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Nomination Struggles in the Post-nuclear Senate

<https://doi.org/10.1515/for-2022-2038>

Abstract: Three times in the last decade Senate majorities have re-interpreted the rules of the Senate to limit the ability of Senate minorities to obstruct presidential nominees. Each of these invocations of the so called nuclear option have either reduced the threshold of votes needed to invoke cloture on a nominee or shortened the amount of post-cloture debate on nominees. In the current Senate, cloture can be invoked on nominees with a simple majority vote and most nominees are subject to only two hours of post-cloture debate. Despite these re-interpretations of the Senate's rules, presidents are still struggling to secure confirmation for many of their nominees. As of this writing, fewer than 40% of President Biden's nominations have secured confirmation, and more than 140 who have cleared committee are awaiting floor action in the Senate. We explore the factors that are inhibiting the confirmation process and discuss potential changes in the process that could expedite the confirmation of executive nominations.

Keywords: senate, president, nominees, filibuster

1 Introduction

One of the daunting tasks each new presidential administration faces is the nomination of individuals to executive-branch and judicial positions. Presidents face enormous pressure to staff their cabinet and other executive-branch positions quickly with individuals who will help carry out the administration's policy priorities. They also wish to imprint their stamp on the judicial branch, both to secure their legacy and to create more friendly venues for legal challenges to administration policies.

A key impediment to swift action on presidential nominees is the U.S. Senate. The advice and consent provision found in Article II of the Constitution requires the Senate to acquiesce to many executive-branch positions and all judicial nominees.

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In recent decades, as elite polarization has reached near record levels, conflict between presidents and the Senate over the makeup of the judicial and executive branch has been a regular feature of American politics.

As the scrutiny received by each nominee has increased, administrations have responded by spending more time vetting potential nominees and by choosing individuals who are less likely to generate strong Senate opposition. Despite these measures, all recent presidents have had high-profile nominees fail or be withdrawn due to Senate opposition. President Clinton was forced to withdraw two Attorney General nominees, President George W. Bush withdrew Harriet Miers' nomination to the Supreme Court, and President Obama withdrew former Senate Majority Leader Tom Daschle's nomination to be Secretary of Health and Human Services. More recently, President Trump withdrew Andrew Puzder's nomination to be Labor Secretary due to a tax reporting issue, and President Biden was forced to withdraw Neera Tanden's nomination to be the director of the Office of Management and Budget due to her disparaging tweets about some lawmakers.

In addition to the widespread opposition of certain nominees, senators who take issue with a particular presidential nominee have routinely exercised their procedural prerogatives to delay or obstruct a nomination by threatening to or actually filibustering a nominee. For most of the Senate's history, a minority of senators had the ability to prevent a vote on presidential nominees through the use of obstructive tactics. Given that Senate majorities have rarely been large enough to invoke cloture on a party-line vote, most successful presidential nominees have required some degree of cooperation, if not consent, from members of the minority party in the Senate.

During the presidencies of George W. Bush and Barack Obama, minority party senators regularly refused to consent or cooperate with efforts to confirm judicial nominees. In both cases, senators in the majority threatened to "go nuclear" and reinterpret the Senate's rules so that a simple majority could invoke cloture and confirm most presidential nominees. The Republican attempt to go nuclear in the 109th Congress was thwarted by the "Gang of 14" – a bipartisan group of senators who agreed to confirm some of President Bush's nominees while letting others expire. Senate Democrats did detonate the nuclear option in the 113th Congress, which had the effect of creating a majority cloture threshold for most judicial nominations (Supreme Court excluded) and all executive nominees.¹

These recent rules changes have made it ostensibly easier for the Senate to process nominees, especially on occasions when the president and Senate majority

¹ Senate Republicans invoked the nuclear option twice during the Trump administration: first on Supreme Court nominees in the 115th Congress and again in the 116th Congress to limit post-cloture debate time to two hours for most executive-branch nominations.

share a party. Presidents Trump and Biden were the first two presidents in modern history to take office with both a Senate containing a majority from their party and Senate rules in place that would allow nominees to be confirmed without cooperation or consent from any minority party senators. Yet, as detailed below, both of these presidents have experienced struggles getting their nominees confirmed by the Senate. The data we have on the Trump and Biden administrations make it clear that “nuking” the filibuster for presidential nominees was not sufficient to insure smooth sailing for all presidential nominees.

2 Presidents and the Post-nuclear Senate

As noted above, senators became quite adept at obstructing presidential nominees during the George W. Bush and Barack Obama administrations. Circuit court nominations, in particular, were difficult to confirm during these administrations. George W. Bush was able to secure confirmation for only 52% of his circuit court nominees, whereas Barack Obama was slightly more successful with 64% gaining Senate confirmation.² The average for Obama masks considerable variation, however. In the 111th Congress, Democrats briefly enjoyed a filibuster-proof majority and were able to confirm 64% of Obama’s nominees, but this fell to 56% in the 112th Congress. As we noted above, Senate Democrats invoked the nuclear option for the express purpose of expediting the processing of circuit court nominees during the 113th Congress and were then able to confirm 88.5% of Obama’s nominees, a level of success not seen since the 101th Congress. President Trump also enjoyed considerable success with his circuit court nominees with 78.2% of his nominees winning confirmation. It is still very early in the Biden administration, but, as of this writing, 75% of his circuit court nominees who have cleared committee have been confirmed.

These data above suggest that the post-nuclear Senate is a much friendlier place for presidential nominees to the U.S. Circuit Courts.³ However, once we move beyond circuit court nominees the story is much more complicated. According to data collected by the Partnership for Public Service, the Trump and Biden administrations are doing far worse at securing confirmation for their nominees than did the Obama administration and the George W. Bush administration. The Partnership for Public Service tracks a consistent set of positions across each

² Data on judicial nominees taken from McMillon, Barry, 2021, “Judicial Nomination Statistics and Analysis: U.S. District and Circuit Courts, 1977–2020.” CRS Report #R45622.

³ This appears to only be true when the president shares a party with the Senate majority. A Republican-led Senate only confirmed 22% of President Obama’s circuit court nominees during the 114th Congress.

administration for each president's first year in office, and found that Bush had seen 403 nominees confirmed and Obama had 383, while Trump secured confirmation for 238 and Biden has, to date, seen 203 confirmed.⁴ From these data it seems clear that re-interpreting the Senate rules to allow majority cloture has not fully removed the Senate as an obstacle to confirmation.

Why are presidents still struggling to secure confirmations in the post-nuclear Senate? We consider several potential explanations. First, it could be the fault of presidents themselves. If an administration is not making nominations in a timely manner or failing to compile a nominee's file of financial disclosures and background checks prior to her nomination, then the Senate cannot act on them. Simply put, the Senate cannot confirm a nominee who has not been put forward, and will be slow to process a nominee if the necessary paperwork is not sent in order or in a timely fashion.

A second potential issue is that senators from the same party as the president may not necessarily approve of all a president's nominee. Each of the failed nominations we cite above failed at least in part due to a lack support from within the president's party. This is a particularly acute concern for the Biden administration as they have exactly zero Democratic votes to spare in the Senate. While inter-party polarization gets most of the attention in Washington today, all recent presidents have learned that choosing nominees that can appease all factions of a president's party is difficult task.

Senate committees can also stand in the way of swift confirmation of presidential nominees. Most nominations are forwarded to a standing committee for consideration before they reach the floor. Committees and their staff conduct background research on each nominee and then typically hold a hearing for each nominee before voting on the question of whether to report the nominee favorably to the floor. This committee process has been unaffected by the re-interpretation of Senate rules we discussed above. Therefore, if committees are slow-walking nominees, we would expect to see presidents struggle to secure confirmation.

Finally, even though the Senate's rules have been interpreted to allow for majority cloture, the process of invoking cloture and securing a vote on confirmation is still time consuming. In addition to post-cloture debate time, it takes time for a cloture motion to ripen, it takes time to hold a roll-call vote on cloture, and it takes time to hold a roll-call vote on confirmation. For this reason, the Senate depends heavily on Unanimous Consent Agreements (UCAs) to manage this process. As is the case with most Senate business, senators will often agree to a UCA

⁴ Data courtesy of the Partnership for Public Service, <https://ourpublicservice.org/political-appointee-tracker/>. Biden's total as of December 14, 2021, which could increase by the end of the year.

that will expedite the consideration and confirmation of non-controversial nominees. These UCAs are flexible and can dramatically increase the speed with which nominees are confirmed. The downside, of course, is that any one senator’s objection scuttles a UCA. Thus, even with possibility of majority cloture, the Senate’s rules still allow one or more senators to slow down confirmation. In fact, the use of post-cloture debate time by Senate Democrats was the driver of the most recent nuclear episode in the Senate, which reduced post-cloture debate time from thirty to two hours for most nominees. Then Majority Leader Mitch McConnell (R-KY) stated that, The status quo [of thirty hours of post-cloture debate] is unsustainable for the Senate. It’s unfair to this president [Trump] and the future presidents of either party. It cannot stand ... it will not stand.⁵

In the following section we summarize data on recent executive nominations in order to assess how these possible explanations for the recent confirmation difficulties fit the data.

3 Data

To compare nominations under Presidents Trump and Biden, we utilize data on all executive and judicial nominations made by each president in their first year in office.⁶ As depicted in Figure 1, the timing of both presidents’ nominations follows a roughly similar trend, with a large spike at the beginning of their administration

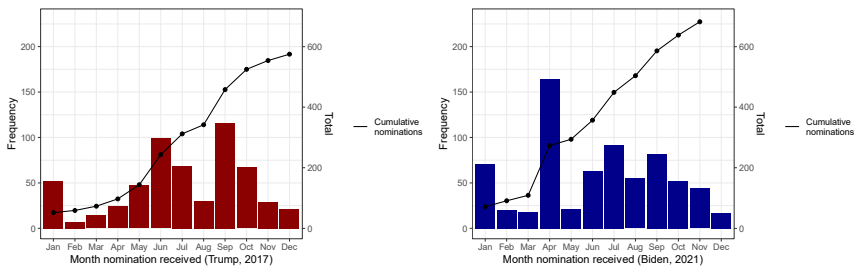


Figure 1: Timing of executive and judicial nominations in a President’s first year.

⁵ Bolton, Alexander, 2019, “McConnell sets stage for ‘nuclear option’ to change rules on judges,” *The Hill*, March 28, 2019. <https://thehill.com/homenews/senate/436332-mcconnell-sets-stage-for-nuclear-option-to-change-rules-on-judges>.

⁶ As these data were collected on December 9, 2021, we limit President Trump’s first-year nominations to those made on or before December 9, 2017.

and an expected dip around the time of the congressional August recess. The past four presidents have nominated an average of 56 individuals in their first month in office, which is largely a function of a given administration's transition preparedness. In fact, presidents often nominate 30 or so individuals on the day of their inauguration.

The rate at which President Trump and President Biden filed their nominations is relatively similar. On average, President Trump filed his nominations 177 days after his inauguration, while President Biden took an average of 155 days to nominate individuals to executive and judicial positions. President Biden, however, received criticism early in his administration for the slow pace of his ambassadorial nominations, but President Biden has now outpaced President Trump's first year of nominations. President Trump filed 575 nominations during his first year in office, while as of this writing, President Biden has filed 699 nominations in since taking office in January. These numbers are somewhat comparable to recent presidents, as President Obama submitted 660 nominations during his first year in office and President George W. Bush submitted 896. With 699 nominees submitted, it seems clear that the lack of nominees confirmed to date is not the fault of the Biden administration, and while President Trump clearly lagged behind other presidents in the number of nominations submitted in the first year, that relatively lower number of nominees submitted alone cannot explain low number of confirmations seen in his first year.

Next, we turn to committee action and find broadly similar patterns across Presidents Trump and Biden. The rate at which committees processed and reported nominations by Presidents Trump and Biden has been roughly the same. Both presidents saw quick committee action on nominees that were submitted early in their administrations and then a gap as other nominees were sent in later months. As depicted in Figure 2, President Trump's nominations were reported out of committee an average of 71 days after they were received by the Senate. President

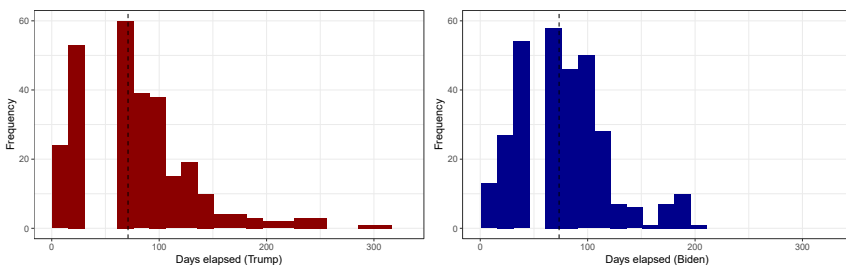


Figure 2: Time elapsed from a nomination's receipt to a favorable committee report.

Biden's nominations took only two days longer, with an average of 73 days from nomination to committee report.

Of those nominees that received a favorable committee report and were successfully confirmed by the Senate, they faced a similar path under both President Trump and President Biden. As Figure 3 below reveals, President Trump's nominees were confirmed by the Senate an average of 40 days after their favorable committee report, while President Biden's nominations were confirmed 34 days after being reported favorably out of committee.

Where the trends diverge sharply, however, is the lack of floor action. Under both Presidents Trump and Biden, the nominees who received a favorable committee report and who were ultimately confirmed by the Senate were confirmed in roughly the same amount of time. The major distinction lies in the number of nominations who have not successfully navigated this process.

In the first year of their respective administrations, Presidents Bush, Obama, and Trump saw 69.3, 92.8, and 72.7% of their nominations confirmed by the Senate. As of this writing, President Biden, on the other hand, has seen only 39.5% of his nominations confirmed. It is important to consider the Senate rules and makeup relative to each president's first year, because, as noted above, these two factors have substantial effects on a president's success in having his nominations confirmed. President Bush's first year in the 107th Congress was marked by a fluctuating majority, beginning with a nominal Republican majority as the Senate was evenly divided. Republicans lost their slim majority in June of 2001, however, when Sen. Jim Jeffords (I-Vt.) began caucusing with the Democrats. The tight margins for the majority party were relevant to the nominations process as the nuclear option had not yet been invoked, necessitating a supermajority to break pre-cloture filibusters.

The pre-cloture filibuster was less relevant in President Obama's first year in office as the 111th Senate began with a 60-vote Democratic supermajority. This

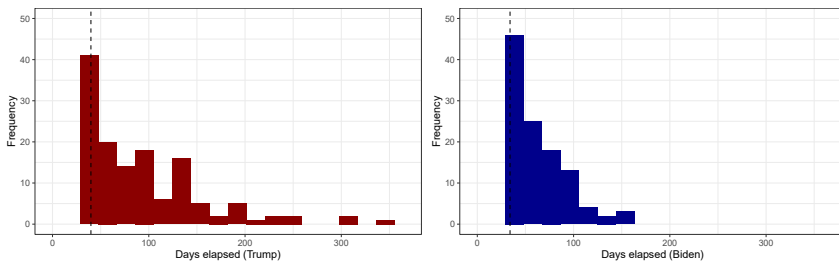


Figure 3: Time elapsed from a nomination's favorable committee report to confirmation by the Senate.

supermajority was lost after the death of Senator Ted Kennedy (D-Mass.), yet the size of the majority was enough to explain the widespread success President Obama achieved in getting his nominations confirmed in his first year. The Senate faced by President Trump, with a slim Republican majority, more closely resembled what Presidents Bush and Biden faced than what President Obama faced, yet he was able to see so many of his nominees confirmed due to the previous invocation of the nuclear option, eliminating the filibuster for both executive-branch and judicial nominations.

The real outlier among recent presidents is clearly President Biden. As Figure 4 below starkly demonstrates, he has a much higher proportion of his nominees either stuck in committee or awaiting floor action.

Focusing on committees, as of this writing, 235 of President Biden's nominees are pending in committee. At similar times in their administrations, President Bush had 185 pending in committee, President Trump had 46 nominees pending in committee, and President Obama had only nine nominations pending in committee. Figures 5 and 6 break this down by committee for Presidents Trump and Biden. Two committees, Foreign Relations and Judiciary, are referred the lion's share of nominations and thus it is not surprising to see that the majority of Biden's pending nominees are awaiting action in those two committees. These two committees could, perhaps, be processing nominees with more haste, but it is not clear that would do much to increase the rate of confirmations given the current logjam on the Senate floor.

Without a doubt, the major roadblock standing in the way of President Biden's nominees is the Senate floor. As of this writing, 141 or 21.6% of Biden's nominees are awaiting floor action. For comparison, at this point President Trump had 69, or

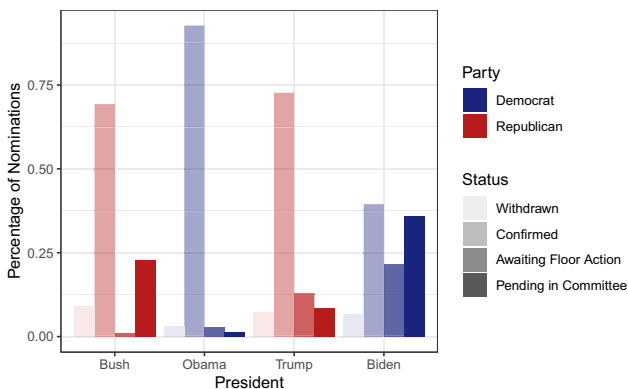


Figure 4: Nomination status by president.

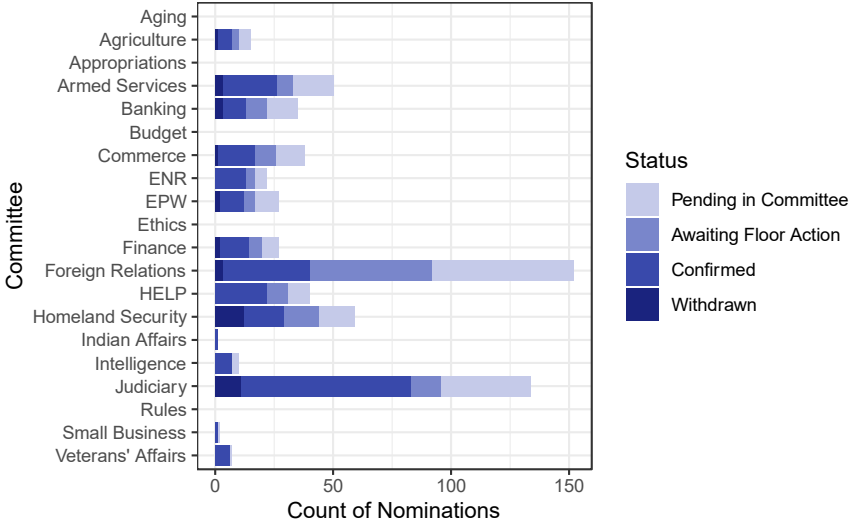


Figure 5: Nomination status by committee – President Biden.

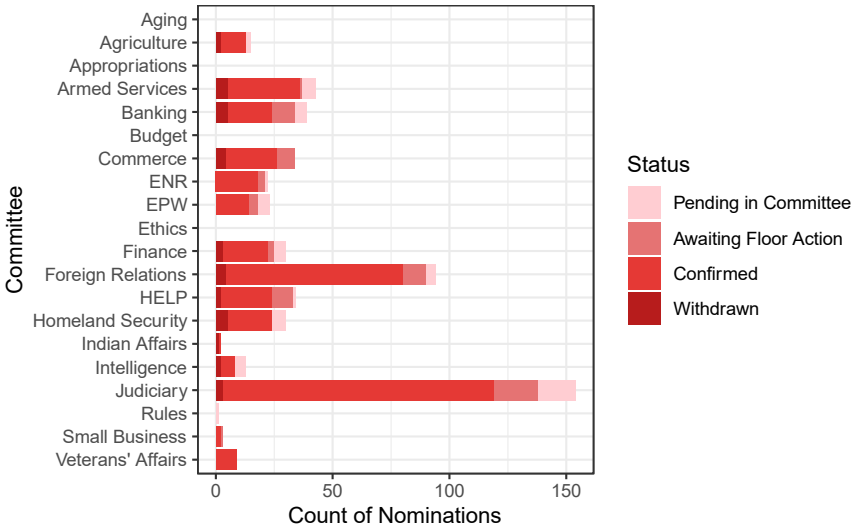


Figure 6: Nomination status by committee – President Trump.

12%, awaiting floor action, President Obama had 18, or 2.7%, awaiting floor action, and President Bush had 8, or less than 1%, of his nominees awaiting floor action.

Why is the floor moving so slowly despite the fact that under the current interpretation of the Senate's rules it has never been easier to advance a nominee? Two things are driving the delay: (1) threats to obstruct by Republican senators and (2) reluctance on the part of Senate Democrats to force these nominees onto the floor. As for obstruction, two Republican senators are seemingly engaging in most of the obstructive behavior. In September 2021, Josh Hawley (R-Mo.) announced that he would place a "hold" on "every single civilian nominee" for the State and Defense Departments unless both Secretary of State Antony Blinken and Secretary of Defense Lloyd Austin resigned their positions.⁷ In Senate parlance, a hold is simply a threat to object to a unanimous consent request, and is often meant to imply that the person placing the hold will engage in extended debate against the item in question. In early November, Senator Hawley signaled that he may carry through with his threat by objecting to a number of nominees that Democrats had tried to confirm via unanimous consent.⁸ At the same time, Senator Ted Cruz (R-TX) has placed holds on dozens of ambassadorial nominations and other State Department nominees. Senator Cruz's objections stem from his frustration with the Biden administration waiving sanctions on Russia related to the Nord Stream 2 pipeline that would carry gas from Russia to Germany. Senator Cruz has said he will lift his holds if the administration imposes these sanctions on Russia.⁹

To be sure, the use of holds on presidential nominations is not unique to the Republican party. Democrats objected to many of President Trump's nominations, yet the apparent frequency and blanket application of Republican holds on President Biden's nominees is unique. In neither Senator Hawley nor Senator Cruz's case does it seem that the obstructing senator will get their policy ask. No administration would be willing to sacrifice two of its top cabinet secretaries in order to appease the junior senator from Missouri in a dispute over executive nominations. As for Cruz's request on the Nord Stream 2 pipeline, the administration is torn between wanting to appease a staunch ally in Germany and imposing sanctions on Russia. This is no doubt a difficult policy bind for the administration, but it seems highly unlikely that they will change their policy to appease Senator Cruz.

7 Raju, Manu and Devan Cole, 2021, "Hawley says he'll hold up State and Defense Department Nominees unless Blinken and Austin Resign, CNN, September 14, 2021. <https://www.cnn.com/2021/09/14/politics/josh-hawley-state-defense-nominees/index.html>.

8 Desiderio, Andrew, 2021, "Josh Hawley blocks confirmation of several State Dept. Nominees," *Politico*, November 2, 2021. <https://www.politico.com/news/2021/11/02/josh-hawley-state-department-nominees-confirmation-518642>.

9 Crowley, Michael, 2021, "Empty Desks at the State Department, Courtesy of Ted Cruz," *New York Times*, October 14, 2021. <https://www.nytimes.com/2021/10/02/us/politics/senate-confirmation-cruz-nominations.html>.

Democratic senators and their allies have decried the actions by Senators Cruz and Hawley, but they have taken little to no action to thwart the threatened obstruction. It may be true that senators have typically acquiesced to unanimous consent requests on non-controversial nominees, but under the rules of the Senate, neither Senator Hawley nor Senator Cruz are in any way obliged to consent. Yet the current interpretation of Senate rules lays out a clear path for confirming these blocked nominees, despite objections from individual senators. A senator can file a cloture petition on any of these nominees that are subject to a hold. Once cloture is invoked with a simple majority vote the Senate can proceed to debate the nominee for up to two hours and then hold a vote on confirmation.

If Senate Democrats are unified in their support of these nominees there is nothing that Senator Hawley, Senator Cruz, or any other Republican senator can do to stop the confirmation. To date, however, they have not been willing to take the time and exert the effort to do this. The Senate has been operating under its normal schedule where senators are typically only in Washington from late Monday to late Thursday, which is in essence a three-day work week. If Majority Leader Schumer and other Democratic senators decided to push forward with these nominees, one of two things would happen: (1) Senator Cruz or Senator Hawley could force the issue and insist on two hours of debate on each nominee, or (2) they would fold and either yield back some of the debate time or agree to some other time agreement that would facilitate confirmation. Pushing forward would require the Senate to be prepared to be in Washington for more than the standard three-day work week. This would no doubt be inconvenient to senators, but it could also force the issue. As Senator Robert Menendez (D-N.J.) stated, “Ted Cruz and Josh Hawley are not paying any consequences, but when members have to be here on a weekend, voting only on these things that are passing overwhelmingly in a bipartisan vote, I think peer pressure might be brought to bear.”¹⁰ We simply do not know at this point if Senators Cruz and Hawley truly care enough about these nominees to stay in Washington on weekends and spend hours on the floor debating them only to see these nominees confirmed after debate time has expired. To date, the Democrats simply have not been willing to find out and have let them engage in costless obstruction. As a result, the Biden administration has struggled to fill positions and many governmental positions sit empty, not because the Senate rules do not provide a path to confirming these nominees, but because the Senate Democrats have not been willing to undertake the effort necessary to confirm them.

10 Crowley, Michael, 2021, “Empty Desks at the State Department, Courtesy of Ted Cruz,” *New York Times*, October 14, 2021. <https://www.nytimes.com/2021/10/02/us/politics/senate-confirmation-cruz-nominations.html>.

4 Discussion and Conclusion

The separation of powers system set up under the Constitution is designed to make it difficult for any one branch of government or government actor to act without the cooperation with others. Nowhere is this more apparent than in the nomination and confirmation process for judicial nominees and executive branch positions. Recent presidents have struggled to secure confirmations and Senate majorities have become so frustrated by this process that they have re-interpreted the Senate's rules three times in the past decade to make the confirmation process run more smoothly.

Despite these changes, our data indicate that the Biden administration is facing an unprecedented backlog in the confirmation of its nominees. We have analyzed data on the timing of nominations, committee action on nominees, and floor action on nominees to identify what part of the process is slowing confirmation. Our analyses reveal that the combination of the unwillingness of one or two senators to agree to unanimous consent requests and the reluctance of the Senate majority to force action on nominees has largely ground the process to a halt.

Without a doubt, the inability of the Biden administration to secure confirmation for its nominees is affecting the work of embassies, the State Department, and the Defense Department, among others. What can be done? The short-term solution, in our view, would be for the Senate to grind through the confirmation process. We have serious doubts that Senator Cruz or Senator Hawley would be willing to hold the floor for the length of time required to fully exploit the time available for debate. If the Democrats want to see these individuals confirmed they need to call the bluff of the obstructing senators and move on with the process.

As this article was going to press, Majority Leader Schumer took steps to confirm nominees through the process outlined above. During a late-night session on Friday, December 17th that bled into the early hours of Saturday, December 18th, Senator Schumer called Senators Hawley and Cruz's bluff and successfully invoked cloture on 10 separate nominees, resulting in 11 new confirmations. The bulk of those nominees who were confirmed at the end of President Biden's first year in office, however, came as a result of Senator Cruz lifting his hold on 32 nominees after striking a deal with Senator Schumer to vote on his Nord Stream sanctions bill in January.¹¹ Despite this final flurry of confirmations over 50% of President Biden's nominees are still awaiting confirmation.

¹¹ Desiderio, Andrew, 2021, "Cruz secures vote on Russian pipeline sanctions in deal with Schumer," *Politico*, December 18, 2021. <https://www.politico.com/news/2021/12/18/cruz-vote-russian-pipeline-sanctions-schumer-525334>.

In the longer term, it may be worth reconsidering the number of positions subject to Senate confirmation. Senators Cruz and Hawley have put in stark relief the inherent problem in relying on unanimous consent to conduct so much of the Senate's business. This may have worked well in the past when senators felt constrained by norms of behavior, but depending on cooperative behavior of the minority is a very poor strategy for today's political environment. If these positions are not important enough to warrant the two hours of debate that is possible under the Senate's current rules, then they likely are not important enough to need Senate confirmation. A reduction in the number of Senate-confirmed positions would allow administrations to staff up more quickly and would reduce the amount of time the Senate spends on lower-level positions.