcation may be more evidence of the prioritization of circuit nominations. Unsurprisingly, we find that the 114th Congress (starting in 2015), with the blockade of President Obama's nominations under divided government, contained the lowest success rates within our data for both district and circuit court nominations.

To examine the relationship between the rules reform, divided partisan control, and success in judicial nominations further, we run logistic regression models predicting successful confirmations while taking into account broader political contexts. Nominations can end in outright failure with a vote, by being withdrawn, or through never reaching a vote before the end of a Congress. However, nominations can only succeed through a confirmation vote. As such, we use a logistic model for this dichotomous outcome of success or not. Again, we divide the models between district and circuit courts to acknowledge the difference in how the Senate prioritizes and considers these nominations. Table A2 in the appendix provide the full logistic regression models.

To investigate our fourth expectation – that post-reform nominations will be more likely to be confirmed when the president and Senate are of the same party compared to before the reform – Figures 8 and 9 show the (a) predicted probabilities of confirmation success and (b) marginal effects of confirmation success by political conditions and the Senate rule change for circuit and district courts, respectively. For Figures 8(b) and 9(b), the reference category is unified control of the presidency and Senate majority before the Senate rule change. Values above the dotted line at zero represent an increased confirmation likelihood compared to the reference category while values below a decreased likelihood. Confidence intervals that cross the dotted line at zero are not significantly different than unified government before the 2013 rule reform. For simplicity, we examine our main variables of interest – political conditions and the Senate rules change – with full regression results available in Table A2 in the appendix.

Turning out attention to Figures 8(b) and 9(b), we see that before the rules change confirmation success did not significantly differ between unified or divided control of the presidency and Senate majority. At the circuit level, Figure 8(b) shows that nominees before the rules change under unified control were nine percentage points more likely to be confirmed (0.59 vs. 0.50, p =.07) compared to divided control, but they were not statistically different. Similarly, Figure 9(b) shows district nominees under unified control were not statistically different than divided control before the rules change, with only a three percentage point increase (0.65 vs. 0.62, p =.40).

By comparison, Figures 8(b) and 9(b) suggest that the rules change has made unified control a key predictor of success. Nominees under unified control after the rules change experience a significant increase in confirmation

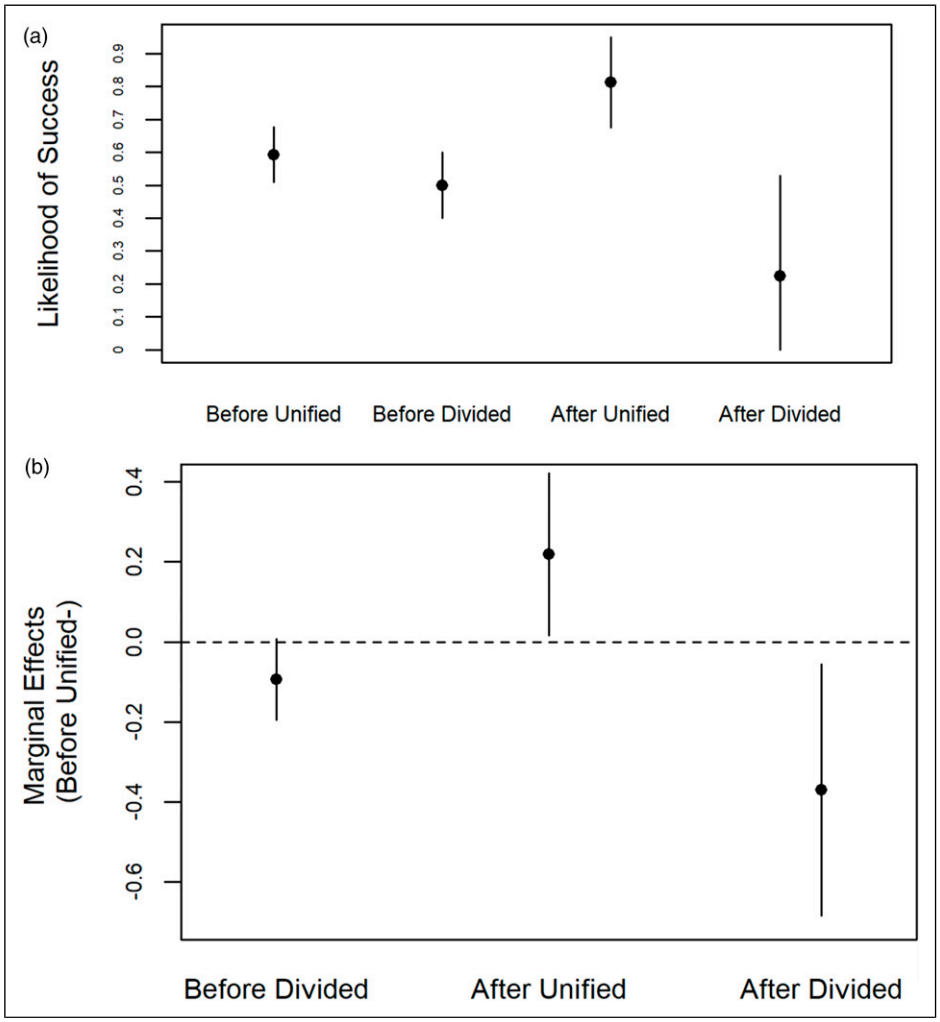

Figure 8. (a) Likelihood of person of confirmation success for circuit courts during unified or divided government before or after the 2013 rules change , and (b) marginal effects of confirmation success for circuit courts of political conditions with the reference category of before the 2013 rules change and unified government. Vertical bars represents 95% confidence intervals and vertical bars crossing the dotted line at zero do not significantly differ. Full regression results are in column 1 of Table A2.

success. Both circuit (0.81) and district (0.86) nominees are significantly more likely to be confirmed in the post-nuclear era under unified control than in unified control before the rules change. However, when the president and Senate are not of the same party, the likelihood of confirmation drops off dramatically as circuit (0.22, $p < 0.05$) and district (0.42, $p < 0.01$) nominations are significantly less likely to be confirmed in a post-rules change, divided government era. This stands in stark contrast to before the rule change, when political control did not impact confirmation success. The results of the logistic regression models demonstrate that after the rules reform both circuit and district nominations are significantly more successful during unified partisan control of the Senate and presidency. This provides strong empirical support for our fourth and final expectation.

In addition to political conditions and rules reform, several other factors influence confirmation success for circuit and district nominees. Nominees to the D.C. courts are significantly less likely to be confirmed.[17] And, intuitively, those nominated earlier in a congressional session have higher confirmation success. Further, for all administrations since President Reagan, nominees are less likely to be confirmed than during the Reagan administration with one lone exception: circuit nominees under H.W. Bush. These findings provide evidence of the increasingly contentious confirmation environment nominees face.

Interestingly, circuit and district nominees diverge in several factors regarding confirmation success. While district nominees are less likely to be confirmed when facing an opposition delegation, senator delegations have no influence on circuit nominees. This finding makes sense as norms such

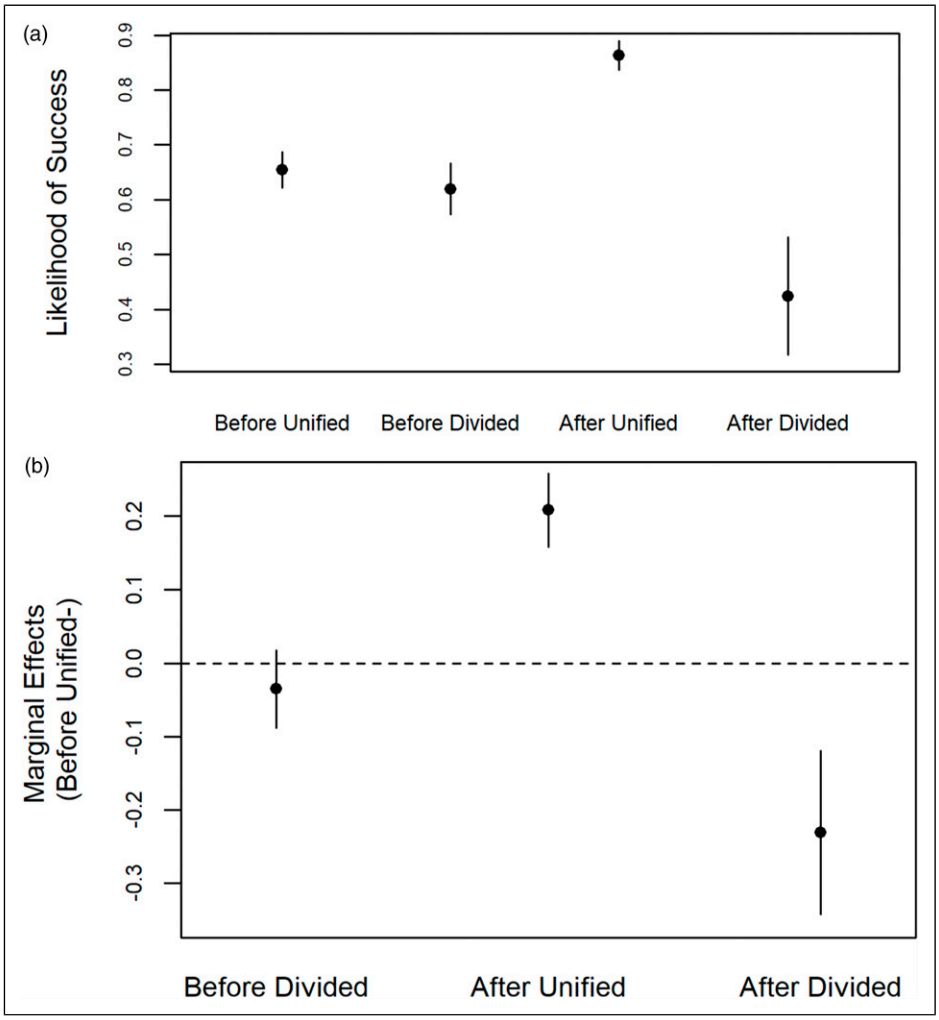

Figure 9. (a) Likelihood of person of confirmation success for district courts during unified or divided government before or after the 2013 rules change , and (b) marginal effects of confirmation success for district courts of political conditions with the reference category of before the 2013 rules change and unified government. Vertical bars represents 95% confidence intervals and vertical bars crossing the dotted line at zero do not significantly differ. Full regression results are in column 2 of Table A2.

as the blue slip have broken down for circuit nominees while they continue to hold for districts (Dinan, 2019; Levine, 2021). Further, and interestingly, nominee qualifications only impact district nominees' chances of success. While qualified or not qualified district nominees are less likely to be confirmed compared to those that are well qualified, these qualifications have no influence on circuit nominee success. Finally, district court nominees that are renominated are significantly more likley to be confirmed while there is no impact of renomination at the circuit level. Taken together, these findings demonstrate the importance of treating circuit and district nominees separately for modeling purposes.

Conclusions

Cloture has become the key to understanding judicial appointment politics. Only cloture can consistently overcome the endemic Senate obstruction of nominations stemming from a combination of intense polarization, the rising salience of the judiciary, and slim Senate majorities. With the 2013 Senate rules reform lowering the threshold to invoke it, cloture – once a rare event – became the *most common* vehicle for gaining confirmation on lower court nominations. Presidents with even a small Senate majority may now nominate and quickly gain confirmation for judges that would have languished or failed under the old rules structure. This change is impactful, and we must re-examine our intuitions accordingly.

Both descriptive and empirical analyses demonstrate that the Senate rules change had significant effects on the duration and success of judicial nominations. After the reform, when the presidency and the Senate majority are controlled by co-partisans, both circuit and district nominations proceed more

quickly through the Senate and are more likely to succeed. The relative speed of nominations has also changed. The lower cloture threshold for nominations may have changed how Majority Leaders prioritize nominees for votes. Whereas district court nominations once moved relatively faster than circuit nominations, the reverse is now true. District nominations have been de-prioritized relative to higher-level circuit nominations. Together, our empirical findings suggest that the judicial appointments process has significantly changed due to the reformed Senate rules structure.

Our findings also suggest that the Senate reform coupled with changing norms may have created a bifurcated nominations process with presidents experiencing a boom or a bust in their judicial confirmations depending on the partisan affiliation of the Senate majority. Whereas divided control had no significant impact on the success of nominations before the reform, afterwards division predicts lower success rates while unity predicts greater success. When the presidency and Senate majority are controlled by rival parties, the opposition Majority Leader will have little incentive to use cloture. In these conditions, a majority of senators may even prefer to blockade most judicial nominations hoping that a future co-partisan president will fill the vacancies. Evidence suggests that this pattern will continue. During the Biden administration, Republican Minority Leader Mitch McConnell suggested that Republicans would again block a Democratic nomination to the Supreme Court if Republicans were to retake the Senate in 2022.[18]

These findings have non-trivial implications for judicial selection and inter-branch politics more generally. Judicial confirmations are a true exercise in constitutional separation of powers. To the extent that we have shifted into a boom and bust era of judicial nominations depending on the partisan control of the presidency and Senate majority, then the constitutional role of the Senate may diminish from advising and consenting to partisan agreement or obstruction and lead to polarized, less efficient courts (Badas, 2024). Such open partisanship may in turn reduce the public support and legitimacy of the federal courts. Furthermore, this shift in norms may cascade into increasingly combative "constitutional hardball" (Tushnet, 2004). And as creative rule innovations tend to spark more adaptation in response (Shepsle, 2017), then we may yet see additional changes to the appointments process unfold.

Our results also inform future studies of the judicial appointments process. Scholars such as Hendershot (2010) and Hollibaugh and Rothenberg (2021) have noted that there are distinct epochs within the appointments process, and our findings suggest that we have entered a new one for judicial nominations. As such, future work should take into account the shift in Senate rules and the partisan relationship between the Senate and presidency when modeling the success or duration of nominations. This new dynamic may, for example, alter judges' strategic decisions about retirement. While our understanding of lower federal court confirmation politics has dramatically expanded in the past 20 years with contributions from congressional, presidential, and courts scholars (Shomade et al., 2014). But now we must reconsider revisiting some of our intuitions about how the process operates under a dramatically changed Senate rules structure.

Appendix A. Full Empirical Models

Table A1. Weibull Duration Model: Nominations 1981–2022.

	Dependent variable	
	Delay	
	Circuit	District
Before divided	0.383***	0.430***
	(0.061)	(0.032)
After unified	2.930***	2.070***
	(1.075)	(0.300)
After divided	0.108**	0.180***
	(0.110)	(0.045)
Female nominee	1.062	1.004
	(0.140)	(0.063)
Mixed delegation	1.006	0.871**
	(0.141)	(0.057)
Opposed delegation	0.914	0.578***
	(0.127)	(0.041)
D.C. court	0.907	0.540***
	(0.185)	(0.100)
Qualified	0.797*	0.810***
	(0.097)	(0.050)
Not qualified	0.878	0.415***
	(0.524)	(0.109)
Renomination	1.028	1.266***
	(0.148)	(0.093)
Days left in congressional session	1.000	1.000
	(0.000)	(0.000)
H.W. bush	0.492***	0.435***
	(0.116)	(0.049)
Clinton	0.145***	0.220***
	(0.029)	(0.020)
W. Bush	0.068***	0.178***
	(0.014)	(0.018)
Obama	0.092***	0.085***
	(0.022)	(0.010)
Trump	0.104***	0.035***
	(0.043)	(0.006)
Biden	0.061***	0.044***
	(0.027)	(0.010)
Constant	0.003***	0.003***
	(0.001)	(0.000)
Observations	569	2,038
Log likelihood	−602.87	−2,022.18
ln(*p*)	0.352	0.455
	(0.041)	(0.194)

Note. *$p < 0.1$; **$p < 0.05$; ***$p < 0.01$.

Table A2. Confirmation Success: 1981–2022.

	Dependent variable	
	Success	
	Circuit	District
Before divided	−0.478*	−0.240
	(0.271)	(0.186)
After unified	1.309*	1.806***
	(0.733)	(0.310)
After divided	−2.075*	−1.479***
	(1.135)	(0.345)
Female nominee	0.160	0.111
	(0.234)	(0.131)
Mixed delegation	−0.014	−0.090
	(0.261)	(0.149)
Opposed delegation	−0.087	−0.776***
	(0.248)	(0.145)
D.C. court	−0.666*	−0.612*
	(0.359)	(0.369)
Qualified	−0.234	−0.479***
	(0.219)	(0.121)
Not qualified	0.118	−1.167**
	(0.964)	(0.479)
Renomination	0.157	0.295*
	(0.251)	(0.171)
Days left in congressional session	0.003***	0.005***
	(0.001)	(0.003)
H.W. Bush	−0.712	−1.233***
	(0.541)	(0.320)
Clinton	−1.922***	−1.086***
	(0.445)	(0.270)
W. Bush	−3.044***	−1.726***
	(0.437)	(0.277)
Obama	−2.463***	−2.762***
	(0.486)	(0.279)
Trump	−2.857***	−4.520***
	(0.867)	(0.419)
Biden	−2.730***	−4.610***
	(0.913)	(0.467)
Constant	1.246***	1.426***
	(0.453)	(0.274)
Observations	573	2,056
Log likelihood	−316.791	−962.130
Akaike Inf. Crit	669.582	1,960.260

Note. *$p < 0.1$; **$p < 0.05$; ***$p < 0.01$.

Table A3. Weibull Duration Model: Nominations 1981–2022 (D.C. Courts Omitted).

	Dependent variable	
	Delay	
	Circuit	District
Before divided	0.414***	0.417***
	(0.068)	(0.031)
After unified	3.326***	2.014***
	(1.250)	(0.300)
After divided	0.113**	0.181***
	(0.115)	(0.045)
Female nominee	1.011	0.998
	(0.140)	(0.064)
Mixed delegation	1.024	0.853**
	(0.145)	(0.056)
Opposed delegation	0.927	0.569***
	(0.129)	(0.040)
Qualified	0.768*	0.810***
	(0.097)	(0.050)
Not qualified	0.871	0.415***
	(0.520)	(0.109)
Renomination	0.933	1.331***
	(0.142)	(0.099)
Days left in congressional session	1.000	1.000
	(0.000)	(0.000)
H.W. Bush	0.459***	0.418***
	(0.112)	(0.047)
Clinton	0.150***	0.206***
	(0.031)	(0.019)
W. Bush	0.074***	0.163***
	(0.017)	(0.016)
Obama	0.092***	0.078***
	(0.023)	(0.009)
Trump	0.092***	0.032***
	(0.040)	(0.006)
Biden	0.058***	0.041***
	(0.027)	(0.009)
Constant	0.003***	0.003***
	(0.001)	(0.000)
Observations	518	1,991
Log likelihood	−547.62	−1,962.68
ln(p)	0.636	0.463
	(0.043)	(0.020)

Note. *$p < 0.1$; **$p < 0.05$; ***$p < 0.01$.

Table A4. Confirmation Success: 1981–2022 (D.C. Courts Omitted).

	Dependent variable	
	Success	
	Circuit	District
Before divided	−0.408	−0.194
	(0.279)	(0.190)
After unified	1.344*	1.807***
	(0.744)	(0.317)
After divided	−2.067*	−1.473***
	(1.144)	(0.346)
Female nominee	0.111	0.112
	(0.246)	(0.133)
Mixed delegation	0.0003	−0.096
	(0.262)	(0.150)
Opposed delegation	−0.098	−0.783***
	(0.248)	(0.145)
Qualified	−0.304	−0.462***
	(0.226)	(0.122)
Not qualified	0.078	−1.162**
	(0.974)	(0.480)
Renomination	0.140	0.295*
	(0.264)	(0.173)
Days left in congressional session	0.003***	0.005***
	(0.001)	(0.0004)
H.W. Bush	−0.685	−1.309***
	(0.563)	(0.325)
Clinton	−1.830***	−1.101***
	(0.464)	(0.276)
W. Bush	−2.903***	−1.762***
	(0.459)	(0.282)
Obama	−2.334***	−2.795***
	(0.513)	(0.284)
Trump	−2.702***	−4.552***
	(0.889)	(0.428)
Biden	−2.654***	−4.647***
	(0.945)	(0.476)
Constant	1.099**	1.423***
	(0.470)	(0.279)
Observations	522	2,009
Log likelihood	−288.389	−934.377
Akaike Inf. Crit	610.779	1,902.753

Note. *$p < 0.1$; **$p < 0.05$; ***$p < 0.01$.

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Notes

1. There are multiple pathways to achieving a reform by ruling. See Beth (2005) for details.
2. See Binder and Smith (1997), Wawro and Schickler (2006), Koger (2010), Wallner (2017), and Reynolds (2017) for an in-depth discussion of the filibuster, obstruction, and cloture.
3. While the original nuclear option excluded Supreme Court, the use of the nuclear option itself created a precedent for simple majority precedent creation. Mitch McConnell used the same tactic in 2017 to extend the nuclear option and confirm Justice Gorsuch.
4. Not every use of cloture implies that a filibuster occurred. Invoking cloture effectively prevents obstruction from holds or filibusters by advancing a nomination to a final vote.
5. These data come from searching Congress.gov for judicial nominations – excepting tax courts and the federal circuit – with cloture motions noted as an action. These cases do not imply that cloture was invoked, only that a motion was filed.
6. We confirm this visual finding with a *t* test of cloture use before and after the reform. The results show a statistically significant increase after the rules change ($p < .001$).
7. This was once the case for all nominations. However, in April 2019, the Senate enacted another "nuclear option" limiting post-cloture debate time for district judge nominations to 2 hours.
8. This time frame includes the totality of complete digitized nominations records provided by Congress.gov at the time of writing.
9. We consider a nomination "clotured" if a cloture motion is filed.
10. There are exceptions in which the unit of analysis is the vacancy duration (Hollibaugh, 2015; Hollibaugh & Rothenberg, 2017; Massie, Hansford, & Songer, 2004). The choice to focus on nomination duration is due to our interest in the effects of the rules change on *Senate* delay.
11. Independent senators are coded as the party they caucus with.
12. Additionally, we provide models fully omitting the D.C. courts in Tables A3 and A4. Our main substantive findings do not change when omitting the D.C. nominees.
13. Given such high rates of cloture use, we are unable to include cloture within our predictive models because of perfect separation issues.
14. This includes both confirmations and failures. The "event" that we model is the end of consideration through success or failure with nominations "returned" to a president at the end of a Congress being defined as censored observations.

15. See Box-Steffensmeier and Jones (2004) for a more complete discussion of the merits of the Weibull duration model. We also note that the shape parameter in our Weibull models are significant, which confirms our expectation of duration dependence.
16. As demonstrated in Table A3, excluding D.C. nominees does not change our substantive findings.
17. As demonstrated in Table A4, our main substantive results do not change when excluding the D.C. courts from analysis. The sole difference is found at the circuit level where nominations before the rules change under divided government do not significantly differ from nominations before the rules change under unified government.
18. See https://thehill.com/homenews/senate/558268-mcconnell-signals-gop-would-block-biden-supreme-court-pick-in-24?rl=1 for details of the McConnell quote.

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